In the High Court of New Zealand
Wellington Registry

CIV 2023-

I Te Kōti Matua O Aotearoa
Te Whanganui-a-Tara Rohe

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**, a duly incorporated society having its registered office at Level 13, 70 Shortland Street, Auckland Applicant
And	**Minister of Climate Change**, Parliament Buildings, Wellington Respondent

STATEMENT OF CLAIM

Dated: 9 May 2023

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STATEMENT OF CLAIM

The applicant by its solicitor says:

Parties

1. The Applicant is an incorporated society of 300 lawyers who seek to ensure more effective action in Aotearoa New Zealand against climate change.

2. The Applicant has no private interest in the issues at stake in this proceeding. This proceeding is brought in the public interest, having regard to the serious threat that the climate crisis poses to all New Zealanders.

3. The Respondent is the Minister of Climate Change, a Minister of the Crown having responsibility for administering the Climate Change Response Act 2002 (**Act**), including part 2 of the Act which provides for the implementation, operation and administration of a greenhouse gas emissions trading scheme (**ETS**).

The climate crisis

4. The Intergovernmental Panel on Climate Change (**IPCC**) is the United Nations body tasked with assessing the science related to climate change.

5. The *Synthesis Report of the IPCC Sixth Assessment Report* was published in March 2023 (**2023 Synthesis Report**).

6. The findings of the 2023 Synthesis Report include that:

   a. Human activities, principally emissions of greenhouse gases, have caused global warming.

   b. Global surface temperatures have increased by approximately 1.1°C on average above pre-industrial levels.

   c. Climate change is a threat to human well-being and planetary health.

   d. Human-caused climate change has already had adverse consequences around the world including extreme weather patterns leading to droughts and flooding, sea level rises and loss of biodiversity.

e. There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all.

f. Deep, rapid and sustained reductions in emissions this decade are required in order to limit warming to 1.5°C with no or limited overshoot.

g. Every increment of global warming will intensify multiple and concurrent hazards.

7. These findings have been part of the scientific consensus for at least the last decade.

International commitments

United Nations Framework Convention on Climate Change

8. Aotearoa New Zealand is a party to the United Nations Framework Convention on Climate Change (**UNFCCC**).

9. Aotearoa New Zealand signed the UNFCCC on 4 June 1992 and ratified it on 16 September 1993.

10. The objective of the UNFCCC is to "achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (art 2).

11. In order to achieve this objective, the UNFCCC provides that parties should "take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects".

12. Aotearoa New Zealand is listed as an Annex I (developed) country under the UNFCCC.

13. Article 4 of the UNFCCC requires Annex I countries to "take the lead" to reverse the long-term trends in anthropogenic emissions.

14. More than 190 countries are parties to the UNFCCC.

Paris Agreement

15. The Paris Agreement is an international agreement under the UNFCCC (**Paris Agreement**).

16. The parties to the UNFCCC passed a resolution to adopt the Paris Agreement at the 21st Conference of the Parties to the UNFCCC held in Paris on 30 November to 13 December 2015 (**Decision to Adopt the Paris Agreement**).

17. Aotearoa New Zealand signed the Paris Agreement on 22 April 2016 and ratified it on 4 October 2016.

18. The Paris Agreement entered into force on 4 November 2016.

19. The central aim of the Paris Agreement is to strengthen the global response to the threat of climate change including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and by pursuing efforts to limit the temperature increase to 1.5°C (art 2).

20. In order to achieve that long-term temperature goal, the parties to the Paris Agreement have agreed to aim to reach global peaking of greenhouse gas emissions as soon as possible, and to undertake rapid reductions thereafter (art 4(1)).

21. The Paris Agreement requires each party to establish successive national climate action plans known as nationally determined contributions (**NDCs**) and submit them to the UNFCCC secretariat. Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives of their NDCs (art 4(2)).

22. The Parties' first NDCs were updated in 2020 and the parties must submit further NDCs every five years following that (art 4(9)). Each successive NDC for a party must represent a progression beyond the current NDC and reflect that party's "highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (art 4(3)).

23. Parties may engage in voluntary cooperation which involves the use of internationally transferred mitigation outcomes to achieve their NDCs provided that they adopt robust accounting measures to ensure, inter alia, the avoidance of double counting such that emissions reductions shall be used to demonstrate achievement of one Party's NDC only (art 6). This practice is known as "offshore mitigation".

