

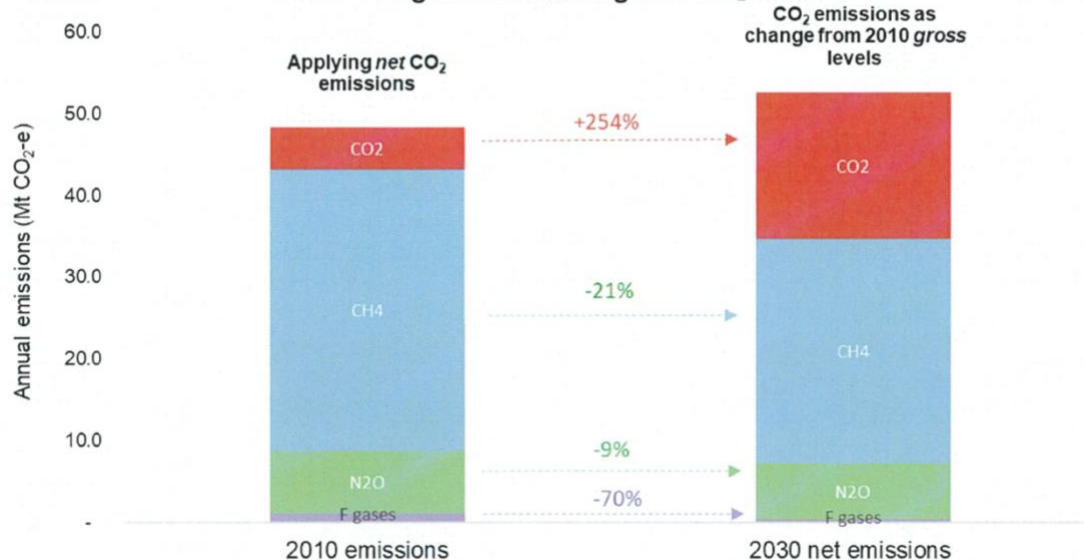
Reflections on the High Court decision in *Lawyers for Climate Action NZ Incorporated v Climate Change Commission* [2022] NZHC 3064

LCANZI brought judicial review proceedings against the Climate Change Commission because we consider that the level of ambition contained in its advice to the Minister is not commensurate with what the science says is required to contribute to limiting global warming to 1.5°C over the course of this decade.

The IPCC's 2018 Special Report provides the rule of thumb that emissions need to halve between 2010 and 2030.

In advising on the NDC, however, the Commission's said that we could be consistent with the 2018 Special Report and also have our emissions *increase* over this period as shown in the figure below from the evidence of Dr Will Taylor. The issue arises because the Commission applied the percentage reductions for net CO₂ to our 2010 level of gross CO₂.

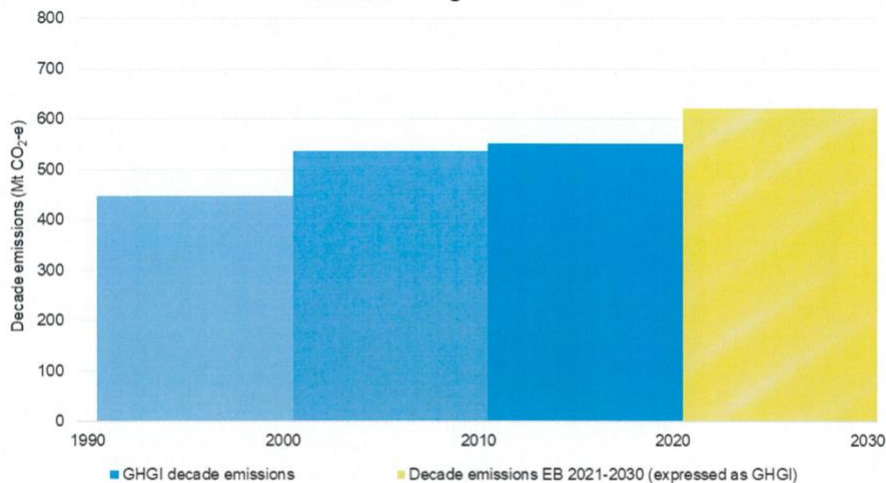
Figure 3.3: 2010 total emissions applying net CO₂ and CCC's 2030 total net emissions targets from 2010 gross CO₂



Source: NERA analysis of NDC calculator data.

We were also concerned that net emissions would be higher under the budgets in 2021-30 than in any of the previous three decades as shown below (also from the evidence of Dr Will Taylor).

