

Applicant’s hand up regarding admissibility of evidence

1. The first respondent raised objections to the admissibility of the expert evidence filed for the Applicant for the first time in its written submissions dated 14 February 2022. This document addresses the Applicant’s position on that issue.

Legal principles

2. The Commission addresses the legal principles applicable to the admissibility of expert evidence in judicial review proceedings at paragraphs [219] to [235] of its written submission. Its submissions rely heavily on U.K. case law and in particular draw on *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649. This case has however received limited judicial attention in New Zealand.¹
3. The starting point in this proceeding is not the U.K. case law but the admissibility rules set out in the Evidence Act 2006. Under s 25 of that Act, expert evidence is admissible where it is relevant and the Court is “likely to obtain substantial help” from the expert evidence.² The evidence must be within the scope of the witness’s expertise. Ultimately, it is these issues which must be addressed in determining the admissibility of expert evidence.
4. The orthodox New Zealand position is summarised in chapter 30 of *The New Zealand Judicial Review Handbook*.³
5. In any event, it is accepted by the Commission that expert evidence is admissible to assist the court in understanding the technical context of a decision or to demonstrate a technical error to a layperson. That is the purpose of the applicant’s expert evidence in this case. Such evidence must, as a matter of principle, be admissible for the Court to be able to perform its supervisory function under the judicial review jurisdiction.

Timing of objection

6. The Applicant also notes that the Commission did not notify the Applicant of its objections to the admissibility of its evidence until it

¹ Counsel is only aware of one New Zealand case in which *R (Law Society) v Lord Chancellor* has been cited: *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 3009. In that case the Court noted at [149] that the grounds of review were focused on validity of the regulations in issue, which did not require “a merits-based approach on contested evidence.” It was therefore unnecessary to determine the conflicts in the experts’ evidence (at [196]). The Court’s reference to *R (Law Society) v Lord Chancellor* was therefore obiter and has not gone uncriticised: see *New Zealand Animal Law Association v Attorney-General: New Zealand’s most significant animal law case in a generation* (2021) 29 NZULR 593.

² The “substantial help” criterion involves a consideration of the relevance, probative value and reliability of the evidence – *Mahomed v R* [2010] NZCA 419.

³ Smith, *The New Zealand Judicial Review Handbook*, chapter 30.

served its submissions on 14 February 2022, two weeks before the hearing.

7. If this proceeding were a trial involving briefs of evidence rather than affidavits, the Commission would have failed to comply with High Court Rule 9.11. That rule requires any challenge to the admissibility of evidence to be notified within 20 working days after the receipt of the brief and if that challenge is not resolved between the parties within a further 10 working days, it is then referred to the Court.
8. This rule is phrased as applying to briefs of evidence, but the rationale for it applies equally to affidavit evidence. As Jagose J stated in *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2020] NZHC 1233, (2020) 25 PRNZ 347:

Although the time limits applying in relation to challenges to briefs may be less observable in proceedings in which affidavits are adduced, the principle should be no different. The objective is challenges to admissibility are addressed in advance of hearing or trial.

9. In contrast to the need for early notification of objections to admissibility, the Commission first raised its objections to the admissibility of the Applicant's evidence on 14 February 2022 in circumstances where:
 - a. It had been in receipt of the majority of the Applicant's evidence since 24 September 2021, some **20 weeks** prior to serving its submissions;⁴
 - b. In December 2021, the Commission filed extensive evidence of its own, much of which referred and responded to the Applicant's evidence;
 - c. The Commission had previously noted, before the Applicant had served its evidence, that it intended to file expert evidence;⁵ and
 - d. In its memorandum concerning the publication of pleadings dated 13 October 2021, the Commission referred in abstract terms to resolving admissibility issues before access to court documents is granted. The Commission did not, however, raise

⁴ The Applicant served two further affidavits after 24 September 2021, being the affidavit of Dr Joeri Rogelj (served on 29 September 2021) and the second affidavit of Dr William Taylor (served on 12 November 2021). The Applicant's reply evidence was served on 20 January 2022, although the Applicant apprehends that the Commission's primary complaint relates to the Applicant's evidence-in-chief.

⁵ Memorandum of counsel for the respondents dated 6 August 2021 at [23] – [25].

any concerns regarding the admissibility of the Applicant's evidence in this memorandum.

10. As a result, the Applicant and the Court are left in the unsatisfactory position where the Commission has raised extensive admissibility objections, which now appear to be central to its defence of this claim, shortly before the hearing. That is not the proper course.