Our NDC

24. Aotearoa New Zealand's current NDC was announced on 31 October 2021. It is a commitment to reduce net greenhouse gas emissions to 50 per cent below gross 2005 levels by 2030.

25. In terms that are comparable to Aotearoa New Zealand's previous NDC, this corresponds to a 41 per cent reduction when managed using a multi-year emissions budget starting from Aotearoa New Zealand's 2020 emissions target.

26. The Government estimates the NDC budget to be 571 million tonnes of carbon dioxide equivalent (**Mt CO_2-e**) for the 2021 to 2030 period (the **NDC Budget**).

27. As described in paragraphs 21 to 23 above, under this Paris Agreement, Aotearoa New Zealand may achieve the emissions reductions required to meet the NDC Budget through a combination of domestic mitigation measures and offshore mitigation.

2050 Target

28. The Climate Change Response (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**) came into force on 13 November 2019.

29. The Zero Carbon Act amended the Act to set a target for Aotearoa New Zealand to (s 5Q) (known as the **2050 Target**):

    a. reduce net accounting emissions of all greenhouse gases (except biogenic methane) to zero by 2050; and

    b. reduce emissions of biogenic methane to 24–47 per cent below 2017 levels by 2050, including to 10 per cent below 2017 levels by 2030.

Emissions budgets

30. The Act requires the Minister to set emissions budgets which must state the total emissions that will be permitted for the relevant emissions budget period, expressed as a net quantity of carbon dioxide equivalent (ss 5X and 5Y).

31. Emissions budgets are set with a view to meeting the 2050 Target and contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels (s 5W).

32. From 31 December 2021, there must be 3 consecutive emissions budgets, 1 current and 2 prospective, in place at any one time.

33. On 9 May 2022 the Minister published Aotearoa New Zealand's first emissions budgets as required by the Act, covering the period 2022 to 2035 (the **Emissions Budgets**).

    a. The emissions budget for the 2022 to 2025 emissions budget period is 290 Mt CO_2-e.

    b. The emissions budget for the 2026 to 2030 emissions budget period is 305 Mt CO_2-e.

c. The emissions budget for the 2031 to 2035 emissions budget period is 240 Mt CO_2-e.

34. The Minister must ensure that net accounting emissions do not exceed the emissions budget for each emissions budget period (s 5X(4)).

35. The emissions budgets must be met, as far as possible, through domestic emissions reductions and domestic removals. However, offshore mitigation may be used if there has been a significant change of circumstances that affects the considerations on which the relevant emissions budget was based and that affects the ability to meet the relevant emissions budget domestically (s 5Z).

36. On 16 May 2022, the Minister published Aotearoa New Zealand's first emissions reduction plan as required by the Act (the **Emissions Reduction Plan**).

37. The sum of New Zealand's net emissions in 2021 and the Emissions Budgets for the 2022 to 2030 period exceeds the NDC Budget by approximately 99 Mt CO_2-e (the **NDC Budget Shortfall**).

38. The Climate Change Commission (the **Commission**) recognised the NDC Budget Shortfall in chapter 22 of its 31 May 2021 *Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025* and concluded that offshore mitigation would be required for New Zealand to meet the NDC, as illustrated in the Commission's figure 22.1 reproduced below, albeit that it was not yet clear how New Zealand would access such offshore mitigation or what it would cost:

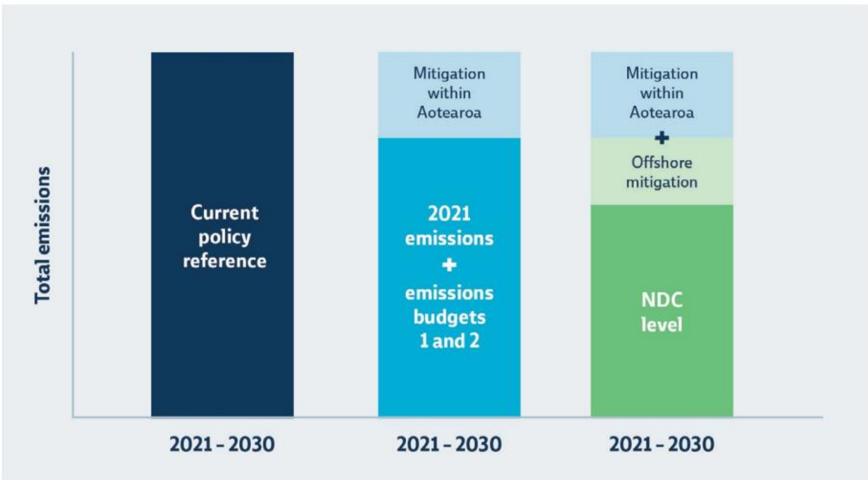

Figure 22.1: Illustration of the role of international mitigation in the NDC compared to emissions budgets