Figure 4.4: Annual historic GHGI net emissions by decade 1991–2020 and CCC Emissions Budgets 2021–2030

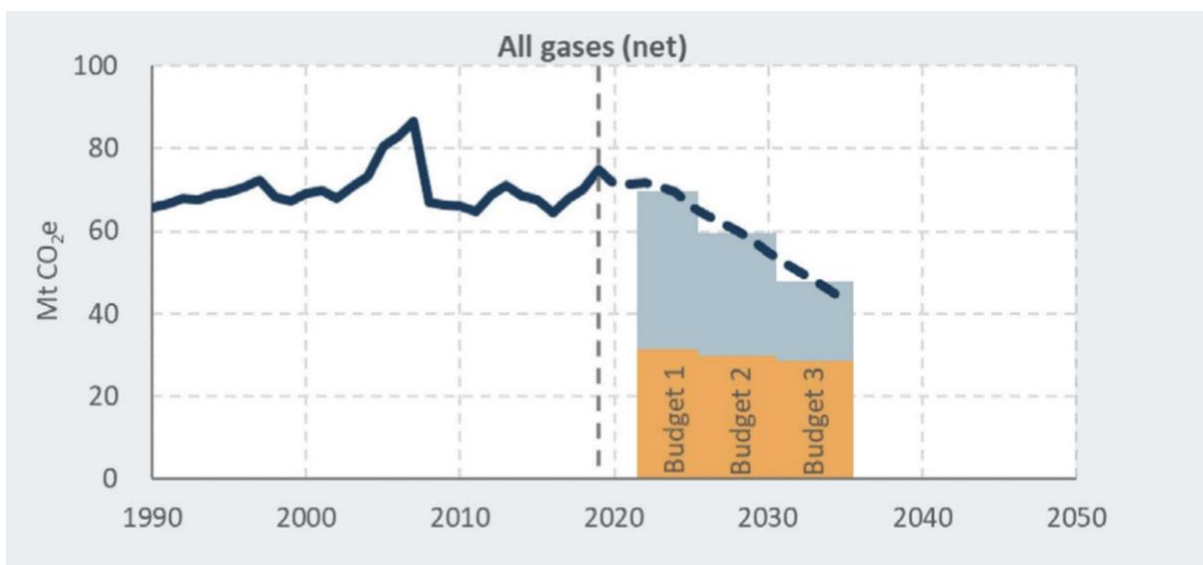


Source: NDC calculator; CCC Final Advice, p 363 and Table 22.1.

Note: See Appendix B.1 for calculations of decade totals. Values for 2020 emissions have not yet been published. I have estimated 2020 GHGI net emissions by taking emissions from the MAB accounting figures presented in Figure 5.3 of the Final Advice and backing out the difference in removals between MAB and GHGI presented in Figure 10.1 of the Final Advice (see Appendix B.4).

The figure above shows emissions the way that we report them under the United Nations Framework Convention on Climate Change. This is also referred to as “Greenhouse Gas Inventory net” or GHGI net.

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. As a result, the Commission’s demonstration path (copied below from fig 5.3 of the May 2021 recommendations) looks much more ambitious than it actually is in terms of what the atmosphere has seen and will see from New Zealand.



We considered that the presentation of these issues was obscure, so that an average reader would assume that the recommended budgets would put New Zealand in line with the 2018 Special Report.

While our application for review was dismissed, we did succeed on many issues.

The High Court confirmed that the Commission's advice (despite its status as advice rather than traditional government decision-making) can be subject to judicial review. This is because it is public advice with public consequences that are separate from the consequences of the Minister's ultimate decision.

The High Court also rejected the Commission's argument that our expert evidence was inadmissible "ex-post facto" evidence attempting to relitigate the Commission's substantive conclusions

In terms of the NDC analysis, Mallon J agreed that the Commission had applied the 2018 Special Report in a way that was potentially misleading. That is, it could wrongly lead a reader to believe that its recommendation represented a level of ambition that was mathematically in line with the IPCC 1.5°C global pathways. The Commission departed from a mathematical approach and applied the IPCC's percentage reductions to gross CO₂ to avoid New Zealand being penalised for the cycles of trees already planted. Her Honour noted this is an argument of fairness rather than mathematics.

However, Mallon J found that key question was whether the advice had misled the Minister as the intended recipient of the advice. Her Honour found that although the Cabinet paper repeated the potentially misleading impression of mathematical alignment it was clear from Appendix 2 of the Cabinet Paper that the Minister understood the choice made by the Commission and so no reviewable error had occurred.

In terms of the choice of MAB over GHGI net, Mallon J agreed that the choice of MAB rather than GHGI net alters whether our emissions will appear to have *increased* or *decreased* between 2021 and 2030 relative to the previous decade. She also found that the proposed budgets did not put New Zealand on track to reduce domestic net emissions by 2030 as per the IPCC global pathways.

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. She also found that the Climate Change Response Act did not mandate the use of GHGI net.

We are presently considering whether to appeal and will also seek to engage with the Commission over how it presents its work going forward and the Minister as to potential amendments to the Act to embed 1.5°C as a bottom line. The deadline for filing a notice of appeal is 21 December.