CLIMATE CHANGE: WHAT CAN LAWYERS DO?

Dr James Every-Palmer KC[1]
Stout Street Chambers
Wellington

A. Introduction

This paper encourages you to respond to the climate crisis by engaging in climate conscious lawyering.[2]

In Sections B to D, I attempt to anticipate and answer three questions: What is climate conscious lawyering? Why should I be a climate conscious lawyer? And, what can I do about climate change? I seek to emphasise that we are currently heading towards temperatures by the end of this century that will be 3°C higher than before the industrial revolution and that we should be doing all we can to avoid this, including to preserve human rights and protect the rule of law.[3]

Climate conscious lawyering is about applying a climate lens in your everyday legal practice.

But, it also encompasses "activism" in the form of raising awareness of climate issues, lobbying for greater action, and engaging in public interest litigation which attempts to hold public decision-makers and greenhouse gas emitters to account on climate change.

Public interest climate litigation is occurring throughout the world as people become increasingly concerned about the gap between the reduction in emissions that the science says is required to limit global warming to 1.5°C and what is occurring in practice.[4] In Section E, I provide an overview of climate change litigation that was before the courts in Aotearoa New Zealand over the last year.

---

1 I am a founder and current board member of Lawyers for Climate Action NZ Inc (LCANZI), and have appeared as counsel for LCANZI as applicant in its judicial review against the Climate Change Commission and as an intervener in *Smith v Fonterra* in the Supreme Court. LCANZI is also a member of All Aboard Aotearoa which is the applicant in another judicial review application discussed in this paper.

2 This paper was written before the record-breaking floods in and around Auckland at the end of January 2023. Some worry that this is the new normal. The greater concern is that in hindsight it will look like a relatively benign event.

3 Greta Thunberg made this point without sugar-coating at the World Economic Forum, in Davos Switzerland (25 January 2019): "Adults keep saying, 'We owe it to young people to give them hope'. But I don't want your hope. I don't want you to be hopeful. I want you to panic. I want you to feel the fear I feel every day, and then I want you to act. I want you to act as you would in a crisis. I want you to act as if our house is on fire. Because it is".

4 1.5°C is commonly regarded as a relatively safe temperature increase, and much more benign than 2°C or more. The Intergovernmental Panel on Climate Change (IPCC) published a Special Report on Global Warming of 1.5°C in 2018 which considered different pathways than would result in different levels of global warming by the end of the Century and set out the reductions in different greenhouse gases implied for different end temperatures. For example, to have a 50-66% chance of limiting global warming to 1.5°C by 2100 with no or limited overshoot, global net CO_2 emissions should reduce by 40-58% from 2010 levels by 2030 and by 94-107% by 2050.

B. What is climate conscious lawyering?

The phrase "climate conscious lawyering" is the title of a 2021 article by Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales.[5] Justice Preston makes a simple distinction between two modes of practice: being informed about and engaged in climate change issues in daily legal practice, versus a climate blind approach where no attention is given to climate change issues even though the matter at hand has a potential climate impact.

At a minimum, a climate conscious approach requires you to acquire and maintain a basic understanding of the issue and the legal dimensions of climate change. But it also has implications for the advice we give to our clients and the professional activities we give our time to, as discussed in Section D.

C. Why should I be a climate conscious lawyer?

In 2023, there are probably few people reading an NZLS CLE paper who would contest whether climate change is happening; whether it is caused by human activity; and whether it represents a significant social, political, and economic risk.

We are all aware that the release of carbon dioxide, methane and other greenhouse gases since the industrial revolution is causing long-term shifts in temperatures and weather patterns. The Earth is now about 1.1°C warmer than it was in the late 1800s, and the last decade was the warmest on record.[6] The consequences of climate change already include intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms, and declining biodiversity.

But is that enough to impose on lawyers a professional responsibility to be climate conscious?

A potential objection to the thesis of this paper is to ask what sets climate action apart from poverty relief, animal rights, housing affordability or any other of the long list of worthy causes. Each one of us might take an interest in some or all of these issues personally, but that does not mean that as a member of the legal profession we have a responsibility to keep them front of mind.

Another objection is to say that we have moved beyond the need to worry about climate change as an unsolved threat. Rather, internationally we have the Paris Agreement and domestically we have a 2050 net zero target and five-yearly emissions budgets, so we just need to focus on technical implementation issues. Accusing fossil fuel producers of "racing to expand production, knowing full well that their business model is inconsistent with human survival" is being alarmist.[7] Furthermore, the detailed response to climate change – in terms of targets, the pace of change and the policy instruments we adopt –

---

5 Brian J Preston "Climate Conscious Lawyering" (2021) 95 ALJ 51 (also available at SSRN https://ssrn.com/abstract=3949080).

6 Since the beginning of the industrial revolution, the concentration of CO_2 in the atmosphere has increased from around 280 to 415 parts per million, primarily as a result of burning fossil fuels (coal, oil and gas). CO_2, together with methane and other greenhouse gases, traps some of the heat emitted by the earth into the atmosphere. Global average temperatures have increased in proportion to the concentration of CO_2 in the atmosphere. In the future, however, we may reach tipping points such as collapses of ice masses in the polar zones and thawing of the Siberian and North American permafrost areas where a small change produces a much larger and perhaps irreversible changes in the global climate.

7 Antonio Guterres, United Nations Secretary-General "Remarks at the World Economic Forum" (Davos, Switzerland, 18 January 2023).

is quintessentially a polycentric policy matter that is for politicians to resolve and not well suited to legal reasoning.

In my view, these objections are not valid. There are two reasons why we as lawyers – as members of the legal profession – have a responsibility to engage in climate conscious lawyering: the threat to the rule of law; and the reality that we are far from reaching a technical implementation phase because no one else appears to have the ability or willingness to take the required steps to bring down emissions.

Climate change is a broad threat to human rights and to the rule of law

Despite commitments to limit warming,[8] current policies in place across the world imply global temperatures being an average of 2.8°C higher by the end of the century than they were before the industrial revolution.[9]

What does a world with this level of warming look like? And what are the impacts on human rights and the rule of law?