Emissions trading scheme

39. Part 4 of the Act establishes the New Zealand greenhouse gas emissions trading scheme (**ETS**).

40. The specific purpose of the Act in relation to the ETS is to (s 3(1)(b)):

> "provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—
>
> > (i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and
> >
> > (ii) assisting New Zealand to meet its 2050 target and emissions budgets."

41. The ETS has a central role in:

    a. reducing greenhouse gas emissions in Aotearoa New Zealand; and

    b. enabling Aotearoa New Zealand meeting its short- and long-term commitments to reduce greenhouse gas emissions.

42. Each entity subject to the ETS must surrender a quantity of New Zealand units (**NZUs**) for each calendar year that corresponds to the quantity of the entity's covered greenhouse gas emissions that year.

43. An NZU represents one metric tonne of carbon dioxide, or the equivalent of other covered greenhouse gases.

44. Entities subject to the ETS can trade NZUs, providing flexibility on where emission reductions are made and establishing a market price for NZUs. Entities are also able to bank NZUs (that have not yet been surrendered) for use in future years.

45. There are four sources of NZUs currently available:

    a. NZUs that have been banked by companies from previous years;

    b. new NZUs sold by the Minister on behalf of the Crown by auction;

    c. free allocation NZUs, that is, NZUs provided free to industries considered emissions-intensive and trade-exposed to protect their international competitiveness; and

d. NZUs earnt by forests that remove carbon dioxide from the atmosphere ("forestry removals") and a small quantity from "other removals".

46. The new NZUs potentially available for purchase at auction as described in paragraph 45.b above comprise:

a. a base volume; and

b. a reserve amount of NZUs available to be released if a specified trigger price is reached or exceeded by bidding at auction (the **Cost Containment Reserve**).

47. The net emissions that can be lawfully emitted in sectors of the economy covered by the ETS is constrained over time by the amount of NZUs described in paragraphs 45.a to 45.c above. Accordingly, the amount of new NZUs available for purchase at auction can be used to help achieve the Emissions Budgets, the NDC and the 2050 Target.

48. The Cost Containment Reserve is designed to make extra units available if the NZU price is unexpectedly high, and therefore only released in rare circumstances.

Emissions Trading Scheme volume and price settings

49. The settings governing the volume and price of new NZUs to be made available by auction as described in paragraph 45.b above are contained in the Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020 (**Regulations**). The Regulations are made by the Governor-General on the recommendation of the Minister (s 30GB).

50. Amendments to the Regulations are made annually to set:

a. a limit on the NZUs made available by auction;

b. a minimum price below which units will not be sold at auction;

c. the amount of NZUs available in the Cost Containment Reserve and the trigger price for their release;

d. a limit on the use of approved overseas units in the ETS; and

e. an overall unit supply limit, which is the sum of auctioned units, NZUs available by other means (i.e. free allocation), and approved overseas units.

51. Amendments to the Regulations are made for the five years ahead, on a rolling basis. Each year:

a. a further year's settings are added to the Regulations;

b. settings for the two years preceding the added year must be reconsidered and may be revised; and

c. settings for the first two years may be revised only if specified conditions are met.

52. In recommending amendments to the Regulations, the Minister must be satisfied that the limits and price control settings are in accordance with (s 30GC(2)):

a. the emissions budgets, and the NDC, that apply to the period for which the limits or price control settings are being prescribed or any period after that for which an emissions budget or NDC exists; and

b. the 2050 Target.

53. However, the limits and price control settings need not strictly accord with the emissions budgets or NDC as long as the Minister is satisfied that the discrepancy is justified, after considering the other matters specified under s 30GC(5) and, in relation to the price control settings, also the additional matters specified under s 30GC(6) (s 30GC(3)).

