

LCANZI v CCC: Appellant's roadmap for oral submissions, 20 November 2023

1. Context

- IPCC AR6 Summary for Policy Makers (August 2021) 502.0643
- Remaining carbon budget: 502.0681 remaining budget of CO₂ + Taylor [58]-[59]
- Pathways for 1.5°C: SR18 (October 2018) 501.0013
- NZ track record: NZ GHG Inventory (April 2021) 503.0978; tables 504.1679. Sims [20]-[28]; UNFCCC data 504.1680.
- Our targets risk giving a misleading sense of ambition: subs [45]-[48]

2. What went wrong and why it matters

- Climate Change Response Act 2002: BOA tab 22, 1104
- Unresolved conflict in Commission's Advice between:
 - Recognising global emissions have to halve between 2010 and 2030 and developed countries like NZ need to take the lead 401.0211; 401.0376-77.
 - Recommending Budgets and an NDC which will see emission increase: subs [19]-[21]
- Court's role in supporting and enforcing the statutory scheme: *Smith v Fonterra* [35]

3. Ground 1

- What CCC did:
 - Chapter 21: 401.001 at 401.0369. Box 21.1: SR18 provided "a starting point, based on scientific modelling" while leaving ethical and political judgements about international equity to the Govt of the day
 - Supplementary Chapter 13: 403.0759 at 403.0915
- Expert evidence
 - Gale 201.0001: [14]-[23] (see also Forster, Rogelj, Wuebbles, Bertram, Taylor)
 - Smith 201.0140: Disagrees on "many levels" [107]-[110]
 - Forster reply 201.0420 (see also Sims reply)
- High Court: [112]-[127]: CCC advice "potentially misleading", but Minister aware of choice
- High Court did not address the problems of internally inconsistency: purported to follow SR1.5, yet implies emissions can increase and absence of probative evidence
- Respondents' evidence
 - Saying there were "value judgements" and this was a deliberate "choice", does not respond to the claim that the CCC's approach is inconsistent with SR1.5
 - Respondents' witnesses lack relevant expertise and are all clearly within CCC/MfE camp
- Consequences
 - Re NDC: subs [69]-[74]
 - Re Budgets: subs [31]-[42]

4. Ground 3

- Issue: Does the CCC/Minister have a discretion as to which emissions/removals count towards the budgets and 2050 Target, or does the Act prescribe UNFCCC/GHGI?
- High Court: [218]-[273]
- Plain meaning of "net accounting emissions": subs [146]
- Legislative history: Department Report (Sept 2019) our BOA tab 32; and Select Committee Report (2nd resp supp bundle, tab 1)
- Problems with the view that the Minister can choose an accounting methodology:
 - Accounting methodology must be determined before setting Budgets: subs [148]-[149]
 - The Act does not give the Minister power to change methodology: subs [150]-[152]
 - Inconsistent with Henry VIII principles: subs [153]-[156] and fn 209

5. Ground 2

- Issue 1: Is 1.5°C purpose in s 3 and s 5W an “aspiration” to be “kept in mind” as part of “overall assessment” in relation to the Budgets, or an operative legal requirement/bottom line?
- Issue 2: Did Commission’s Budgets Advice adequately address/meet the 1.5°C purpose?
- High Court: [162], [171], [191]
- Legislative history: Hansard (first reading), BOA Tab 27 1457 at 1459, 1464; Cabinet Paper, BOA Tab 30 1566 at 1571; Hansard (second reading), BOA Tab 28 1486 at 1490.
- What CCC did:
 - Chapter 4: 4.1 401.0069, Figure 4.2 401.0071, 4.2.2 401.0074, 4.2.4 401.0076
 - Chapter 5: Summary 401.0080, 5.1 401.0082, Figure 5.1 401.0083, 5.1.4 401.0086
 - Chapter 9: Summary 401.0204-410.0205, Global efforts 401.0209-401.0214
- What does contributing to 1.5°C mean?
 - UNFCCC: Art 2, BOA Tab 22 1187 at 1193
 - Paris Agreement: Arts 2, 3, 4, BOA Tab 22 1187 at 1249
 - *Netherlands v Stichting Urgenda*: BOA Tab 20 1028
 - *Neubauer v Germany*: BOA Tab 18 0887
 - Ministry for Environment Consistency Advice 301.0370
- Bottom line/operative requirement: *Trans-Tasman Resources*: BOA Tab 12 0432

6. Ground 4

- Overall effect of grounds 1-3 is that Budgets are unreasonable in *Wednesbury* sense
- Climate change cases call for higher intensity of review: High Court [71]-[76]
- *Taskin v Turkey*: BOA Tab 21 1075 at 1098
- But, regardless of whether heightened standard applies, threshold for illegality met

7. Justiciability

- High Court correct to find Advice justiciable: High Court [68]
- Advice required by Act, has statutory and public consequences, falls within JPRA s5(2)(b) & (c)
- Minister’s NDC decision also justiciable: *Thomson* BOA Tab 11 0374 at [101], [133]
- UNFCCC/Paris Agreement/IPCC reports provide “yardstick”

8. Admissibility

- High Court correct to find LCANZI evidence admissible: High Court [78]-[80]
- Evidence Act ss 7, 25: test is whether relevant and likely to be substantially helpful
- Evidence provides necessary background on subject matter, explains logical error, difference between GHGI and MAB
- Court not being asked to decide contested matters of science

9. Relief

- Relief sought: NOA 05.0001
- Given timing of next steps re Budgets and NDC, content for: order (f) to be confined to the 2026-30 and 2031-35 budgets; and Court to indicate Minister not expected to revise NDC1
- NDC is not “at least as stringent as” it would have been if mathematically correct advice had been provided
- The Budget decisions not out of scope: see memoranda of counsel dated 11 March and 18 May 2022 and Minister’s response to Budget Advice dated 16 May 2022