With around 2°C warming this is the world our children and grandchildren will inhabit:[10]

- 37% of the global population will be exposed to extreme heat at least once every five years;
- sea-levels will rise by around 0.5m by 2100, leading to large increases in coastal flooding, saltwater intrusion in low-lying areas, and more damaging storm surges. The most vulnerable countries include small island states, Bangladesh, low-lying Southeast Asian cities and settlements, and many regions along the African coast;
- 99% of coral reefs will be dead from severe bleaching;
- a decline of three million tonnes in marine fisheries, with the most severe impacts on developing countries that rely on marine fish for a large fraction of protein in their diets;
- ecosystems will shift to a new biome on 13% of Earth's land, leading to large rates of extinctions as well as a surge in invasive species as individual organisms migrate in response to a changing climate;
- 6.6 million square kilometres of Arctic permafrost will thaw, releasing large amounts of CO_2 and methane to the atmosphere;
- 7% reduction in maize harvests in the tropics, with the poorest countries suffering the most damaging impacts;
- 16% of plant species will lose at least half of their current range, leading to significant within-ecosystem changes as well as an increase in extinction rates.

---

8 The Paris Agreement commits New Zealand and most other countries to "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change": Paris Agreement 3156 UNTS I-54113 (opened for signature 12 December 2015, entered into force 4 November 2016) art 2.

9 See the UN Environment Programme Emissions Gap Report 2022: The Closing Window (October 2022). Implementation of the current pledges will only reduce this to a 2.4-2.6°C temperature rise by the end of the century.

10 This summary is based on the expert evidence of Professor Will Steffen in *Sharma v Minister for the Environment* [2021] FCA 560, (2021) 391 ALR 1. The Federal Court finding that the Minister owed a duty of care in relation to the impacts of climate change was overturned on appeal in *Minister for the Environment v Sharma* [2022] FCAFC 35, (2022) 400 ALR 203 but there was no particular dispute as to the expert evidence on the existence of effects of climate change. Professor Steffen died on 29 January 2023. His many videos available on the internet provide direct and clear explanations for the urgency for climate action.

Higher levels of warming offer an even bleaker picture. With 4°C of warming, our descendants will see:[11]

- multiple impacts on agricultural regions, including depletion of soil fertility, changes in water availability and loss of coastal agricultural lands, with the risk of widespread starvation in the most vulnerable regions and/or large migrations out of those regions, increasing the risk of conflict elsewhere;
- the Amazon rainforest at risk of conversion to savanna from both climate and land-use change. This would lead to large releases of CO_2 to the atmosphere as well as large increases in extinction rates of species that depend on the rainforest;
- tropical drylands at risk of becoming too hot and dry for agriculture, and too hot for human habitation. This has very large implications for many regions in Africa in particular, but also parts of Asia and much of Australia (see below);
- very large risks from coastal flooding to transport, infrastructure and coastal ecosystems. Economic damages could trigger regional or global economic collapse as major coastal cities on all continents become uninhabitable;
- reliability of South Asian (Indian) Monsoon vulnerable to high aerosol loading and to the warming of the Indian Ocean and adjacent land. Well over 1 billion people in South Asia depend on a reliable monsoon system. Failure of the monsoon would very likely lead to large-scale starvation, migration and conflict;
- mountain glaciers melting at rapid rates, with changing amounts and timing of run-off. Freshwater resources of over 1 billion people at risk;
- large changes to riparian and wetlands, with loss of water in some places and increased flooding in others.

In addition to these physical changes, hundreds of millions of people may be forced to migrate in search of a more hospitable environment as their homelands are flooded, are left barren from drought or simply become too hot to sustain human life. Large scale geopolitical instability would likely follow.

It is readily apparent that a temperature rise in the order of 2-4°C would adversely impact the conditions for the enjoyment of human rights in Aotearoa New Zealand and throughout the world. The social pressures created by climate change domestically and internationally would also risk social stability and threaten the rule of law.

The connection between human rights and the environment is not new or novel.[12] The link has been drawn in the United Nations context since the 1960s, when the General Assembly passed a resolution noting its concern about accelerating impairment to the human environment and the consequent effects on the condition of man [sic] and "his enjoyment of basic human rights, in developing as well as developed countries".[13]

[11] The text describes the global position. Closer to home, the situation for Australia is described by Professor Steffen as follows: Much of Australia's inland areas (savanna and semi-arid zones) will become uninhabitable for humans; the southeast and southwest agricultural zones will become largely unviable, due to extreme heat and a reduction in cool season rainfall; Australia's large coastal cities (Brisbane, Sydney, Melbourne, Adelaide, Perth) will suffer increasing inundation and flooding from storm surges as sea level rises to metres above its pre-industrial level over the coming centuries; and most of the eastern broad-leafed forests (eucalypt forests) will no longer exist due to repeated, severe bushfires.

[12] For an overview of this subject see Justice Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293.

[13] Problems of the Human Environment GA Res 2398 (1968), preamble. The General Assembly resolved to hold a Conference on the Human Environment in order to develop a framework for focussing the attention of Governments on environmental issues and ways of resolving them through international co-operation.

The specific link between human rights and climate change has attracted much attention in recent years.

Recent cases have found that rights such as the right to life and the right to the right to respect for private and family life encompass a positive obligation on governments to take steps in response to climate change that are in line with the scientific consensus as to the reductions in emissions that are required. For example, in the famous *Urgenda* case, the Supreme Court of the Netherlands ordered the Dutch Government to reduce greenhouse gases by 2020 by at least 25% compared to 1990 in order to comply with the European Convention on Human Rights.[14]

Furthermore, The United Nations General Assembly recently (28 July 2022) voted overwhelmingly to declare access to a clean, healthy and sustainable environment, a universal human right (passed with eight abstentions; no votes against; Aotearoa New Zealand voted in favour).

As a profession, we have a shared commitment to the rule of law including the protection of human rights and the orderly administration of justice. We have a responsibility to uphold the rule of law. This does not mean preserving the status quo: law needs to adapt to provide protection for human rights, accountability for those who harm others, and effective remedies for wrongs. In my view, the threat posed by climate change to these values creates a professional responsibility to be climate conscious in our work.

