

## **Press Release: Lawyers' challenge to Climate Change Commission's Advice and Minister for Climate Change decisions to start today 28 February 2022.**

### *Introduction*

Lawyers for Climate Action NZ Inc (LCANZI) is a group of lawyers who have a common interest in using their legal skills to promote climate change action in Aotearoa.

Today, Monday 28 February 2022, LCANZI's judicial review of the Climate Change Commission's advice to the Minister of Climate Change, and the Minister's subsequent decision to amend Aotearoa New Zealand's nationally determined contribution under the Paris Agreement, will commence in the High Court in Wellington. The hearing is expected to run until the end of Friday 3 March 2022.

The purpose of this document is to provide background information in relation to this legal action.

### *Why LCANZI has brought legal proceedings against the Commission?*

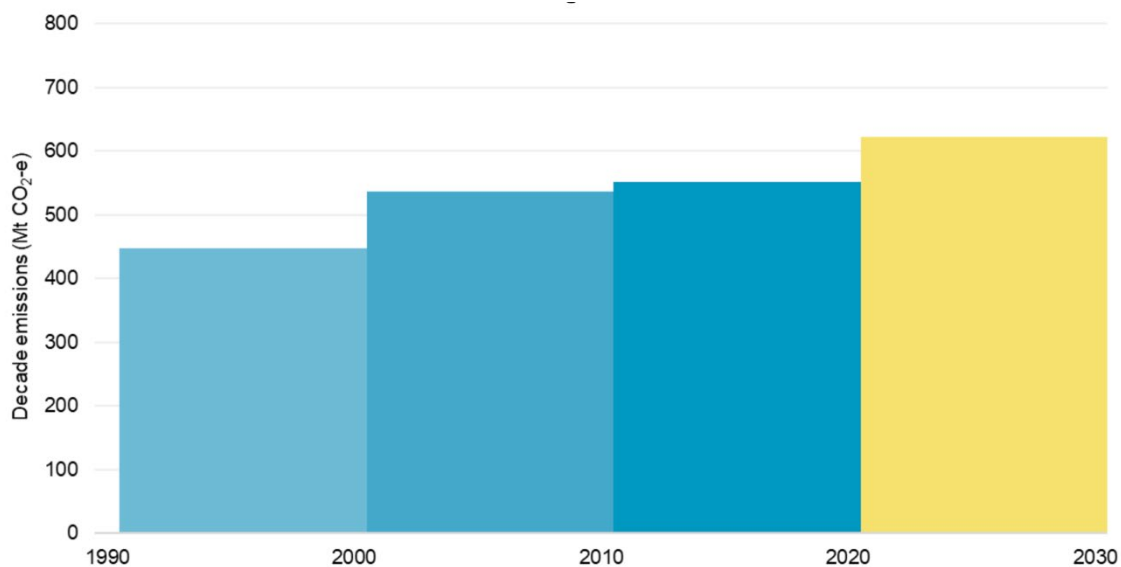
LCANZI has brought judicial review proceedings because the Commission's advice to the Government has a significant impact on Aotearoa New Zealand's climate change policies.

LCANZI's view is that the Commission's advice is inconsistent with its statutory framework and that as a result its advice is far less ambitious than it needs to be.

The Intergovernmental Panel on Climate Change (IPCC)'s *Special Report on Global Warming of 1.5°C* (2018) provides authoritative guidance on the urgent steps required to limit global warming to 1.5°C. In simple terms, net emissions in 2030 must be half of what they were in 2010. The present decade is accordingly crucial to the global effort under the Paris Agreement to limiting warming to 1.5°C.

Despite the clear science, the emissions budgets recommended by the Commission would see our net emissions continuing to *increase* over the decade to 2030.

