

Hand-up: Amendment to relief sought

1. The Applicant's second amended statement of claim dated 3 November 2021 presently seeks relief as set out at paragraph 122 as follows:

122. On the basis of each of the grounds set out above, together and individually, the applicant seeks the following relief:

- a. a declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5°C-compliant NDC;
- b. a declaration that the Minister acted unlawfully in determining the Amended NDC in reliance on the Commission's advice on what would constitute a 1.5°C-compliant NDC;
- c. an order that the Commission re-consider the part of the Advice that relates to the 2030 NDC in accordance with the law as set out in the Court's judgment;
- d. an order that the Minister re-consider the Amended NDC in accordance with the law as set out in the Court's judgment;
- e. a declaration that the Commission acted unlawfully in proposing the first three emissions budgets;
- f. an order that the Commission re-consider the proposed first three emissions budgets in accordance with the law as set out in the Court's judgment; and
- g. such other relief as the Court thinks fit.

Relief in relation to the first ground of review

2. The Applicant's first ground of review is that, in preparing the NDC Advice for the Government, the Climate Change Commission made a logical error in its application of the IPCC's 2018 Special Report (an error of law and irrationality).

3. In the event that the Applicant succeeds on its first ground of review, the Court will then need to consider whether the orders sought at paragraphs 122(a) to (d) of the Applicant's second amended statement of claim ought to be made.

4. In relation to relief on this ground, the Commission's position is that:¹

¹ See paragraphs 386 and 387 of the Commission's written submissions.

- a. its advice on New Zealand’s NDC is now moot as the Commission has now given its advice on this to the Government, which since reset New Zealand’s NDC (the **Amended NDC**); and
 - b. if a further request for advice was made under s 5K of the Climate Change Response Act 2002, that advice may be prepared differently to the advice presently under review.
5. The Minister’s position is that:
 - a. relief is not appropriate including because the Minister independently analysed the Commission’s advice and was aware of different approaches to setting the NDC, and the Minister set an Amended NDC that is at least as stringent as would be required by the Applicant’s approach; and
 - b. an order for reconsideration of the Minister’s decision setting the Amended NDC (being an order in the nature of mandamus) is not available against the Crown.²
6. Having reflected on these submissions (but without conceding that they are correct), the Applicant now seeks in relation to the first ground (and in place of the orders sought at paragraphs 122(a) to (d) of its statement of claim):
 - a. a declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5°C-compliant NDC (as already sought at paragraph 122(a) of the Applicant’s second amended statement of claim); and
 - b. a declaration that the Minister took into account the Commission’s unlawful advice in setting the Amended NDC.
7. In these circumstances, it would also be open to the Court to “invite” the Minister to reconsider the Amended NDC in light of the Court’s judgment.
8. As noted in the Minister’s submissions (at paragraphs [274] to [275]), this was the approach taken by Ellis J in *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683. In that case, Ellis J found that there were errors in advice given to Cabinet by the Minister of Justice regarding the amount of compensation to be paid to the applicant who had been

² See paragraph 276 of the Minister’s written submissions.

wrongly imprisoned. Cabinet's decision (adopting the Minister's advice) was therefore made in error. Ellis J considered:

[139] [...] I have considerable reservations about any grant of relief in the terms sought by Mr McCoy. Notwithstanding that it was couched in declaratory terms, what he asks the Court to do is to quash the Cabinet decision. Even were that open to me (and I do not think: it is) I would demur, as a matter of comity and constitutional principle.

[140] In any event, my analysis above suggests that the real error here lay not in the Cabinet decision itself but in the advice that preceded it. Due to that advice, Cabinet has yet to have the opportunity properly to consider the critical issue, namely whether it wishes to treat Mr Pora consistently with those other claimants who have received compensation under the Guidelines at earlier points in time.

[141] The fundamental point is that, in my view, the Guidelines permit the quantum of compensation payable to an applicant for his or her non-pecuniary losses (i.e. the benchmarks stipulated in steps one and two) to be adjusted for inflation, where it is in the interests of justice to do so. I make a declaration accordingly.

[142] In light of that declaration, I also invite the Minister to consider whether, in the circumstances of Mr Pora's case, the interests of justice require the benchmarks in the Guidelines to be inflation adjusted. I am unable to see any impediment to her taking the matter back to Cabinet should that be seen as the proper outcome.

Relief in relation to other grounds of review

9. In relation to the Applicant's other grounds of review, the Minister notes that orders necessitating the reconsideration of the Commission's advice on the emissions budgets could delay the implementation of emissions budgets.

10. As noted at paragraph 123 of the Applicant's statement of claim, the Applicant:

[D]oes not seek to restrain the second respondent from proceeding to carry out his powers, functions and duties taking into account the Advice received from the first respondent. The applicant's position is that action by the second respondent consistent with the first respondent's Advice would be inadequate (and unlawful), but that it would prefer such action to be taken pending the determination of these proceedings than no action taken.

11. To address this issue, the Minister proposes (from paragraph [287] of his submissions) that: relief against the Minister should be suspended pending further submissions on the form of relief; or that the effect of

any declaration or order should be suspended whilst the issues are reconsidered by the Commission or the Crown.

12. The Applicant agrees that, in the event it is successful in relation to its second, third and/or fourth grounds of review, it would be appropriate to defer the issue of relief to allow for further submissions. This process would also afford the parties the opportunity to reach an agreed proposed position in relation to relief in light of the judgment.