Climate change is not under control

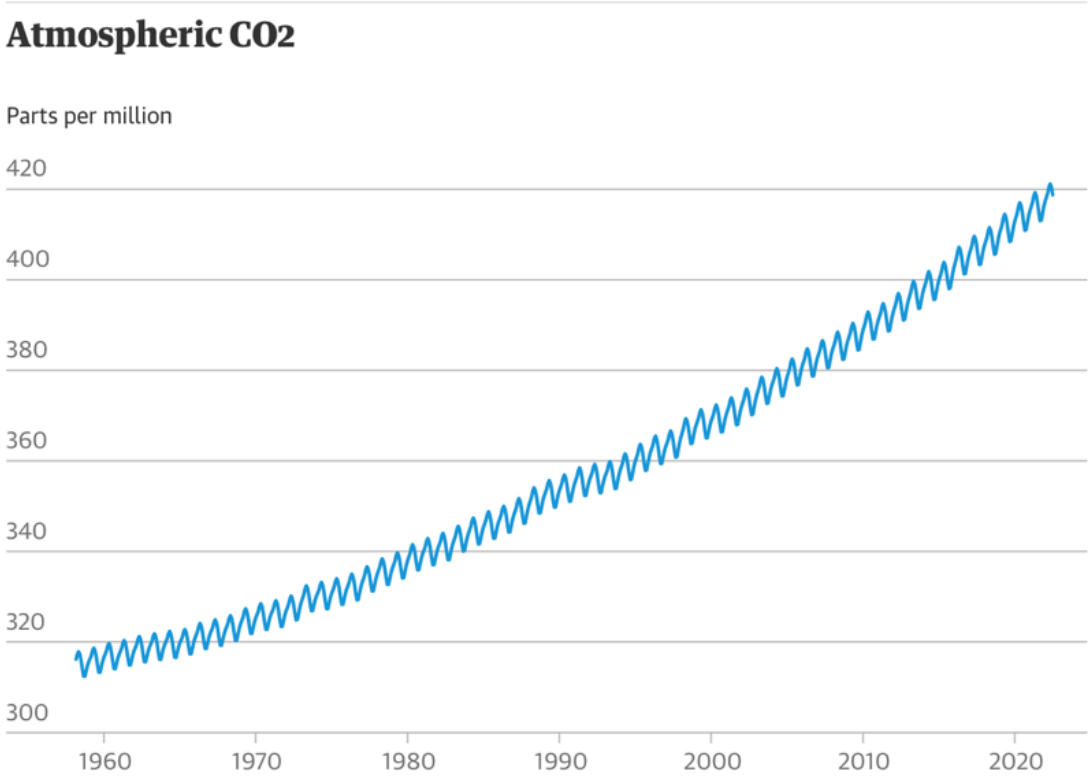
The second reason why we should engage in climate conscious lawyering is that no one else has this problem under control. While it would be comforting to think that the combined efforts of politicians, economists, diplomats and climate scientists are making meaningful progress, this is not the case. The actual level of action on the ground domestically and internationally falls far short of what the science says is required to limit global warming to 1.5°C. It is a misconception that either globally or even in New Zealand that we are on track.

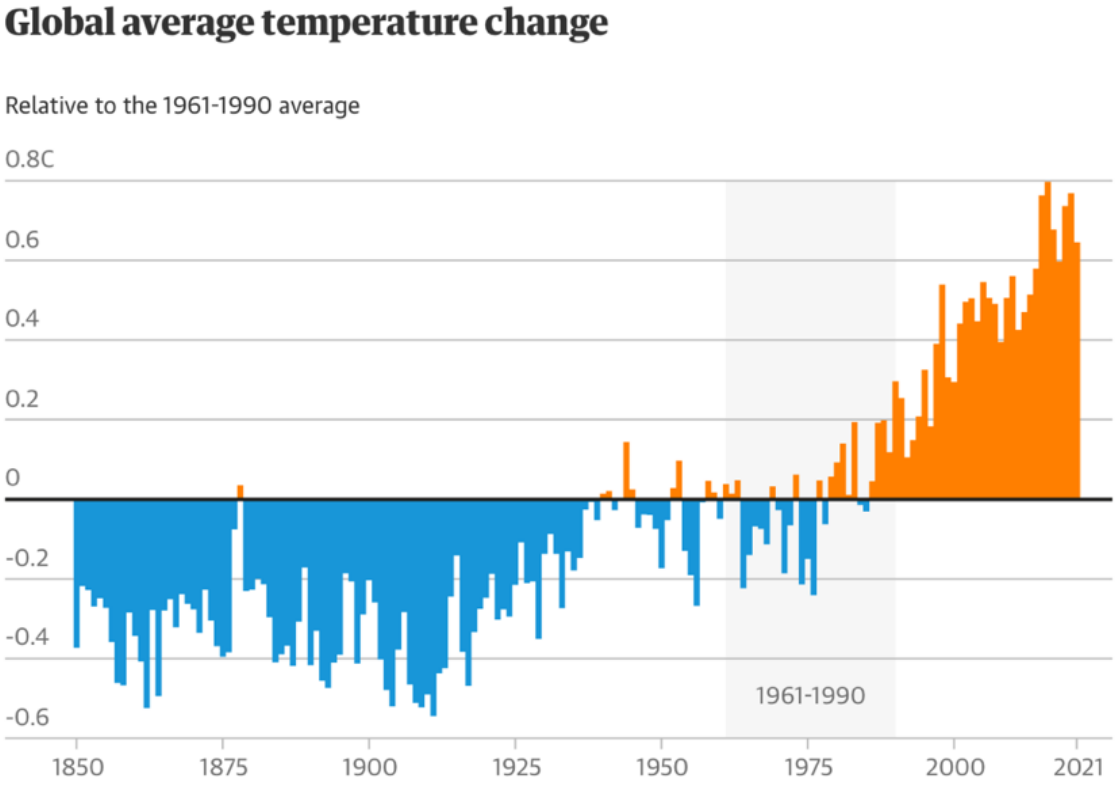
Climate change has been a known issue since the 1970s. In 1988 the Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations to collate and assess evidence on climate change. Its first assessment report was published in 1990 and concluded that temperatures had risen by 0.3-0.6°C over the last century, that humanity's emissions are adding to the atmosphere's natural complement of greenhouse gases, and that the addition would be expected to result in warming.

In 1992, at the Earth Summit in Rio de Janeiro, the United Nations Framework Convention on Climate Change was established. The key objective of the Convention is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. Targets were introduced as part of the Kyoto Protocol which was concluded in 1997 and came into force in 2007.

[14] See *Urgenda Foundation v State of the Netherlands* (Supreme Court of the Netherlands, 20 December 2019). The 25% was based on IPCC recommended targets at the time to limit warming to 2°. See also the decision of the German Constitutional Court in *Neubauer v Germany*, 24 March 2021, which held that the German Government proposed reduction in greenhouse gas emissions was insufficient to limit the increase in global temperature to below 2°C and was therefore inconsistent with the constitutional right to life. The courts in both Urgenda and Neubauer rejected the argument that the global nature of the climate and global warming invalidates the national obligation to take climate action. On 23 September 2022, the United Nations Human Rights Committee found that Australia had failed to adequately protect indigenous Torres Islanders against the adverse impacts of climate change, and this violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home.