The following chart (based on our Greenhouse Gas Inventory net emissions and the Commission's "demonstration path" converted from its "modified activity-based" approach to Greenhouse Gas Inventory net) shows how our net emissions have increased since 1990 (blue) and the projected continued increase under the Commission's proposed budgets (yellow):



The purpose of the judicial review proceedings is to test whether the Commission has correctly applied the findings from the IPCC’s 2018 Special Report to Aotearoa New Zealand, whether it has given effect to the statutory purpose of recommending budgets which contribute to limiting warming to 1.5°C and whether it was lawful to use a “modified activity-based approach” to measure emissions.

We believe the Commission has made fundamental errors on each of these points that must be corrected so that the Government is properly advised in making policy decisions at this crucial time for addressing climate change. The Commission denies that it has made any error. The Minister also disputes LCANZI’s claims.

### *Judicial review proceedings*

In a judicial review proceeding a judge reviews the decisions of a public decision-maker (here the Commission and the Minister) to see whether they acted within the powers given to them by the law. As a general rule, public decision-makers must correctly apply their statutory purposes, properly interpret their statutory frameworks, and their decisions must be supportable as a matter of logic.

These proceedings relate to the advice provided by the Commission in June 2021 to the Minister of Climate Change under the Climate Change Response Act. In particular, our challenge relates to:

- a. The Commission’s recommendations under s 5ZA of the Act on the first three emissions budgets for New Zealand’s anthropogenic (human caused) greenhouse gas emissions for the periods from 2022-25, 2026-30 and 2031-35; and
- b. The Commission’s advice in response to a request from the Minister under s 5K of the Act on whether Aotearoa New Zealand’s then current nationally determined contribution under the Paris Agreement to reduce 2030 net

emissions to 30% below 2005 gross emissions (**2016 NDC**) was consistent with limiting global warming to 1.5°C and, if not, what changes were needed.

### *The grounds of LCANZI's legal challenge*

LCANZI says that the Commission has made three errors which invalidate its advice on the NDC and its recommendations on budgets.

First, we say the Commission has misapplied the findings of the IPCC's 2018 Special Report. The Special Report found that net CO<sub>2</sub> emissions need to reduce by 40—58% (with a midpoint of 49%) from 2010 levels by 2030 to have a better than even chance of limiting warming to 1.5°C. Net CO<sub>2</sub> emissions here refers to gross CO<sub>2</sub> emissions (from example, from fossil fuel use) less CO<sub>2</sub> removals (for example, from forestry).

In Aotearoa New Zealand's case, that implies going from 5 Mt of net CO<sub>2</sub> emissions in 2010 to 2.6 Mt in 2030. However, the Commission applied the percentage reduction to our much higher gross CO<sub>2</sub> emissions in 2010 (35 Mt) to calculate a 2030 target for net CO<sub>2</sub> of 17.9Mt. Instead of halving, this allows net CO<sub>2</sub> emissions to *increase* by 250% over this period. We say that this is a basic error of logic that must be corrected. The Commission says that it is not an error but a choice of approach that reflects the fact that, whereas the forestry and land use sector is a net source of emissions globally, it is a net sink of emissions in Aotearoa New Zealand. LCANZI does not accept this reasoning.

Secondly, we say that the Commission has failed to properly grapple with the statutory purpose of setting budgets that are “ambitious” and contribute to the goal of limiting warming to 1.5°C. Instead, it has wrongly assumed that all that is required is to be net zero by 2050. LCANZI says that what happens this decade is crucial and that the budgets recommended by the Commission will allow net emissions to continue increasing through to 2030 instead of decreasing rapidly as the science requires. Furthermore, the gap between our domestic budgets and our international commitments (the NDC) commits Aotearoa New Zealand to spending billions of dollars on “offshore mitigation” without any cost-benefit comparison with doing more domestically. In response, the Commission says that it has prepared budgets which meet the targets in the Act and that LCANZI's position would involve a pace of change which would have severe social and economic impacts. Again, LCANZI does not accept this.

Thirdly, the Commission has chosen to measure emissions using an idiosyncratic measure that it has called the “modified activity-based approach”. LCANZI says this has the impact of masking Aotearoa New Zealand's continued poor performance by making historic emissions look higher than they actually were and projected emissions this decade look lower than they actually will be. Our position is that the definition of “net accounting emissions” in the Climate Change Response Act requires the use of the net emissions reported under the United National Framework Convention on Climate Change and the Commission had no legal authority to apply a different measure. The Commission denies this and says it had a free hand to select an accounting methodology.

