IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE **CIV-2021-485-341**

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**
	Applicant
AND	**CLIMATE CHANGE COMMISSION**
	First respondent
AND	**MINISTER OF CLIMATE CHANGE**
	Second respondent

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT

14 February 2022

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INTRODUCTION

1. This case is a judicial review of advice provided by the Climate Change Commission to the government under the Climate Change Response Act 2002 (**CCRA**). The advice concerns the first three emissions budgets which are intended to set New Zealand on a path to net zero emissions by 2050. The 2050 target is a legislated greenhouse gases emissions reduction target (noting there is a separate target for biogenic methane).[1]

2. The judicial review also concerns advice provided by the Commission to the government, at the Minister's request, on New Zealand's nationally determined contribution (**NDC**) under the Paris Agreement. The NDC is not a statutory decision, but the Commission is empowered to provide advice on it. The government announced an updated NDC decision in late October 2021, and the claim was subsequently amended to also seek relief against the Minister of Climate Change in respect of the updated NDC decision.

3. The advice and decisions at issue form part of New Zealand's overall framework and regulatory design for responding to climate change. Major decisions regarding New Zealand's response to climate change are political decisions that involve the weighing of multiple interests and necessary trade-offs. Our system of government tasks the executive with making those decisions, with the necessary democratic mandate. To the extent the decisions are covered by statute (in this case, only the emissions budgets) those decisions must be made within the limits set by Parliament. However, within those limits, the weighing of public policy issues is appropriately a matter for the relevant decision-maker.

4. At the heart of LCANZI's claim is the contention that New Zealand's emissions budgets must, at a minimum, follow an equivalent rate of emissions reductions as those projected by the Intergovernmental Panel on Climate Change (**IPCC**) in its global pathways to limiting the global temperature increase to 1.5°C. LCANZI's claim is driven by a concern that more needs to be done between now and 2030 in order to reach the 1.5°C temperature goal. Those concerns are of course relevant to the task of setting emissions budgets. But the CCRA does not require emissions budgets to follow a specific path to achieve the net-zero (2050) target. The 1.5°C goal remains an important purposive consideration and

[1] Climate Change Response Act (**CCRA**), s 5Q.

there could be no question of decision-makers abdicating responsibility for contributing to that goal. Here, there has been appropriate cross-checking to the IPCC global pathways as part of testing whether proposed emissions budgets achieve the purpose of the CCRA. However, the legislation does not 'apply' the IPCC global pathways to New Zealand's national circumstances.

5. Importantly, in respect of LCANZI's arguments on the NDC, on a proper comparison, the final NDC decision implies a NDC budget that is more stringent than, or at least consistent with, what LCANZI says is required as a starting point .[2] This is discussed further at paragraphs [76] to [84] and in **Annex A**.

Wider context

6. The CCRA is part of the framework by which New Zealand is developing and implementing clear and stable climate change policies. It was enacted with cross-party support, legislated a 2050 net zero target, and established an independent expert commission to advise the government of the day on complex technical issues. This year will see New Zealand's first three emissions budgets and a statutory emissions reduction plan. Other parts of the legislative framework (not the subject of this proceeding) support a reformed Emissions Trading Scheme, and climate change disclosure obligations and reforms to the financial sector. Proposals for comprehensive reform of the Resource Management Act 1991, including proposals to address climate mitigation and adaption, are also well advanced.

7. As the Chief Justice and two Supreme Court Judges have noted, writing extrajudicially: "This is an area of high policy; where the need for a speedy response is balanced in policy terms with preserving economic stability and legitimate policy choices as to how reduction targets may best be met."[3]

8. The advice at issue here is only the first in a long line of emissions budgets advice that the Commission will prepare for the government. While of course the Court has a supervisory role through the judicial review jurisdiction, climate change issues are polycentric and involve the weighing of competing interests not

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2 Assuming, but without accepting, that the net-net rate of reductions in the IPCC global pathways must be 'applied' on a net-net basis to New Zealand.

3 Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (a paper prepared for the Asia Pacific Judicial Colloquium, May 2019) at [137].

normally amenable to review. As this Court has previously held, it is "well established that the Court, in considering an application for judicial review, will be cautious about interfering with decisions made by a specialist body acting within its own sphere of expertise".[4]

9. Ultimately, the challenge for government is to sustain collective action on complex issues in order to achieve the necessary social and economic transition.

10. A summary of the Crown's key points in response to LCANZI's submissions is at [14]-[26] below.

The parties

11. The applicant is a registered incorporated society called "Lawyers for Climate Action NZ Inc" (**LCANZI**). LCANZI, amongst other things, advocates for legislation and policies that will reduce greenhouse gas emissions.

12. The first respondent is the Climate Change Commission (**Commission**), an independent Crown entity, established pursuant to 2019 legislative amendments to the CCRA, to provide independent advice to the government. The Commission's members and staff hold significant expertise in the matters the subject of this proceeding.[5] The members of the Commission are appointed by the Governor-General on the recommendation of the Minister of Climate Change, following consultation with representatives of all political parties in Parliament, and after consideration by the Minister of specified statutory matters, including the technical and professional skills, experience and expertise of appointees.[6]

13. The second respondent is the Minister of Climate Change, the Hon James Shaw. The Minister made the updated NDC decision, with the agreement of Cabinet. The Minister will also make final decisions on the first three emissions budgets by 31 May 2022. The government has agreed in principle to follow the Commission's advice on the emissions budgets, subject to consideration of the

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4 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] 1 NZLR 75 (HC) at [41] per Venning J **[Respondents' Bundle of Authorities (BOA), Tab 38 at 1458]**. This case was brought by "an entity whose members were interested in the issue of climate", who in that instance did not accept NIWA's conclusion that "New Zealand's climate has experienced a warming trend".

5 See Affidavit of Joanna Elizabeth Hendy affirmed on 10 December 2021.

6 CCRA, ss 5E and 5H.

results of consultation and final decision-making.[7] Accordingly, the Minister has an interest in the arguments advanced by LCANZI concerning the emissions budgets.

Summary of arguments

14. There are four grounds of review. A summary of each ground and the Crown's response is below.

First ground of review – NDC advice and decision

15. The Commission's advice on what NDC would be consistent with the 1.5°C temperature goal was formulated with reference to the Intergovernmental Panel on Climate Change's (**IPCC**) global emissions reduction pathways. The IPCC's global pathways are calculated on a "net-net" basis (i.e. net emissions reductions from a net position are calculated as being required).

16. Having used the IPCC pathways in formulating the advice, LCANZI says the Commission should have applied the global rate of reduction of net CO_2 emissions to New Zealand's 2010 *net* CO_2 emissions instead of *gross* emissions. LCANZI says the Commission's use of a gross-net approach was an error of logic, which has resulted in the wrong "starting point" and insufficiently ambitious advice from the Commission on the NDC (i.e. the 36% reduction starting point provided in the Commission's advice to government on the NDC). Because the government relied on the 36% figure as its starting point, LCANZI says the NDC decision is similarly flawed.

17. The Crown's submission is that it was reasonable for the Commission to use the gross-net approach in translating the global pathways to New Zealand, because of New Zealand's particular factual circumstances (largely forestry related). The reasons for gross-net accounting underpin the Kyoto Protocol, and are why New Zealand has always used gross-net accounting for its international targets. Gross-net accounting is used by a number of other countries for their NDCs. The Commission was free to use the IPCC pathway as a base and then adjust

[7] The Government has agreed in principle to broadly accept the Commission's recommended emissions budgets amended to recognise changes in projected forestry emissions, based on new information that was not available when the Commission prepared its final advice. The proposed amendment would increase emissions allowed in the first emissions budget period by 0.7% (2 MtCO2-e). But the combined effect over the three emissions budget periods will reduce emissions by a total of 14 MtCO2-e, 1.6% lower than the Commission's recommended total. See Ministry for the Environment "Emissions budgets and the emissions reduction plan" <environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-budgets-and-the-emissions-reduction-plan>.

for New Zealand's national circumstances – this was a value judgement open to the Commission. All national interpretations of the IPCC's 1.5°C global pathways include value judgements.

18. In respect of the government's decision on the NDC, the briefings to the Minister and the Cabinet paper record the net-net/gross-net issue and note that the Commission's advice, and any NDC decision based on that advice, incorporates particular value judgements concerning New Zealand's national circumstances. Accordingly, Ministers were not operating under an error of fact (and there was no underlying "logical error").

Second ground of review – the purpose of the CCRA and the emissions budgets

19. The Commission's advice on the emissions budgets focused on what was realistic and feasible for New Zealand, as stepping stones to the 2050 net zero target.

20. LCANZI says the Commission failed to give sufficient regard to the purpose provisions in the CCRA, which state that one of the purposes of the emissions budgets is to contribute to the 1.5°C temperature goal. LCANZI says this goal had to be paramount and is a free-standing purpose, essentially requiring the emissions budgets to follow the IPCC global pathways.

21. The Crown's submission is that the legislative text, statutory scheme and the legislative history, do not support LCANZI's interpretation. Contributing to the 1.5°C temperature goal does not equate to mechanically applying the IPCC global pathways. The Commission was required to undertake a far more detailed exercise taking into account numerous mandatory considerations listed in the legislation in order to recommend emissions budgets suitable for New Zealand. The Commission, of course, had to have the 1.5°C goal in mind (because it is in the purpose provisions). The Commission did that, and cross-checked its emissions budgets against the IPCC pathways. But that does not mean that the IPCC pathways had to be mirrored for New Zealand's pathway to 2050.

Third ground of review – Accounting methodology for the emissions budgets

22. The Commission's advice on the emissions budgets used modified-activity based (**MAB**) accounting. LCANZI argues that the CCRA mandates the use of

UNFCCC annual inventory "accounting" for the emissions budgets (and the 2050 target).

23. The Crown's submission is that the CCRA empowers, and requires, the Commission to advise on the rules for accounting. MAB accounting is what the New Zealand government has advised the parties to the Paris Agreement it will use for its NDC. It is a variation of the target accounting New Zealand has always used for its emissions targets, and which underpins the Kyoto Protocol. Target accounting essentially only includes emissions or removals from post-1990 activities (to ensure additionality is the key driver in climate policy). The MAB variation averages the emissions and removals from New Zealand's production forestry so that the happenstance timing of harvesting or planting does not mask actual trends in gross emissions, or removals from new forestry planting.

Fourth ground of review – unreasonableness challenge to the emissions budgets

24. Regardless of its success or otherwise on the above three grounds, LCANZI says the Commission's advice on the emissions budgets is irrational and unreasonable because insufficient emissions reductions will occur before 2030, and the IPCC's 2018 Special Report says that deep reductions by 2030 are essential to meeting the overall 1.5°C goal.

25. The Crown's submission is that the Court should rarely interfere with a decision on irrationality/unreasonableness grounds, particularly when the challenge is to matters of public policy entrusted to the decision-maker, not the Court. Even on questions of fundamental human rights (which this is not) the Courts are wary of turning judicial review into a merits review exercise. In any event, the Commission's advice on the emissions budgets was reasonably open to it in light of the statutory scheme which, with reference to the 2018 Special Report, adopted the 2050 net zero target but left the pathway to net zero to be determined by the Commission. In addition, the emissions budgets are not New Zealand's only contribution to the 1.5°C temperature goal; New Zealand will also make a substantial contribution through offshore mitigation under the NDC.

26. Finally, the Crown rejects the insinuation in LCANZI's submissions that Dr Reisinger's evidence suffers from partiality, by dint of his subsequent

appointment as Commissioner to the Commission.[8] Dr Reisinger has filed a second affidavit outlining the key dates relating to his appointment, as well as affirming that the content of his first affidavit was not influenced by his potential appointment to the Commission at the time.[9] Brief submissions on this point are set out in **Annex B**.

8 LCANZI's submissions at [209] and [251].

9 Second affidavit of Dr Andreas Reinhard Reisinger affirmed 8 February 2022 (**Second Affidavit of Dr Andreas Reisinger**).

CLIMATE CHANGE RESPONSE ACT 2002

27. The CCRA was originally enacted to:[10]

> put in place a framework to allow New Zealand to meet its international obligations under the Kyoto Protocol to the United Nations Framework Convention on Climate Change… The Bill will also formalise the powers and institutions necessary for New Zealand to continue to meet its obligations under the United Nations Framework Convention on Climate Change…

28. The CCRA has undergone a number of amendments since it was first enacted.

29. The purposes of the CCRA are to:[11]

> (aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—
>
> (i) contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and
>
> (ii) allow New Zealand to prepare for, and adapt to, the effects of climate change:
>
> (a) enable New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement, including (but not limited to)—
>
> (i) its obligation under Article 3.1 of the Protocol to retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases emitted from the sources listed in Annex A of the Protocol in New Zealand in the first commitment period starting on 1 January 2008 and ending on 31 December 2012; and
>
> (ii) its obligation to report to the Conference of the Parties via the Secretariat under Article 12 of the Convention, Article 7 of the Protocol, and Article 13 of the Paris Agreement:
>
> (b) provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—
>
> (i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and
>
> (ii) assisting New Zealand to meet its 2050 target and emissions budgets:

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10 Climate Change Response Bill 2002 (212-1) (explanatory note) at 1.

11 CCRA, s 3.

> (c) provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce the emission of those gases by—
>
> (i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and
>
> (ii) assisting New Zealand to meet its 2050 target and emissions budgets.

Emissions Trading Scheme reforms to the CCRA

30. The Climate Change Response (Emissions Trading) Amendment Act 2008 established the New Zealand Emissions Trading Scheme (**NZ ETS**) as a key mechanism for reducing New Zealand's emissions of greenhouse gases and meeting New Zealand's international commitments. The ETS puts a price on emissions by charging certain sectors of the economy for the greenhouse gases they emit.

31. The ETS has undergone a number of legislative reforms. The most recent amendment was by the Climate Change Response (Emissions Trading Reform) Amendment Act 2020, which introduced a cap on emissions within the ETS to align with New Zealand's emissions budgets to be set under the mechanisms established in parallel by the Climate Change (Zero Carbon) Amendment Act 2019 (**Zero Carbon Amendment Act**). The amendments also included the establishment of an auctioning process for emissions limits and provided for biogenic emissions from agriculture to incur a carbon price from 2025 at the latest.

Zero Carbon amendments

32. The Zero Carbon Amendment Act came into force on 14 November 2019. The purpose of the Act stated in the Explanatory Note to the Bill is:[12]

> to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels.
>
> The overarching purpose represents a balance of the guiding principles agreed by Cabinet to frame the development of climate change policy:

[12] Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 1 **[LCANZI's BOA, Volume 3, Tab 20, at 1065]**.

> leadership at home and abroad; a productive, sustainable, and climate-resilient economy; and a just and inclusive society.
>
> The Bill sets out a durable framework, and stable and enduring institutional arrangements, for climate change action that will help keep New Zealand on track to mitigate and adapt to climate change. It also contains mechanisms for increasing transparency of decisions relating to climate change. This includes processes, time frames, reporting obligations, monitoring, and considerations to take into account.
>
> The Bill seeks to strike a balance between flexibility and prescription in New Zealand's long-term transition, as well as building in considerations for how impacts are distributed.

33. This section of the submissions describes the CCRA as amended by the Zero Carbon Amendment Act.

The 2050 emissions targets

34. The Zero Carbon Amendment Act introduced a binding target of reducing net emissions (excluding biogenic methane) to zero by 2050. Section 5Q was inserted into the CCRA which provides:

> (1) The target for emissions reduction (the 2050 target) requires that—
>
> (a) net accounting emissions of greenhouse gases in a calendar year, other than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year; and
>
> (b) emissions of biogenic methane in a calendar year—
>
> (i) are 10% less than 2017 emissions by the calendar year beginning on 1 January 2030; and
>
> (ii) are 24% to 47% less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent calendar year.
>
> (2) The 2050 target will be met if emissions reductions meet or exceed those required by the target.

Emissions budgets

35. Section 5X of the CCRA as amended by the Zero Carbon Amendment Act requires the Minister to set five-yearly emissions budgets, essentially to act as "stepping stones" to the 2050 target.[13] The purpose of the emissions budgets (described at s 5W) is to require the Minister to set the budgets:

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[13] Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3 **[LCANZI's BOA, Volume 3, Tab 20, at 1067]**.

> (a) 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° Celsius above pre-industrial levels; and
>
> (b) in a way that allows those budgets to be met domestically; and
>
> (c) that provides greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals that will be required.

36. The Explanatory Note to the Bill describes the purpose of the emissions budgets:[14]

> Emissions budgets can be understood as interim targets or "stepping stones" to New Zealand's emissions reduction target. A system of emissions budgets will help to manage the transition to a low-emissions New Zealand and avoid any abrupt changes in policy. They will also serve as a valuable tool for tracking progress and determining whether New Zealand is on track to meet the emissions reduction target established under the Bill. In doing so, they will also create accountability across successive governments.
>
> Emissions budgets will signal the reductions required in the short to medium term and will be supported by a plan that includes strategies and policies to achieve the reductions required. In this way, emissions budgets will operate as a market signal, providing households, businesses, and industries with greater predictability and driving investment in low-emissions technology and innovation.

37. Section 5Z of the CCRA specifies that emissions budgets must be met, as far as possible, through domestic emissions reductions and removals. However, offshore mitigation may be used if there has been a significant change in circumstance that affects the considerations on which the relevant emissions budget was based, and that affects the ability to meet the relevant emissions budget domestically.

38. Section 5ZB requires that before setting an emissions budget, the Minister must be satisfied that there has been adequate consultation.

39. The Commission is required to regularly monitor and report progress towards meeting an emissions budget and the 2050 target under s 5ZJ. It must also report annually on the results of monitoring (s 5ZK) and must, at the end of an emissions budget period, prepare a report for the Minister evaluating the

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[14] Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3 **[LCANZI's BOA, Volume 3, Tab 20, at 1067]**.

progress made in the relevant budget period towards meeting the emissions budget in the next emissions budget period (s 5ZL).

40. When the CCC is advising on an emissions budget and when the Minister is determining an emissions budget, they must have regard to the matters listed at s 5ZC(2), which are as follows:

> (a) have particular regard to how the emissions budget and 2050 target may realistically be met, including consideration of—
>
> (i) the key opportunities for emissions reductions and removals in New Zealand; and
>
> (ii) the principal risks and uncertainties associated with emissions reductions and removals; and
>
> (b) have regard to the following matters:
>
> (i) the emission and removal of greenhouse gases projected for the emissions budget period:
>
> (ii) a broad range of domestic and international scientific advice:
>
> (iii) existing technology and anticipated technological developments, including the costs and benefits of early adoption of these in New Zealand:
>
> (iv) the need for emissions budgets that are ambitious but likely to be technically and economically achievable:
>
> (v) the results of public consultation on an emissions budget:
>
> (vi) the likely impact of actions taken to achieve an emissions budget and the 2050 target, including on the ability to adapt to climate change:
>
> (vii) the distribution of those impacts across the regions and communities of New Zealand, and from generation to generation:
>
> (viii) economic circumstances and the likely impact of the Minister's decision on taxation, public spending, and public borrowing:
>
> (ix) the implications, or potential implications, of land-use change for communities:
>
> (x) responses to climate change taken or planned by parties to the Paris Agreement or to the Convention:
>
> (xi) New Zealand's relevant obligations under international agreements.

41. Section 5ZG also requires the Minister to prepare and make publicly available an emissions reduction plan (**ERP**) setting out the policies and strategies for meeting the next emissions budget. The plans must include:

(a) sector-specific policies to reduce emissions and increase removals; and

(b) a multi-sector strategy to meet emissions budgets and improve the ability of those sectors to adapt to the effects of climate change; and

(c) a strategy to mitigate the impacts that reducing emissions and increasing removals will have on employees and employers, regions, iwi and Māori, and wider communities, including the funding for any mitigation action; and

(d) any other policies or strategies that the Minister considers necessary.

42. The CCRA, at ss 5X and 5ZG, provides statutory timeframes for the setting of emissions budget and the ERP. The COVID-19 Response (Management Measures) Legislation Act 2021 extended some of the timeframes provided. The original timeframes and the timeframes as extended are set out below:

Statutory decision	**Deadline as provided under the Zero Carbon Amendment Act**	**Current deadline including the amendments from the COVID-19 Response (Management Measures) Legislation Act 2021**
First emissions budget (2022 – 2025)	31 December 2021	31 May 2022
Second emissions budget (2026 – 2030)	31 December 2021	31 May 2022
Third emissions budget (2031 – 2035)	31 December 2021	31 May 2022
Fourth emissions budget (2036 – 2040)	31 December 2025	31 December 2025
Fifth emissions budget (2041 – 2045)	31 December 2030	31 December 2030
Sixth emissions budget (2046 – 2050)	31 December 2035	31 December 2035
First ERP[15]	31 December 2021	31 May 2022

Climate Change Commission

43. Section 5A of the CCRA as amended by the Zero Carbon Amendment Act provides for the establishment of the Climate Change Commission. The purposes of the Commission, set out in s 5B are:

[15] Under s 5ZG, each subsequent ERP must be prepared and published after the relevant emissions budget has been notified and prior to the commencement of that emissions budget period.

(a) to 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) to monitor and review the Government's progress towards its emissions reduction and adaptation goals.

44. The Commission's functions are listed at s 5J:

(a) to review the 2050 target and, if necessary, recommend changes to the target;

(b) to provide advice to the Minister to enable the preparation of emissions budgets;

(c) to recommend any necessary amendments to emissions budgets;

(d) to provide advice to the Minister about the quantity of emissions that may be banked or borrowed between 2 adjacent emissions budget periods;

(e) to provide advice to the Minister to enable the preparation of an emissions reduction plan;

(f) to monitor and report on progress towards meeting emissions budgets and the 2050 target;

(g) to prepare national climate change risk assessments;

(h) to prepare reports on the implementation of the national adaptation plan; and

(i) to provide other reports requested by the Minister.

45. Section 5ZA requires that the Commission advise the Minister on the following matters relevant to setting an emissions budget:

(a) the recommended quantity of emissions that will be permitted in each emissions budget period; and

(b) the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target; and

(c) how the emissions budgets, and ultimately the 2050 target, may realistically be met, including by pricing and policy methods; and

(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 (see section 5Z).

46. When the Commission prepares it advice for the Minister under s 5ZA and when, it must also have regard to factors listed at s 5ZC(2).

47. Section 5K provides that the Minister may, at any time, request that the Commission prepare reports to the Government on matters relating to reducing emissions and adapting to the effects of climate change.

48. On 1 February 2021, the Commission released its draft advice on:

48.1 the first three emissions budgets;

48.2 policy direction for the Government's first ERP, to meet New Zealand's first emissions budget;

48.3 New Zealand's 2030 NDC; and

48.4 eventual reductions required for biogenic methane for New Zealand to contribute to limiting global average temperature increase to 1.5°C above pre-industrial levels.

49. The Commission worked with iwi and Māori to develop its recommendations and consulted widely on the draft report from 1 February to 28 March 2021. It received more than 15,000 submissions. The Commission provided its final advice to the Government on 31 May 2021, which was tabled in Parliament on 9 June 2021.

50. The Commission's final advice recommended that the Government set and meet the emissions budgets summarised in the table below:

	2019	**Emissions budget 1 (2022 – 2025)**	**Emissions budget 2 (2026 – 2030)**	**Emissions budget 3 (2030 – 2035)**
All gases, net (AR5)[16]		290 MtCO2e	312 MtCO2e	253 MtCO2e
Annual average	78.0 MtCO2e	72.4 MtCO2e/yr	62.4 MtCO2e/yr	50.6 MtCO2e/yr

[16] AR5 is the Fifth Assessment Report of the IPCC, completed in 2014. It is the fifth in a series of comprehensive assessment reports prepared by the IPCC covering scientific, technical and socio-economic information relevant for the understanding of human induced climate change, potential impacts of climate change and options for mitigation and adaptation.

51. The Government has agreed in principle[17] to broadly accept the Commission's recommended budgets, albeit amended to recognise changes in projected forestry emissions. The proposed amendments would increase emissions allowed in the first emissions budget period by 0.7% (2MtCO2e). However, the combined effect of the amendments over the three emissions budget periods will reduce emissions by a total of 14 MtCO2e, which is 1.6% lower than the Commission's recommended total.[18] These amendments are not at issue in this proceeding.

[17] Subject to consideration of the results of public feedback received on a discussion paper - on 13 October 2021, the Government issued an ERP discussion document for consultation, setting out the policies and strategies for meeting the first emissions budget. The discussion document set out the proposed first three emissions budgets, as amended for updated projected forestry emissions. Consultation on the discussion document closed on 24 November 2021. The ERP will be published by 31 May 2022 and is not at issue in this proceeding. The discussion paper is called *Te hau mārohi ki anamata - Transitioning to a low-emissions and climate-resilient future*. See: <environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-budgets-and-the-emissions-reduction-plan>.

[18] Ministry for the Environment "Emissions budgets and the emissions reduction plan" <environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-budgets-and-the-emissions-reduction-plan>.

INTERNATIONAL AGREEMENTS

United Nations Framework Convention on Climate Change

52. The United Nations Framework Convention on Climate Change (**UNFCCC**) is the major foundation global treaty that deals with climate change. New Zealand signed the UNFCCC in 1992 and ratified it in 1993. The UNFCCC came into force on 21 March 1994. There are 197 Parties to the UNFCCC.