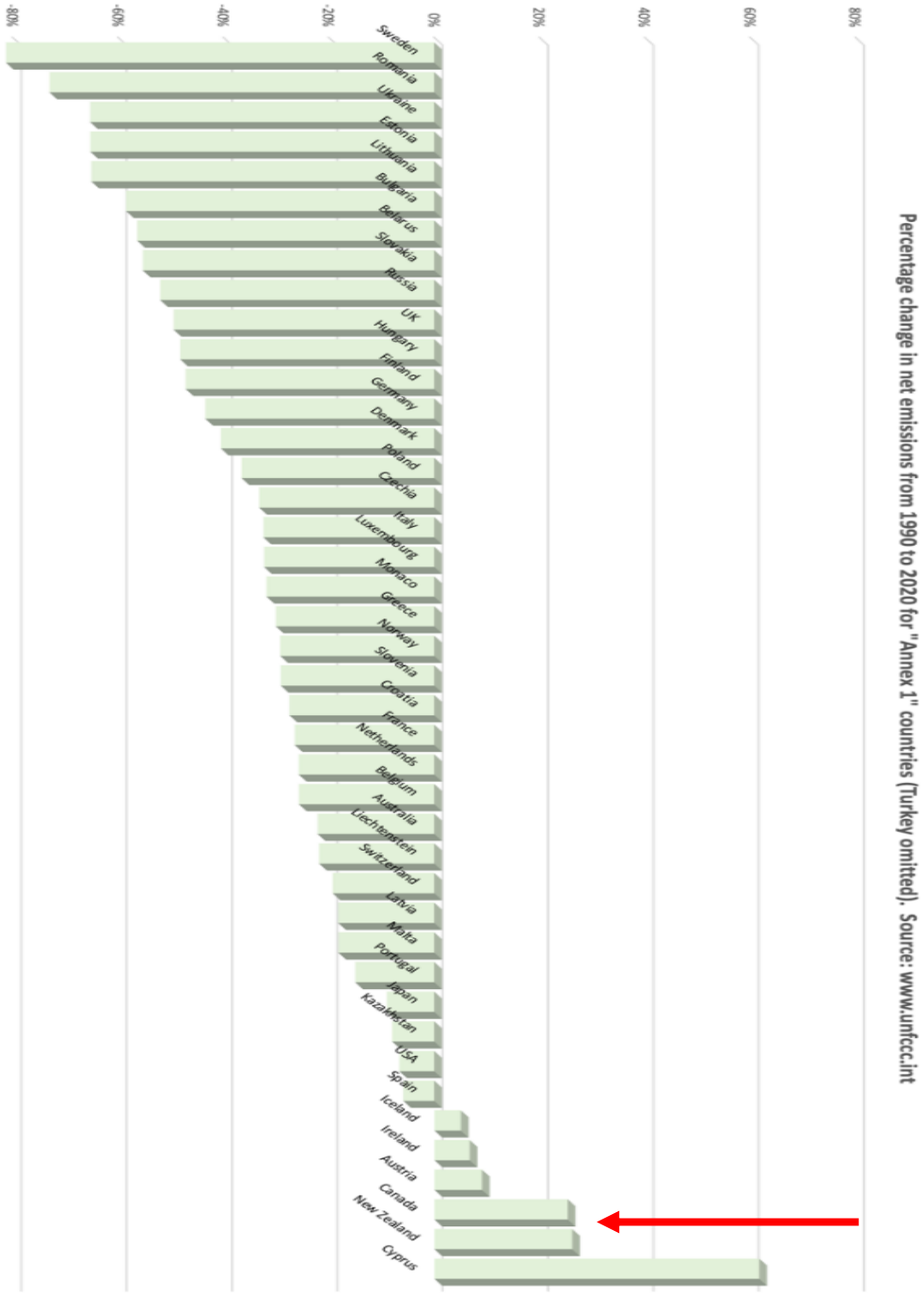
Despite three decades of serious international attention, atmospheric CO_2 levels and





[15] The charts are from Damian Carrington and Cath Levett "The climate crisis explained in 10 charts" The Guardian (online ed, London, 19 September 2019) https://www.theguardian.com/environment/2022/nov/04/the-climate-crisis-explained-in-10-charts

Unfortunately, the domestic picture in Aotearoa New Zealand is no brighter. The following chart shows the percentage change in net emissions since 1990 for "Annex 1" countries under the Kyoto Protocol:[16]



As the chart shows, Aotearoa New Zealand's net emissions have *increased* by 26% since 1990 despite talking the talk on climate change. Many will be taken aback with the comparison against the United Kingdom and Australia whose net emissions have *reduced*, by 49% and 22% respectively, over this period. The reality is we have pursued policies in transport, agriculture, and tourism without regard to the impact on our emissions.

[16] The Kyoto Protocol identified "Annex 1" countries (essentially developed countries) that were expected to deliver the greater reductions in emissions. Turkey is an Annex 1 country but is omitted from the chart as its net emissions have increased by 185%.

Important changes to our climate response framework were made in 2020. The Zero Carbon Amendment Act 2020 amended to the Climate Change Response Act 2002 to establish an independent Climate Change Commission to provide for domestic emissions budgets and emission reduction plans. However, these important institutional changes have not resulted in a level of ambition for this decade that is commensurate with the scale of the crisis.

As a rule of thumb, global emissions must halve by 2030 from 2010 levels to limit warming to within 1.5°C.[17] However, our most recent projections show that even with the emissions budgets and emissions reduction plan in place, we remain well off the required pace:[18]

Emissions by sector (mt CO_2e)	**2010**	**2030**	**% change**
Energy	18.9	11.34	-40.0%
Transport	13.35	14.8	10.9%
Industrial processes	4.59	3.81	-17.0%
Agriculture	37.71	36.17	-4.1%
Waste	3.87	2.84	-26.6%
Total gross emissions	**78.42**	**68.96**	**-12.1%**
Total net emissions (after forestry removals)	**49.09**	**55.53**	**13.1%**

As the chart shows, our 2030 gross emissions are projected to fall by only 12.1% by 2030 relative to 2010. This reflects our unambitious policy settings: the emissions trading scheme (ETS) does not cap emissions,[19] and specific policy interventions such as the "clean car discount" scheme have only a marginal impact. And, when forestry is taken into account, our net emissions are projected to be 13.1% *higher* than they were in 2010.[20]