As a result of these aspects of its advice (which LCANZI says are errors but the Commission says are not), the Commission has recommended budgets that, as illustrated in the chart above, see New Zealand's emissions continue to increase over the next decade.

We therefore say that the proposed budgets (and the NDC advice) lack ambition and are inconsistent with the urgent action required to limiting warming to 1.5°C.

Whether the Commission's approach to these matters makes its advice unlawful is a matter for determination by the Court.

### *Relief sought*

Under judicial review proceedings the High Court can find that the Commission's advice and the Minister's decisions were unlawful, based on the alleged errors described above, and should be reconsidered.

LCANZI seeks orders:

- requiring the Commission to reconsider its NDC advice and recommended budgets to correct the alleged errors identified above; and
- requiring the Minister to reconsider the NDC in light of the Court's judgment.

LCANZI believes that a correct application of the IPCC's 2018 Special Report and a correct interpretation of the Climate Change Response Act would result in a much more ambitious set of recommendations from the Commission with a path to rapid decarbonisation this decade. However, this is yet to be determined by the Court.

### *Evidence for LCANZI*

LCANZI has provided affidavit evidence in support of its grounds from leading domestic and global economists and climate scientists.

The full list of witnesses is:

- **Professor Piers Forster** who is Professor of Physical Climate Change at the University of Leeds, a member of the UK Climate Change Committee (the UK's equivalent of the Commission) and has had 20 years of involvement in the work of the IPCC, including acting as a Lead Author for the mitigation pathways chapter of the 2018 Special Report.
- **Dr Joeri Rogelj** who is the Director of Research at the Grantham Institute for Climate Change and Environment and a Reader in Climate Science and Policy at the Centre for Environmental Policy at Imperial College, London. He was one of three Coordinating Lead Authors of the mitigation pathways chapter of the 2018 Special Report. He is also a lead author on the annual Emissions Gap Reports by the United Nations Environment Programme and a lead author for the IPCC's Sixth Assessment Report.
- **Professor Donald Wuebbles** who is a Professor in the Department of Atmospheric Sciences at the University of Illinois. He has been a leader in the US National Climate Assessments and served as the White House expert on climate science under President Obama.

- **Dr Stephen Gale** who is an economist and was Telecommunications Commissioner at the Commerce Commission from 2012 to 2020. Prior to that, he was Deputy Director at New Zealand Institute of Economic Research, and then at Castalia where he held the roles of VP Energy and Markets and latterly Managing Director.
- **Professor Ralph Sims** who is Professor Emeritus, Sustainable Energy and Climate Mitigation at Massey University. He has been a lead author for five IPCC reports and is currently a review editor for the Sixth Assessment Report, Mitigation. He chaired the Royal Society of New Zealand's climate change panel which produced the 2016 report *Transition to a Low-Carbon Economy for New Zealand*.
- **Dr Geoff Bertram** who is an economist and Senior Associate at the Institute for Governance and Policy Studies at Victoria University of Wellington. He has conducted extensive research and consultancy work on climate change policy and co-authored a book on New Zealand's emissions trading scheme.
- **Dr William Taylor** who is an economist and Associate Director at NERA Economic Consulting.

The evidence filed by LCANZI, along with LCANZI's submissions can be downloaded at <https://www.lawyersforclimateaction.nz/projects-resources>. At that link is also a "road map" providing more detailed summary of LCANZI's submissions, and access to a copy of LCANZI's Statement of Claim and links to the Commission and Minister's Statements of Defence.

#### *Attendance at the hearing*

The hearing will take place at the High Court in Wellington. Due to COVID-19 related restrictions, there will be no public access to the hearing. A live stream of the hearing will be linked on our Projects and Resources page as soon as the public link is available to LCANZI. Access is limited by number, on a first in, first served basis.