53. The objective of the UNFCCC is to achieve, in accordance with the relevant provisions, stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human interference with the climate system.[19]

54. The UNFCCC contains commitments for all countries to reduce greenhouse gas emissions and to protect and enhance forest sinks and reservoirs, with the expectation that developed countries will take the lead. All Parties to the UNFCCC are also required to undertake national and regional programmes to mitigate climate change; promote scientific and technical cooperation; promote sustainable management of forests, oceans and ecosystems; prepare for adaptation to the impacts of climate change; and integrate climate change considerations in social, economic and environmental policies.[20] The Parties to the UNFCCC are also required to prepare annual national inventories of anthropogenic greenhouse gas emissions and removals.[21]

55. The UNFCCC does not prescribe any specific emissions reduction targets for the Parties.

Kyoto Protocol

56. The Kyoto Protocol was adopted under the UNFCCC in 1997 as a way to strengthen the commitments of developed countries to reducing greenhouse gases. New Zealand signed the Kyoto Protocol in 1998 and ratified it in 2002. 192 of the Parties to the UNFCCC have ratified the Kyoto Protocol. It came into force in 2005.

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19 UNFCCC, art 2 **[Respondents' Bundle of Documents, Tab 1, at 5]**.

20 Affidavit of Helen Plume affirmed on 10 December 2021 at [11] (**Affidavit of Helen Plume**).

21 UNFCCC, art 4(1)(a) **[Respondents' Bundle of Documents, Tab 1, at 6]**.

57. The key feature of the Protocol was its establishment, for the first time, of internationally binding emissions reductions targets for developed countries, which they were to meet primarily through national measures, for certain commitment periods. The first commitment period under the Kyoto Protocol was from 2008 to 2012. The second commitment period was from 2013 to 2020.[22] Each developed country party had an individual, differentiated target that contributed to a collective goal of reducing emissions by at least 5% below 1990 levels for the first commitment period. The individual, differentiated targets were assigned through a process of intense political negotiation, reflecting each country's specific needs and national circumstances.[23]

58. New Zealand took on a target to return emissions to its 1990 levels. This target was seen as appropriate to New Zealand's national circumstances, including high emissions from the agriculture sector, low use of fossil fuels for electricity, and the role of forests as carbon sinks.[24]

59. Under the Kyoto Protocol Parties could purchase emissions reductions in other countries and claim them towards their target (commonly referred to in New Zealand as "offshore units"). The carbon market was seen as a key tool for reducing emissions worldwide and was actively used throughout both Kyoto Protocol commitment periods.[25]

60. New Zealand met its Kyoto Protocol target for the first commitment period (2008-2012).[26] Despite New Zealand and most other developed countries meeting their targets under the first commitment period, the Kyoto Protocol was not an effective framework to combat global emissions because it did not require developing countries to set binding targets despite being major emitters of greenhouse gases. Further, not all developed countries chose to participate in the Kyoto Protocol framework. The Kyoto Protocol prioritised the imposition of stringent and binding targets over ensuring collective participation and action in response to climate change. For these reasons, over time, the Protocol gradually attracted less political support. Countries with targets under the second

22 Affidavit of Helen Plume at [18].

23 Affidavit of Helen Plume at [19].

24 Affidavit of Helen Plume at [10]-[21].

25 Affidavit of Helen Plume at [22].

26 Affidavit of Helen Plume at [45], [46].

commitment period (2013-2020) made up less than 11 per cent of global emissions.[27]

61. For the 2013-2020 period New Zealand did not formally adopt a target under the Kyoto Protocol, but instead adopted a target under the UNFCCC to reduce emissions 5% below 1990 levels by 2020. New Zealand elected to take a target outside of the Kyoto Protocol because negotiations were ongoing for the Paris Agreement at the same time. New Zealand wished to illustrate that targets could still be taken and met without the "binding" aspect of the Kyoto Protocol.[28] New Zealand is on track to meet its 2013-2020 target (final data for the period will be available by April 2022).[29]

Paris Agreement

62. In 2011 the Parties to the UNFCCC agreed to negotiate a new global agreement applicable to all countries post-2020. Negotiations were concluded in December 2015, when the Paris Agreement was adopted by 196 Parties to the UNFCCC. The Paris Agreement came into force on 4 November 2016.

63. The Paris Agreement aims to strengthen the global response to the threat of climate change, including by holding temperature rise well below 2 degrees (and to pursue efforts to limit to 1.5 degrees), increasing the ability to adapt to the adverse impacts of climate change and making finance flows consistent with low greenhouse gas and climate resilient development. It addresses mitigation, adaptation, finance, technology development and transfer, transparency of action and support and capacity-building.

64. The primary vehicle for achieving the goal of holding temperature rise well below 2C (and to pursue efforts to limit to 1.5°C) is the requirement for all Parties to have a "nationally determined contribution" (**NDC**). This requirement is contained in Article 4(2) of the Paris Agreement.

65. The obligation to have an NDC applies to all countries, rather than just developed countries. This was a significant shift from the Kyoto Protocol, which

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27 Affidavit of Helen Plume at [47].

28 Affidavit of Helen Plume at [50].

29 See Ministry for the Environment "Latest update on New Zealand's 2020 net position" (30 August 2021) <environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-reduction-targets/latest-update-on-new-zealands-2020-net-position>.

only imposed targets on developed countries.[30] The success of the Agreement rests on the continued participation of all countries. While the Kyoto Protocol had prioritised the setting of stringent and binding targets, the Paris Agreement prioritises broad participation and collective action.[31]

66. The other significant shift was that countries would determine for themselves, through their NDC, what their emissions reduction contribution would be; the Paris Agreement does not impose any particular binding target on an individual party. As summarised by the High Court in *Thomson v Minister for Climate Change*:[32]

> Moreover, neither the Convention nor the Paris Agreement stipulate any specific criteria or process for how a country is to set its INDC[33] and NDC, nor how it is to assess the costs of the measures it intends to take. The Paris Agreement seeks a contribution from a country that represents its "highest possible ambition" and developing countries should continue "taking the lead by undertaking economy-wide absolute emission targets" but it leaves these matters to be nationally determined.

67. In New Zealand these matters are nationally determined by the Minister of Climate Change, with the agreement of Cabinet.[34]

68. New Zealand's first NDC was communicated on 5 October 2016. It provided that New Zealand committed to reduce net greenhouse gas emissions to 30% below 2005 levels by 2030.[35]

69. The NDC was updated on 4 November 2021, following the Prime Minister's and the Minister's announcement on 31 October 2021. The updated NDC provides that New Zealand will reduce net greenhouse gas emissions to 41% below 2005 levels by 2030 on an emissions budget approach.[36]

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30 Affidavit of Helen Plume at [51].

31 Affidavit of Helen Plume at [57].

32 *Thomson v Minister for Climate Change* [2017] NZHC 733, [2018] 2 NZLR 160 at [139] **[LCANZI's BOA, Volume 1, Tab 4, at 192].**

33 INDC stands for "intended nationally determined contribution". Parties submitted INDCs in anticipation of the Paris Agreement being adopted.

34 The Minister exercises the prerogative to set and communicate the NDC. By convention a decision of this nature is made with the agreement of Cabinet: Philip Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, 2021) at [20.7.1] **[Respondents' BOA, Tab 92, at 3367-3370]**.

35 This reflected the INDC announced by New Zealand prior to the adoption of the Paris Agreement.

36 Note that on a "point year" basis the updated NDC is expressed as a reduction in net greenhouse gas emissions to 50% below gross 2005 levels by 2030.

FIRST GROUND: EMISSIONS CALCULATION FOR NDC ADVICE, AND THE NDC DECISION

70. LCANZI claims the Commission did not correctly advise the Minister on the changes required to the NDC to "ensure it is compatible with global efforts to limit the average temperature increase to 1.5°C".[37] This is because the NDC advice contained "an error of mathematical logic".[38] The logical error is said to arise from how the Commission translated the rate of emissions reductions in the IPCC's 2018 Special Report global pathways (**global pathways**) to New Zealand.

71. The Commission was asked to advise on whether the NDC is compatible with contributing to global efforts to limit global average temperature rise to 1.5°C above pre-industrial levels. To that end, the Commission compared New Zealand's (then) current NDC "to the comparator NDC budgets developed using the modelled global greenhouse gas reductions in the IPCC 1.5°C pathways".[39] The Commission was conscious that the global pathways represented global averages only;[40] the IPCC did not consider reductions for individual countries as part of the pathways it assessed.[41] It had to decide how to best translate the global rate of reductions to New Zealand.

72. The rates of reduction in the global pathways were expressed using a net-net approach. In developing the comparator NDCs, the Commission translated the reduction percentages in the global pathways to New Zealand on a gross-net basis. Following this calculation, and considering a range of relevant value judgements, it advised that, for the NDC to be compatible with the 1.5°C goal, it would need to "reflect a reduction to net emissions of much more than 36% below 2005 gross levels by 2030" (**36% advice**).[42] LCANZI says this is wrong

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37 LCANZI's submissions at [200].

38 LCANZI's submissions at [199].

39 Climate Change Commission *Supporting Evidence, Consultation Feedback and Updates: Chapter 13: Requests under s 5K relating to the Nationally Determined Contribution and biogenic methane – supporting evidence* at section 13.2.3, page 6 **[Bundle of Climate Change Commission's Advice and Supporting Volumes (Advice Bundle) at 916]**.

40 Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 191, paragraph [28] **[Advice Bundle at 207]**.

41 Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 354*, box 21.1 **[Advice Bundle at 370]** *[This hyperlinked version of the submissions updates the previous incorrect reference from 191 to 354].

42 Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 358, recommendation 30 **[Advice Bundle at 374]**.

and that the rate of reductions in the global pathways can only be "applied" to New Zealand on a net-net basis.[43] Accordingly, LCANZI alleges the Commission adopted the wrong "starting point" for its NDC analysis and that its 36% advice is "irrational".[44] It further says the Minister and Cabinet's NDC decision is "invalidated" because it "had regard to, took into account or relied on the Commission's incorrect Advice".[45]

73. The Crown rejects these assertions, for these reasons: (a) the alleged 'error' is but a reasonable disagreement open to experts, based on value judgements; (b) Ministers understood the basis of the 36% advice and therefore did not operate under any 'error'; and (c) the alleged "error", if it exists, was but one input into a complex decision made on the basis of different competing factors and is therefore insufficient to render the NDC decision unlawful.

74. Moreover, the NDC decision is an exercise of the Crown's external affairs prerogative.[46] The High Court in *Thomson* considered such an exercise of the prerogative was reviewable. Accordingly, the Crown's submissions proceed on that basis, but with the proviso that the Crown does not accept the reasonableness of New Zealand's NDC is a matter properly the subject of judicial review:

    74.1 The exercise of the royal prerogative is prima facie reviewable, however the courts have been reluctant to review prerogative decisions regarding external affairs.[47]

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43 LCANZI's submissions at [236].

44 LCANZI's submissions at [28], [199] and [219].

45 LCANZI's submissions at [30].

46 Philip Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, 2021) at [19.4.2(2)] **[Respondents' BOA, Tab 92, at 3364]**. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [54]* **[Respondents' BOA, Tab 78, at 2879]**, the majority of the United Kingdom Supreme Court said that "the most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs". *[This hyperlinked version of the submissions updates the previous incorrect reference from [51] to [54] in *R (Miller) v Secretary of State for Exiting the European Union*].

47 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [83] **[Respondents' BOA, Tab 46, at 1755]**. At [93], Ellis J noted that the exercise of prerogatives touching on foreign relations continues "to be accepted as likely to be immune from review" **[Respondents' BOA, Tab 46, at 1756]**. The Crown acknowledges that in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61**[Respondents' BOA, Tab 78]** (regarding "Brexit") the majority of the Supreme Court did not consider the subject matter of the prerogative under review was determinative.

74.2 What is key is that the matter under review has a legal yardstick against which the decision in issue can be measured.[48]

74.3 The unreasonableness challenge made by LCANZI in respect of the NDC raises questions of adjudication for which there is no legal yardstick. As covered extensively in the Commission's submissions, the use of gross-net versus net-net accounting as a method for translating the global IPCC pathways is a matter on which there are differing expert opinions. As set out in the submissions below, any particular choice made in terms of how to be "consistent" with the 1.5°C temperature goal, including matters of detail such as gross-net versus net-net accounting, require judgements to be made about equity in the context of the global problem of climate change.

74.4 In addition, the executive rather than the courts has the means and competence to weigh the competing variables relevant to determining the NDC (political, economic, scientific).[49]

75. Accordingly, the Crown does not accept the reasonableness of New Zealand's NDC is a matter properly the subject of judicial review. In any event, and presuming the Court proceeds to review the NDC decision in this case, the Crown submits the Court should be slow to intervene as the NDC concerns matters of high policy and substantive merits.[50] The Executive should be accorded with a wide margin of discretion in these matters.

A Preliminary point

76. LCANZI says that, if a net-net approach had been applied, the 'correct' NDC budget (for 2021-2030) should be 484Mt CO2-eq, which it says is the "minimum level of ambition consistent with the science in the 2018 Special Report".[51] The final NDC decision, based on a gross-net approach, implies a provisional NDC

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48 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [89]-[91] **[Respondents' BOA, Tab 46, at 1755-1756]**. See also *XY v Attorney-General* [2016] NZHC 1196, [2016] NZAR 875 at [31], [57] and *McLellan v Attorney-General* [2015] NZHC 3218, [2016] NZAR 859 at [58] **[Respondents' BOA, Tab 33, at 1137]**.

49 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [89] **[LCANZI's BOA, Volume 1, Tab 3 at 109-110]**; *Smith v Fonterra Co-operative Group Limited* [2021] NZCA 552 at [26] **[Respondents' BOA, Tab 51, at 1854]**.

50 See *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [22]-[28] **[Respondents' BOA, Tab 19, at 466-467]**; also, by analogy, *R (Transport Action Network Limited) v Secretary of State for Transport* [2021] EWHC 2095 at [13]-[14] **[Respondents' BOA, Tab 83, at 3154]**.

51 LCANZI's submissions at [259].

budget of 571Mt CO2-eq (for 2021-2030).[52] At first blush, on this simplistic comparison, the NDC might *appear* less stringent than what LCANZI says 'the science requires'.[53]

77. These figures, however, are not directly comparable. This is because they use different "GWP" weighting[54] and are based on different accounting systems for CO_2 emissions and removals from the land use, land-use change and forestry sector (**LULUCF**).[55] The difference between the accounting systems – that is, between UNFCCC inventory reporting and net target accounting (or referred to as the MAB approach later in these submissions on ground 3)[56] – is addressed in the affidavit of Dr Andrea Brandon.[57] In short, UNFCCC inventory reporting includes a larger set of emissions and removals from LULUCF than net target accounting. In particular, UNFCCC inventory reporting includes removals by forests that were planted prior to 1990, which constitute a substantial part of New Zealand's current total removals under the UNFCCC inventory report; whereas net target accounting does not include such removals. Accordingly, net emissions expressed in UNFCCC inventory reporting terms are substantially lower than those expressed in net target accounting terms, both now and projected for 2021-2030.[58]

78. LCANZI's net-net figure (of 484Mt) uses an older GWP weighting (known as AR4) and is based on UNFCCC inventory reporting.[59] By contrast, the final NDC decision uses the most recent GWP weighting (AR5) and is explicitly based on net target accounting.

79. To enable a meaningful comparison, Dr Reisinger has recalculated the relevant figures by putting them on the same footing – that is, using the net-net approach and AR5 GWPs, and employing the latest projected CO_2 emissions and removals from LULUCF to translate the NDC into same accounting system.

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52 Affidavit of Andreas Reinhard Reisinger affirmed on 10 December 2021 at [90.5] (**First Affidavit of Dr Andreas Reisinger**).

53 LCANZI's submissions at [259].

54 First Affidavit of Dr Andreas Reisinger at [86]; for an overview of what GWP, in particular AR4 and AR5, means, see First Affidavit of Dr Andreas Reisinger, Appendix 2 at [2]-[4].

55 Consistency Advice at [84] **[Respondents' Bundle of Documents, Tab 54, at 589]**.

56 First Affidavit of Andreas Reisinger at [6.2].

57 Affidavit of Dr Andrea Mary Brandon affirmed on 10 December 2021 at [66]-[67] (**Affidavit of Dr Andrea Brandon**).

58 First Affidavit of Dr Andreas Reisinger, Appendix 1 at [2].

59 First Affidavit of Dr Andreas Reisinger at [86].

The results are summarised in **Annex A**. For the avoidance of doubt, New Zealand's NDC, as communicated to the secretariat of UNFCCC, is expressed solely in net target accounting terms. The comparison below is for illustrative purpose only for this litigation; it does not purport to replace the actual NDC as communicated.

80. In short, *if both figures were expressed on UNFCCC inventory reporting terms*, the recalculation shows:

80.1 LCANZI's approach (i.e. 'applying' the net-net rates of reduction in the global pathways to New Zealand, but using AR5 GWP instead of AR4 GWP) would produce a NDC budget of **511Mt CO2-eq** (for 2021-2030);[60] and

80.2 The final NDC decision translates into a provisional, UNFCCC inventory-reporting based NDC budget of **476Mt CO2-eq** (if focused only on the period 2021-2030, as LCANZI has done)[61] or **505-537Mt CO2-eq** (if based on a longer period of 2021-2050).[62]

81. As the comparison shows, the government's NDC decision implies a more stringent budget than what LCANZI perceives to be required as a starting point, if focused on the period of 2021-2030 (as LCANZI does in its calculations).[63] Even on a longer-term basis, the NDC translates into an indicative range that encompasses LCANZI's 'starting point'.

82. Alternatively, *if both figures were expressed in net target accounting terms*, the results are:

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60 First Affidavit of Dr Andreas Reisinger at [86].

61 Briefly, the NDC budget is 571 Mt in net target accounting terms. If New Zealand takes the envisaged actions necessary to meet this NDC, its net domestic emissions (in net target accounting terms) would be 673 Mt, and it will purchase 102 Mt of offshore abatement. These same net domestic emissions, but expressed in UNFCCC reporting terms, would be 95 Mt lower. Accordingly, if New Zealand achieves its NDC, its cumulative domestic net emissions in UNFCCC reporting terms over 2021-2030 would be 578 Mt (673 Mt minus 95 Mt). Reducing this further by 102 Mt for offshore abatement, which remains unchanged, the total emissions New Zealand would be responsible for during 2021-2030 would be 476 Mt in UNFCCC reporting terms (578Mt minus 102Mt). See First Affidavit of Dr Andreas Reisinger at [90.1]-[90.5].

62 The difference between removals included in net target accounting and in UNFCCC reporting is projected to vary significantly over time and therefore depends on the time horizon considered. If focused only on 2021-2030, the difference is projected to be 95 Mt; but, on average over the 2021-2050 period, the projected difference is between 34-66 Mt: see First Affidavit of Dr Andreas Reisinger, Appendix 2 at [7]. The Ministry used the 34-66Mt range when updating its advice to the government: see First Affidavit of Dr Andreas Reisinger, Appendix 2 at [8]. 571Mt minus 34-66Mt results in a range of 505-537Mt.

63 LCANZI's submissions at [259].

82.1 LCANZI's approach would produce a NDC budget of **606Mt CO2-eq** (if focused on the period 2021-2030)[64] or **545-577Mt CO2-eq** (if based on a longer period of 2021-2050).[65]

82.2 The final NDC decision implies a provisional NDC budget of **571Mt CO2-eq**.

83. Again, the NDC provides a more stringent budget than what LCANZI says is required as a starting point, if focused on 2021-2030 (as LCANZI has done). For 2021-2050, the NDC still falls within the indicative range based on a calculation that uses the net-net rate of reduction.

84. In other words, by its revised NDC, New Zealand can expect to be doing more than, or at least consistent with, what LCANZI considers to be "the science in the 2018 Special Report".[66]

Legal principles

85. In *R (Law Society) v Lord Chancellor*, the English Divisional Court (Leggatt LJ and Carr J sitting, as they were) held that a judicial review challenge based on "irrationality", or more accurately "unreasonableness", has two aspects.[67] The first aspect concerns whether the decision under review is outside the range of reasonable decisions open to the decision-maker. This aspect focuses on the outcome or "terminus". The second aspect is concerned with the process by which the decision was reached. It attacks the "route" of the decision. The Divisional Court elaborated on the second aspect in this way:[68]

> A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious

64 First Affidavit of Dr Andreas Reisinger at [86]: as above, LCANZI figure of 484Mt is recalculated using AR5 GWPs rather AR4 GWPs, which results in 511 Mt (in UNFCCC reporting terms). This is then translated to net target accounting terms by adding 95Mt, which results in 606 Mt (511 plus 95). If the focus is only on the 2021-2030 period, net target accounting emissions are projected to be 95 Mt higher than UNFCCC reporting: First Affidavit of Dr Andreas Reisinger at [89.2].

65 First Affidavit of Dr Andreas Reisinger at [87].

66 LCANZI's submissions at [259].

67 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 **[Respondents' BOA, Tab 75, at 2733]**.

68 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 at [98] **[Respondents' BOA, Tab 75, at 2757]**.

> and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] QB 1044.

86. This aspect can be summarised, per Palmer J in *Hu v Immigration and Protection Tribunal*, by asking whether "there is a material disconnect in the chain of logic from a fact…to a conclusion".[69] The Divisional Court added that a decision may be irrational because the reasoning which led to it is vitiated by a technical error, but what matters for this purpose is whether the alleged error is "incontrovertible".[70] The corollary is that, "if the alleged technical error is not incontrovertible but is a matter on which there is room for reasonable differences of expert opinion, an irrationality argument will not succeed".[71] This situation arises where, for instance, the evidence of an expert relied upon by a claimant is contradicted by a rational opinion in a statement from an expert filed by the defendant.[72] These propositions accord with this Court's decision in *New Zealand Animal Law Association v Attorney-General*, holding that "it is inappropriate for the Court to adjudicate on "scientific differences of opinion" in judicial review proceedings.[73] Similar comments were made in *NZ Climate Science v National Institute of Water and Atmospheric Research Ltd*[74] and *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry*.[75]

87. The reference to factual or technical errors in the above authorities is apposite, as LCANZI's challenge to the NDC decision is couched, or best conceptualised, in those terms. In New Zealand, while the precise scope of judicial review for error of fact (or technical error) is not yet settled, it is clear that, as the Court of Appeal held in *Glaxo Group Ltd v Commissioner of Patents*, the relevant error "must be sufficiently material to be described as the basis or the probable basis of the

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69 *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [30] **[Respondents' BOA, Tab 25, at 738-739]**.

70 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 at [40] **[Respondents' BOA, Tab 75, at 2745]**.

71 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 at [41] **[Respondents' BOA, Tab 75, at 2745]**.

72 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 at [41] **[Respondents' BOA, Tab 75, at 2745]** and *R(Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [174] **[Respondents' BOA, Tab 82, at 3045]**.

73 *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 3009 at [196] **[Respondents' BOA, Tab 37, at 1445]**.

74 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] 1 NZLR 75 (HC) at [41] **[Respondents' BOA, Tab 38, at 1458]**.

75 *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry* HC Wellington CIV-2011-485-719, 25 May 2011 at [33].

decision".[76] Mistakes may be made if they are "not grave enough to undermine the basis of a multi-faceted decision".[77] Similarly, the Supreme Court in *Ririnui v Landcorp Farming Ltd* held that the exercise of public power is reviewable if it was "based on" a material error.[78] The mistaken fact must be "an established one or an established and recognised opinion"[79] or an "incontrovertible expert opinion".[80] It is not a mistake simply to adopt "one of two differing points of view of the facts, each of which may be reasonably be held".[81]

88. Moreover, as the Divisional Court held in *R (Spurrier) v Secretary of State for Transport*, it is well-established that the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise.[82] In particular, "where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial".[83]

LCANZI's challenge to NDC decision

89. LCANZI does not appear to challenge the NDC decision as falling outside the range of reasonable outcomes that are open to the decision-maker.[84] Rather, LCANZI's challenge appears to focus only on the second aspect of a rationality challenge (that is, a challenge to the 'route', rather than the outcome of the

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76 *Glaxo Group Ltd v Commissioner of Patents* [1991] 3 NZLR 179 at 184 ll17-20 **[Respondents' BOA, Tab 23, at 670]**.

77 *R v Independent Television Commission, ex p Virgin Television Limited* [1996] EMLR 318 (QB)(per Henry LJ and Turner J) at 342, citing *R v Independent Television Commission, ex p TSW Broadcasting Ltd* [1996] EMLR 291 (HL).

78 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [91]; see also [55] **[LCANZI's BOA, Volume 1, Tab 3 at 110-111 and 100-101].**

79 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 ll21-22 **[Respondents' BOA, Tab 41, at 1545]**.

80 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 200* ll16-19 (per Richardson J) **[Respondents' BOA, Tab 18, at 443]**. *[This hyperlinked version of the submissions updates the previous incorrect reference from [300] to [200]].

81 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 ll23-24 **[Respondents' BOA, Tab 41, at 1545]**.

82 *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [179] **[Respondents' BOA, Tab 82, at 3046]**.

83 *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [179] **[Respondents' BOA, Tab 82, at 3046]**.