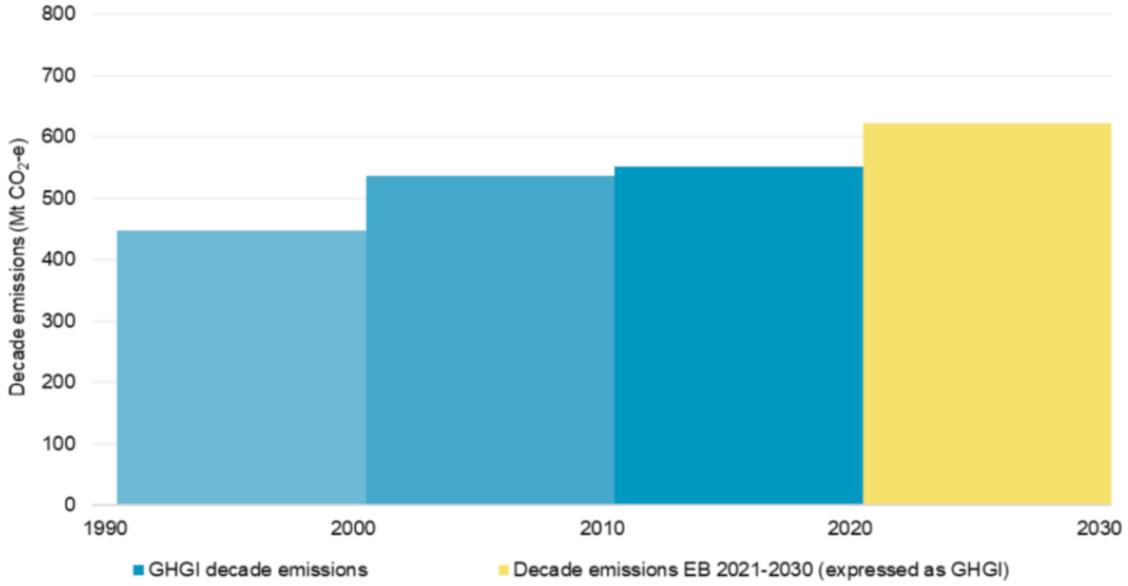
[17] Climate Change Commission Ināia tonu nei: A low emissions future for Aotearoa (May 2021) at 191.

[18] New Zealand's Fifth Biennial Report under the United Nations Framework Convention for Climate Change (Ministry for the Environment, December 2022), ch 4.

[19] The ETS is commonly referred to as a "cap and trade" scheme. However, it is merely a pricing mechanism. Businesses in certain industries are required to surrender one unit for each tonne of CO_2e they emit. The industries covered are budgeted to have emissions of around 32 Mt in 2023. However, the number of units available is not restricted to 32 Mt. The units available to these businesses include: 6 Mt free allocation; 16 Mt auctioned (up to 24 Mt due to cost containment reserve); and 144 Mt are currently "stockpiled": Climate Change Commission Advice on NZ ETS unit limits and price control settings for 2023-2027 (July 2022). Furthermore, because the ETS treats removals from forestry symmetrically with emissions, ETS prices are unlikely to rise high enough to induce significant reductions in gross emissions. That is, rising prices are kept in check by conversions to forestry which make more units available.

[20] The net emissions figures are based on UNFCCC accounting. The Climate Change Commission uses a different measure (the modified activity-based approach) which makes historic emissions look worse than they actually were (pre-1990 forests are disregarded) and makes 2025-35 emissions look better than they will be (certain harvesting related emissions are disregarded). For this reason, I prefer to focus on gross emissions and net emissions using UNFCCC figures.

Indeed, our net emissions are projected to be *higher* for 2021-30 than in any of the three previous decades:[21]



Taking meaningful climate action is difficult politically: there are vested interests in the oil, gas and agricultural industries; and action typically imposes short term costs for long term benefits that depend on other countries taking action as well. The Climate Change Commission and policy makers in Aotearoa New Zealand have preferred to focus on the 2050 target and gaining broad support, and not on the urgency required this decade to limit warming to 1.5°C.

But time is running out. The IPCC has estimated the remaining "carbon budget" from 1 January 2020 left before we exceed 1.5°C warming as 500 billion tonnes.[22] At the current rate of carbon dioxide emissions this will be fully spent by the early 2030s.[23]

Despite the challenges for judicial system to engage in climate policy, it does have some institutional advantages in terms of not being beholden to short-term election cycles and the ability to digest and act on the best scientific evidence. Accordingly, there is a special reason for lawyers as a profession to be climate conscious.

D. What can lawyers do about climate change?

Introduction

Absent much greater action on climate change, the social and economic harm from climate change will continue to worsen. A stable climate is the foundation for a stable civilisation and the rule of law; breaching the 1.5°C Paris temperature goal threatens both.

Yet, it is relatively straightforward to state what is required to avoid this outcome: we must rapidly reduce greenhouse gas emissions by decarbonising the economy and reducing methane emissions from agriculture. Although climate change is a global problem, it will be only solved by the sum total of local responses.

---

[21] See Lawyers for *Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064 at [288], reproducing the diagram from the evidence of Dr Will Taylor for LCANZI.

[22] Climate Change 2022: Mitigation of Climate Change, Summary for Policymakers (IPCC, Contribution of Working Group III to the Sixth Assessment Report of the IPCC, 2022) at 10.

[23] This is based on a 50% chance of limiting warming to 1.5°C. In order to have an 83% chance that warming is limited to 1.5°C, a smaller budget is implied which will be exhausted before the end of this decade.

In these circumstances, what can a climate conscious lawyer do?

To start with, lawyers should understand the basic facts and implications of climate change (which I have tried to outline in this paper). All lawyers should acquire and maintain an understanding of the issue, our response to it, and the adequacy of that response.

I have set out below examples of actions that we can then take in our professional lives as climate conscious lawyers.

As trusted advisors we can offer a climate lens

Our clients generally expect our advice to be holistic and not narrowly legalistic. If there are financial, emotional, reputational or ethical considerations to an issue, then they should form part of well-rounded advice.

The same applies for climate change considerations that are increasingly on the commercial radar. Businesses face a myriad of risks from a changing climate, from supply chain disruption to damaged assets to changes in demand patterns.

Businesses also face legal and reputational risks as contributors to climate change. At the extreme, the social licence of some businesses will be in jeopardy if they continue to be large emitters even where this is currently "lawful". As consumers increasingly take into account the emissions from the goods and services they consume, the temptation will be for business to portray themselves as moving in the right direction while being mindful of the risks of "greenwashing".

Directors will also become increasingly exposed to the risk of breaching their duties if climate issues are not properly canvassed.[24]

Climate change issues are currently front of mind for many businesses and public bodies, and lawyers will often be in a position to educate and influence board rooms and administrative decision makers, and to encourage better decisions.

As contract drafters and transactional lawyers, we can help articulate and allocate climate risks

I have described what a world with a 2-4°C temperature rise is predicted to be like. More extreme weather and sea level rise will damage property and other assets, and disrupt normal activities. Contracts will increasingly need to anticipate and allocate such risks between the parties.