The Applicant's expert evidence is admissible and within the expertise of each witness

11. The Applicant's expert evidence is all admissible. It is:
 - a. relevant to the matters in issue;
 - b. of "substantial help" to the Court, including because it explains the technical context of the Commission's Advice, identifies a technical error in that Advice which would not be obvious to a layperson, and explains the real world implications of the Advice; and
 - c. within the area of expertise of each witness.
12. The Applicant's evidence elucidates the technical background issues relating to climate change science and emissions accounting in order to provide clarity to the Court as to the logical error, statutory interpretation, and unreasonableness grounds of review pursued by the Applicant.
13. As the Commission itself says at [108] of its written submission: "Understanding these concepts [of climate change accounting] and the context in which they developed is therefore fundamental to understanding these claims and the Commission's response to them, and to address some of LCANZ' more generalised propositions and assumptions that are woven through its submissions."
14. Without this evidence, it would not be possible for a non-expert to understand the context for the Applicant's grounds of review.
15. In light of this, it is no objection to say, as the Commission does at [204] and following of its written submissions, that the evidence is inadmissible on the grounds it is ex post facto and was not before the Commission when it finalised its Advice. The Applicant's evidence does not present new factual material which was not before the Commission. Rather, it elucidates and explains why the Commission has made an error, based on the same underlying factual information which the

Commission had before it, in particular, the 2018 Special Report and New Zealand's Greenhouse Gas Inventory data.

16. The Commission seeks to characterise the Applicant's evidence as representing only a difference in views between the Commission and the Applicant's witnesses. That is not an accurate description of the Applicant's evidence and its purpose in this proceeding. The Applicant's evidence does not relitigate the substance of the Commission's advice, but instead explains what the Commission did and what the real-world consequences of this are. Without such evidence, the Commission's advice would in practical terms fall outside the Court's scrutiny.
17. Contrary to the Commission's broad and unfounded submissions that many of the Applicant's witness lack relevant expertise, the Applicant's witnesses are all well-qualified to address the issues that they each comment on. **Annexed** to this document is a table which summarises the evidence provided by each of the Applicant's expert witnesses and identifies that the evidence provided is within the expertise of the witnesses.
18. The above points address the admissibility of Applicant's initial evidence, and consequentially address the admissibility of its reply evidence. The Applicant's expert witnesses' reply evidence all responds to issues raised by the respondents' witnesses in relation to their original evidence. The one exception to this is Professor Sims who also addresses the question of a mathematical error in his reply evidence although he did not do so in his original evidence. However, as explained in his reply affidavit, Professor Sims does this in response to the implication made by one of the Commission's witnesses, Mr Smith, that Professor Sims would not agree with the Applicant's other witnesses on this issue and that this was why he did not comment on it.

How should the Court approach admissibility?

19. The Court's primary concern should be whether the expert evidence before it offers "substantial help" to the Court in determining the matters before it.
20. In this instance, that question is best approached as part of the assessment of the Applicant's grounds of review, rather than as a standalone or preliminary issue. Practically, there is no alternative to this approach available given that the Commission did not raise admissibility objections until immediately before this hearing.

21. When the Applicant's evidence is viewed together with its grounds of review it is clear that the evidence is relevant, that the Applicant's witnesses have relevant expertise, that their evidence explains the technical context of the Commission's advice, and as a result, it is substantially helpful in determining the issues before the Court.

Note on comments regarding independence and impartiality

22. The Applicant also wishes to respond to the comments made in the Commission and Crown's written submissions suggesting that the Applicant's submissions make unfounded and improper criticisms of the independence and impartiality of the respondents' witnesses.

23. The Commission's submissions (at paragraph 277 and footnote 239) do not accurately reflect the Applicant's submissions on this matter.

24. The Applicant's submission – made at paragraphs 115, 209, 210 and 251 of its written submissions – is that many of the respondents' witnesses are not independent (being employees of either the Commission or the Ministry for the Environment) and that their evidence is accordingly not impartial. It does not make any allegations beyond that.

25. In particular, contrary to footnote 239 of the Commission's submissions, the Applicant does not suggest that:

- a. any of the respondents' witnesses "would compromise their integrity and provide evidence contrary to their own professional views and judgement" or "have or would compromise their integrity in terms of the evidence they have given"; or
- b. "Dr Reisinger would compromise his integrity in order to obtain an appointment as a member of the Climate Change Commission".