84 Any such challenge will face formidable hurdles. The NDC decision is an exercise of the Crown's external affairs prerogative. It is not a decision made under statute. It involves balancing of competing economic, social and political considerations As this Court said in *Thomson v Minister for Climate Change* [2017] NZHC 733, [2018] 2 NZLR 160 at [134] **[LCANZI's BOA, Volume 1, Tab 4, at 190]**, "if a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing". Accordingly, while not immune from judicial review, the Executive is accorded a wide-ranging discretion. The Court is slow to intervene in matters of high policy.

decision). In particular, it says the NDC decision is "invalidated" by a logical or mathematical error in the Commission's 36% advice. The Crown disagrees.

Alleged error not incontrovertible, simply disagreement of views

90. First, the Crown submits the alleged error is not "incontrovertible". It reflects a reasonable difference of value judgements. Both gross-net and net-net approaches involve, and reflect, different value judgements. Reasonable people, including experts, may differ on the choice of such judgements. Disagreement does not mean unlawfulness.

91. As discussed above, a challenge based on irrationality requires LCANZI to demonstrate that the 'mistaken' fact, or opinion, is "incontrovertible". As Lord Russell said in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, allegations of unreasonableness may, in truth, only amount to "disagreement, perhaps passionate, between reasonable people".[85] Polar opposite opinions may both be reasonable; the law will not insist on one ahead of the other.[86] Moreover, a margin of appreciation is accorded to decisions involving "scientific, technical and predictive assessments" by those with appropriate expertise.

92. LCANZI says there is "only one way to correctly apply the 2018 Special Report pathways to Aotearoa New Zealand's emissions. That is on a net:net basis".[87] It says further the use of gross-net for this purpose is not a "mathematically valid choice".[88] Dr Reisinger does not take this absolute position. He recognises the gross-net and net-net approach each have their own merits for 'mapping' New Zealand's rate of emissions onto the global pathways,[89] both can be used but embed different value judgements, and the use of gross-net is a rational choice.[90] The Commission, an independent and expert body assigned by Parliament to this very task, made the choice to compare the rate of reductions on a gross-net basis as a starting point. The question for the Court is whether that choice is a reasonable one available to an expert. It is important to note that,

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85 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1075 **[LCANZI's BOA, Volume 2, Tab 13, at 665]**.

86 *Scott v Hutchins & Dick Ltd* HC Auckland CP154/98, 26 May 1999.

87 LCANZI's submissions at [236].

88 LCANZI's submissions, see heading before [229ff].

89 First Affidavit of Dr Andreas Reisinger at [78].

90 Affidavit in reply of Professor Piers Maxwell De Ferranti Forster affirmed 19 January 2022 at [13]-[14].

as discussed later, this issue arises in the context that there are other different ways of equal scientific validity to relate New Zealand's emissions reductions to the global pathways.

93. At heart, LCANZI's complaint relates to the *order* in which the issue of 'fairness' – how to treat a sector that is a source of emissions globally, but a source of removals in New Zealand – should be considered. LCANZI says the Commission should have translated the rates of reduction in the global pathways to New Zealand on a net-net basis and then, and only then, consider other factors, including fair distribution issues.[91] Reasonable people, and experts, may differ on the preferred order of consideration. The Crown submits there is a rational basis to consider it as part of determining how to translate the global pathways to an individual country (as the Commission has done). This view is supported by the expert evidence adduced on behalf of the Commission and the Crown,[92] and was made clear in a briefing to the Minister, entitled "Consistency of NDC1 with efforts to limit global warming to 1.5°C" (**Consistency Advice**) and the Cabinet Paper.[93]

94. As LCANZI appears to accept, there are various ways to determine the compatibility of New Zealand's NDC with the 1.5°C goal.[94] The question of how to allocate or apportion global averages to a particular country cannot be answered by science.[95] Any such decision involves an a priori judgement about equity.[96] The language of 'applying the global pathways' gives a false impression of scientific certitude. As Dr Reisinger explained, "the notion of 'compatibility' has no single scientific definition, but can and should involve consideration of

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91 LCANZI's submissions at [241]: "any fair distribution issues must be addressed separately". See also Affidavit in Reply of Dr Ivo Geoffrey Bertram at [79]: "My point has been simply that the up-front mathematical issue of like-with-like comparison must be resolved before consideration of the other real-world issues that arise in setting an NDC".

92 Affidavit of Matthew James Smith at [40] and First Affidavit of Dr Andreas Reisinger at [80].

93 Consistency Advice at [25]-[26] **[Respondents' Bundle of Documents, Tab 54, at 581-582]**; Cabinet Paper, Appendix 2 at [6].

94 LCANZI's submissions at [236]: "As the Advice and the MfE Consistency Advice both recognise, there are a number of ways that Aotearoa new Zealand's 'fair share' of the global burden could reasonably be determined".

95 Consistency Advice at [15] **[Respondents' Bundle of Documents, Tab 54, at 580]**.

96 This is because, as Dr Reisinger explains, "[t]he global pathways assessed by the IPCC set out what the world as a whole needs to do to meet the 1.5°C goal, at least global cost, based on various assumptions contained in global economic models. However, these global pathways do not tell us what an individual country's equitable contribution to such pathways should be": First Affidavit of Dr Andreas Reisinger at [23].

multiple global equity criteria that can be applied in different ways".[97] The different equity approaches for comparing New Zealand with the global pathways – based on 'equal rate of emissions reduction', 'per capita emissions', 'capacity to pay' and 'responsibility for warming from historical emissions" – are discussed in detail in the Consistency Advice.[98] All of these approaches are based on the global pathways. But no one approach is inherently superior than another from a scientific perspective; each reflects different value judgements.[99] It would, therefore, be a mistake to treat one approach, such as translating the rate of reductions in the global pathways to a country, as though it is more 'scientific' or value neutral.[100]

95. In the result, the Commission chose to be guided by the rate of emissions reductions in the global pathways, but recognising the different national context in New Zealand, including its high historical rates of afforestation.[101]. This was a reasonable, but not the only, option as a starting point. The Commission acknowledged that "the pathways represent global averages and do not set out prescriptive pathways for the individual nations".[102] Accordingly, the Commission expressly caveated that "care needs to be taken when applying the IPCC pathways to Aotearoa".[103] The Commission went on to explain, in its supporting evidence volume, "the judgements that have been made in applying" the global pathways to New Zealand, which included the choice of using the gross-net approach.[104]

96. Matthew Smith, Principal Analyst at the Commission, discusses these issues further in his affidavit. In particular, Mr Smith confirms that the Commission was fully aware of "the limitations and challenges of using the IPCC's global

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97 Consistency Advice at [10] **[Respondents' Bundle of Documents, Tab 54, at 579]**. The Consistency Advice also explains that "the question of what national-level of emission reduction is consistent with limiting warming to 1.5°C depends on the assumptions one makes about how mitigation effort should be distributed between countries globally" (at [16]) **[Respondents' Bundle of Documents, Tab 54, at 580]**.

98 Consistency Advice at [29]-[56] **[Respondents' Bundle of Documents, Tab 54, at 582-586]**.

99 Consistency Advice at [19] **[Respondents' Bundle of Documents, Tab 54, at 581]** and First Affidavit of Dr Andreas Reisinger at [29].

100 Consistency Advice at [22]-[23] **[Respondents' Bundle of Documents, Tab 54, at 581]**.

101 Consistency Advice, Chapter 13 at 9.

102 Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 191, paragraph [28] **[Advice Bundle at 207]**.

103 Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 191, paragraph [28] **[Advice Bundle at 207]**.

104 Commission's Supporting Evidence volume, chapter 13, section 13.2.3 **[Advice Bundle at 916]**.

modelling as a basis to assess New Zealand's national NDC".[105] He describes these challenges and limitations at paragraph [71.1]-[71.5] of his affidavit.[106] These complexities meant that the Commission had to make a number of "judgement calls…to try to ensure that the comparators were as useful and informative as possible for the task we had been asked to undertake".[107] As noted, one of the judgement calls made by the Commission was to use a gross-net approach to apply the global pathways to New Zealand.[108]

97. LCANZI disputes this judgement call or its availability as a judgement call. While it accepts the "choice" to apply the global pathways to New Zealand as a starting point, it argues that "[a]ccepting this choice, the global pathway is still not applied in a mathematically correct way by the Commission".[109] It says there is only one way to do so, which is on a net-net basis. This, however, fails to recognise that, as Dr Reisinger put it, "even if a specific, singular choice were made that…the rate of New Zealand's emission reductions [should mirror] the rate of emission reductions in global pathways, this would still require a number of consequential choices before a mathematical calculation could be done".[110] These "consequential choices" (for translating the rate of reductions in the global pathways to New Zealand) include:

97.1 whether to treat all gases as interchangeable and only use a single global rate of reduction, expressed as CO_2-eq, or whether to differentiate the rates of reduction for different gases (this choice matters because different gases reduce at different rates in the global pathways, but New Zealand's mix of gases is different from the global mix);[111]

97.2 if gases are treated individually, whether to treat all sources of all gases the same, or whether to differentiate further by their different sources from different sectors (this choice matters because emissions from different sectors reduce at different rates in the global pathways, but

105 Affidavit of Matthew James Smith at [71].

106 Affidavit of Matthew James Smith at [71.1]-[71.5].

107 LCANZI's submissions at [82].

108 Affidavit of Matthew James Smith at [84.4].

109 LCANZI's submissions at [232] (referring to Affidavit in Reply of Professor Piers Maxwell De Ferranti Forster at [14]) and [236].

110 First Affidavit of Dr Andreas Reisinger at [62].

111 First Affidavit of Dr Andreas Reisinger at [62.1].

the relative share of those sectors in the global economy is different to their share in the New Zealand economy);[112] and

97.3 whether to add CO_2 emissions and removals from the LULUCF sector to all other gross CO_2 emitting sectors, or whether to treat them differently (why this choice matters is discussed further below).[113]

98. All these choices rely on judgements about which way of mapping New Zealand's emissions onto the global pathways is most appropriate, if the goal is to inform a decision on what NDC emissions budget would be considered compatible with global efforts to limit warming to 1.5°C. These choices echo those referred to by the Commission and Mr Smith. The last choice at paragraph 97.3 above matters because, globally, LULUCF is a significant source of CO_2 emissions, whereas it is already a sink for CO_2 in New Zealand.[114] As Dr Reisinger explains:[115]

> A choice needs to be made how to treat a sector that represents a source of emissions globally, but that constitutes a beneficial activity by removing CO_2 in New Zealand, when attempting to map New Zealand's rate of emission reductions to the global rate. This last choice is the key judgement that underlies different calculations of gross-net and net-net emission targets for New Zealand in relation to global pathways.

99. The Commission's use of gross-net reflects the critical choice that "removals due to afforestation should not simply be subtracted from gross emissions in both the start year and the target (as a net-net approach would do), *if* the purpose is to determine what rate of emissions reduction in New Zealand would be 'consistent with' the global rate".[116] Dr Reisinger considers that this choice is supported by multiple reasons, including "a judgment about fairness":[117]

> [Otherwise] this would force countries that had large removals in the base year to keep planting more and more trees just to keep effectively standing still. This would be inherently unfair and would not serve the objective of determining 'consistency' of those countries' efforts with global reductions. Conversely, if a country had similar gross emissions but started planting trees only after 2010, that country would receive full credit for those removals, even though the

112 First Affidavit of Dr Andreas Reisinger at [62.2].

113 First Affidavit of Dr Andreas Reisinger at [62.3].

114 First Affidavit of Dr Andreas Reisinger at [62.3].

115 First Affidavit of Dr Andreas Reisinger at [62.3].

116 First Affidavit of Dr Andreas Reisinger at [67] (emphasis original).

117 First Affidavit of Dr Andreas Reisinger at [67].

> removals would be less than the removals in a country that had started planting trees decades earlier.

100. For this reason, the "separate choice" of using gross-net to map the global pathways to New Zealand is necessarily informed by a judgement of fairness, rather than simply as a matter of mathematics.[118] Accordingly, his view is that the disagreement between the Commission and LCANZI is "a direct result of different choices and judgements on the most appropriate way to compare New Zealand's NDC with the global pathways. It is not the result of a mathematical calculation error".[119]

101. The above demonstrates that, contrary to LCANZI's submissions, there is no single correct way to apply the global pathways to New Zealand. The scope for choice and value judgement is not exhausted once the Commission has decided on an approach to assess an NDC for 1.5°C consistency – i.e. by translating the rates of reduction in the global pathways to New Zealand, rather than employing approaches based on per capita emissions, capacity to pay, or responsibility for warming including from historical emissions. The question of *how* to translate the rates of reduction in the global pathways to a country, for the purpose of assessing 1.5°C compatibility, also inevitably requires a number of judgement calls. Those choices (discussed at paragraphs 96-100) are not susceptible to a binary, right-or-wrong, answer. They are informed, among other things, by judgements about fairness. The Crown submits there is nothing irrational about the judgement to use gross-net to map New Zealand's rate of emissions reduction to the global pathways as a starting point.

102. Dr Reisinger does not say the net-net approach is wrong or somehow inferior; his position is that both approaches have their own merits (and both approaches were provided in the Consistency Advice). He simply says that it is incorrect to assert there is only one way to carry out the mapping or translating exercise. It ignores the value judgements and choices inherent in that exercise. The Crown respectfully submits Dr Reisinger and Mr Smith have provided a rational expert opinion that contradicts the categorical position advanced by LCANZI. This,

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[118] First Affidavit of Dr Andreas Reisinger at [68].

[119] First Affidavit of Dr Andreas Reisinger at [60].

according to *R (Law Society) v Lord Chancellor* and *New Zealand Climate Science Education Trust*,[120] is fatal to LCANZI's challenge based on irrationality.

103. LCANZI advances two reasons for why it disagrees with Dr Reisinger's view. The first is that fairness "cannot trump mathematics".[121] As discussed, this argument ignores the inevitable "consequential choices" that have to be made when undertaking the mapping exercise, some of which will depend on different perspectives of fairness.[122] These choices necessarily precede the application of mathematics. As Dr Reisinger says, one may hold concerns about the relative balance of reducing gross emissions and removing CO_2 through afforestation in the past.[123] Nevertheless, such past policy choices materially affect options for future emission reductions and the effort required given New Zealand's resulting emissions profile. These implications need to be considered when deciding what share of global emission reduction efforts should be borne by New Zealand. Experts may reasonably disagree on how constraints arising from past policy decisions should inform future choices. But this is no more than a "disagreement, perhaps passionate, between reasonable people" – even between experts.[124] It falls far short of the requisite threshold of incontrovertibility.

104. Relatedly, LCANZI asserts that any fair distribution issues must be addressed separately, after the net-net approach has been applied.[125] As discussed, Dr Reisinger accepts that is a valid approach, but notes that "the mathematical calculation in that approach makes no distinction between harmful activities that resulted in emissions, and beneficial activities that removed CO_2 from the atmosphere, at the start of the calculation period".[126] In other words, this approach builds in its own value judgement not to make such a distinction. At the same time, he considers that a gross-net approach, which expressly builds this distinction into the calculation, is also a valid approach.[127] As elaborated

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120 *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [2018] EWHC 2094 at [41] **[Respondents' BOA, Tab 75, at 2745]** and *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297; [2013] 1 NZLR 75 at [47]-[48] **[Respondents' BOA, Tab 38, at 1459]**.

121 LCANZI's submissions at [240]-[241].

122 This is particularly so given the balance of New Zealand's emissions and removals is different from the global mix of emissions: First Affidavit of Dr Andreas Reisinger at [9].

123 First Affidavit of Dr Andreas Reisinger at [79].

124 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1075 **[LCANZI's BOA, Volume 2, Tab 13, at 665]**.

125 LCANZI's submissions at [241].

126 First Affidavit of Dr Andreas Reisinger at [80].

127 First Affidavit of Dr Andreas Reisinger at [80].

below, the different value judgements underlying the gross-net and net-net approaches were made clear in Consistency Advice and the Cabinet Paper.

105. As discussed, the Crown submits the order in which the question of fairness is considered, in determining New Zealand's equitable contribution to the global pathways, is a matter that experts can legitimately express a different view on. As Lord Diplock said in *Tameside*, "the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred".[128]

106. LCANZI's second disagreement is that, since New Zealand relied on forestry removals to meet its first commitment period obligations under the Kyoto Protocol, it "makes sense" they become part of New Zealand's new baseline.[129] As Dr Reisinger explains, however, on this view, New Zealand would need to continue to plant trees (and may eventually run out of suitable land to do so) to simply maintain its net emissions at the relatively low levels (in terms of net CO_2 emissions) it achieved in 2010.[130] This is a matter that is relevant to determining what future emission reductions would be considered consistent with global efforts to limit warming to 1.5°C. Accordingly, it is again not a question of being scientifically correct or wrong. Rather, it is a situation involving "differing points of view…each of which may be reasonably held".[131] LCANZI's preferred view in this respect does not render the choice of gross-net irrational.

Ministers understood the basis of NDC calculation and did not operate under any mistake of fact

107. The Crown's second submission is that Ministers were not operating under any mistake, when making the NDC decision. A mistake of fact must be shown to have been "in the actual or constructive knowledge of the decision-maker's mind.[132] As alleged, the supposed mistake is that, by using the gross-net approach, the Commission's 36% advice wrongly purported to be a

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128 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064 **[LCANZI's BOA, Volume 2, Tab 13, at 654]**.

129 LCANZI's submissions at [242].

130 First Affidavit of Dr Andreas Reisinger at [76].

131 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552, ll23-24 **[Respondents' BOA, Tab 41, at 1545]**.

132 *Taiaroa v Minister of Justice* HC Wellington CP99/94 (4 October 1994) at 42. This decision was upheld on appeal: *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA).

"scientifically based" minimum,[133] "based on a mathematical interpretation of the SR1.5 report's global pathways".[134] LCANZ says the Commission's advice on the NDC should have used the net-net approach.[135]

108. The evidence is clear that Ministers were not labouring under the alleged mistake. They were aware that the 36% figure arrived at by the Commission included inherent value judgments. They were also presented with a range of options for arriving at an NDC that was compatible with the 1.5°C temperature goal, including on a net-net basis.

Minister and Cabinet understood gross-net embodies value-judgements

109. The Consistency Advice explained that the question of what national level of emissions reduction is consistent with limiting warming to 1.5°C depends on the assumptions one makes about how mitigation effort should be distributed between countries globally.[136] And this distribution "depends almost entirely on value judgements relating to equity, i.e. in which way a country wishes to be consistent with the necessary global effort".[137] There is no single measure of equity, rather there are "multiple lenses" through which equity can be viewed. One such lens is the 'equality' perspective: while this often refers to equal emissions per capita, it may also refer to "the same percentage rate of emission reductions" (that is, translating the rate of reduction in the global pathways to New Zealand, as the Commission has done).[138]

110. The Consistency Advice then turned to the 36% advice and said that "the Commission's quantitative analysis could be viewed as one interpretation of the principle of 'equality', i.e. each country undertaking equal rates of reductions". Addressing the gross-net approach, the Consistency Advice explained:[139]

> The Commission applied a gross-net approach in its quantitative analysis: it calculated the rate of reductions for carbon dioxide by comparing New Zealand's net emissions in 2030 with gross emissions in 2010, and relating this to the rate of reductions of global net carbon dioxide emission between 2010 and 2030 (which are on a

133 LCANZI's submissions at [231].

134 Affidavit in Reply of Professor Piers Maxwell De Ferranti Forster at [14], referred to in LCANZI's submissions at [232].

135 LCANZI's submissions at [236].

136 Consistency Advice at [16] **[Respondents' Bundle of Documents, Tab 54, at 580]**.

137 Consistency Advice at [17] **[Respondents' Bundle of Documents, Tab 54, at 580]**.

138 Consistency Advice at [18(a) **[Respondents' Bundle of Documents, Tab 54, at 580]**].

139 Consistency Advice at [24]-[25] **[Respondents' Bundle of Documents, Tab 54, at 581]**.

> net-net basis). The reason the Commission gives for this approach is that removals in New Zealand in 2010 due to past afforestation measures do not provide on-going removals, and hence on-going planting would be required merely to sustain that level of net emissions. Using net emissions in 2010 as reference point for the required reductions by the year 2030 would therefore constitute an undue burden.
>
> The Commission's approach embodies an additional value judgment about how past efforts should be treated when allocating future responsibilities among countries. An alternative approach would be to apply the global rate of net carbon dioxide emissions reductions to New Zealand's net carbon dioxide emissions both in 2010 and 2030…Using this alternative method would result in a lower NDC1 budget consistent with 1.5°C (quantified below).

111. The Consistency Advice emphasised that "even the 36% starting point is not value-neutral but already contains strong value judgements about how the global effort should be distributed to reach this starting point".[140] Nowhere in the Consistency Advice was it suggested to the Minister that the 36% figure was a "scientifically based" minimum required to meet the 1.5°C goal. This is confirmed by the Minister's evidence. As the Minister said, "it was clear to me that the Commission was not advising on any exact figure which would make New Zealand's NDC *consistent* with 1.5°C".[141] As mentioned, how the global pathways translate to a ***nationally determined*** contribution depends on choices countries make about that contribution, for example, based on a rate of reduction, per capita calculation, or responsibility for historical emissions, etc. It follows there is no definitive or scientific 'IPCC pathway' for any given country. What is consistent with the IPCC pathways depends on the contribution lens through which one looks at the IPCC pathways. This is illustrated by the range of consistent pathways for New Zealand shown at [116] below (from the Consistency Advice).

112. The same point was also conveyed to Cabinet. Annexure 2 to the Cabinet Paper explained:[142]

> Fundamentally, using a gross-net approach to compare New Zealand's rate of reduction with those in global emission pathways assessed by the IPCC is not a simple mathematical calculation, but requires New Zealand to exercise its judgment about the appropriate level of burden sharing between countries with

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140 Consistency Advice at [26] **[Respondents' Bundle of Documents, Tab 54, at 581]**.

141 Affidavit of James Peter Edward Shaw at [21] (emphasis original).

142 Cabinet Paper, Annexure 2, at [6*]. **[Respondents' Bundle of Documents, Tab 56, at 657]** * [This hyperlinked version of the submissions updates the previous incorrect reference from 7 to 6].

> different amounts and types of emissions and removals. Officials note that, as a result, the 36% median rate of reduction calculated by the Commission (as well as any greater reduction expressed as a gross-net target) necessarily includes some of the value judgments set out above.

113. As a result, Ministers were aware that the Commission's 36% advice was "underpinned by the use of particular accounting method which included value judgements about how New Zealand's NDC should be accounted for".[143]

Net-net option was presented to Minister and Cabinet

114. As discussed, the Consistency Advice stated that the Commission's quantitative analysis can be carried out on a net-net approach. In particular, it stated: [144]

> Using otherwise the same methodology as in the Commissions' final advice, the following NDC budgets could therefore be considered as consistent with 1.5°C, updated based on the latest (2021) emissions inventory (interquartile ranges shown in brackets):
>
> a. **568 (527-608) Mt CO2-eq** using a gross-net approach and net target accounting
>
> b. **484 (458-510) Mt CO2-eq** using a net-net approach and inventory-based removals
>
> These two budgets are not directly comparable since they differ not only in their use of gross-net or net-net approaches, but the former excludes removals from pre-1990 forests, whereas the latter includes emissions and removals regardless of planting date.

115. The above net-net calculation is not disputed by LCANZI and indeed its experts came to the same numerical result.[145] LCANZI says the Commission should have advised the Minister of the 484 Mt CO_2-eq figure as "a minimum level of ambition consistent with the science in the 2018 Special Report".[146] It is clear that both options – NDC budgets based on gross-net and net-net – were provided and explained to the Minister. As discussed earlier, however, the two figures in the extract above are not directly comparable. Once the figures are adjusted to allow for a meaningful comparison, the final NDC is more stringent than what LCANZI perceives to be required as a starting point.

116. The Consistency Advice went on to present a chart, setting out the different options for updating the NDC based on the various equity perspectives

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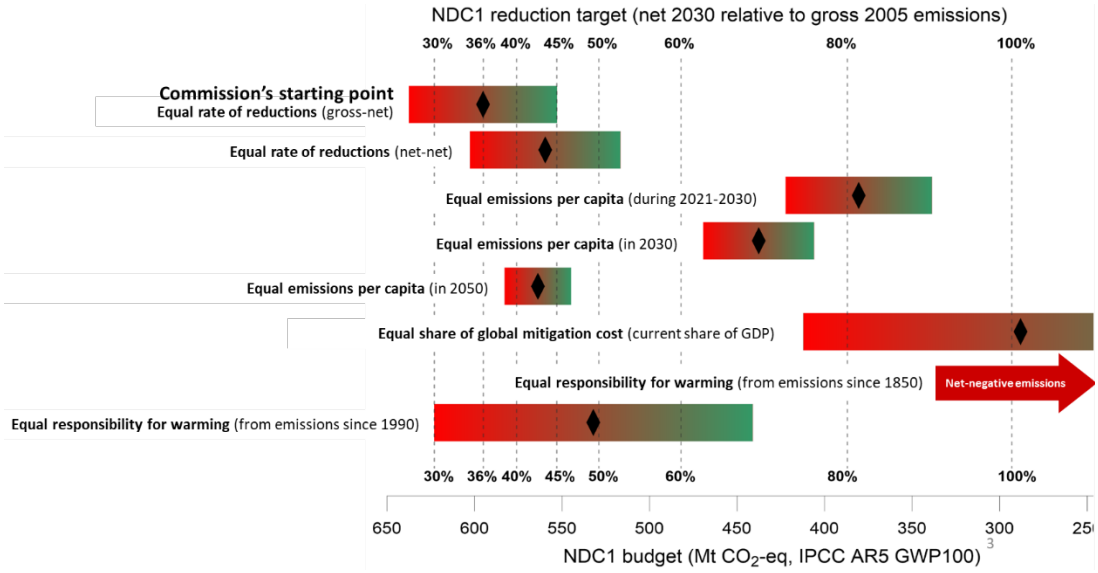
143 Affidavit of James Peter Edward Shaw at [29].