Similarly, in thinking about investments and other major transactions, lawyers will need to ensure that climate-related risks are identified and avoided, or properly priced in.

In terms of significant new investments, clients will need to start thinking about economic resilience to climate change and the wisdom of pursuing any project that is inconsistent with the pathway to 1.5°C.

[24] See Chapman Tripp Climate Change Risk Legal Opinion (October 2019): https://chapmantripp.com/media/r30jdd05/climate-change-risk-legal-opinion-2019.pdf

Law reform

Ensuring that a transition to a low carbon economy occurs, and is as just as possible, will require many rounds of new legislation and adaptation by the common law.

In terms of statutory reform, our present framework lacks adherence to 1.5°C pathways. In particular, there needs to be an overall maximum amount that New Zealand will emit based on our share of the remaining carbon budget for 1.5°C. Otherwise we will continue to kick the can down the road and delay meaningful progress. Without such an overall limit, our emissions trading scheme will continue to be "cap and trade" without the cap. We must also rethink the treatment of forestry: at the moment land is being converted to pine forests in perpetuity within the ETS when the greater priority should be to reduce our gross emissions.

The law will also need to be able to adapt and respond to the issues which will arise in relation to managed retreat, pressure on resources, and compensation claims, or the rule of law will not survive.

Climate conscious lawyers can help address these difficult issues and raise the quality of regulation through lobbying and submissions. It will require adaptability, creativity, courage and understanding of what the core principles of the rule of law are; fairness, transparency, accountability, and respect for the rights of individuals while not losing sight of the needs of society as a whole.

Public interest litigation can try to shift the dial on the climate response

There is considerable scope for public interest litigation in the climate arena.[25] The range of issues that could be tested include: exploring the legal duties of the Government to take climate action, testing the Climate Change Commission's application of its statutory framework, challenging public body decisions that increase emissions, challenging local government decisions to develop areas that will not be viable with sea level rise, testing corporate statements about climate action, and seeking compensation from major emitters. Some of these issues have begun to be explored in the recent cases discussed in Section E below.

We can also lower our own carbon footprints

There are many good reasons for lawyers to reduce their carbon footprints, including as our clients seek to measure their own emissions and need to account for the emissions generated through their acquisition of legal services. Thinking through how we create emissions through our professional activities and how we can reduce them as a valuable exercise. Cutting business travel to essential trips is an obvious low hanging fruit.

[25] On the pedigree of public interest litigation in New Zealand, see *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) as discussed in Jack Alexander "'Busybodies, Cranks and Mischief-Makers': Revisiting *Finnigan v New Zealand Rugby Football Union* and the Pro Bono Ethos" (2017) 48 VUWLR 389.

E. Recent climate litigation in Aotearoa New Zealand

Introduction

In this section I briefly describe climate litigation that is currently before the courts in Aotearoa New Zealand.[26] Given that the cases are still before the courts and that I have been involved in a number of them, I have tried to describe them with editorial comment.

The cases share a common motivating belief that the current policy decisions on climate change are insufficiently ambitious relative to the scientific evidence as to what is required to limit global warming to 1.5°C. In adjudicating these cases, there has been no contention over the existence of anthropogenic climate change and the reports of the IPCC have been taken as representing the scientific consensus. However, the courts have seen the appropriate response to climate change as complex and requiring a holistic approach which balances the competing scientific and political considerations.[27] As such, the courts have so far been reluctant to pass judgment on the sufficiency of the parliamentary and executive response to climate change.[28]

By way of introduction, the cases I discuss below involve:

- attempts to hold administrative decisions over the granting of petroleum exploration licences and the establishment of regional transport plans to account against the required response to climate change;
- an invitation to the courts to impose specific climate target on companies which contribute significantly to our greenhouse gas emissions;
- an argument that the Government is under a duty to protect current and future generations from climate change which it is failing to discharge; and
- a claim that the Climate Change Commission's advice to the Government is insufficiently ambitious.

[26] For an international overview see Isabella Kaminski "Why 2023 will be a watershed year for climate litigation" The Guardian (online ed, London, 4 January 2023) https://www.theguardian.com/environment/2023/jan/04/why-2023-will-be-a-watershed-year-for-climate-litigation.

[27] The courts have engaged with climate change issues in a measured way in these early cases. There is a natural concern for the appropriate role of the courts given comity issues and institutional constraints. On the other hand, the courts have not yet considered the difficulties that Parliament and the Executive face in adequately responding to climate change. Accordingly, *relative* institutional competence has not yet been considered.

[28] A background debate is also occurring in some of these cases as to the intensity of review. On the one hand, is the idea that some administrative decisions warrant more intense scrutiny and that climate cases are in this category: see for example *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [49]-[51]; and *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064 at [71]-[76]. The other view is that the question is one of legality and it is unhelpful to talk about intensity of review: *All Aboard Aotearoa Inc v Auckland Transport* [2022] NZHC 1620 at [87]; and *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 at [40]-[47]. None of the cases have turned on this difference of approach, and it may be more about how the judicial reasoning process is described. The issue will no doubt receive appellate consideration in an appropriate case.

Students for Climate Solutions Inc v Minister of Energy and Resources [2022] NZHC 2116, [2022] NZRMA 612

In June 2021, the Minister of Energy and Resources granted petroleum exploration permits for the onshore Taranaki region. The applicant contended that the decision-maker failed to properly consider the climate change implications of the permits, and specifically to heed the May 2021 advice of the International Energy Agency that limiting the rise of global temperatures to 1.5°C required a moratorium on new oil and gas fields.[29]

The Court dismissed the application for judicial review on the basis that climate change was not a mandatory relevant consideration in respect of the granting of petroleum exploration permits under the Crown Minerals Act 1991 (CMA). In particular, the purpose of the Act was to *promote exploration* and the Act contained a carefully crafted set of considerations.[30] Furthermore, Parliament had already spoken as to the interface between the regime for petroleum exploration and climate change by amendments in 2018 which banned exploration permits other than for the onshore Taranaki region, but retained the purpose of promoting exploration.[31]

The Court also considered the effect of s 5ZN of the Climate Change Response Act 2002. Section 5ZN provides as follows:

> **5ZN 2050 target and emissions budget are permissive considerations**
>
> If they think fit, a person or body may, in exercising or performing a public function, power, or duty conferred on that person or body by or under law, take into account—
>
> (a) the 2050 target; or
>
> (b) an emissions budget; or
>
> (c) an emissions reduction plan.

