

**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**  
Appellant

**And** **The Climate Change Commission**  
First Respondent

**And** **Minister for Climate Change**  
Second Respondent

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**NOTICE OF APPEAL**

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Dated 21 December 2022

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**05.0001**

## NOTICE OF APPEAL

The appellant in the proceeding identified above, Lawyers for Climate Action NZ Incorporated, gives notice that it is appealing to the Court against the decision of Her Honour Justice Mallon delivered in the High Court at Wellington on 23 November 2022 in *Lawyers for Climate Action NZ Inc v The Climate Change Commission & Minister for Climate Change* [2022] NZHC 3064 (CIV 2021-485-341).

1. The specific grounds of appeal are:

### *First ground of review*

- a. In relation to the Climate Change Commission's (**Commission**) advice on New Zealand's nationally determined contribution under the Paris Agreement (**NDC Advice**), the learned Judge found that:
  - i. The Intergovernmental Panel on Climate Change's (**IPCC**) 2018 Special Report sets out global pathways consistent with limiting global warming to 1.5°C above pre-industrial levels including calculations of how much net emissions in 2030 must fall relative to 2010 net emissions: [82].
  - ii. In applying these to New Zealand, the Commission applied the global pathways to New Zealand's 2010 level of gross CO<sub>2</sub> emissions to set a target for New Zealand's 2030 net CO<sub>2</sub> emissions: [83]. This implied that New Zealand's net CO<sub>2</sub> emissions could increase from 5Mt in 2010 to between 14.7Mt and 21.0 Mt in 2030 and still be consistent with the global effort to limit warming to 1.5°C degrees: [107].
  - iii. The Commission's presentation was potentially misleading because it purported to apply the IPCC global pathways as a scientifically modelled starting point, and then said that New Zealand should do more than this because it is a developed country, whereas the Commission made a value

judgment by applying the IPCC net:net pathway to New Zealand's 2010 gross CO<sub>2</sub> emissions rather than New Zealand's 2010 net CO<sub>2</sub> emissions, which means that New Zealand's share of reductions will in fact be less than the global average: [115], [119], [125], [127].

- iv. However, no reviewable error occurred as:
  - 1. the Commission's approach was a deliberate departure from the IPCC pathways: [11](a), [112]-[113], [127]; and
  - 2. the Minister for Climate Change (**Minister**), as recipient of the NDC Advice, was not in fact misled into thinking that the advice was mathematically in line with the IPCC's global pathways: [11](a), [119]-[127].

- b. The learned Judge erred in fact and law at [115]-[127] by:
  - i. focussing exclusively on whether the Minister was misled and without taking into account the broader function of the NDC Advice as advice to "the Government" (s 5K, Climate Change Response Act (**Act**)) that is required to be tabled in Parliament (s 5L) and is of importance to the public as a whole; and
  - ii. considering that the Commission's application of net:net pathways to New Zealand's 2010 gross CO<sub>2</sub> emissions was an available "value judgement" whereas:
    - 1. a mathematically valid comparison must be on a like-for-like basis;
    - 2. there was no probative evidence for the Commission's finding that New Zealand's net CO<sub>2</sub> emissions could substantially increase between 2010

and 2030 and still be consistent with the global 1.5°C effort; and

3. the Commission's analysis was self-contradictory in that it purported to apply the IPCC's global pathways but found that New Zealand's net CO<sub>2</sub> emissions could substantially increase between 2010 and 2030.

*Second ground of review*

- c. In relation to the Commission's advice in respect of New Zealand's emissions budgets set under the Act (**Budgets Advice**), the learned Judge erred by:
  - i. Finding that the purpose set out in s 5W of the Act of contributing to the global effort to limit the global average temperature increase to 1.5°C above pre-industrial levels is an aspiration rather than an obligation ([162]);
  - ii. Finding that contributing to the global effort to limit the global average temperature increase to 1.5°C above pre-industrial levels is not a bottom line, free-standing statutory purpose ([167]-[171]);
  - iii. Finding that the Commission did not misinterpret the purposes set out in s 5W of the Act in its Budgets Advice ([172]-[185]);
  - iv. Finding that the Commission did not misapply the mandatory relevant considerations under the Act in a way that resulted in the Commission failing to direct itself correctly to the statutory purpose ([186]-[190]).

*Third ground of review*

- d. In relation to the Commission's selection of the modified activity-based methodology (**MAB**) to measure net accounting emissions, the learned Judge erred in interpreting the Commission's obligation to advise the Minister on "the rules that will apply to

measure progress towards meeting emissions budgets and the 2050 target” (s 5ZA) as giving the Minister power to determine accounting methodology for measuring “net accounting emissions” under the Act ([241], [248] [253] [259]-[261] and [274]) in circumstances where:

- i. the term “net accounting emissions” refers to New Zealand’s UNFCCC national inventory reports as the mandated accounting methodology: cf [229]-[251];
- ii. the Act does not provide for the Minister to make any decisions in relation to the appropriate accounting methodology (or rules that will apply to measure progress): cf [274];
- iii. allowing the Minister to choose an accounting methodology has the effect of changing the meaning of the 2050 target under the Act and the Minister’s obligations which offends Henry VIII principles: cf [262]-[273]; and
- iv. the question of how emissions are measured is logically prior to the question of how to measure progress towards meeting emissions budgets and the 2050 target since the budgets and target have no meaning without an accounting methodology being specified: cf [256]-[261].

*Fourth ground of review*

- e. The learned Judge erred by finding that the Budgets Advice was not unreasonable, irrational and inconsistent with the purpose of the Act ([305]-[313]).
2. The appellant seeks the following judgment from the Court of Appeal:
    - a. Orders setting aside the High Court’s judgment;
    - b. A declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5°C-compliant NDC;

- c. A declaration that the Minister took into account the Commission's unlawful advice in setting the Amended NDC;
- d. A declaration that the Commission acted unlawfully in advising the Minister on emissions budgets to be adopted under the Act;
- e. A declaration that the Minister took into account the Commission's unlawful advice in setting the emissions budgets under the Act;
- f. An order requiring the Minister to reconsider the emissions budgets adopted under the Act; and
- g. Costs.

The appellant is not legally aided.

Date: 21 December 2022



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M C Smith  
Solicitor for the appellant

This notice of appeal is filed by M C Smith, solicitor for the appellant, of the firm Gilbert Walker. The address for service of the appellant is at the offices of Gilbert Walker, Level 35, 48 Shortland Street, Auckland.

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

- (a) posted to the solicitor at PO Box 1595, Shortland Street, Auckland; or
- (b) emailed to the solicitor at [service@gilbertwalker.com](mailto:service@gilbertwalker.com).