144 Consistency Advice at [83]-[84] **[Respondents' Bundle of Documents, Tab 54, at 589]**.

145 LCANZI's submissions at [258], footnote 262.

146 LCANZI's submissions at [259].

discussed in the advice. It provided 8 options, one of which was based on the net-net approach. The chart was updated[147] and included in the Cabinet Paper as figure 1, as follows:[148]



117. The first two bars represent indicative NDC budgets based on a gross-net and net-net approach to calculate an equal rate of reduction (by translating the rate of reductions in the global pathways). The first bar is the Commission's "starting point", based on a gross-net approach; the second is based on a net-net approach. As Dr Reisinger explained, "both approaches were provided to ensure the implications of those different approaches were transparent".[149]

118. As the Minister said, "Ministers were aware that considering rates of reductions on a net-net approach results in different budget amounts of Mt of CO_2-eq. This is clear from Figure 1, on page 13 of the Cabinet Paper. The first two bars compare rates of reduction on a gross-net versus a net-net basis".[150]

119. In addition, Annexure 2 of the Cabinet Paper explained:[151]

> If the Commission had used a net-net approach, this would have resulted in a different recommendation regarding the NDC emission target. In short, this is because if the emissions figure for the baseline year is calculated on a net basis (i.e. taking into account all land use, land use change, and forestry emissions and removals in the baseline

147 The details of the update, of a technical nature, are discussed in the First Affidavit of Dr Andreas Reisinger, Appendix 2.

148 Cabinet Paper at 13, Figure 1 **[Respondents' Bundle of Documents, Tab 56, at 630]**.

149 First Affidavit of Dr Andreas Reisinger at [78].

150 Affidavit of James Peter Edward Shaw at [30]

151 Cabinet Paper, Annexure 2 at [4] **[Respondents' Bundle of Documents, Tab 56, at 656]**.

> year), there is a lower floor from which further reductions must be made. Accounting towards such a net-net target would also need to include removals on forest land planted prior to 1990.

120. What the evidence shows is that both options, gross-net and net-net, were presented and explained to Ministers. They were aware of both options. They understood that a net-net approach would result in a different NDC. While Ministers "had regard to" the 36% advice,[152] they did not misapprehend it as the "scientifically based" minimum. They knew it was underpinned by value-judgement.

121. Accordingly, even on LCANZI's theory, the alleged error, if it exists, was overtaken by the Ministry's independent analysis of both approaches. Ministers were not operating under any mistake of fact.

No "material error" – NDC decision not "based on" 36% advice

122. Third, the Crown submits that, even if the 36% advice was in error, it is not a "material" error because it was not "the basis of" the NDC decision.

123. The Minister's unchallenged evidence is that "the process of deciding New Zealand's updated NDC was a complex one that involved the consideration of many factors, not just the gross-net issue focused on by [LCANZI]".[153] As this Court held was the case in *Thomson*, here also "the nature of the decision involved a balancing of competing factors".[154] No single factor had a dominating effect, such that it can be described as "*the* basis of" the decision. As the Consistency Advice explained, consistency with the global 1.5°C goal is only one, albeit important, consideration that contributes to the overall decision of what constitutes New Zealand's highest possible ambition for its NDC under the Paris Agreement.[155]

124. The multi-faceted nature of the task is also reflected in the Cabinet Paper, which stated: "…when taking decisions on NDC1 and determining which option constitutes New Zealand's highest possible ambition (as required by the Paris Agreement) we will need to consider a number of factors and issues".[156]

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152 Minister's Second Amended Statement of Defence [94A.2].

153 Affidavit of James Peter Edward Shaw at [19.1].

154 *Thomson v Minister for Climate Change* [2017] NZHC 733, [2018] 2 NZLR 160 at [160] **[LCANZI's BOA, Volume 1, Tab 4, at 196]**.

155 First Affidavit of Dr Andreas Reisinger at [20].

156 Cabinet Paper at [106] **[Respondents' Bundle of Documents, Tab 56, at 634]**.

Ministers were asked to "weigh up a range of domestic and international policy considerations" in assessing options for New Zealand's updated NDC, including New Zealand's broader foreign policy and regional objectives,[157] New Zealand's national circumstances,[158] equity considerations,[159] New Zealand's capacity to deliver and the costs of meeting any updated NDC.[160] Consistency with the 1.5°C goal, while important, was one out of four factors in the NDC options assessment table.[161] None of those criteria had, or purported to have, a dominating effect over another.

125. As the Minister said:[162]

> Accordingly, a wide range of factors were taken into account. Ministers were acutely conscious of the 1.5°C temperature goal, but this necessarily had to be weighed up with considerations such as feasibility and cost. Ministers knew that the greater the reduction target of the NDC above 36%, the more consistent it would be with 1.5°C.

126. Indeed, LCANZI accepts that there are many factors involved in setting the NDC. As Lord Templeman made clear in *R v Independent Television Commission, ex p TSW Broadcasting Ltd*, "mistakes of fact may be made provided that the mistakes are not grave enough to undermine the basis of a multi-faceted decision".[163] The Crown submits the 36% advice, even if wrong, does not have such undermining effect. In other words, it is not sufficiently material to vitiate the rationality or reasonableness of the NDC decision – a decision involving a multitude of different high-policy factors, made pursuant to prerogative powers.

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157 Cabinet Paper at [41] **[Respondents' Bundle of Documents, Tab 56, at 624]**.

158 Cabinet Paper at [48]-[53] **[Respondents' Bundle of Documents, Tab 56, at 625-626]**. Affidavit of James Peter Edward Shaw at [22.2]

159 Cabinet Paper at [54]-[69] **[Respondents' Bundle of Documents, Tab 56, at 626-628]**. Affidavit of James Peter Edward Shaw at [22.3]

160 Cabinet Paper at [70]-[76] **[Respondents' Bundle of Documents, Tab 56, at 629]**. Affidavit of James Peter Edward Shaw at [22.4]

161 Cabinet Paper, at 20, Table 2 **[Respondents' Bundle of Documents, Tab 56, at 637]**.

162 Affidavit of James Peter Edward Shaw at [23].

163 *R v Independent Television Commission ex parte Virgin Television Limited* [1996] EMLR 318 (QBD) at 342 (per Henry LJ), citing *R v Independent Television Commission, ex p TSW Broadcasting Ltd* (Court of Appeal, 5 February 1992).

SECOND GROUND: STATUTORY PURPOSE & EMISSIONS BUDGETS

127. LCANZI submits that the Commission erred in law in proposing the emissions budgets, primarily by failing to act in accordance with the relevant purpose provisions.

128. The specific errors of law argued by LCANZI are that:

128.1 The Commission failed, contrary to the purpose of the Act, to determine what levels 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[164]

128.2 The Commission misconstrued the mandatory considerations in s 5ZC and s 5M as matters that could be balanced against the relevant purpose provisions when advising on emissions budgets.[165]

129. The Crown does not consider the Commission has failed to act in accordance with the CCRA in its advice on the emissions budgets.

130. LCANZI effectively seeks to elevate the statutory purpose under s 3(1)(aa)(i) into an independent statutory duty. However, the section is clearly not phrased as an enforceable duty, but simply a standard purpose clause (which normally functions as an aid to interpretation, as opposed to creating an obligation for the Crown to meet) . In particular, LCANZ's position, which asserts an absolute duty, ignores the words "*contribute to* the global effect" in s 3.

131. At best, the underlined words only give rise to a type of "target duty". As a leading English text, *De Smith's Judicial Review*, explains, "such a duty seeks to achieve more an aspiration than an obligation. The authority is simply required to 'do its best' and failure to achieve the duty does not result in illegality…Courts allow great flexibility to authorities to achieve this kind of duty, as long as they are not 'outside the tolerance' of the statutory provision. And since these duties normally require the decision to allocate scarce resources among competing needs, the courts will not interfere readily…".[166] In this connection, *R (Friends of*

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164 Second Amended Statement of Claim at [99](a), (b), (c), (f).

165 Second Amended Statement of Claim at [99](d).

166 Harry Woolf and others *De Smith's Judicial Review* (8th ed, Thomson Reuters, 2018) at [5-073]-[5-074] **[Respondents' BOA, Tab 95, at 3386-3387]**.

the Earth) v Secretary of State of Energy and Climate Change is instructive.[167] There, one issue concerned s 2(2)(c) of the UK Act, which says "In England, the Government as far as reasonably practicable will seek an end to fuel poverty for vulnerable households by 2010". In respect of this duty, the English Court of Appeal said, "it behoves a court to proceed with caution so as to ensure that softer obligations are not construed in a more prescriptive manner than their language and context requirement…I agree that, properly construed, the essential legal obligation is correctly described in terms of effort or endeavour".[168] The language used in the UK Act ("as far as practical" and "will") is stronger than that used in the CCRA ("contributes to"). Accordingly, if the wording the UK Act only imposes obligations in terms of effort and endeavour, then, at most, s 3(1)(aa)(i) of the CCRA would require only similar obligation – and not, a hard-edged duty as contended by LCANZI.

Alleged misinterpretation of purpose provisions

132. The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.[169] Central to the understanding of any statute is its purpose, however the actual words of the CCRA remain the most important single factor in statutory interpretation.[170]

133. LCANZI refers to the general purpose provision in the Act: "to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that, inter alia, contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above preindustrial levels".[171] LCANZI also refers to the specific purpose section contained in the emissions budgets subpart of the Act:

5W Purpose of this subpart

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167 Michael Fordham *Judicial Review Handbook* (7th ed, Hart Publishing, 2020) at [53.1.10] **[Respondents' BOA, Tab 91, at 3358]**.: duty to promote the legislative purpose, citing *R (Friends of the Earth) v Secretary of State of Energy and Climate Change* [2009] EWCA Civ 810 **[Respondents' BOA, Tab 74]**.

168 *R (Friends of the Earth) v Secretary of State of Energy and Climate Change* [2009] EWCA Civ 810 at [20] **[Respondents' BOA, Tab 74, at 2725]**.

169 Legislation Act 2019, s (10)(1).

170 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 288, 289 **[Respondents' BOA, Tab 90, at 3318, 3319]**; and *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* (2017) 18 NZCPR 587 (HC) Palmer J at [55] **[Respondents' BOA, Tab 12, at 234]**.

171 CCRA, s 3(1)(aa)(i).

> The purpose of this subpart and subparts 3 and 4 is to require the Minister to set a series of emissions budgets—
>
> (a) 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 Celsius above pre-industrial levels; and
>
> (b) in a way that allows those budgets to be met domestically; and
>
> (c) that provides greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals that will be required.

134. LCANZI says that the purpose provisions of the CCRA mean the Commission was required to recommend emissions budgets for the purpose of reaching the net zero target and, separately, for the purpose of contributing to the 1.5°C temperature goal. LCANZI interprets this second separate purpose as meaning that each emissions budget must constitute New Zealand's "fair share" of the global emissions budget, according to the IPCC 2018 special report pathways.[172] Practically, LCANZI is concerned that the emissions budget for the period to 2030 is insufficient (i.e. that New Zealand is not prioritising early emissions reductions, in accordance with the IPCC pathways).

Legislative history of s 5W

135. First, LCANZI submits that the legislative history confirms the importance of 1.5°C when the Commission advises on emissions budgets.[173] This is because the reference to 1.5°C in s 5W was inserted into the Bill following the recommendation of the Select Committee. The Select Committee said:[174]

> We recommend that a reference to New Zealand's obligations under the Paris Agreement be included in clause 8, new section [5W], which sets out the purpose of emissions budgets. This would strengthen the obligation to consider the global response to climate change and the 1.5°C temperature goal outlined in the agreement when setting emissions budgets. It would also better align this provision with the purpose statement of the bill.

136. The language of s 5W as amended, and the language of the Select Committee in recommending the change ("strengthen the obligation to consider the global response to climate change and the 1.5°C temperature goal") do not equate to an obligation to mechanically follow the IPCC pathways for every emissions budget. Nor does the language require the Commission to go about the

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172 LCANZI's submissions at [284].

173 LCANZI's submissions at [274]-[280].

174 Climate Change Response (Zero Carbon) Amendment Bill (136-2) (select committee report) at 10 **[LCANZI's BOA, Volume 3, Tab 21, at 1115].**

preparation of its advice in any particular way. Rather, the Commission was required to "consider" the 1.5°C temperature goal. The Commission clearly did this: see Chapter 9 of the Commission's advice titled "Contributing to limiting warming to 1.5°C".[175]

137. The Departmental Report quote relied on by LCANZI simply says that the proposed change to the s 5W purpose would ensure "that the 1.5°C temperature goal remains an active consideration."[176] Again, it is clear that the 1.5°C temperature goal was an active consideration for the Commission.[177]

138. The quote from the Minister relied on by LCANZI says, again, that the new purpose provision would reinforce the need for decision makers "to consider" the global response to climate change when determining the level of emissions budgets.[178] As above, the Commission did this.

139. LCANZI's submissions on the legislative history conclude by saying that Parliament intended the budgets to be "consistent" with both the 2050 Targets and the 1.5°C goal. LCANZI has interpolated the word "consistent" into the s 5W purpose section. The legislative history does not support that interpolation; rather it supports an interpretation that the addition of the reference to 1.5°C in s 5W was in order to ensure the Commission considered the 1.5°C temperature goal in advising on the budgets. The Commission did this.

The statutory text

140. Second, LCANZI provides submissions on what the word "contribute" in s 5W means.

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175 *Iināia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at Chapter 9 **[Advice Bundle at 200-210].**

176 LCANZI's submissions at [277] citing the Ministry for the *Environment Department Report on the Climate Change Response (Zero Carbon) Amendment Bill 2019* (September 2019) (**Departmental Report**) at 73 **[LCANZI's BOA, Volume 4, Tab 31 at 1610].**

177 The other Departmental Report quote referred to in the LCANZI's submissions at [278] has not been placed in context by LCANZI; it was in response to a submission that the Commission be required to calculate an equitable share of the remaining global carbon budget. The authors of the Departmental Report considered that this requirement was not necessary because the reference to 1.5°C would "ensure relevant matters are taken into account." (Departmental report at 73). The authors also noted that "the Bill does not prescribe the process for preparing advice on emissions budgets. This means that the Commission may calculate New Zealand's cumulative budget *if they consider it necessary* to aligning the emissions budgets with the 1.5°C purpose." (emphasis added, Departmental Report at 73 **[LCANZI's BOA, Volume 4, Tab 31 at 1610]**). See also the statement in the Departmental Report at 74: "We also note that the current drafting protects the ability to ensure a just transition, for example by setting emissions budgets that are technically and economically feasible, and that consider the distributional impacts of actions taken to achieve the 2050 target".

178 LCANZI's submissions at [279] referring to the Minister's second reading speech.

141. LCANZI says that the words "contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C Celsius above pre-industrial levels" mean that doing less than "our part" is not consistent with "contributing to" the global effort.[179]

142. LCANZI relies on a dictionary definition of "contribute to" as meaning "to have a share in bringing it about, or to help cause it to happen".[180] Dictionary definitions vary, and include "to do a part in bringing (it) about; to have a part or share in producing"[181] and "play part in the achievement of a result; provide (agency or assistance) to a common result purpose."[182] None of the dictionary definitions denote the level of contribution that must be made; as LCANZI acknowledges, contributions can be small or large.[183]

143. LCANZI says that the meaning of "contributing to" must be interpreted in light of the UNFCCC and the Paris Agreement.[184] However, neither the UNFCCC nor the Paris Agreement provide a fixed method of allocating emissions reductions as between countries.[185] A defining feature of the Paris Agreement is that it is for each party to determine for itself what emissions reductions it will contribute to the global temperature goals.[186]

144. LCANZI then relies on two European cases, *Urgenda* and *Neubauer*, for the proposition that the UNFCCC and the Paris Agreement should be interpreted as requiring Parties to "each do their part".[187]

Urgenda

145. The plaintiff in *Urgenda* sought an order requiring the State of the Netherlands to reduce emissions by at least 25% compared to 1990.

146. The Dutch Supreme Court held that arts 2 and 8 of the European Convention on Human Rights (**ECHR**) (right to life and right to respect for private and

179 LCANZI's submissions at [284].

180 LCANZI's submissions at footnote 290, citing Collins Online Dictionary.

181 Oxford English Dictionary at 848 **[Respondents' BOA, Tab 94, at 3380]**.

182 Shorter Oxford English Dictionary at 509 **[Respondents' BOA, Tab 93, at 3378]**.

183 LCANZI's submissions at [283].

184 LCANZI's submissions at [285] and [291].

185 See above at [66] of these submissions; and *Thomson v Minister for Climate Change* [2018] 2 NZLR 160 (HC) at [139] **[LCANZI's BOA, Volume 1, Tab 4 at 192].**

186 Affidavit of Helen Plume at [54].

187 LCANZI's submissions at [286].

family life) should be interpreted in such a way that States were obliged to do "their part" to counter the danger of climate change.

147. The conclusion was reached with reference to, inter alia, the preamble to the UNFCCC. The Dutch Supreme Court summarised the UNFCCC in the quote given by LCANZI: "The UNFCCC is based on the idea that climate change is a global problem that needs to be solved globally. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries."[188]

148. Importantly, the question being considered by the Supreme Court when the UNFCCC was referred to was whether arts 2 and 8 provided protection in the context of the global problem of the danger of climate change (the State had argued that, as climate change was global in both cause and scope, arts 2 and 8 did not oblige the State to take measures).[189]

149. In light of art 13 of the ECHR (right to an effective remedy), and European Court of Human Rights (**ECtHR**) case law on adequate protection, the Supreme Court rejected the State's defence regarding the global nature of climate change. Importantly, under ECtHR case law, art 2 encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction, including from environmental hazards or natural disasters, and risks that may only materialise in the longer term. The protection is not limited to specific persons but to society or the population as a whole.[190] No such general positive obligation in respect of s 8 of NZBORA (right not to be deprived of life) is recognised under New Zealand Law (and see the discussion on the right to life at [172] to [188] below).

150. The Supreme Court considered that giving an effective remedy required the State to take particular measures, as that would increase the chance of all States taking measures, and thus the temperature goals being reached.[191]The Supreme Court

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188 LCANZI's submissions at [286] citing *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at [5.7.2] **[LCANZI's BOA, Volume 2, Tab 15 at 854].**

189 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at at [5.1], [5.6.1], [5.7.1] **[LCANZI's BOA, Volume 2, Tab 15 at 849, 853-854].**

190 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at at [5.22], [5.31] **[LCANZI's BOA, Volume 2, Tab 15 at 849, 853-854].**

191 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at at [5.7.7]-[5.8] **[LCANZI's BOA, Volume 2, Tab 15 at 856].**

acknowledged that the UNFCCC does not itself provide the answer as to what measures must be taken; the UNFCCC only contains obligations of a general nature.[192] The Supreme Court looked elsewhere, applying ECtHR methods and case law, to determine what would constitute sufficient measures to afford the protection required.[193]

151. In summary, *Urgenda* was decided under a very different constitutional framework, and in the context of ECHR case law that establishes specific positive State obligations in in respect of arts 2 and 8.[194] Interpretation of the preamble to the UNFCCC for those specific purposes does not assist this Court in interpreting the emissions budgets provisions of the New Zealand CCRA.

Neubauer

152. *Neubauer v Germany* was a constitutional challenge to Germany's Federal Climate Change Act.[195] The complainants alleged that the target of reducing greenhouse gases 55% by 2030 from 1990 levels was insufficient, relying on human rights arguments and referring to the need for Germany to "do its part" to achieve the Paris Agreement goals. The Federal Constitutional Court struck down parts of the Federal Climate Protection Act, as they failed to provide for emissions cuts beyond 2030 to achieve climate neutrality.

153. LCANZI refers specifically to a statement by the Federal Constitutional Court that the Paris Agreement depends on mutual trust between Parties, giving rise to an obligation to take national action that will help build mutual trust and avoid creating incentives for other countries to undermine cooperation.[196] However, the obligation found by the Federal Constitutional Court derived from the Court's interpretation of Article 20a of the German Constitution: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and

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192 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at at [6.2] **[LCANZI's BOA, Volume 2, Tab 15 at 857].**

193 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at at [6.3] **[LCANZI's BOA, Volume 2, Tab 15 at 857].**

194 See *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at [5.2.1]–[5.3.4] **[LCANZI's BOA, Volume 2, Tab 15 at 850-851].**

195 *Neubauer v Germany* (Fed CC) 29 April 2021 at [1] **[LCANZI's BOA, Volume 2, Tab 12 at 537].**

196 LCANZI's submissions at [289] citing *Neubauer v Germany* (Fed CC) 29 April 2021 at [202]-[203] **[LCANZI's BOA, Volume 2, Tab 12 at 585-586].**

justice, by executive and judicial action, all within the framework of the constitutional order."

154. The Court held that the constitutional provision obliges the state to take climate action, and since the German legislature on its own is not capable of protecting the climate as required under art 20a, the Article also requires that solutions be sought at a national level, and that this means the constitutional "climate action mandate" possesses a special international dimension. This international dimension compels the state to engage in internationally orientated activities to tackle climate change at the global level, to promote climate action within the international framework and to the implementation of agreed solutions. Because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action under art 20a, the state must avoid creating incentives for other states to undermine this cooperation.[197]

155. The Court concluded that "Since Art.20a GG also includes an obligation to reach the climate goal through international cooperation, Germany's contribution in this regard must be determined in a way that promotes mutual trust in the willingness of the Parties to take action, and does not create incentives to undermine it."[198]

156. New Zealand, of course, does not have an equivalent of Article 20a of the German Constitution. The reasoning by which the German Federal Constitutional Court determined that the Paris Agreement gave rise to a specific obligation on the German state does not apply here.

Paris Agreement

157. So far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international *obligations* (not international political commitments).[199] The nature of the actual international obligation (and the

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197 *Neubauer v Germany* (Fed CC) 29 April 2021 at [197], [198], 200], [202] **[LCANZI's BOA, Volume 2, Tab 12 at 583-585].**

198 *Neubauer v Germany* (Fed CC) 29 April 2021 at [225] **[LCANZI's BOA, Volume 2, Tab 12 at 592].**

199 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 675-676, citing the leading appellate cases referring to "international law obligations", "international obligations" **[Respondents' BOA, Tab 90, at 3346-3347]**.

nature of the statute in question) impacts on the approach taken by the courts as to how the international obligation is taken into account.[200]

158. LCANZI submits that: "at a minimum 'contributing to' the global effort under the Paris Agreement requires us to comply with our obligations under that agreement."[201]

159. The proposition presented by LCANZI does not follow from the statutory text. The words "contributing to" used in s 5W do not amount on their plain and ordinary meaning to a domestic law requiring New Zealand's international law obligations arising from the Paris Agreement to be met via the emissions budgets.

160. Such an interpretation would also be nonsensical, given it is the NDC which is the vehicle used to meet the relevant international law obligation arising from the Paris Agreement:

160.1 New Zealand's primary emissions reduction obligation under the Paris Agreement is to communicate successive NDCs that it intends to achieve, pursuant to Article 4(2) of the Agreement;

160.2 The power to set the NDC remains outside of legislation and is a matter of the Crown's external affairs prerogative powers;[202]

160.3 The CCRA provides the primary mechanism (via emissions budgets and the ETS) for pursuing domestic mitigation measures. However, New Zealand's actual NDC will be met through a combination of the domestic mitigation measures achieved under the CCRA, and offshore mitigation.[203]

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200 *Ye v Minister of Immigration* [2010] 1 NZLR 104, [2009] NZSC 76 at [24]-[25] **[Respondents' BOA, Tab 61, at 2353-2354]** per Tipping J also writing for Blanchard, McGrath and Anderson JJ, disagreeing with the appellants' argument that a particular interpretation should be made of the Immigration Act in light of the United Nations Convention on the Rights of the Child. See also *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] NZLR 298 per McGrath J at [143]-[145] **[Respondents' BOA, Tab 24, at 711]**, noting the "long-established presumption that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations". However, the "international text may not be used to contradict or avoid applying the terms of the domestic legislation".

201 LCANZI's submissions at [291].

202 See above at [74] of these submissions.

203 The fact that the NDC would be met via offshore mitigation, and was not limited from using offshore mitigation in the same way as the 2050 target, is made clear in the Explanatory note to the Climate Change Response (Zero Carbon) Amendment Bill (136-1) at 6 **[LCANZI's BOA, Volume 3, Tab 20 at 1070]**.

161. Even if s 5W required the emissions budgets to meet New Zealand's international law obligations arising from the Paris Agreement, this would not assist LCANZI.