On its face, the effect of s 5ZN is to make the listed climate change issues permissive relevant considerations for the exercise of any public function. However, the Judge also expressed the view that the specific regime for exploration permits trumped this general provision.[32] In other words, not only was climate change not a mandatory relevant consideration but the decision-maker would have erred if climate change had been considered at all.[33]

The decision is currently under appeal. In addition, the Crown Minerals Amendment Bill was introduced in December 2022. The Bill proposes to change the word "promote" in the purpose statement of the CMA to more neutral language that neither requires nor inhibits development of Crown-owned minerals, to increase flexibility in the management of Crown-owned resources. This is likely to ensure that climate change can be taken into account.

---

29 At [55]-[57].
30 At [63]-[73].
31 At [75].
32 At [76]-[79].
33 This illustrates the difficulty in ensuring that macro-level decisions about emissions budgets flow through to operational decisions. This is one of the reasons that LCANZI advocates for an amendment to the New Zealand Bill of Rights Act 1990 to expressly recognise a right to a sustainable environment.

All Aboard Aotearoa Inc v Auckland Transport [2022] NZHC 1620[34]

A Regional Land Transport Plan (RLTP) is a transportation planning document. The RLTP for a region sets out its land transport objectives and policies, and identifies short-to medium-term investment priorities. RLTPs are prepared every six years.

Auckland's most recent RLTP was approved by Auckland Transport in June 2021. Greenhouse gas emissions from transport account for approximately 40% of Auckland's emissions,[35] and increasing the use of public transport as well as cycling and walking has the potential to significantly reduce emissions. Despite this, the investment programme envisaged in Auckland's 2021 RLTP would see predicted road transport emissions increase by 6% between 2016 and 2031.[36]

All Aboard Aotearoa sought judicial review of the decision to approve the RLTP on various grounds including that the relevant committee could not be satisfied that the RLTP was consistent with the Government Policy Statement (GPS) on land transport which required investment decisions to support the rapid transition to a low carbon transport system that reduces greenhouse gas emissions.[37]

The Court dismissed the application for review. In relation to the GPS, the Court found that compliance with the GPS had to be approached on an overall basis as climate change was one of four strategic priorities, the others being safety, better travel options and improving freight connections. The Court found that the committee properly directed itself and it was open to it to be satisfied that the RLTP was consistent with the GPS.

The decision is under appeal.

Smith v Fonterra Co-Operative Group Ltd [2021] NZCA 552, [2022] 2 NZLR 284[38]

Mike Smith is a kaumatua of Ngāpuhi and Ngāti Kahu. In the belief that the Government's response to climate change is insufficiently ambitious, Mr Smith seeks to use the common law to directly limit the emissions of some of the largest contributors to greenhouse gas emissions in Aotearoa New Zealand.[39]

He claims in tort law against Fonterra, Dairy Holdings Ltd, electricity generator Genesis Energy, which runs the Huntly power station; NZ Steel, owner of the Glenbrook Steel Mill; Z Energy, NZ Refining Company, and BT Mining, a joint venture between Bathurst Resources and Talley's Energy operating the Stockton mine on the South Island's West Coast. He alleges that the defendants' contributions to climate change constitute a public nuisance, negligence, and breach of a duty to cease contributing to climate change, and seeks to require each company's emissions to reach net zero by 2030.

---

34 LCANZI is a member of All Aboard Aotearoa Inc along with Generation Zero, Bike Auckland, Movement, Women in Urbanism, Greenpeace Aotearoa.

35 At [29].

36 At [177]. This figure takes into account expected population growth over this period. In addition, when anticipated improvements in vehicle efficiency and planned central government interventions are taken into account the overall projected change is a 1% decrease in emissions.

37 At [103].

38 LCANZI appeared as an intervener in the Supreme Court hearing, supporting Mr Smith's argument against strike out and submitting that if the claim was to be struck out it should be on as narrower basis as possible to allow for potential future developments in the interface between tort law and climate change.

39 In a similar action in The Netherlands, the Hague District Court recently ordered the Royal Dutch Shell company to reduce its emissions by 45% by 2030, relative to 2019, across all activities including both its own emissions and end-use emissions: *Milieudefensie v Royal Dutch Shell*, 26 May 2021. The decision is under appeal.

In the High Court, the claims in public nuisance and negligence were struck out, but the claim based on a climate duty was allowed to go to trial. However, on appeal all three claims were struck out. The Court of Appeal considered that the courts were not well suited to developing an appropriate regulatory response to climate change,[40] and that Mr Smith had failed to show a physical or temporal relationship between the defendants and the harms he alleged that he was suffering or in the future would suffer from climate change.[41]

Mr Smith's appeal to the Supreme Court was heard in August 2022,[42] and a decision is awaited.

Smith v Attorney-General [2022] NZHC 1693

In addition to his tort law claim, Mr Smith has brought proceedings against the Crown alleging breaches of a duty to protect the plaintiff and future generations from the adverse effects of climate change.[43] The source of the duty is said to include the public trust doctrine, the New Zealand Bill of Rights Act 1990, tikanga Māori and our international law obligations. He seeks the Court to intervene in the Parliamentary and executive response to climate change due to the inadequacy of those responses.

The claim was struck out in the High Court based on concerns that it was inappropriate to import private law concepts of a duty of care into public law,[44] and that the response to climate change involved a balance of competing social, economic, political and scientific considerations which the Court was not in a position to adjudicate over.[45]

The High Court decision has been appealed to the Court of Appeal.

Lawyers for Climate Action NZ Inc v Climate Change Commission [2022] NZHC 3064

LCANZI brought judicial review proceedings against the Climate Change Commission in relation to its advice to the Minister over our nationally determined contribution (NDC) under the Paris Agreement, and its recommendations for the 2022-25, 2026-30 and 2031-35 emissions budgets. LCANZI's concern was that the level of ambition contained in its advice was not commensurate with what the science says is required to contribute to limiting global warming to 1.5°C by 2030 and that the Commission had not complied with its obligations under the Climate Change Response Act 2002.[46]

---

40 At [16]-[34].

41 At [99]-[113].

42 The appeal focussed on the importance of determining the role of tort law in the context of a trial rather than at strike out, the role of Tikanga evidence in terms of the development of the law and the ability of the Court to fashion appropriate relief such as through suspended remedies.