26. No such allegations were made or intended. What the Applicant in fact says in its submissions, at [209] is:

In terms of the independence of the Respondents' experts, the Applicant notes that: the evidence of Mr Smith has to be read in the light of his leading role in preparing the parts of the Commission's advice that have been said to be in error; Dr Glade was an MfE employee between 2011 and 2019 and this relationship apparently continues in a contracted capacity; and Dr Reisinger was announced as a new appointee as a Commissioner to the Climate Change Commission on 22 December 2021.

27. Footnote 195 in respect of Dr Reisinger states:

<https://www.beehive.govt.nz/release/new-appointments-climate-change-commission-board>. An application for this position was presumably live at the time his evidence was given.

28. The question of independence is a relevant consideration in weighing the evidence of expert witnesses (in extreme cases, it can also go to admissibility, but the Applicant does not suggest that is the position here).⁶
29. The Applicant does not suggest any lack of integrity or impropriety on the part of Dr Reisinger or any of the respondents' witnesses. Rather, the Applicant's submission is simply that the majority of the respondents' witnesses do not have the same degree of independence as the Applicant's witnesses, which is a factor the Court is entitled to, and should, have regard to in weighing their evidence. With regard specifically to the appointment of Dr Reisinger to the Commission, the Applicant's view was that was relevant information to bring to the Court's attention and no criticism of Dr Reisinger was made or intended.

⁶ *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47

Annex: Table of Applicant’s expert evidence

Witness	Topics covered	Within expertise?
Dr Stephen Gale	<p>Comments on the calculation carried out by the Commission to determine a 2030 target for net CO2 that would be consistent with the global pathways in SR2018.</p> <p>His evidence elucidates the nature of the logical error issue by explaining what the Commission did and what mathematical/logical issues it gives rise to.</p>	<p>Expertise outlined at [1].</p> <p>Evidence relates to a question of practical mathematics and is well within his expertise.</p>
Professor Piers Forster	<p>Comments on the calculation carried out by the Commission and on Dr Gale’s affidavit. As an author of SR2018 he confirms that an error is made when the percentage reductions are applied to 2010 gross CO2. Provides technical background so the Court can assess whether there are any climate science accounting issues that fall outside Dr Gale’s evidence. His reply evidence confirms that these is nothing in the evidence of Dr Glade, Mr Smith and Dr Reisinger that causes him to change his views.</p>	<p>Expertise outlined at [1].</p> <p>There can be no question that views are within his expertise.</p>
Dr Joeri Rogelj	<p>Comments on the calculation carried out by the Commission and how the implications of SR2018 can be assessed for New Zealand. He is also an author of the IPCC’s SR2018 report.</p>	<p>Expertise outlined at [1]-[3] and in reply [4].</p> <p>There can be no question that views are within his expertise.</p>
Professor Donald Wuebbles	<p>Comments on the calculation carried out by the Commission and how the implications of SR2018 can be assessed for New Zealand.</p>	<p>Expertise outlined at [1]-[3] and in reply [3].</p> <p>There can be no question that views are within his expertise.</p>
Dr William Taylor	<p>Dr Taylor provides background on New Zealand’s historic emissions and the urgency to reduce emissions. He comments on the following topics:</p> <ul style="list-style-type: none"> The 2010 CO2 value the SR2018 percentage reductions should be applied to and the implications of the Commission’s approach. 	<p>Expertise outlined at [2]-[4] and all issues addressed are within his expertise.</p>

Witness	Topics covered	Within expertise?
	<ul style="list-style-type: none"> • The differences between MAB and GHGI net as measures of net emissions. This demonstrates the materiality of ground 3 and provides technical background to the other grounds of review. • The extent to which the Commission assessed the costs and benefits of more ambitious budget levels which provides the technical background for the claim in ground 2 that the Commission failed to properly grapple with what 1.5 degrees requires in setting the budgets. 	
Dr Geoffrey Bertram	<p>Dr Bertram provides background as to measurement and reporting issues as well as New Zealand’s emissions record. He comments on the following topics:</p> <ul style="list-style-type: none"> • The use of a 2010 gross (rather than net) CO2 emissions figure when calculating a New Zealand contribution to the global emissions reductions from SR2018. • The use of MAB when calculating our net greenhouse gas emissions. • The level of ambition on which the Commission has based its recommendations. 	Expertise outlined at [1]-[8] and reply [33]-[35], and all issues addressed are within his expertise.
Professor Ralph Sims	<p>Provides brief background as to:</p> <ul style="list-style-type: none"> • the IPCC framework and assessments (in particular SR2018); • New Zealand’s contribution to the climate crisis; and • the impacts of climate change on New Zealand. 	Expertise outlined at [1]-[2], and all issues addressed are within his expertise.