162. The relevant Article is Article 4:

> **Paris Agreement, Article 4**
>
> 1. In order to achieve the long-term temperature goal set out in Article 2, Parties **aim** to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.
>
> 2. Each Party **shall** prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties **shall** pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.
>
> 3. Each Party's successive nationally determined contribution **will** represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. (emphasis added)
>
> (…)

163. In terms of arts 4(1)-(3), Article 4(2) contains the only legal obligations, as it uses the word "shall".[204] This is in contrast to the use of the words "aim" or "will" in Article 4(1) and Article 4(3)). Indeed, although the Paris Agreement is a binding treaty at international law, it imposes a surprisingly limited number of binding legal obligations. Most of the provisions in the Paris Agreement reflect strong political/diplomatic commitments that do not create legal obligations.

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[204] See Lavanya Rajamani and Jacob Werksman "The legal character and operational relevance of the Paris Agreement's temperature goal" (2018) 376 Phil Trans R Soc 1 at 6 **[Respondents' BOA, Tab 100, at 3454]**: "[Article 4.2] uses the imperative "shall"…" and at 8 explaining the difference between the use of language that is predictive ("will") and prescriptive ("shall"). See also Daniel Bodansky "The Legal Character of the Paris Agreement" (2016) 25 RECIEL 142 at 145: "The particular character of a provision is usually determined by the choice of verb: for example, 'shall' generally denotes that a provision in a treaty creates a legal obligation, 'should' (and to a lesser degree, 'encourage') that the provision is a recommendation, 'may' that it creates a licence or permission, and various nonnormative verbs (such as 'will', 'are to', 'acknowledge' and 'recognize') that the provision is a statement by the parties about their goals, values, expectations or collective opinions. See also Anthony Aust *Modern Treaty Law and Practice* (3rd ed, Cambridge University Press, 2013) at 30-31 and Appendix G.

164. Accordingly, LCANZI's submissions mischaracterise a number of the provisions in the Paris Agreement, by portraying political/diplomatic commitments as legal obligations

164.1 At [3] and [49] of LCANZI's submissions, LCANZI suggests that the Agreement imposes a binding obligation to limit warming to 2 degrees and preferably 1.5 degrees. That is wrong. Article 2(1)(a) reflects an underlying aim of the Paris Agreement, but it does not impose a binding obligation.

164.2 At [68] LCANZI states that signatories to the Paris Agreement "must" "aim to reach global peaking of greenhouse gas emissions as soon as possible…" That is wrong. The word "must" has been added by LCANZI. The use of the word "aim" reflects a political/diplomatic commitment not a legal obligation.

164.3 At [69] LCANZI lists "the parties' key obligations in respect of their NDCs". In the list that follows, only (a) is a true legal obligation; the rest reflect political/diplomatic commitments. So it is therefore wrong for LCANZI then to state at [70] that "NDCs must be set within these parameters".

164.4 LCANZI contends at [292] that the Paris Agreement imposes an "obligation on all parties to adopt NDCs which reflect their highest possible ambition". That is incorrect. Article 4(3) of the Agreement reflects a strong political/diplomatic commitment but not a legal obligation ("will" rather than "shall").

165. New Zealand takes the political/diplomatic commitments contained in the Paris Agreement seriously and considers itself politically/diplomatically bound to meet all those commitments, even if not legally obliged to do so.. But that does not make the commitments legally binding. A reference in domestic legislation to "contributing to the global effort under the Paris Agreement" cannot sensibly elevate political/diplomatic commitments that are not binding at international law obligations that are legally binding at domestic law.

166. In summary, the meaning of the words "contributing to" in s 5W do not amount to a domestic requirement to meet New Zealand's legal obligations under the Paris Agreement via the emissions budgets.

167. Even if they did, New Zealand's relevant legal obligations[205] under the Paris Agreement are to prepare, communicate and maintain successive NDCs, and to pursue domestic mitigation measures with the aim of achieving the objectives of those NDCs (that these are international legal obligations is denoted by the use of the word "shall" in Article 4(2)). NDCs, as New Zealand's legal obligation under the Paris Agreement, are by definition "nationally determined".

168. As LCANZI acknowledges, "the Paris Agreement does not provide a fixed allocation or a methodology for allocating the burden of global emissions reductions between parties."[206] There is no obligation in the Paris Agreement that each Party contribute emissions reductions in line with the IPCC global pathways.

169. Finally, in respect of the Paris Agreement, LCANZI submits that the words "common but differentiated responsibilities and respective capabilities, in light of national circumstances" (**CBDR-RC, ILNC**) in Article 4(3) of the Paris Agreement is a principle that was intended to accommodate the needs of developing countries, not developed countries.[207] LCANZI relies on an article by L Rajamani et al in support of this submission, and in particular the sentence in the article "In any case, the principle has been interpreted to require developed country leadership in addressing environmental and climate harm".[208]

170. CBDR-RC, ILNC is not a hard methodology (as is suggested at [305] of LCANZI's submissions). Rather it is a matter, like equity, to inform a Party's approach in determining its NDC. Professor Rajamani, in an article titled 'The legal character and operational relevance of the Paris Agreement's temperature

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205 The Crown notes that there are other legal obligations under the Paris Agreement in respect of NDCs (arts 4(8), (9) and (13)), but they are not relevant here.

206 LCANZI's submissions at [292].

207 LCANZI's submissions at [293].

208 Lavanya Rajamani et al "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law" 21 (2021) 983 at 990**[LCANZI's Supplementary BOD, Tab 9 at 403].**

goal' says there is no agreed interpretation of "common but differentiated responsibilities and respective capabilities in light of national circumstances":[209]

> In any case, the term 'equity' and the CBDR-RC principle, including the clause 'in light of different national circumstances' introduced in the Paris Agreement, are ambiguous, and thus have limited legal pull. Indeed, the language of the CBDR-RC principle in the FCCC has, over the years, generated considerable debate and dissonance, and there is no agreed interpretation of it [42] (for a discussion of this principle, and in particular the negotiating dynamics in Paris in relation to it, see [40]) (footnotes omitted). In the context of such divergences on the principle, the expectation that the Agreement will be implemented to reflect this principle essentially leaves the choice of interpretation, and degree of implementation, to national determination.

171. Relevantly, the article concludes that: "the Paris Agreement falls short of converting the temperature goal into a provision with specific legal force applicable to the actions of individual parties."[210]

Right to life

172. There is a presumption that Parliament intended to enact legislation consistent with the New Zealand Bill of Rights Act 1990 (**NZBORA**). However, the first step in any such analysis of consistency with NZBORA is to ascertain whether a right is actually impinged upon.[211]

173. LCANZI says that the right to life under s 8 of the NZBORA is relevant to the interpretation of the statutory purpose of the CCRA. In order to establish that the right to life has been engaged, LCANZI must demonstrate an actual loss of life, or an increase in the likelihood of death.[212] LCANZI has not filed any evidence or made any submissions which substantiate an actual loss of life or an increased likelihood of death in this case, such as would be required to engage s 8 of the NZBORA.

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209 Lavanya Rajamani and Jacob Werksman "The legal character and operational relevance of the Paris Agreement's temperature goal" (2018) 376 Phil Trans R Soc 1 at 8 **[Respondents' BOA, Tab 100, at 3456]**.

210 Lavanya Rajamani and Jacob Werksman "The legal character and operational relevance of the Paris Agreement's temperature goal" (2018) 376 Phil Trans R Soc 1 at 12 **[Respondents' BOA, Tab 100, at 3460]**.

211 Section 6 of the NZBORA provides: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 488-490 **[Respondents' BOA, Tab 90, at 3334-3336]**.

212 *AR (India) v Attorney General* [2021] NZCA 291 **[Respondents' BOA, Tab 5, at 64-66]**, citing previous New Zealand case law that has proceeded on the same basis: *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA); *Seales v Attorney-General*, [2015] NZHC 1239; and *Attorney-General v Zaoui* (No 2) [2005] NZSC 38.

174. Further, New Zealand Courts have only found that a positive obligation under s 8 arises in cases where there is a known risk to the life of a particular individual or a group, and the State has the means to prevent that death:

174.1 The High Court in *Wallace v Attorney-General*, concerning a Police killing, observed that s 8 incorporates an obligation on State actors to plan and control potentially dangerous operations in a way that minimises risk to life. Establishing a breach requires the demonstration of "an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect [the individual]'s life".[213]

174.2 In *Re J (an infant): B and B v Director-General of Social Welfare*, the parents of an infant who was made a ward of court in order to facilitate a blood transfusion to which they did not consent sought a declaration that their right to freedom of religion had been breached. The Court of Appeal held that the asserted right could not extend to imperilling the life and health of the child, thereby defeating the s 8 guarantee as to the child's right to life.[214] It was implicit in the Court's decision that, where the State was aware of a risk to the life of an identifiable individual, in that case the child,, it had a positive duty to act to prevent the child's death.

175. While the Crown recognises the existence of climate change and its adverse effects, LCANZI is unable to substantiate the required deprivation of or an actual risk to life of the applicant or any alleged rights-holder in this case, such as would be required to engage any positive obligations under s 8 (even assuming any such positive obligation arises in this context, which is denied).

176. LCANZI's claim that the right to life is engaged therefore rests on the general or prospective risks of climate change, which alone cannot establish the risk to life required to engage s 8.

177. The requirement that the applicant show a real and reasonably foreseeable risk to the life of an identifiable individual accords with how the United Nations

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213 *Wallace v Attorney-General* [2021] NZHC 1963 at [556] **[Respondents' BOA, Tab 57, at 2231]**.

214 *Re J (an infant); B & B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) at 146 **[Respondents' BOA, Tab 47, at 1779]**.

Human Rights Committee has interpreted the right to life under art 6 of the International Covenant on Civil and Political Rights (**ICCPR**). In *Teitiota v New Zealand*, involving a challenge to New Zealand's rejection of an application for refugee status, the Human Rights Committee upheld the determination of New Zealand domestic Courts that the author had not sufficiently substantiated that he faced a real and foreseeable risk to his life such that the right to life in the ICCPR was violated.[215]

178. In rejecting the application for refugee status, the New Zealand Immigration and Protection Tribunal held that the asserted risk to life remained "firmly in the realm of conjecture or surmise", despite considering the applicant's account of the conditions in Kiribati and the impacts of climate change including sea-level-rise to be "credible".[216] The Tribunal's determination was upheld by the New Zealand High Court, Court of Appeal and the Supreme Court.[217] The Human Rights Committee in turn dismissed the claim on the merits, on the basis that it could only reverse a State's determination if it had been clearly arbitrary or amounted to a manifest denial of justice.[218]

179. The Human Rights Committee's decision contrasts with the decision of the Supreme Court of the Netherlands in the *Urgenda* case on which LCANZI relies. The Dutch Supreme Court concluded that, based on ECtHR jurisprudence, states may owe positive obligations to members of the general public in relation to risks of future harm, particularly in environmental cases where the harm will invariably affect the general population in an area, region or country.[219]

180. LCANZI relies primarily on *Urgenda* and the *Neubauer* decision of the German Federal Constitutional Court for the proposition that international decisions have recognised that climate change poses a threat to the right to life.[220] However, while similar challenges to *Urgenda* have been raised in other

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215 *Teitiota v New Zealand* UN doc CCPR/C/127/D/2728/2016 (Human Rights Committee, 23 September 2020) at [9.7]–[9.13] and [10] **[Respondents' BOA, Tab 55, at 2024-2026]**.

216 *AF (Kiribati)* [2013] NZIPT 800413 at [38], [91].

217 *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107; *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688; and *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; [2014] NZAR 162.

218 *Teitiota v New Zealand* UN doc CCPR/C/127/D/2728/2016 (Human Rights Committee, 23 September 2020)

219 *Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007, No 19/00135 (SC) 20 December 2019 at [5.6.2] **[LCANZI's BOA, Volume 2, Tab 15 at 853].**

220 LCANZI's submissions [177]-[182].

jurisdictions, Courts have taken differing approaches to the right to life in a climate change context.

181. Case law in the United Kingdom illustrates a different approach to claims based on the right to life. The High Court of England and Wales in *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* dismissed a challenge to a decision by the Secretary of State not to amend the 2050 emissions target under the UK Climate Change Act 2008.[221] The claimants argued that the decision constituted a violation of their human rights, including the right to life under the ECHR, and noted that climate change was acknowledged by the Government as an "existential threat".[222] The claimants did not identify any interference to which the decision at issue gave rise, but only pointed to the effects of climate change generally.[223] The violation was said to arise because of the failure of the Secretary of State to take proper preventive measures. In rejecting this submission, the Court noted that the Government "is committed to set a net zero emission target at the appropriate time" and that this was:[224]

> an area where the executive has wide discretion to assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion.

182. The Court concluded that the decision was not arguably unlawful and that the human rights challenge was not sustainable. Permission to appeal the decision was rejected, despite the skeleton argument for the appellant citing the decision of the District Court of the Hague in *Urgenda* in support of how Courts in England and Wales should interpret art 2 of the ECHR.[225]

183. In a recent decision issued on 21 December 2021, *Plan B Earth v Prime Minister*, the High Court of England and Wales dismissed a challenge that the State had breached positive obligations that arose under arts 2 and 8 of the ECHR to put

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221 *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) at [1] **[Respondents' BOA, Tab 69, at 2541]**.

222 *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) at [48] **[Respondents' BOA, Tab 69, at 2555]**.

223 *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) at [48]-[49] **[Respondents' BOA, Tab 69, at 2555]**.

224 *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin) at [49] **[Respondents' BOA, Tab 69, at 2555]**.

225 *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy*, Applicant's Skeleton Argument in Support of an Application for Permission to Appeal against the Refusal of Permission to Apply for Judicial Review (26 July 2018) at [30] <**climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal-1.pdf**>.

in place an administrative framework designed to provide effective deterrence against threats to the right to life.[226] The claimant's case was that there was a situation which presents a risk to life such that it was necessary to have a practical and effective framework to deter the threat, drawing on ECtHR jurisprudence.[227]

184. The Court concluded that:[228]

> The insuperable problem with the Article 2 claim (and with any Article 8 claim based on the physical or psychological effects of climate change on the Claimants) is that there is an administrative framework to combat the threats posed by climate change, in the form of the [UK Climate Change Act 2008] and all the policies and measures adopted under it…
>
> Moreover, the framework consists of high level economic and social measures involving complex and difficult judgments. As Lord Reed recently explained in *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, [2021] 3 WLR 428 at [158], the State enjoys a wide margin of appreciation in matters of that kind. Whilst all the circumstances must be taken into account, it remains the position that the judgment of the executive or legislature in such areas "*will generally be respected unless it is manifestly without reasonable foundation*" (emphasis original).
>
> That approach respects the constitutional separation between the Courts, Parliament and the executive. It also reflects the fact that the Court is not well equipped to form its own views on the matters in question… the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a global debate.

185. While the Dutch Supreme Court found a violation of the right to life in *Urgenda*, the United Kingdom Courts have preferred a wider margin of appreciation. One reason for this may be that in *Urgenda* the Dutch Supreme Court relied on the jurisprudence of the ECtHR in its analysis of the right to life under the ECHR. The Netherlands adopts a monist approach to international law, giving the ECHR the same legal ranking as domestic law.[229] By contrast, in dualist jurisdictions such as the United Kingdom, the Courts of England and Wales are

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226 *Plan B Earth v Prime Minister* [2021] EWHC 3469.

227 *Plan B Earth v Prime Minister* [2021] EWHC 3469 at [40]–[41].

228 *Plan B Earth v Prime Minister* [2021] EWHC 3469 at [49]–[51].

229 Article 93 of the Dutch Constitution provides: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published". Article 94 of the Dutch Constitution provides "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons". However, also note that the German Federal Constitutional Court in *Neubauer* gave the state a wider margin of appreciation on the protection of the right to life than the Dutch Supreme Court in *Urgenda*: *Neubauer v Germany* (Fed CC) 29 April 2021 at [152] **[LCANZI's BOA, Volume 2, Tab 12 at 568]**. In *Neubauer*, the Court found no such violation of the duty to implement positive measures. The wider margins of appreciation afforded by the German Federal Constitutional Court and the UK Courts show that *Urgenda* is a not a definitive interpretation of ECtHR case law on the right to life in the context of climate change.

only required to "take into account" the jurisprudence of the ECtHR and follow it so far as is possible.[230]

186. New Zealand is of course not a party to the ECHR. The ECtHR jurisprudence on which *Urgenda* is based and the Dutch Supreme Court's decision itself cannot be transferred to the New Zealand context in the absence of a principled basis to do so.[231]

187. LCANZI has not established that the right to life under s 8 of the NZBORA is engaged in this case and has not mounted any evidence to that effect.

188. The Crown notes that issue of whether s 8 may be engaged in the context of climate change decisions in New Zealand, and the nature of any obligation that arises under s 8, will be dealt with extensively in the *Smith v Attorney-General* proceeding. The Crown's strike out application in that proceeding, including in respect of the plaintiff's s 8 cause of action, will be heard by the High Court at Wellington on 29 and 30 March 2022.[232]

Treaty of Waitangi

189. There is a presumption that Parliament intends to legislate in accordance with the principles of the Treaty of Waitangi.[233]

190. LCANZI submits that the Treaty of Waitangi does not require an interpretation of the CCRA that is different to that which would otherwise apply, however it reinforces the need to "interpret and implement the Act in a way that promotes the Act's purpose of limiting global warming to 1.5°C."[234]

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230 The UK Supreme Court stated in *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104 at [48]: This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law…

231 And see the caution evident in the following cases about applying international case law, in the context of different constitutional instruments and context, to New Zealand: *Smith v Attorney-General* [2020] NZHC 836 at [20](a)]; *AR (India) v Attorney-General* [2021] NZCA 291 at [48]-[57] **[Respondents' BOA, Tab 5, at 68-70]**. As detailed below at [259], *Urgenda* was cited by Palmer J in *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228 **[LCANZI's BOA, Volume 1, Tab 1]** in support of a heightened scrutiny test. It is unclear, however, whether Palmer J considered that fundamental rights were engaged by climate change: his Honour stated, in obiter, at [51] that "the intensity of review of decisions about climate change by public decision-makers *is similar to that* for fundamental human rights" (emphasis added).

232 *Smith v Attorney General* CIV-2019-484-384.

233 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 668 **[Respondents' BOA, Tab 90, at 3339]**; and see *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 518. In *Tainui Māori Trust Board v Attorney-General*, Cooke P said the Court should be slow to ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty, but he considered that the relevant question there could be settled on standard statutory interpretation approaches.

234 LCANZI's submissions at [297].

191. The Crown, of course, differs from LCANZI in terms of the interpretation that would "otherwise apply". In any event, LCANZI has not identified a credible interpretative issue to which the Treaty provides specific guidance: LCANZI invokes the interpretative principle without saying how it applies, or to which specific words.[235] LCANZI only makes general references to "the natural environment", has not filed any evidence on the interests said to be at issue, and does not submit that the Commission has failed to consider the Crown-Māori relationship, te ao Māori or the effects on iwi and Māori (as the Commission is required to do under s 5M(f) of the CCRA when recommending emissions budgets).

192. Courts have expressed caution about generalised claims about tikanga and taonga.[236] Environmental protection is only one part of protection of Māori interests and values. Impacts on economic well-being, and sustainable economic activity for Māori communities, may also engage protective obligations.[237] This means the Treaty principles require a range of factors to be weighed and considered. The protective steps required of the Crown are highly context sensitive, and may change depending on a range of economic, social and budgetary conditions (conditions which the Crown is entitled to weigh).[238]

193. In the absence of any detailed argument or evidence from LCANZI on these matters, the interpretive principle does not advance LCANZI's argument in respect of s 5W.

Tikanga Māori

194. LCANZI says that the CCRA must be interpreted consistently with tikanga Māori, in particular mana tangata and mana whenua.[239]

195. Tikanga is part of the values of the New Zealand common law, and therefore informs interpretation and development of the law.[240] The tikanga must be

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235 Compare *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [49].

236 In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, William Young and Ellen France JJ rejected any suggestion that the environment as a whole is a taonga. Rather, specific taonga and tikanga interests should be identified; or in the case of kaitiakitanga, specific activities: see [154] and [155], and especially footnote 244 **[LCANZI's BOA, Volume 1, Tab 5, at 260-261]**, citing Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 269 https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAotearoaTeneiTT2Vol1W.pdf. Williams J agreed with William Young and Ellen France JJ, at [296].

237 See for example *Ngai Tai ki Tamaki Tribunal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

238 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (*Broadcasting Assets)* at 517.

239 LCANZI's submissions at [184].

240 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 **[Respondents' BOA, Tab 53]**.

established, must be relevant to an identified statutory interpretation task or question, and must be weighed with other considerations within the interpretative process.[241] In particular, the tikanga Māori relied on for a particular statutory interpretation must be established by evidence, unless the tikanga concerned is so "notorious" that judicial notice may be taken. Evidence may include reference to leading texts or authorities.[242]

196. LCANZI has not filed any evidence nor referred to any authority to establish the content of the tikanga relied on.[243] LCANZI's submissions refer in a footnote to the Commission's advice containing "a brief discussion of relevant principles of tikanga".[244] However the pages referred to by LCANZI in the Commission's advice do not provide any detailed information on the tikanga concepts relied on by LCANZI.

197. This is not to argue that mana whenua or mana tangata may not have a role to play in a particular interpretative exercise. However, the content of such tikanga, and its relationship to other elements of tikanga, cannot be presumed by the Court, and cannot simply be asserted by the plaintiffs.[245]

Effect of mandatory considerations

198. Sections 5M and s 5ZC set out mandatory considerations for the Commission. The consideration are substantial and important, and so are set out in full below:

5M Matters Commission must consider

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241 *Ngāti Maru Trust v Ngāti Whātua Orākei Whia Maia Ltd* [2020] NZHC 2768, (2020) 22 ELRNZ 110 at [68], [69], [102]-[115] **[Respondents' BOA, Tab 43, at 1632, 1639-1641]**. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [152]-[156], [164] per Tipping, McGrath and Blanchard JJ **[Respondents' BOA, Tab 53, at 1969-1972]**.

242 See for example Williams J's endorsement of Richard Benton, Alex Frame and Paul Meredith *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 192 and 198-200 in *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746 at [29].

243 We have not identified any case law that addresses the tikanga regarding mana tangata. The High Court has previously said that the concept of mana whenua is contested and cannot be treated as notorious: *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] 3 NZLR 378 (HC) at [173]-[174]. The case was appealed, but the Court did not disturb this finding.

244 LCANZI's submissions at [184](b) referring to the Advice Evidence Chapter 10 **[Advice Bundle at 716, in particular 723-726].**

245 And note also that in *TTRL*, Williams J stressed that tikanga values are relational (at [297*]). This means they cannot be seen in isolation from each other, or from the particular way they "manifest in practical ways" in relation to a specific issue. General assertions of one or two tikanga principles may be of little interpretative assistance given that "practice and principle are intertwined" when considering iwi relationships with places or resources: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 (and see at [155] per William Young and Ellen France JJ) **[LCANZI's BOA, Volume 1, Tab 5, at 312, 261]**. *[This hyperlinked version of the submissions updates the previous incorrect reference to [207] to [297] in *TTRL*].

In performing its functions and duties and exercising its powers under this Act, the Commission must consider, where relevant,—

(a) current available scientific knowledge; and

(b) existing technology and anticipated technological developments, including the costs and benefits of early adoption of these in New Zealand; and

(c) the likely economic effects; and

(d) social, cultural, environmental, and ecological circumstances, including differences between sectors and regions; and

(e) the distribution of benefits, costs, and risks between generations; and

(f) the Crown-Māori relationship, te ao Māori (as defined in section 5H(2)), and specific effects on iwi and Māori; and

(g) responses to climate change taken or planned by parties to the Paris Agreement or to the Convention.

5ZC Matters relevant to advising on, and setting, emissions budgets

(1) This section applies to—

(a) the Commission, when it is preparing advice for the Minister under section 5ZA:

(b) the Minister, when the Minister is determining an emissions budget.

(2) The Commission and the Minister must—

(a) have particular regard to how the emissions budget and 2050 target may realistically be met, including consideration of—

(i) the key opportunities for emissions reductions and removals in New Zealand; and

(ii) the principal risks and uncertainties associated with emissions reductions and removals; and

(b) have regard to the following matters:

(i) the emission and removal of greenhouse gases projected for the emissions budget period:

(ii) a broad range of domestic and international scientific advice:

(iii) existing technology and anticipated technological developments, including the costs and benefits of early adoption of these in New Zealand:

(iv) the need for emissions budgets that are ambitious but likely to be technically and economically achievable:

(v) the results of public consultation on an emissions budget:

(vi) the likely impact of actions taken to achieve an emissions budget and the 2050 target, including on the ability to adapt to climate change:

(vii) the distribution of those impacts across the regions and communities of New Zealand, and from generation to generation:

(viii) economic circumstances and the likely impact of the Minister's decision on taxation, public spending, and public borrowing:

(ix) the implications, or potential implications, of land-use change for communities:

(x) responses to climate change taken or planned by parties to the Paris Agreement or to the Convention:

(xi) New Zealand's relevant obligations under international agreements.