43 At [22]-[32]. The action has similarities to the famous case of *Urgenda Foundation v State of the Netherlands* (Supreme Court of the Netherlands, 20 December 2019) which found that the Dutch Government's climate targets were insufficiently ambitious to comply with its human rights obligations and required the Government to meet an emissions goal of 25% reduction from 1990 levels by 2020. See also the recent decision of the German Constitutional Court in *Neubauer v Germany*, 24 March 2021, which held that the German government had failed to introduce a legal framework that is sufficient to swiftly reduce greenhouse gases and to limit the increase in global temperature to well below 2°C, and preferably to 1.5°C, compared to pre-industrial levels as stipulated in the 2015 Paris Climate Agreement. The complainants claimed that the reduction of CO_2 emissions specified in the Federal Climate Protection Act-a 55% reduction by 2030 from 1990 levels-was insufficient and would exhaust Germany's share of the remaining global CO_2 budget by 2030 at the expense of future generations.

44 At [113]-[116].

45 At [136]-[146]. Claims founded in the New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi were also struck out.

46 In a similar vein, the United Kingdom's net zero strategy was recently subject to a successful judicial review application in *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), [2023] 1 WLR 225. The applicant successfully argued that the strategy did not comply with the relevant legislation as it lacked detail as to how the United Kingdom's sixth carbon budget would be met.

For its review of the NDC, the Commission sought to determine where Aotearoa New Zealand should be at by 2030 by applying the percentage reductions for each greenhouse gas that the IPCC's 2018 Special Report found would give a 50-66% chance of limiting warming to 1.5°C. For net CO_2 (that is, gross CO_2 emissions less removals from forestry), the IPCC found that a 40-58% decrease was required between 2010 and 2030. However, in order to determine the 2030 net CO_2 level required, the Commission applied this range to our 2010 gross CO_2 emissions (35.0 Mt) rather than our 2010 net CO_2 emissions (5.0 Mt). Accordingly, the Commission proceeded on the basis that a 250% increase in net CO_2 from 5Mt to 17.5 Mt would be consistent with the 2018 Special Report.

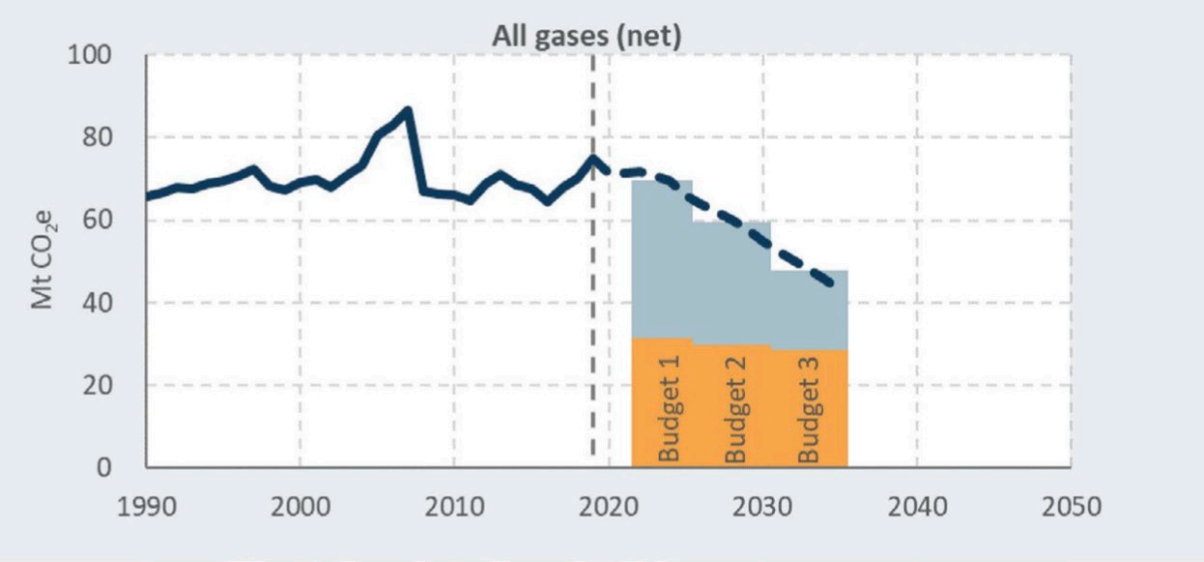
The High Court agreed that the Commission had applied the 2018 Special Report in a way that was potentially misleading.[47] That is, it could wrongly lead a reader to believe that the Commission's recommendation represented a level of ambition that was mathematically in line the IPCC 1.5℃ global pathways, which was not the case.[48] However, the Judge found that key question was whether the advice had misled the Minister as the intended recipient of the advice.[49] Her Honour found that although the Cabinet paper repeated the potentially misleading impression of mathematical alignment, it was clear from an appendix that the Minister understood the approach taken by the Commission and so no reviewable error had occurred.[50]

In terms of the statutory purpose of the domestic emissions budgets, the Judge agreed that the proposed budgets did not put New Zealand on track to reduce domestic net emissions in line with the IPCC global pathways.[51] However, her Honour went on to find that although one of the statutory purposes of the budgets was to contribute to the global 1.5°C effort, this was in the nature of an "aspiration" that was to be "kept in mind", rather than an enforceable legal duty.[52]

Finally, LCANZI was concerned that the accounting methodology chosen by the Commission made the trajectory of our emissions looks much better than they actually are. As shown in the figure below paragraph 0 above, under UNFCCC accounting (which is the best measure of what the atmosphere will see),[53] our net emissions will be higher in 2021-30 than in any of the three previous decades. In contrast, the Commission's preferred way of accounting for emissions is to use the modified-activity based measure or MAB. This factors out pre-1990 forests and also (from 2021) treats plantation forests differently. The effect is to make our historic emissions in 1990 to 2025 look higher than they actually were, and future emissions from 2025 to 2035 look lower than they actually will be.

47 At [115].
48 Rather, the Commission departed from a mathematical approach and applied the IPCC's percentage reductions to gross CO_2 to avoid New Zealand being penalised for the cycles of trees already planted.
49 At [115].
50 At [119].
51 At [11(d)].
52 At [120].
53 At [304].

As a result, the Commission's demonstration path (copied below from fig 5.3 of its May 2021 budget recommendations) looks much more ambitious than it actually is in terms of what the atmosphere will see:



In terms of the choice of MAB over UNFCCC accounting, Mallon J agreed that this choice alters whether our emissions will appear to have increased or decreased between 2021 and 2030 relative to the previous decade.[54] However, she also found that the Climate Change Response Act 2002 did not mandate the use of GHGI net.[55]

The decision has been appealed.

F. Conclusion

This decade is crucial to averting a climate catastrophe which will adversely affect human rights and threaten the rule of law. Lawyers have an important role to play, both in our everyday legal practices and by stepping up to raise awareness and push for greater ambition. While this is a role that will not come naturally to most of us, no one else has this problem for us.

[54] At [295].
[55] At [274].