199. LCANZI seeks to convert the reference to contributing to the 1.5°C temperature goal in s 5W into an "environmental bottom line", relying on the recent Supreme Court judgment in *Trans-Tasman Resources Limited* (***TTRL***).[246] In LCANZI's submission this means: "the risk of adverse social and economic impacts from reducing emissions in line with 1.5°C cannot justify departing from the purpose of the Act. While such impacts are a mandatory relevant consideration under s 5ZC, for the reasons discussed above they do not outweigh the purpose of contributing to the global 1.5°C effort."[247]

200. The *TTRL* decision was made in respect of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The majority of the Supreme Court in *TTRL* considered the purpose section at issue amounted to an "operative restriction", and was thus an environmental bottom line.[248] This conclusion was reached with reference to the specific text of the purpose provision, the scheme of the Act and the legislative history. In particular, the relevant purpose provision was "to protect the environment from pollution" by

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246 LCANZI's submissions at [171]-[174]. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 **[LCANZI's BOA, Volume 1, Tab 5]**.

247 LCANZI's submissions at [342] referring in footnote 347 to LCANZI's submissions on *TTRL* at [170]-[174] **[LCANZI's BOA, Volume 1, Tab 5, at 267-269]**.

248 The term "operative restriction" is in the judgment of Glazebrook J at [245], which Winkelmann CJ and Williams J agreed with (at [303] and [292], respectively).

regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste in particular waters. The majority concluded that if the environment could not be protected by regulation, then those activities would need to be prohibited.

201. The purpose provision can be contrasted with s 5W in this case, which refers to "contributing" to the 1.5°C temperature goal. The purpose provision does not create an operative restriction in the sense that term is used by the majority in *TTRL*. To read s 5W in that way would be to render s 5M and s 5ZC all but redundant.

202. The Crown disagrees that the matters in s 5ZM, and particularly s 5ZC, are to be given the limited effect advocated for by LCANZI. For example, in respect of the Commission's concern that moving too far and too fast would result in large scale cuts to economic output with disproportionate effects on younger generations and Māori,[249] LCANZI's position is that the IPCC 2018 Special Report made it clear that addressing climate will carry costs and cause economic and social disruption.[250] LCANZI says the mandatory considerations under the CCRA cannot outweigh the 1.5°C purpose.[251] In other words, LCANZI seeks to enforce the IPCC global pathways as a minimum standard for each emissions budget.

203. As above, the text of s 5W does not support this interpretation, as the words "contributing to" do not amount to an operative restriction to follow the IPCC global pathways on an equal rate of reductions approach. Neither does the scheme of the CCRA support LCANZI's interpretation of s 5W:

203.1 The overarching purpose of the CCRA is to "provide a framework by which New Zealand can develop and implement clear and stable climate change policies";[252]

249 Relevant to s 5M(c), (e), (f); s 5ZC(2)(b)(vi), (vii), (viii).

250 LCANZI's submissions at [336], [338].

251 LCANZI's submissions at [342].

252 CCRA, s 3(1)(aa).

203.2 The overarching purpose, including the reference to the 1.5°C goal, was described in the general policy statement of the Explanatory note to the Bill as follows:[253]

> The overarching purpose represents a balance of the guiding principles agreed by Cabinet to frame the development of climate change policy: leadership at home and abroad; a productive, sustainable and climate-resilient economy; and a just and inclusive society… The Bill seeks to strike a balance between flexibility and prescription in New Zealand's long-term transition, as well as building in consideration for how impacts are distributed.

203.3 This is given effect to, for the purposes of emissions budgets, through the establishment of an expert, independent Climate Change Commission to advise the government;[254]

203.4 The appointment process and skill set for the Commission is carefully prescribed by the Act. The skill set includes expertise relevant to public and regulatory policy processes, the Treaty of Waitangi and te ao Māori, and a range of sectors and industries at regional and local levels;[255]

203.5 The Commission is required to advise the Minister on recommended emissions budgets, including how the emissions budgets and ultimately the 2050 target, may realistically be met;[256]

203.6 The CCRA specifically states that in preparing advice for the Minister on emissions budgets "the Commission must have regard to the matters set out in section 5ZC" (i.e. emphasising the importance of s 5ZC);[257]

203.7 The CCRA mandates public consultation on the Commission's draft emissions budget advice[258] (and before the Minister sets an emissions budget, the Minister must be satisfied there has been adequate

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253 Climate Change Response (Zero Carbon) Amendment Bill (136-1) (explanatory note) at **[LCANZI's BOA, Volume 3, Tab 20 at 1065]**.

254 CCRA, ss 5A, 5B.

255 CCRA, s 5H.

256 CCRA, s 5ZA(1)(c).

257 CCRA, s 5ZA(2).

258 CCRA, s 5ZA(3).

consultation – if inadequate, the CCRA mandates further public consultation);[259]

203.8 Section 5ZC reiterates the need for the Commission to consider how the emissions budget and 2050 target may be "realistically met", including consideration of opportunities, risks and uncertainties;[260]

203.9 Importantly, once an emissions budget is set it may only be revised in limited circumstances. These circumstances include if "1 or more significant changes have affected the considerations listed in s 5ZC(2) on which an emissions budget was based."[261]

204. The scheme of the CCRA indicates a Parliamentary intention to ensure that bespoke, realistic emissions budgets are formulated for New Zealand by the Commission (and subsequently set by the Minister). The mandatory considerations are central factors for emissions budgets, as indicated by the factors listed above.

What was the Commission required to do?

205. LCANZI sets out its own construction of the particular process the Commission should have taken in formulating its advice on the emissions budgets at [304] of the submissions. The LCANZI construction would require the Commission to recommend budgets that constitute New Zealand's "highest possible ambition", language taken from Article 4 of the Paris Agreement. Of course that language is in respect of a party's NDC, which the emissions budgets are not. As above, the language of "highest possible ambition" is also a political/diplomatic commitment, not a binding legal obligation. Furthermore, the CCRA has a specific formulation of ambition which the Commission was required to consider at s 5ZC(2)(b)(iv): "the need for emissions budgets that are ambitious but likely to be technically and economically achievable". Where Parliament has used particular language on a subject that language is to be applied rather than the language of the international agreement.[262]

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259 CCRA, s 5ZB(1).

260 CCRA, s 5ZC(2).

261 CCRA s 5ZE(1)(b).

262 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] NZLR 298 per McGrath J at [143]-[145] **[Respondents' BOA, Tab 24, at 711]**.

206. LCANZI's constructed process would then require the Commission to resolve any inconsistency between applying the IPCC global pathways and the factors in s5M and s 5ZC which resulted in smaller emissions reductions, by considering whether a lower contribution was justified under the common but differentiated responsibilities and respective capabilities principle.[263] It is unclear why LCANZI thinks this is the particular test the statute requires the Commission apply. The reference by LCANZI to common but differentiated responsibilities and respective capabilities comes from Article 4(3) of the Paris Agreement, again and as above, which reflects political/diplomatic commitments, not legal obligations in respect of New Zealand's NDC – not the emissions budgets under the CCRA. In addition, it would be surprising if this was the statutory test, given:

206.1 It is not included in the statute;

206.2 New Zealand's international obligations are listed as a factor for the Commission to have regard to under s 5ZC, together with and without being accorded any greater weight than the other s 5ZC factors;

206.3 The difficulty of using the common but differentiated responsibilities and respective capabilities principle as a legal yardstick with which a domestic court could adjudicate in the context of judicial review of a statutory decision. As above, the concept is not sufficiently precise or defined as a matter of international law to be capable of application in the way LCANZI seeks.[264]

207. Separately, LCANZI in its submissions critiquing what the Commission did do, seems to depart from its constructed statutory process. LCANZI's ultimate position is that social and economic impacts from reducing emissions in line with 1.5°C cannot "outweigh the purpose of contributing to the global 1.5°C effort".[265] Because LCANZI interprets this purpose as meaning following the IPCC global pathways, LCANZI's actual statutory process is to impose the

263 LCANZI's submissions at [305].

264 See above at [170] of these submissions, citing Lavanya Rajamani and Jacob Werksman "The legal character and operational relevance of the Paris Agreement's temperature goal" (2018) 376 Phil Trans R Soc 1 at 8 **[Respondents' BOA, Tab 100, at 3456]**.

265 LCANZI's submissions at [342].

IPCC global pathways as an "environmental bottom line", a position not supported by the statutory language or the scheme or the Act.

208. If the Court were to adopt LCANZI's interpretation of s 5W, the 2050 target becomes almost redundant (so long as the IPCC pathways continue to require a higher level of effort). And yet the legislative focus is predominantly on the 2050 target.

THIRD GROUND: MODIFIED ACTIVITY-BASED MEASURE

209. Section 5ZA(1)(b) of the CCRA provides that the Commission must advise the Minister on:

> (b) the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target;

210. The Commission's advice on these rules is set out at Chapter 10 of its advice, with more detail provided in Chapter 3 of the supporting evidence to the Commission's advice. In short, the Commission advised that the rules should be:[266]

210.1 Greenhouse gas emissions would be calculated on a production rather than consumption basis (not at issue in this judicial review); and

210.2 Land-based emissions would be accounted for using a "modified activity-based approach" (**MAB**). The MAB accounting approach is also the approach New Zealand has advised the Parties to the Paris Agreement it will use to account for its NDC.

211. LCANZI says that the Commission was required under the CCRA to use a different accounting approach for land-based emissions, namely the approach used for UNFCCC inventory reporting. The Crown disagrees and says that UNFCCC inventory reporting is not a mandatory accounting methodology under the CCRA for the emissions budgets.

212. The Crown's position is that the Commission, as expert technical decision-makers operating with statutory independence, was empowered under the CCRA to advise that the MAB accounting approach should be used to measure progress towards meeting emissions budgets and the 2050 target.

The Commission is required to advise on the rules to measure progress

213. As LCANZI acknowledges, part of the policy parameters set by Cabinet for the introduction of the Bill was that the Commission's advice would include: "the accounting methodologies that will apply (eg, whether they should align with the accounting methodologies that apply to NDCs set under the Paris Agreement or

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266 Climate Change Commission *Inaia tonu nei: a low emissions future for Aotearoa Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* (31 May 2021) at 195, 196 and 207. The Commission also provided advice under Chapter 10 on voluntary offsetting and carbon neutral claims, if the government allowed such voluntary offsetting. This is not at issue in this judicial review **[Advice Bundle at 211, 212 and 223]**.

those used for the New Zealand GHG Inventory)".[267]

214. LCANZI then submits that: "The Bill as introduced, however, took a different approach and hard-wired in a particular accounting methodology. It did not include the Commission making recommendations, or the Minister making any further decisions in relation to accounting methodologies."[268]

215. The Crown does not agree with this interpretation. As above, s 5ZA(1)(b) requires the Commission to advise on the rules for measuring progress towards the emissions budgets and the 2050 target. LCANZI has provided no explanation of what this power is referring to, unless it is a reference to accounting methodologies. On LCANZI's interpretation the clause is redundant.

216. Nor is there any explanation for why the Bill as introduced would depart from Cabinet's approved policy parameters, nor anything in the legislative materials that indicates that the intention was to change approach. To the contrary, the Rgeulatory Impact Statement, referred to in the Explanatory Note to the Bill, explains that under the proposed approach the Commission's advice will include (inter alia) "the accounting methodologies that will apply."[269]

217. To the contrary, the Departmental Report, provided after the first reading and after submissions were received by the Select Committee, advised, under the heading "New Sections 5X to 5ZF: Role of Commission in setting emissions budgets" (i.e. the section of the Departmental Report that covered s 5ZA(1)(b)):

> The Commission's advice will include:
>
> …
>
> - the accounting methodologies that will apply (eg, whether they should align with the accounting methodologies that apply to NDCs set under the Paris Agreement or those used for the New Zealand GHG Inventory)

218. The Departmental Report would not include this description of the Commission's task if a decision had been made at that point about what accounting methodology would be used for the emissions budgets and the 2050 target.

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267 LCANZI's submissions at [361] citing Hon James Shaw *Cabinet Paper on Proposed Climate Change Bill* (December 2018) **[LCANZI's BOA, Volume 4, Tab 32]**.

268 LCANZI's submissions at [362].

269 Ministry for the Environment *Regulatory Impact Statement for the Zero Carbon Bill* (January 2019) at 142 **[LCANZI's BOA, Volume 4, Tab 30 at 1493]**.

LCANZI's statutory definition arguments do not assist LCANZI's interpretation

219. LCANZI seeks support for its position from the definition of "net accounting emissions" in the CCRA. The Minister's duty to meet the emissions budgets is set out in s 5X(4) with reference to net accounting emissions ("The Minister must ensure that the "net accounting emissions" do not exceed the emissions budget for the relevant emissions budget period"). Similarly, the 2050 target is described with reference to "net accounting emissions": s 5Q(1)(a). In effect, LCANZI says the definition of "net accounting emissions" provides, or at least contains within it, the accounting measure.

220. Net accounting emissions is defined as follows:[270]

> **net accounting emissions** means 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

221. The Crown submits that the definition of net accounting emissions provides the broad sum to be conducted (the word "total" is used as a noun; "the total of").[271] Parliament wanted the following categories of emissions and removals included:

221.1 Gross emissions (i.e. the sectors listed in the definition of gross emissions, being the agriculture, energy, industrial processes and product use, and waste sectors);[272]

221.2 Land use, land-use change and forestry (**LULUCF**); and

221.3 Offshore mitigation (for obvious reasons, removals only).

222. But Parliament did not specify the scope of emissions or removals in those categories which were to be counted. As discussed further below, the information in these categories is compiled and reported in three different sets of reports

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[270] CCRA, s 4. Note that the amendments made to the definition of "net accounting emissions" at the Select Committee stage ("net accounting emissions" replaced both "net emissions" and "net budget emissions"), were due to the need to clarify that offshore mitigation would count towards the emissions budgets and 2050 target: Climate Change Response (Zero Carbon) Amendment Bill (136-2) (select committee report) at 3 **[LCANZI's BOA, Volume 3, Tab 21 at 1108].**

[271] Note that the Bill initially used the words "combined with", rather than "the total of": Climate Change Response (Zero Carbon) Amendment Bill (2019) (136-1) at cl 6 **[LCANZI's BOA, Volume 3, Tab 20 at 1081]**. This is consistent with reading the phrase "the total of" (as enacted) to mean "the sum of". There is no indication in the legislative history that suggests a departure from the original meaning conveyed by "combined with".

[272] CCRA, s 4.

encompassed by the general term "New Zealand Greenhouse Gas Inventory". Within those reports, different information is compiled to meet specific reporting requirements under the UNFCCC, the Kyoto Protocol and the Paris Agreement. Importantly for the purposes of interpretation, Parliament's definition of "net accounting emissions" does not specify that one of the sets of information in the reports is to be used, nor that any particular *accounting* method is adopted. It is the categories identified in the definition of "net accounting emissions", not the scope of information within those categories, that is the subject of the relatively high-level definition "net accounting emissions". The scope of emissions or removals in those categories which are to be counted has been left to the independent statutory Commission to advise on as part of the rules. This is clear from the original Cabinet policy proposal for the Bill, the Regulatory Impact Statement referred to in the Explanatory Note to the Bill, and the Departmental Report.

223. The statutory definition of the "New Zealand Greenhouse Gas Inventory", a term referred to in "net accounting emissions" does not support LCANZI's interpretation. The definition provides:

> **New Zealand Greenhouse Gas Inventory** means the reports that are required under Articles 4 and 12 of the Convention [UNFCCC], Article 7.1 of the [Kyoto] Protocol, and Article 13.7 of the Paris Agreement and that are prepared in accordance with section 32(1).

224. The Crown notes that this is the actual definition in the Act, at the time the Commission prepared its advice, and at the time of this judicial review. LCANZI's submissions rely on earlier versions of the definition. It is the definition at the time of the alleged error which is important to the statutory interpretation exercise. Regardless of which definition is used, the reports listed are not simply those that would be used for UNFCCC reporting (which is the "accounting" LCANZI advocates for). Rather, the reports are:[273]

224.1 Articles 4 and 12 of the UNFCCC: national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases;

224.2 Article 7.1 of the Kyoto Protocol:[274] annual inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases, *incorporating the necessary supplementary information for the purposes of ensuring*

[273] Affidavit of Dr Andrea Mary Brandon at [14], [23].

[274] Kyoto Protocol, art 7(1) **[Respondents' Bundle of Documents, Tab 2, at 31]**.

compliance with Article 3, to be determined in accordance with paragraph 4 below (emphasis added).[275] The necessary supplementary information for the purposes of ensuring compliance with Article 3.3 is the information on the "net changes in greenhouse gas emissions from sources and removals by sinks resulting from direct human-induced land use change and forestry activities, limited to afforestation, reforestation, and deforestation since 1990".[276] This is different to the data that would only be required under Articles 4 and 12 of the UNFCCC; it is the data used for "target accounting" under the Kyoto Protocol;

224.3 Article 13.7 of the Paris Agreement:[277] a national inventory report of anthropogenic emissions by sources and removal by sinks of greenhouse gases *and* (emphasis added) information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4 [of the Paris Agreement].

225. Accordingly, the references in "net accounting emissions" to "as reported in the New Zealand Greenhouse Gas Inventory" do not just cover basic UNFCCC reporting. The term "New Zealand Greenhouse Gas Inventory" incorporates the specific information used for Kyoto Protocol accounting (which, broadly, only includes LULUCF emissions and removals which are created as a result of post 1990 activity), and also the specific information used to track progress against New Zealand's NDC under the Paris Agreement (i.e. MAB accounting, explained further below).

226. What is important is that the underlying data used by the Commission to measure progress comes from officially reported sources, i.e. those reports referred to in the CCRA's definition of "New Zealand Greenhouse Gas Inventory" and which are prepared (by the Ministry for the Environment) under s 32(1) of the CCRA. The particular rules around how the data is used for the purposes of *accounting*, within the categories of emissions and removals identified for Parliament in the definition of "net accounting emissions", are for the Commission to advise on. Hence, the

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[275] Paragraph 4 of art 7 provides that the Conference of the Parties to the Kyoto Protocol shall adopt guidelines for the preparation of information required under Article 7 **[Respondents' Bundle of Documents, Tab 2, at 32]**. For completeness, the Crown notes that under art 3.4 of the Kyoto Protocol, for the second commitment period, pre-1990 forests are accounted for but against a baseline or reference level in order to capture only the effect of activity in respect of those forests post-1990 **[Respondents' Bundle of Documents, Tab 2, at 27]**.

[276] Kyoto Protocol, art 3(3) **[Respondents' Bundle of Documents, Tab 2, at 27]**.

[277] Paris Agreement, art 13(7) **[Respondents' Bundle of Documents, Tab 3, at 66]**.

power to advise on such rules in s 5ZA(1)(b).

227. The effect of LCANZI's submission, that UNFCCC reporting would be used to measure progress against the emissions budgets and 2050 target, would be that Parliament had decided, with no discussion, that New Zealand would use an entirely different approach for accounting for emissions budgets under the CCRA than had been used since targets were first ever accounted for in 2008.[278] This is a surprising interpretation of the statutory scheme. Rather, the more likely outcome was that the Commission would advise (as explicitly stated in the materials referred to above) on the particular accounting methodologies to be used. Also important is the *lack* of any commentary in the Explanatory note to the Bill, the select committee report, or in Hansard on such a fundamental switch from New Zealand's existing methods of accounting for emissions reduction targets.

MAB accounting under the Paris Agreement

228. LCANZI argues that MAB accounting could not have been what Parliament intended for the emissions budgets and the 2050 target because the rules around MAB accounting were not defined at the time the 2019 amendment legislation to the CCRA was enacted.

229. At the time the amendment legislation was enacted (November 2019) New Zealand's intended MAB approach for its first NDC under the Paris Agreement had been publicly available and advised to the Parties to the Paris Agreement for over three years (October 2016, when New Zealand's first NDC was communicated). The level of detail was sufficient for the purposes of New Zealand's obligation under the Paris Agreement to advise on the manner in which it would account for its NDC.[279]

230. More importantly, however, Parliament left it to the independent and expert Commission to determine which accounting methodology to use. This is evident from s 5ZA(1)(b) and the comment in the Departmental Report which explicitly identified that a choice would need to be made by the Commission on whether to use the same accounting method as New Zealand would be using for its NDC.

231. The Crown does not consider any unlawful delegation issue arises in the

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[278] The start of the first commitment period under the Kyoto Protocol (2008-2012). And note that when a target was set under 224 of the CCRA (s 224 is now repealed), it was set using the Kyoto Protocol accounting rules approach: "The Climate Change Response (2050 Emissions Target) Notice 2011" (31 March 2011) *New Zealand Gazette* No 2011-go2067.

[279] Affidavit of Dr Andrea Brandon at [41]-[50].

Commission advising the Minister on the rules to be applied (an issue raised in LCANZI's submissions,[280] but not pleaded in any of the three statements of claim filed by LCANZI). The Commission and the relevant power is sufficiently identified by Parliament, is an independent expert body (appointed following consultation with all Parties represented in the House) and is governed by the CCRA (including consultation requirements and mandatory considerations) and the Crown Entities Act. The scope of the power is, as usual, subject to the scheme and purpose of the Act. It is not unusual for Parliament to delegate powers of this nature.[281]

Effect of MAB accounting

232. LCANZI states that ground three is based purely on a statutory interpretation argument.[282] However, LCANZI goes on to characterise MAB accounting as "an esoteric methodology of filtering some removals and averaging others"[283] and argues that MAB conceals that net emissions will continue to increase under the emissions budgets.[284]

233. MAB accounting is a variation on "target accounting". Target accounting is the form of accounting that has been used by New Zealand since 2008 (when the first Kyoto Protocol commitment period started).

234. The key feature of target accounting is additionality; that is, accounting drives climate action in a way that is different to business-as-usual.[285] The requirement for climate change benefits to be additional is reflected in the Kyoto Protocol, which states that the commitments of the (developed country) Parties will be met by "the net changes in greenhouse gas emissions from sources and removals by sinks resulting from direct human-induced land use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990…"[286] The Kyoto Protocol set a baseline of 1990 and sought to incentivise additional climate action beyond that date which would not have otherwise occurred.

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280 LCANZI's submissions at [380].

281 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55] **[LCANZI's BOA, Volume 1, Tab 6, at 348]**.

282 LCANZI's submissions at [350].

283 LCANZI's submissions at [383].

284 LCANZI's submissions at [384], [385].

285 Affidavit of Dr Andrea Brandon at [58.2].

286 Article 3(3) Kyoto Protocol (and for completeness see the reference in footnote 276 above about art 3.4) **[Respondents' Bundle of Documents, Tab 2, at 27]**.

235. Target accounting is designed to incentivise emissions reductions and to avoid relying on actions that occurred before 1990 (such as forest planting in the 1970s and 1980s for entirely non climate change-related reasons) that continue to result in emissions and removals today.[287]

236. Accordingly, for the purposes of New Zealand's international targets since 2008, New Zealand has accounted for its emissions on the basis of target accounting; i.e. measuring emissions and removals for the LULUCF sector based only on what has occurred as a result of additional efforts since 1990.[288]

237. MAB accounting is a variation on the target accounting New Zealand has been using since 2008. Dr Andrea Brandon, Principal Scientist, Greenhouse Gas Reporting at the Ministry for the Environment, describes New Zealand's MAB approach by explaining the current approach to LULUCF for target accounting with the MAB modification in italics:[289]

237.1 deforestation of all forests since 1990; to penalise this activity;

237.2 afforestation/reforestation of forests established since 1990 *up until they reach their average long term carbon stock for that forest type;* to incentivise this activity; and

237.3 forest management of pre-1990 forests against a reference level, to incentivise management practices that increase carbon storage in these forests.[290]

238. The long-term average carbon stock is the amount of carbon the forest will store on average over multiple cycles of growth and harvest, based on typical harvest ages seen in New Zealand forestry.[291] Dr Brandon goes on to explain that:[292]

> Applying MAB accounting to planted production forests eliminates the ongoing crediting and debiting cycle that is a characteristic of sustainably managed forestry operations. The cycle of growth, harvest and replant masks the real trends that are occurring in the LULUCF sector that would demonstrate the effectiveness of policies that protect and enhance carbon

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287 Affidavit of Dr Andrea Brandon at [67] and see [53].

288 For completeness, note that some pre-1990 forests are still accounted for under target accounting, but against a reference level which factors out indirect-human induced and natural impacts on managed lands as well as legacy impacts from actions that occurred pre-1990. The purpose of this is to incentives the good management of pre-1990 forests in a way that creates additional climate benefits: Dr Brandon affidavit at [69.3].

289 Affidavit of Dr Andrea Brandon at [50].

290 Note the Commission has recommended this aspect be excluded, at least initially, for the emissions budgets as the reference level has not yet been set.

291 Affidavit of Dr Andrea Brandon at [51].

292 Affidavit of Dr Andrea Brandon at [51].

> sinks and reservoirs. This is because the planted production forests are not providing long-term permanent additional carbon storage once they have reached their long-term average carbon stocks.

239. The practical effect of *not* using MAB accounting, and instead using LCANZI's preferred UNFCCC inventory reporting accounting, is explained in a number of examples in the affidavit of Dr Paul Young:

239.1 UNFCCC inventory reporting includes removals from pre-1990 forests, meaning that using UNFCCC inventory reporting for the purposes of emissions budgets and the 2050 target would allow New Zealand to benefit from these forests, despite no additional action being taken in terms of actually planting new forests. The amount from regenerating pre-1990 natural forest is equivalent on an annual basis to the direct emissions from New Zealand's entire steel and aluminium production industries, meaning that these industries' emissions can be offset under LCANZI's approach with no additional action being taken.[293]

239.2 MAB accounting removes the cyclical swings in emissions generation and removals that are a feature of sustainably managed production forests, such as those in New Zealand. Under LCANZI's preferred approach of using UNFCCC inventory reporting for accounting, the 2050 target will be met (and exceeded) with *no additional action* in terms of emissions reduction or increasing removals.[294] This is because in 2050 New Zealand's forests will be at a peak removals "sink" stage in their growth cycle. Governments between now and 2050 would need to do nothing additional from now to meet the 2050 target under LCANZI's accounting approach.

239.3 This is an illustration of the problem addressed by MAB accounting; that the peaks and troughs of the forestry cycle can make it appear at any particular point in time that New Zealand's emissions or removals are dramatically increasing or decreasing, when in fact, over the long term, those emissions and removals will equal themselves out. This is the problem with using UNFCCC inventory reporting to account for targets designed to increase progress on climate action – accounting for what the atmosphere "sees" in any given year can be skewed by the happenstance of a particular event (e.g.

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293 Affidavit of Dr Paul Young at [39].

294 Affidavit of Dr Paul Young at [49].

harvesting) that is not indicative of actual long term trends.[295] If some form of averaging approach is not taken, actual gross emissions reductions and new removals (i.e. new forestry planting) are masked by the large effect of New Zealand's production forests' harvesting timeline.[296]

LCANZI's underlying concerns

240. Finally, the Crown notes that underlying LCANZI's submissions on the third ground of review is particular disagreement with New Zealand's "past policies which have focussed on planting trees and buying offshore mitigation rather than tackling our emissions."[297]

241. The balance to be struck on those matters of policy, in terms of emissions budgets, has been addressed by Parliament in the CCRA. The CCRA limits the amount of offshore mitigation that may be used to meet the emissions budgets.[298] In respect of concerns regarding the use of forestry removals, the legislative history indicates that these concerns were raised by submitters on the Bill and were addressed through the legislation (the 2050 target review provisions were amended to specifically include an ability for the Commission to advise on removals, and a requirement was introduced for the Commission and the Minister to consider the implications, or potential implications, of land-use change for communities).[299] Importantly, the Departmental advice to the select committee was that it was currently inappropriate to restrict the amount of forestry offsets that can be used towards meeting emissions budgets.[300]

242. These are policy choices, not matters of lawfulness relevant to the judicial review.

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295 Affidavit of Dr Paul Young at [58].

296 Affidavit of Dr Paul Young at [50]-[52]. And see [62]: "… the removals by forests [using UNFCCC inventory reporting accounting] swing by more than 40 percent of New Zealand's long-lived greenhouse gas emissions when no mitigation action or change in behaviour has occurred."

297 LCANZI's submissions at [385].

298 CCRA, s 5Z.

299 Climate Change Response (Zero Carbon) Amendment Bill (136-2) (select committee report) at 8, 11, 12; and Ministry for the *Environment Department Report on the Climate Change Response (Zero Carbon) Amendment Bill 2019* (September 2019) at 80-84, 63-64, 69-70 **[LCANZI's BOA, Volume 4, Tab 31 at 1617-1621, 1600-1601 and 1606-1607]**.

300 Ministry for the *Environment Department Report on the Climate Change Response (Zero Carbon) Amendment Bill 2019* (September 2019) at 84 **[LCANZI's BOA, Volume 4, Tab 31 at 1621]**.

FOURTH GROUND: PROPOSED EMISSIONS BUDGETS ARE ALLEGEDLY IRRATIONAL AND UNREASONABLE

243. LCANZI submits that, irrespective of the outcome of the other grounds of review, the emissions budgets advice by the Commission should be set aside as "patently unreasonable in the face of a climate emergency".[301] This ground of review is an irrationality and unreasonableness challenge to the emissions budgets advice.[302] The Crown does not agree that the emissions budgets advice was irrational or unreasonable.

The authorities on reasonableness

Orthodox approach

244. The orthodox standard of reasonableness applied in the review of administrative decisions is still attributed to the judgment of Lord Greene MR in *Wednesbury*, although he said very little about it, beyond the observation that the courts could interfere if "a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it"[303]

245. It is the re-formulation of the test by Lord Diplock in *CCSU v Minister for the Civil Service* that more accurately captures what we know as the *Wednesbury* test for irrationality: [304]

> [Unreasonableness or "irrationality"] applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

246. The high threshold for unreasonableness derived from *Wednesbury* was adopted in the New Zealand context by the Court of Appeal in *Wellington City Council v Woolworths NZ Ltd (No 2).*[305] Of particular relevance in this judicial review, in *Woolworths* Richardson P observed:[306]

> Finally, there are constitutional and democratic constraints on judicial involvement in wider public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those

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301 LCANZI's submissions at [396].

302 LCANZI's submissions under this ground also make reference to the purpose of the CCRA at parts of [392], [394]. The response to the argument that the emissions budgets are unlawful because they do not accord with the purpose provisions of the CCRA is already dealt with in detail under ground 2 and is not repeated here.

303 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 2 KB 223 (CA) at 228-229.

304 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410. The decisions that have followed since and in particular those from New Zealand are collected in an informative article by Dr Dean Knight entitled "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117.

305 *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537 (CA) **[Respondents' BOA, Tab 58]**.

306 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546, Richardson P for the Court **[Respondents' BOA, Tab 58, at 2268]**.

> elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

247. It is important to note that the obiter comments by Thomas J in *Waitakere City Council v Lovelock*, quoted by LCANZI, were made as part of Thomas J's separate judgment in that case.[307] The majority of the Court of Appeal in *Waitakere City Council* was content that *Woolworths*, as a recent decision (at the time) of a Court of five, stated the law of New Zealand in respect of the *Wednesbury* test.[308]

Evolution of the **Wednesbury** *approach*

248. A recent decision by the Court of Appeal, *CP Group Ltd v Auckland Council*, cites two High Court decisions with approval, which indicate the modern formulation of the reasonableness standard of review:[309]

> [134] However, the full context in which the particular decision is made will obviously be important, as Wild J observed in *Wolf v Minister of Immigration*:[310]
>
> [47] I consider the time has come to state — or really to clarify — that the tests as laid down in *GCHQ* and *Woolworths* respectively are not, or should no longer be, the invariable or universal tests of "unreasonableness" applied in New Zealand public law. Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them. This is a rather long-winded way of saying, as Lord Steyn so succinctly did in *Daly*:
>
> In administrative law context is everything.
>
> [135] Drawing on the decisions of the House of Lords in Edwards v Bairstow311 and the Supreme Court of New Zealand in Bryson v Three Foot Six Ltd,312 Palmer J recently offered a useful formulation of the

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307 LCANZI's submissions at [388].

308 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397 per Richardson P writing also for Blanchard J.

309 *CP Group Ltd v Auckland Council* [2021] NZCA 587 **[Respondents' BOA, Tab 17]**.

310 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); referring to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) [**Respondents' BOA, Tab 58]**; and *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 (HL). Wolf was later applied in *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486 at [73].

311 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.

312 *Bryson v Three Foot Six* Ltd [2005] NZSC 34, [2005] 3 NZLR 721.

> test for unreasonableness in Hu v Immigration and Protection Tribunal as follows:313
>
> > A decision may be unreasonable if it is not supported by any evidence, or if the evidence is inconsistent with or contradictory of it, or if the only reasonable conclusion contradicts the determination. The first two of these involve the adequacy of the evidential foundation of the decision. The last involves the chain of logical reasoning in the application of the law to the facts: if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision **may** be unreasonable and therefore unlawful (per Palmer J) (emphasis added).

249. Despite endorsing this modern approach, the Court of Appeal in *CP Group Ltd* still referred, with approval, to the statements by the Court of Appeal in *Woolworths* regarding judicial involvement in public policy issues:[314]

> …there are constitutional and democratic constraints on judicial intervention in cases involving wide public policy issues. The larger the policy content and the more the decision making is within the customary sphere of those entrusted to make it, the less inclined the Court should be to interfere. The Court [in *Woolworths*] applied those principles in declining to interfere with complex and inherently subjective decisions about benefit allocation affecting the general rate and differential rating.

The law in New Zealand on "heightened scrutiny"

250. LCANZI submits that its unreasonableness challenge is deserving of "heightened scrutiny" because of "the far-reaching and long-term consequences of the Commission's Advice for the response of Aotearoa New Zealand to climate change and the potential impacts of that response on the lives of current and future generations, including potential impacts on the right to life."[315]

251. The *Kim* extradition litigation represents the most recent and authoritative statements on the issue of heightened scrutiny. The case concerned the extradition of Mr Kim to China and the effectiveness of assurances obtained from China that Mr Kim's fundamental rights would be protected during the pre-trial process. Mr Kim contended that the Minister's extradition decision "had not fully understood the realities of China's legal system in which pre-trial torture was endemic, a fair trial was not possible and China's assurances about his treatment

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313 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [30] **[Respondents' BOA, Tab 25, at 738-739]**.

314 *CP Group Ltd v Auckland Council* [2021] NZCA 587at [136] **[Respondents' BOA, Tab 17, at 410]**, Gilbert J for the Court. Note that the Court of Appeal in *CP Group Ltd* contrasted this position with the issues before it (a narrowly targeted rate affecting a small group of ratepayers, and where the only recourse was via judicial review).

315 LCANZI's submissions at [390].

and that he would not be subject to death penalty could not be relied upon."[316]

252. In terms of the standard of review to be applied, Mallon J (in a first judicial review application) stated:[317]

> …fundamental human rights, involving potential risks to Mr Kim's life and liberty, are at stake. It is an area where the court is required, in its supervisory jurisdiction, to closely scrutinise the Minister's exercise of the power. That is not to say there should be no deference accorded to matters requiring the Minister's judgment. Heighted scrutiny is not a merits review. While it is difficult to define with precision what heightened scrutiny entails, in the present context I consider **it requires the court to ensure the decision has been reached on sufficient evidence and has been fully justified, while recognising that Parliament has entrusted the Minister (not the courts) to undertake adequate enquiries and to exercise her judgment on whether surrender should be ordered** (emphasis added).

253. In the second judicial review application by Mr Kim, Mallon J elaborated on the standard of review to be applied: [318]

> …I accept the unreasonableness ground of review will be established if the Minister's decision was not one that **was open to a reasonable decision maker**. That is the appropriate test at a general level…
>
> In my view the unreasonableness ground of review allows some scope for the Court to stand back and conclude that, despite a proper process (compliance with natural justice, taking into account all and only the relevant considerations required by the statute, having sufficient information, making no material mistake of fact or error of law), a reasonable decision maker would not have made this decision. It is a backstop check on the lawful exercise of a power which does not depend on tightly set specific criteria against which unreasonableness can be made out.
>
> **This does not turn the review into a wholesale merits review**. In the judicial review context the Court must respect that the decision has been entrusted to the person or body whose decision is under review. Different reasonable minds can make different reasonable decisions and proper deference must be given to the decision maker's assessment of matters. The Court cannot substitute its own view of the conclusion which should have been drawn from those matters where the conclusion reached by the decision maker **is one that is reasonably open to her** (emphasis added).

254. Justice Mallon's approach to heightened scrutiny in a judicial review where fundamental human rights were in issue was endorsed by the Court of Appeal.[319] The point was not in issue before the Supreme Court. Accordingly the Supreme Court applied the "reasonably open" test formulated by Mallon J.[320] However, the

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316 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] NZLR 823 at [9] **[Respondents' BOA, Tab 29, at 851]**.

317 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [7] **[Respondents' BOA, Tab 28, at 780]**.

318 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] NZLR 823 [2017] at [18]-[21] **[Respondents' BOA, Tab 29, at 854-855]**.

319 *Kim v Minister of Justice* [2019] NZCA 209 at [47] **[Respondents' BOA, Tab 30, at 911]**.

320 *Minister of Justice v Kim* [2021] NZSC 57 at [41].

Supreme Court observed:[321]

> We also comment that, as the standard of review is not before us, we are not to be taken as endorsing the heightened scrutiny test. Whether, and if so when, heightened scrutiny of the reasonableness of a decision is appropriate will have to be considered in a case where the issue arises and has been fully argued.

255. Accordingly, final determination of the appropriate circumstances in which to apply a "heightened scrutiny" test (and what that entails) must await a future Supreme Court case. Until then, the authority established by the High Court in the *Kim* litigation, and endorsed by the Court of Appeal, is that when fundamental rights are at stake, heightened scrutiny requires the court to ensure the decision has been reached on sufficient evidence and has been fully justified. However this may not descend into a merits review; the general question is whether the decision was one that was reasonably open to the decision-maker.

The climate change context

256. The Court of Appeal recently observed in *Smith v Fonterra* (an unsuccessful tortious claim against industry emitters) that the courts "have a very important role in supporting and enforcing the statutory scheme for climate change responses and in holding the government to account".[322]

257. However, the Court of Appeal also cautioned, in respect of the alleged tortious duties in *Smith v Fonterra*, which would require a court-designed and supervised regulatory regime, that:[323]

> The design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process. **Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices**. The court process does not provide all affected stakeholders with an opportunity to be heard, and have their views taken into account. Climate change provides a striking example of a polycentric issue that is not amenable to judicial resolution. (footnote omitted, emphasis added)

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321 *Minister of Justice v Kim* [2021] NZSC 57 at [51], including footnote 55: "For commentary, see for example, Dean Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZ L Rev 63; Dean Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117; and Hanna Wilberg "Administrative Law" [2019] NZ L Rev 487 at 495-499. See also the comments of Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [5] on the utility of labels such as heightened scrutiny.

322 *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [35] **[Respondents' BOA, Tab 51, at 1855]**.

323 *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [26] **[Respondents' BOA, Tab 51, at 1854]**.

258. As referred to by LCANZI, Palmer J in *Hauraki Coromandel Climate Action* said:[324]

> I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny.

259. Palmer J's rationale for this statement appears to be that climate change gives rise to vitally important environmental, economic, social, cultural and political issues.[325] The statement by Palmer J is:

259.1 caveated by the words "depending on their context". It is not clear what the particular context is that would make a climate change decision subject to heightened scrutiny — but the caveat means the statement cannot be treated as a blanket rule;

259.2 not essential to the decision reached in the case. Palmer J stated at [54] that the decision was not unreasonable at law, whether given heightened scrutiny or not (the applicant won on a separate ground); and

259.3 a statement by a single High Court Judge, not binding on other High Court justices or the Court of Appeal or Supreme Court. Also important is the Supreme Court's comment in *Minister of Justice v Kim* (in a decision released after *Hauraki Coromandel Climate Action)*, that it is not to be taken as endorsing the heightened scrutiny test.[326]

260. In *Thomson v Minister for Climate Change Issues* Mallon J stated that:[327]

> The importance of the matter [climate change] for all and each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections. If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing.[328]

261. There was no suggestion from Mallon J that heightened scrutiny, of the type

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[324] *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228 at [51]**[LCANZI's BOA, Volume 1, Tab 1, at 22].**

[325] At [50]. Alternatively, Palmer J may have considered fundamental human rights were engaged (noting he referred to the grave risks from climate change. But that was not the subject of argument in the case.

[326] *Minister of Justice v Kim* [2021] NZSC 57 at [51].

[327] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] NZLR 160 at [134] **[LCANZI's BOA, Volume 1, Tab 4 at 190]**.

[328] *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546 **[Respondents' BOA, Tab 58, at 2268]**.

discussed in human rights cases, was to be applied.

262. In *NZ Climate Science v National Institute of Water and Atmospheric Research Ltd* (NIWA), a Trust concerned with climate science sought judicial review of climate temperature data published by NIWA.[329] The judicial review was dismissed. Venning J made the following observations which are highly relevant to this judicial review and are therefore set out in full:

> [41] It is well established that the Court, in considering an application for judicial review, will be cautious about interfering with decisions made by a specialist body acting within its own sphere of expertise. In *Lab Tests Auckland Ltd v Auckland District Health Board* Arnold and Ellen France JJ in the Court of Appeal considered the Court was not well placed on a judicial review application:
>
> > ... to assess ... the medical, economic and other complexities raised by an evaluation process such as that undertaken in the present case.
>
> [42] In *Z v Dental Complaints Assessment Committee* the Supreme Court accepted that the fact that lawfulness "turn[ed] on expert judgment" suggested that a less searching review was appropriate.
>
> [43] In *New Zealand Public Service Association Inc v Hamilton City Council* Hammond J accepted that a less intensive review can be appropriate for a number of reasons. It may arise from a:
>
> > ... democratic imperative; (that is, the deciders derive authority from an electoral mandate, to which they are accountable); secondly, a constitutional imperative, (that government, not Courts, decides fundamental policy); and thirdly, an imperative that Courts in many, if not most areas, lack the relevant expertise to make such assessments.
>
> [44] The last feature is particularly relevant where, as in this context, the Trust's challenge is based on what it defines in its pleadings as "recognised scientific opinion". A less intensive review is particularly apposite where the Court is not in a position to definitively adjudicate on scientific opinions. The Trust defines "recognised scientific opinion" as established scientific opinions and methods described in internationally recognised research journals. NIWA does not accept there is any such obligation, a matter to which I return shortly.
>
> [45] I consider this Court should be cautious about interfering with decisions made and conclusions drawn by a specialist body, such as NIWA, acting within its own sphere of expertise. In such circumstances a less intensive or, to put it another way, a more tolerant review is appropriate.
>
> [46] There is a further point. At times the witnesses have identified a difference of opinion about scientific methods applicable to climatology. There are a number of examples where the Court stated its reluctance to adjudicate on matters of scientific debate. In S*mithKline Beecham (New Zealand) Ltd v Minister of Health* Ronald Young J said:

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329 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297; [2013] 1 NZLR 75 **[Respondents' BOA, Tab 38, at 1449]**.

> This Court's function is not to rule on the science. The important point is that Medsafe, MAAC and Dr Boyd have considered all the Plaintiffs' scientific propositions and have a credible view of the science by relevantly qualified scientists. They have considered and rejected on scientific grounds the Plaintiffs' views on safety and efficacy and related matters.
>
> [47] Unless the decision maker has followed a clearly improper process, the Court will be reluctant to adjudicate on matters of science and substitute its own inexpert view of the science if there is a tenable expert opinion: *R (Campaign to End All Animal Experiments) v Secretary of State for the Home Department*; *Mothers Against Genetic Engineering Inc v Minister for the Environment*.
>
> [48] I consider that unless the Trust can point to some defect in NIWA's decision-making process or show that the decision was clearly wrong in principle or in law, this Court will not intervene. This Court should not seek to determine or resolve scientific questions demanding the evaluation of contentious expert opinion. (footnotes omitted)

263. Venning J concluded that to the extent the matter involved differing contestable scientific opinions, the Court could not resolve them.[330]

Propositions on reasonableness

264. The Crown submits that the following propositions can be taken from the above in respect of judicial review on the ground of on reasonableness, relevant to this case:

264.1 The *Wednesbury* test (a decision so unreasonable that no reasonable authority could ever have come to it) remains the starting position for a challenge based on unreasonableness/irrationality.[331]

264.2 The modern application of the test will depend on the context of the particular case (who made the decision, by what process, the subject matter and level of policy content in the decision, and the importance of the decision to those affected by it).[332]

264.3 A decision may be unreasonable if there is an inadequate evidential foundation for the decision, or if there is a material disconnect in the chain

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330 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297; [2013] 1 NZLR 75 at [137], [157], [161] **[Respondents' BOA, Tab 38, at 1476, 1479, 1480]**.

331 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) **[LCANZI's BOA, Volume 2, Tab 9]**, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) **[Respondents' BOA, Tab 58]**.

332 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC), referred to with approval by the Court of Appeal in *CP Group Ltd v Auckland Council* [2021] NZCA 587 **[Respondents' BOA, Tab 17]**.

of logic from a fact or a legal proposition to a conclusion.[333]

264.4 When fundamental rights are at stake heightened scrutiny requires the court to ensure the decision has been reached on sufficient evidence and has been fully justified. However this may not turn into a merits review; the general question is still whether the decision was one that was reasonably open to the decision-maker.[334]

264.5 There is one High Court authority suggesting that, depending on context, climate change decisions may be subject to heightened scrutiny.[335] The comment was not determinative in the case and was made prior to the Supreme Court's observation that it was not to be taken as endorsing the heightened scrutiny test (in the context of fundamental human rights).[336]

264.6 There are constitutional and democratic constraints on judicial intervention in cases involving wide public policy issues. The larger the policy content and the more the decision making is within the customary sphere of those entrusted to make it, the less inclined the Court should be to interfere.[337]

264.7 This is particularly the case where the reasonableness of decisions by expert decision-makers within their areas of expertise are challenged, especially for contested scientific or technical issues.[338]

Does heightened scrutiny apply in this case?

265. LCANZI has not established in evidence or submissions a threat of deprivation of human life under s 8 of the NZBORA (see above at [172] to [188]), such that this case falls into the same category as other cases concerning fundamental rights.

266. The other matters LCANZI mentions, i.e. the far-reaching and long-term consequences of the Commission's advice, can similarly be used to describe all

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333 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41; [2017] NZAR 508 **[Respondents' BOA, Tab 25]** referred to with approval by the Court of Appeal in *CP Group Ltd v Auckland Council* [2021] NZCA 587 **[Respondents' BOA, Tab 17]**.

334 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 **[Respondents' BOA, Tab 28]**; *Kim v Minister of Justice* [2017] NZHC 2109, [2017] NZLR 823 **[Respondents' BOA, Tab 29]**; *Kim v Minister of Justice* [2019] NZCA 209 **[Respondents' BOA, Tab 30]**; and *Minister of Justice v Kim* [2021] NZSC 57.

335 *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228 **[LCANZI's BOA, Volume 1, Tab 1]**.

336 *Minister of Justice v Kim* [2021] NZSC 57.

337 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) **[Respondents' BOA, Tab 58]**; *CP Group Ltd v Auckland Council* [2021] NZCA 587 **[Respondents' BOA, Tab 17]**; *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 **[Respondents' BOA, Tab 51]**; and *Thomson v Minister for Climate Change* [2017] NZHC 733, [2018] 2 NZLR 160 **[LCANZI's BOA, Volume 1, Tab 4]**.

338 *NZ Climate Science v National Institute of Water* [2013] 1 NZLR 75 (HC) at [41]-[45] per Venning J and see [137], [157], [161] **[Respondents' BOA, Tab 38, at 1458-1459, 1476, 1479, 1480]**.

major areas of public policy: education, health, justice, social services and so on. There is a no authority to support "heightened scrutiny" of major policy decisions in those areas. To the contrary, the authorities instruct the Court to be particularly wary of challenges on reasonableness grounds on public policy issues, as the subjective elements of those decisions have been entrusted to the relevant decision-maker, not the Court.

267. In any event, even if this Court was minded to apply "heightened scrutiny" to the Commission's emission's budgets advice, the decisions made by the Commission were clearly reasonably open ones, made on an abundance of evidence and fully justified (i.e. the test for heightened scrutiny applied in the *Kim* litigation).[339]

Substantive basis of LCANZI's unreasonableness challenge

268. LCANZI says that, given limiting warming to 1.5°C requires an approximately 50% reduction in global net CO2 emissions by 2030, the emissions budgets do not reduce emissions sufficiently between now and 2030.[340] In other words, because of the climate emergency, the Commission has acted unreasonably and irrationally in not reducing New Zealand's emissions in line with the need for the globe to reduce emissions by around half by 2030.[341]

269. The Crown does not agree that the Commission has acted unreasonably or irrationally:

269.1 Parliament enacted the Zero Carbon amendments on the basis of the advice in the IPCC 2018 special report, which concluded that in order to have the best chance of reaching the 1.5°C temperature limit global emissions would need to be zero by the middle of the century.[342] As LCANZI points out, the report also advised that in order to reach zero emissions by mid-century, emissions would need to reduce by half by 2030. The IPCC 2018 special report is based on global pathways, not national pathways.

269.2 Parliament decided to act on the 2018 special report through the 2050 net zero target. Despite submissions to the select committee seeking a 2030 target, requiring reductions of 45-40 percent by 2030, this was not taken up

339 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [7] **[Respondents' BOA, Tab 28, at 780]**.

340 LCANZI's submissions at [393].

341 LCANZI's submissions at [394], [395].

342 Climate Change Response (Zero Carbon) Amendment Bill (136-1) (explanatory note) at 4 **[LCANZI's BOA, Volume 3, Tab 20 at 1068]**.

in any amendment to the Bill.[343]

269.3 Parliament established the Commission to provide advice on what the pathway to 2050 should be, via a series of emissions budgets. Contributing to the 1.5°C global temperature goal was included in the relevant purpose statement and is of course a necessary and important consideration for the Commission in advising on the budgets. However, and as made clear by the analysis of the statutory scheme under ground two above, there were many specific factors for the Commission to consider as part of determining the budgets advice.

269.4 It was reasonably open to the Commission in light of that statutory scheme not to mirror the IPCC global pathways. Part of the Commission's task, after considering all of the relevant factors and, importantly, after conducting significant public consultation, was to advise what level of domestic emissions reductions were realistic for New Zealand. That is an inherently subjective decision which includes weighing multiple interests across the community.

269.5 Of course, the emissions budgets are not the only contribution New Zealand will make to global efforts to combat climate change. New Zealand also has its NDC, which adds extensive offshore mitigation to emissions reductions.

269.6 Importantly, nowhere does LCANZI dispute that the emissions budgets recommended by the Commission do in fact put New Zealand on a path to net zero emissions by 2050. It is this aspect of the 2018 Special Report that Parliament has incorporated via the 2050 target in the CCRA.

RELIEF

270. In filing this proceeding, LCANZI made a point of saying:[344]

> 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

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343 Ministry for the *Environment Department Report on the Climate Change Response (Zero Carbon) Amendment Bill 2019* (September 2019) at 61 **[LCANZI's BOA, Volume 4, Tab 31 at 1598]**. The setting of a 2030 target was proposed in some submissions to the Environment Select Committee in relation to the Climate Change Response (Zero Carbon) Amendment Bill, see for example Generation Zero "Submission the Environment Select Committee: Climate Change Response (Zero Carbon) Amendment Bill" at 5 and 11 www.parliament.nz/resource/en-NZ/52SCEN_EVI_87861_EN9966/5f65f6987ea580cfbfec2fe650b059984e733201.

344 Second Amended Statement of Claim at [123] (emphasis added).

> 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.

271. The Crown acknowledges what appears to be (in the emphasised passage at least) a realistic appreciation of the potential adverse impact of undue procedural delay or uncertainty on New Zealand's climate response. Such delay and uncertainty could arise from this case, or through other challenges from sectors, regions, or communities affected by, or otherwise interested in, the government's climate policy. While of course the Court retains an important oversight role in terms of the lawfulness of public decision-making, relief in judicial review involves the exercise of judicial discretion.

272. In relation to the Minister, LCANZI seek:

272.1 a declaration that the Minister acted unlawfully in determining the Amended NDC in reliance on the Commission's advice on what constitutes a 1.5°C-compliant NDC; and

272.2 an order that he reconsider the Amended NDC "in accordance with the law as set out in the Court's judgment".[345]

273. Therefore, on the pleadings, the only relief sought against the Crown is in relation to the exercise of a prerogative power. The relief sought does not relate to the exercise of a 'statutory power' and it follows the Judicial Review Procedure Act 2016 is not engaged: ss 3 and 5.

274. In *Pora v* Attorney-*General* Ellis J concluded that it was not open to the Court to quash a Cabinet decision (on compensation for false imprisonment):[346]

> Notwithstanding that it was couched in declaratory terms, what [the applicant] asks the Court to do is to quash the Cabinet decision. Even were that open to me (and I do not think it is) I would demur, as a matter of comity and constitutional principle.

275. Instead, a declaration was made at [141] concerning the lawfulness of underlying advice as to whether Cabinet guidelines on compensation allowed for inflation adjustment. At [142] the Court "invited" the Minister of Justice, in light of the

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345 Second ASOC at [122(b)], [122(d)]; LCANZI submissions at [397].

346 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [139] **[Respondents' BOA, Tab 46, at 1765]**.

declaration, to consider whether the interests of justice in this case required the benchmarks in the Cabinet guidelines to be inflation adjusted. The judgment stated: "I am unable to see any impediment to [the Minister] taking the matter back to Cabinet should that be seen as the proper outcome".[347]

276. An order in the nature of mandamus – that is, an order for reconsideration of the NDC – is not available against the Crown.

277. In any event, relief on an application for judicial review is discretionary. While it is accepted courts will "generally consider it appropriate to grant some form of relief where they find reviewable error",[348] there are good reasons (discussed below) for the Court to decline to exercise the discretion in this case.

278. LCANZI has signalled a prospective challenge to the Minister's proposed statutory decisions setting emissions budgets by 31 May 2022, but no relief is sought in relation to those proposed decisions at this stage. The implications of any orders the Court might make in respect of the Commission's advice on emissions budgets is also discussed briefly below.

Relief in the nature of mandamus unavailable

279. Mandamus is designed to compel performance of a public duty within the powers of an office (whether under the Crown or not).[349]

280. An order for mandamus is typically granted where the Court wants to ensure an executive decision-maker is acting in accordance with its statutory power. The Court is seeking to protect the will of Parliament.

281. Given that this case involves the exercise of prerogative power, there is a further issue regarding whether an order for mandamus can lie against the Crown

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347 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [142] **[Respondents' BOA, Tab 46, at 1765]**.

348 *Ririnui v Landcorp Farming Ltd* [2106] NZSC 62, [2016] 1 NZLR 1056 at [112] **[LCANZI's BOA, Volume 1, Tab 3 at 116-117]**

349 *Environmental Defence Society Inc v Agricultural Chemical Boards* [1973] 2 NZLR 758 (SC) at 762; See also *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 (HC) at [6].

itself,350 as the jurisdiction of the Court to grant a mandatory order against the Crown is questionable.351

282. In addition to the sound legal basis for declining to grant mandamus against the Crown directly, it is submitted as a matter of principle a mandatory order should not be granted in respect of the exercise of a prerogative power. The remedy of mandamus is generally only available to compel the performance of a duty and not the exercise of a power.352

283. The Court should be reluctant to grant mandamus to ensure compliance with New Zealand's international obligations, much less require compliance in a particular way.353

Good reasons to decline relief against Minister

284. The Crown does not accept there is any reviewable error affecting the Crown's prerogative decision setting the NDC. If, however, the Court were to consider relief, that is at the Court's discretion, and the following points tell against any declaration in relation to the Minister:

284.1 In exercising the Crown's prerogative in international relations, the Amended NDC has already been communicated to the Parties to the

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350 In *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, the Court said there is no doubt that in seeking certiorari and mandamus against Cabinet, the plaintiffs are seeking those remedies against the Crown directly.

351 In *Corbett v Social Security Commission*, North J said "at common law mandamus will not lie against the Crown or servants of the Crown acting in that capacity": *Corbett v Social Security Commission* [1962] NZLR 878 (CA) at 900 **[Respondents' BOA, Tab 15, at 329]**. Section 12(1) of the Crown Proceedings Act 1950 and the related definition of "civil proceeding" in s 2(1) of the Act keep alive the common law rule that the prerogative remedies cannot be awarded against the Crown: by virtue of the express exclusion of the remedies of mandamus, prohibition and certiorari from the definition of "civil proceedings" in s 2(1) of the Act, none of these remedies lie against the Crown. In *Akatere v Attorney-General*, the High Court observed that certiorari and mandamus "do not lie against the Crown" in accordance with s 12(1) of the Crown Proceedings Act and r 622 of the High Court Rules (now r 30.1 of the High Court Rules 2016): *Akatere v Attorney General* [2006] 3 NZLR 705, (2005) 23 CRNZ 222 at [69] **[Respondents' BOA, Tab 4, at 56]**. This case concerned Cabinet's decisions on compensation and ex gratia payments for persons wrongly convicted. See also Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers, Wellington) at [HR.30.1].

352 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214. See also *Bleakley v Environmental Risk Management Authority* (2005) 11 ELRNZ 289 (HC) at [41] where Miller J said "mandamus will not be granted to compel a person to perform a public duty that is permissive rather than mandatory".

353 *Federated Farmers of New Zealand Inc v New Zealand Post Ltd* (1992) 3 NZBORR 339 (HC) at 390 **[Respondents' BOA, Tab 21, at 597-598]**. Even if the Court did find mandamus was available in this context, the threshold for judicial intervention is extremely high. In *May v May* (1982) 1 NZFLR 165 at [87], the Court summarised the relevant principle for judicial interference with the exercise of executive discretion: "… the Court will only interfere if the exercise of a discretionary power has overlooked a relevant consideration, or is plainly wrong." The extremely limited circumstances in which the Courts have been prepared to grant the remedy of mandamus to compel the exercise of a statutory power in a particular way have been expressed as where there is a "sole legally permissible result": Michael Fordham *Judicial Review Handbook* (7th ed, Hart Publishing, 2020) at [24.4.9] **[Respondents' BOA, Tab 91, at 3357]**. See also *R v Ealing London Borough Council, ex parte Parkinson* (1996) 8 Admin LR 281 at 287F. Setting New Zealand's NDC is not a case where there is a "sole legally permissible result".

Paris Agreement. The Amended NDC was formally submitted to the United Nations Framework Convention on Climate Change secretariat on 4 November 2021, after being announced by the Prime Minister and the Minister on 31 October 2021 ahead of the 26th Conference of the Parties.[354] As noted above, in filing this proceeding, LCANZI made it clear it did "not seek to restrain the second respondent from proceeding to carry out his powers, functions and duties taking into account the Advice".

284.2 In this case there is no utility in the relief sought against the Minister, given there is already an existing process for the progression of NDCs under the Paris Agreement. Each Party's successive NDC will represent a progression beyond the then current NDC, and reflect its highest possible ambition.[355]

284.3 Differences of opinion between LCANZI and the Commission about the appropriate methodology for translating IPCC pathways to New Zealand's national circumstances nevertheless result in starting points which have ultimately been met or exceeded by the Crown in setting the NDC. (See the summary in **Annex A**.

284.4 The Minister was not obliged to seek the Commission's advice on the compatibility of the NDC with the 1.5°C goal (although the ability of ministers to seek and receive such independent advice is clearly in the public interest). The Commission did not recommend a specific NDC figure, and LCANZI's suggestion that it's advice may have had an "anchoring effect"[356] is entirely speculative. There is no reason to believe any reviewable error in the Advice had any materially negative impact on the level of the NDC.[357]

285. The Court, in exercising its supervisory jurisdiction in what could easily become an increasingly contentious area, can properly consider how constitutional arrangements can be most productive of co-operation as opposed to conflict.

354 Affidavit of James Peter Shaw at [3], [4].

355 Paris Agreement, Article 4(3) **[Respondents' Bundle of Documents, Tab 3, at 53]**.

356 LCANZI submissions at [267].

357 See above at [121]-[125].

This is akin to how senior courts have treated bill of rights consistency claims, "where the inconsistency was described in the reasons for judgment but no declaration was made".[358] Otherwise, where collective action problems like climate change are involved, there is the potential for interested parties to seek to litigate a range of disagreements about complex scientific or policy questions, and for delay, uncertainty, or disruption to cut across the public interest.[359]

286. For all the above reasons the relief sought by LCANZI should be denied.

Alternatively, effect of relief should be suspended

287. Alternatively, any relief against the Minister ought to be suspended, either pending further submissions on the question of form of relief, or suspending the effect of any declaration (or order) pending reconsideration by the Commission and/or the Crown. While this would be an unusual course, it is available.

288. In this connection, Joe Williams J in *Kapiti Coast District Council v Kapiti High Voltage Coalition Inc (No 2)* declined to accept a submission that "the court has no power to suspend the effect of a declaration as to current legality".[360] In particular, his Honour referred to *Fitzgerald v Muldoon*, where Wild CJ declared the then Prime Minister's proclamation in relation to superannuation payments to be unlawful, but "suspended the effect of the declaration for six months, to allow Parliament to consider proposed legislation resolving the matter".[361] The possibility of issuing suspended relief in judicial review has garnered academic support, including Professor Phillip Joseph[362] and as canvassed in the recent

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358 *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6], in turn referring to *R v Hansen* [2007] NZSC 7, [2007] 2 NZLR 1.

359 See *Unison Networks Limited v Commerce Commission* CA284/05, 19 December 2006 at [87]. By way of example of potential disruption, Dr Reisinger explains that, referring to the briefing, "Supporting paper – methodologies for defining and account for New Zealand's NDC1" (**Methodologies Paper**), the use of a net-net approach for New Zealand's NDC would present "significant challenges" for New Zealand. Among other things, this includes the fact that "[t]arget accounting is currently embedded in many elements of New Zealand's domestic policy framework, including core design aspects of the regulatory framework of the emissions trading system (**ETS**) such as the distinction of pre- and post-1990 forests, and the methods used to calculate ETS auction volumes…" (see First Affidavit of Dr Andreas Reisinger at [51.4] and Methodologies Paper at [51](d))

360 *Kapiti Coast District Council v Kapiti High Voltage Coalition Inc (No 2)* [2013] NZHC 287 at [10] **[Respondents' BOA, Tab 27, at 772]**.

361 *Kapiti Coast District Council v Kapiti High Voltage Coalition Inc (No 2)* [2013] NZHC 287 at [11] **[Respondents' BOA, Tab 27, at 772]**, referring to *Fitzgerald v Muldoon* [1976] 2 NZLR 615 .

362 Philip Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, 2021) at [27.3.1(2)] **[Respondents' BOA, Tab 92, at 3373]**. There, the learned Professor observed that "public law remedies commend themselves to "temporal flexibility" and that "In constitutional adjudication, final appellate courts sometimes suspend the operation of declarations of unconstitutionality to allow for the enactment of corrective legislation before the declaration takes effect".

report of *The Independent Review of Administrative* Law, chaired by Lord Faulks QC (which recommended giving the courts the option of making a suspended quashing order).[363]

Relief sought against Commission – implications for Minister setting emissions budgets

289. The Minister is required by statute to set emissions budgets by 31 May 2022 (already a revised statutory deadline).

290. Emissions budgets were intended to be, and are best seen as, "stepping stones" to achieving the purpose of the Act. This in turn requires developing and implementing clear and stable climate change policies.

291. Court orders that necessitated re-consideration of the Commission's Advice with respect to the emissions budgets, either before 31 May or subsequently, would entail:

291.1 Delay in implementing the government's chosen policy settings, including the emissions reduction plan which responds to a specific budget (necessitating a budget to be in place: ss 5ZG, 5ZI);

291.2 Uncertainty as to whether the proposed settings can be relied on in the meantime.

[363] The Independent Review of Administrative Law (March 2021) at [3.47]-[3.69] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf>. In the event, the report considered that legislative intervention is required to provide for this remedy, in light of the UK Supreme Court's decision in *Ahmed v Her Majesty's Treasury* [2010] UKSC 2, [2010] UKSC 5, [2010] 2 AC 534. In *Kapiti Coast District Council*, Joe Williams J expressly considered this decision and did not find that precluded the issuing of suspended relief, at least in this jurisdiction (at [10]). This appears consistent with the Court of Appeal's decision in *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 at [41], conceptualising the limits of suspended relief as not being able to "purport to modify or change what could not be change". That is not the case here.

292. The real-world effect of such delay and uncertainty in terms of the necessary social and economic transition could be more significant than differences of view about methodology or even ambition. This is because policy needs to be translated into practical action as soon as possible.

14 February 2022

Aaron Martin / Polly Higbee / Nixon Fong / Naushyn Janah
Counsel for the second respondent

CHRONOLOGY

Date	Event	Document reference
May 1992	UNFCCC adopted.	
16 September 1993	New Zealand ratified UNFCCC.	Affidavit of Helen Plume at [8]
11 December 1997	Kyoto Protocol adopted.	Affidavit of Helen Plume at [18]
18 November 2002	New Zealand enacted the Climate Change Response Act 2002.	
October-November 2001	Seventh COP held in Marrakesh, where countries agreed to the Marrakesh Accords which provided the detailed rulebook required to make the Kyoto Protocol operational.	Affidavit of Helen Plume at [33].
December 2002	New Zealand ratified Kyoto Protocol.	
16 February 2005	Kyoto Protocol entered into force.	Affidavit of Helen Plume at [18].
1 January 2008	1st CP commitment under Kyoto Protocol began covering the period from 2008 to 2012.	Affidavit of Helen Plume at [18]
September 2008	ETS introduced under Climate Change Response (Emissions Trading) Amendment Act 2008.	
December 2009	Fifteenth COP held in Copenhagen, Denmark and took note of the Copenhagen Accord.	
November 2010	Sixteenth COP held in Cancun, Mexico and Parties committed to a maximum temperature rise of 2°C above pre-industrial levels, and lowering that to 1.5°C in the future.	Affidavit of Helen Plume at [37].
December 2011	Seventeenth COP held in Durban, South Africa and Parties agreed to negotiate a global agreement applicable to all countries post-2020.	Affidavit of Helen Plume at [38].
November 2012	Eighteenth COP and eighth CMP held in Doha, Qatar and Parties agreed to establish 2nd CP commitment.	Affidavit of Helen Plume at [40].
1 January 2013	2nd CP commitment under Kyoto Protocol began covering the period from 2013 to 2020.	Affidavit of Helen Plume at [18].

Date	Event	Document reference
August 2013	New Zealand adopted an unconditional 2020 target of a 5 percent reduction in greenhouse gas emissions from 1990 levels by 2020.	Affidavit of Helen Plume at [48].
November-December 2013	Nineteenth COP held in Warsaw, Poland and Parties agreed to communicate their respective contributions, or INDCs, towards new global climate change agreement in advance of the 2015 meeting in Paris, France.	Affidavit of Helen Plume at [41].
December 2014	Twentieth COP held in Lima, Peru and Parties agreed on ground rules for how countries could submit their INDCs for new global agreement in first quarter of 2015.	Affidavit of Helen Plume at [43].
7 July 2015	New Zealand's INDC is submitted to the UNFCCC.	Affidavit of Helen Plume at [68].
December 2015	Twenty-first COP held in Paris, France and Parties agreed to adopt Paris Agreement.	Affidavit of Helen Plume at [51].
5 October 2016	New Zealand submitted its NDC and ratifies the Paris Agreement.	Affidavit of Helen Plume at [69].
14 November 2019	Climate Change Amendment (Zero Carbon) Amendment Act 2019 comes into force.	
22 April 2020	New Zealand submitted its "communication and update" in relation to its NDC to the UNFCCC, noting its commitment to ambitious national climate action through the Climate Change Response (Zero Carbon) Amendment Act 2019.	Affidavit of Helen Plume at [76].
31 October 2021	New Zealand announced its updated NDC.	Affidavit of Helen Plume at [80].
4 November 2021	New Zealand submitted updated NDC to UNFCCC.	Affidavit of Helen Plume at [80].
October-November 2021	Twenty-sixth COP held in Glasgow where key decisions and resolutions were made to strengthen the implementation of the Paris Agreement and complete the Paris Rulebook.	
31 May 2022	Statutory deadline for the first, second and third emissions budgets	

Date	Event	Document reference
	to be set and the first emissions reduction plan to be published.	
31 December 2025	Statutory deadline for the fourth emissions budget to be set.	
31 December 2030	Statutory deadline for the fifth emissions budget to be set.	
31 December 2035	Statutory deadline for the sixth emissions budget to be set.	

Annexure A: Table of key numbers involved in this proceeding

Table 1: Key number expressed in net target accounting terms

"Net target accounting" is also referred to as the MAB approach: Affidavit of Andreas Reisinger at [6.2]

Net target accounting					
	Description	**AR4**	**AR5**	**Further explanation**	**Reference**
1.	New Zealand's first NDC under the Paris Agreement for the period 2021-2030 (gross-net)		The NDC is to reduce net greenhouse gas emissions to 50 per cent below gross 2005 levels by 2030. The target will be managed using an emissions budget across the NDC period (using net target accounting).	This corresponds to 41 per cent when managed using a multi-year emissions budget starting from New Zealand's 2020 emissions target. The NDC includes domestic emissions reduction and offshore mitigation.	New Zealand's submission under the Paris Agreement updated 4 November 2021 Helen Plume's affidavit annexure HP-6
2.	NDC – provisional budget		571 Mt		Helen Plume's affidavit annexure HP-6
3.	Projected domestic net emissions over the NDC period (2021-2030) if the Government's proposed emissions budgets are adopted and achieved (and including forecast emissions for 2021). This figure is domestic emissions only and does not take into account offshore mitigation.	648 Mt	673 Mt		CCC's advice – see paragraph 24 page 363 Andreas Reisinger's affidavit at [90.3]
4.	What LCANZI requires as a 'starting point' (net-net)	579 Mt (2021-2030) or 518-550 Mt (2021-2050)	606 Mt (2021-2030) or 545-577 Mt (2021-2050)	LCANZI figure of 484Mt is recalculated using AR5 GWPs, which results in 511 Mt (in UNFCCC reporting terms). This is then translated to net target accounting terms by: • adding 95Mt, if focused on 2021-2030, which results in 606 Mt; or • adding 34-66Mt, for 2021-2050, which results in 545-577Mt NB. Net emissions, expressed in net target accounting terms, are projected to be 95 Mt higher (during the 2021-2030 period). The difference is less, in the range of 34-66 Mt, if taking the projected difference between net target accounting and UNFCCC reporting over the longer period 2021-2050.	Andreas Reisinger's affidavit at [86] & appendix 2, [7]-[8]

Table 2: Key number expressed in UNFCCC inventory reporting terms

For the avoidance of doubt, New Zealand's NDC, as communicated to the secretariat of UNFCCC, is expressed solely in net target accounting terms. The comparison below is for illustrative purpose only for this litigation; it does not purport to replace the actual NDC as communicated.

	UNFCCC inventory reporting				
	Description	**AR4**	**AR5**	**Further explanation**	**Reference**
1.	New Zealand's first NDC under the Paris Agreement for the period 2021-2030 (gross-net)		The NDC is to reduce net greenhouse gas emissions to 50 per cent below gross 2005 levels by 2030. The target will be managed using an emissions budget across the NDC period (using net target accounting).	This corresponds to 41 per cent when managed using a multi-year emissions budget starting from New Zealand's 2020 emissions target. The NDC includes domestic emissions reduction and offshore mitigation.	New Zealand's submission under the Paris Agreement updated 4 November 2021 Helen Plume's affidavit annexure HP-6
2.	NDC – provisional budget		476 Mt (2021-2030) or 505-537 Mt (2021-2050)	The NDC budget is 571 Mt in net target accounting terms. If New Zealand takes the envisaged actions necessary to meet this NDC, its net domestic emissions (in net target accounting terms) would be 673 Mt, and in addition it will purchase 102 Mt of offshore abatement. These same net domestic emissions, but expressed in UNFCCC reporting terms, are projected to be 95 Mt lower (during the 2021-2030 period). The difference is less, in the range of 34-66 Mt, if taking the projected difference between net target accounting and UNFCCC reporting over the longer period 2021-2050. Accordingly, if New Zealand achieves its NDC, its cumulative domestic net emissions in UNFCCC reporting terms would be: • 578Mt, if focused on 2021-2030 (673Mt minus 95Mt); or • 639-607Mt, for 2021-2050 (673Mt minus 34-66Mt) Reducing these figures further by 102 Mt for offshore abatement, the total emissions New Zealand would be responsible for would be: • 476 Mt, if focused on 2021-2030 (578Mt minus 102Mt); or • 505-537 Mt, for 2021-2050 (639-607Mt minus 102)	Andreas Reisinger's affidavit at [90.1]-[90.5].
3.	Projected domestic emissions over the NDC period (2021-2030) if the Government's proposed emissions budgets are adopted and achieved (and including forecast emissions for 2021) This figure is domestic emissions only and does not take into account offshore mitigation.		578Mt (2021-2030) or 607-639 Mt (2021-2050)	673 Mt minus 95Mt (for 2021-2030) or 34-66Mt (for 2021-2050)	
4.	What LCANZI requires as a 'starting point' (net-net)	484Mt	511Mt	This figure is a net:net calculation and using UNFCCC inventory accounting. The highlighted figure is calculated based on AR5 GWP, instead of AR4 GWP.	Dr Bertram's affidavit at [89] Dr Reisinger's affidavit at [86]-[87].

Annexure B – Submissions regarding challenge to Dr Reisinger's impartiality

1. As explained in his second affidavit, Dr Reisinger's appointment was not confirmed until 20 December 2021,[1] after the filing of his first affidavit on 10 December 2021. At all relevant times, he was briefed as an expert witness for the Minister, not the Commission. He only recently left the employment of the Ministry for Environment, on 28 January 2022,[2] well after the Commission had published its final advice (9 June 2021) and filed its evidence (on 10 December 2021).

2. Moreover, as a matter of substance, Dr Reisinger's first affidavit focuses and elaborates on the reasoning and content of an independent briefing prepared by the Ministry, entitled "Consistency of NDC1 with efforts to limit global warming to 1.5°C" (**Consistency Advice**). The Consistency Advice was provided to the Minister on or around 10 June 2021, which was three months *before* Dr Reisinger submitted an expression of interest for the role of Commissioner at the Commission on 15 September 2021.[3] LCANZI in its submissions has described the Consistency Advice as "an example of the type of analysis the Commission should have done".[4] Dr Reisinger's subsequent application, and appointment, to the Commission does not provide any basis to cast aspersions on his impartiality.[5]

3. As Kós J (as his Honour then was) said in *Jarden v Lumley General Insurance (NZ) Ltd*, "at the end of the day the hallmarks of an expert witness are two: the objective accuracy of their assessments, and their willingness to consider alternative perspectives".[6] Whether Dr Reisinger's evidence is substantially helpful to the Court is best judged by the content of his evidence, rather than by ad hominem assertions.

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1 Second Affidavit of Dr Andreas Reisinger at [5.4].

2 Second Affidavit of Dr Andreas Reisinger at [5.5].

3 Second Affidavit of Dr Andreas Reisinger at [5.1].

4 LCANZI's submissions at [302].

5 As the Court of Appeal held in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750, "impartiality is a behavioural quality, signifying an attitude of neutrality as between the parties. An expert who lacks independence may nonetheless behave impartially" (at [99]).

6 *Jarden v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1427 at [39].