54. The matters specified under s 30GC(5) (the **Main Matters**) are:

a. the projected trends for New Zealand's greenhouse gas emissions in the 5 years after the current year, including—

i. the anticipated volumes of greenhouse gas emissions to which the emissions trading scheme applies (meaning emissions for which participants are required to submit returns or surrender units under this Act); and

ii. the anticipated volumes of greenhouse gas emissions to which the emissions trading scheme does not apply:

b. the proper functioning of the emissions trading scheme:

c. international climate change obligations and instruments or contracts that New Zealand has with other jurisdictions to access emissions reductions in their carbon markets:

d. the forecast availability and cost of ways to reduce greenhouse gas emissions that may be needed for New Zealand to meet its targets for the reduction of emissions:

e. the recommendations made by the Commission under s 5ZOA of the Act; and

f. any other matters that the Minister considers relevant.

55. The additional matters specified under s 30GC(6) in relation to the price controls (the **Additional Matters**) are:

a. the impact of emissions prices on households and the economy;

b. the level and trajectory of international emissions prices (including price controls in linked markets);

c. inflation.

56. In terms of the process for the annual update to the limits and price control settings:

a. the Commission makes a recommendation to the Minister for the limits and price control settings applying the same requirements as apply to the Minister (s 5ZOA); and

b. if the Minister makes a recommendation to the Governor-General that differs from the Commission’s recommendation, the Minister must prepare a report of the reasons for the difference and present a copy of the report to the House of Representatives and make the report publicly available (s 30GC(7)).

The 2022 update to the Emissions Trading Scheme volume and price settings

57. The most recent update to the Regulations is the Climate Change (Auctions, Limits, and Price Controls for Units) Amendment Regulations 2022 (**2022 Amendment Regulations**). The 2022 Amendment Regulations were promulgated on 12 December 2022, came into force on 1 January 2023 and cover the period 2023 to 2027.

58. Prior to the 2022 Amendment Regulations, the Regulations set the following relevant volume (in million (**m**) NZUs) and price settings for the ETS for the period 2022 to 2026.

	2022	2023	2024	2025	2026	Total
Base NZU auction volume	19.3m	18.6m	18.0m	16.5m	15.0m	87.4m
Auction reserve price	$30	$32.10	$34.35	$36.75	$39.32	

CCR volume	7.0m	7.0m	7.0m	6.8m	6.7m	34.5m
CCR trigger price	$70	$78.40	$87.81	$98.34	$110.15	
Total NZUs available by auction	26.3m	25.6m	25.0m	23.3m	21.7m	121.9m

The Commission's Recommendations

59. The Commission's recommendations under s 5ZOA of the Act in respect of the volume and price settings to be included in the 2022 Amendment Regulations (the **Commission's Recommendations**) were contained in its *Advice on NZ ETS unit limits and price control settings for 2023-2027* released in July 2022 (the **Commission's Advice**).

60. The Commission's Advice recommended the following base volume and reserve price settings for the auctions:

	2023	2024	2025	2026	2027	Total
Base NZU auction volume	16.3m	15.6m	14.0m	12.2m	10.4m	68.5m
Auction reserve price	$60	$64	$68	$71	$75	

61. The Commission's Recommendations set out in paragraph 60 above were based on key judgements set out in the Commission's Advice, including that:

    a. the base NZU auction volumes should be set in line with the Emissions Budgets, with the emissions budget volume allocated to sectors within and outside the ETS based on the sector sub-targets in the Emissions Reduction Plan, as represented in the table reproduced below from figure 5 of the Commission's Advice (which labels this figure as the "NZ ETS cap");

Mt CO_2-e	**2023**	**2024**	**2025**	**2026**	**2027**	**Total**
Emissions budget volume allocated to NZ ETS	32.3	31.1	28.7	26.2	23.7	142.0

    b. the emissions budget volume allocated to the ETS should then be adjusted for certain technical volume adjustments as represented in the table below:

Mt CO_2-e	2023	2024	2025	2026	2027	Total
Emissions budget volume allocated to NZ ETS sectors	32.3	31.1	28.7	26.2	23.7	142.0
Technical volume adjustment – liquid fossil fuels	-0.8	-0.8	-0.8	-0.8	-0.8	-4.0
Technical volume adjustment – coal and steel	-0.8	-0.7	-0.5	-0.5	-0.5	-3.0
Emissions budget volume allocated to ETS sectors after technical adjustments	**30.7**	**29.6**	**27.4**	**24.9**	**22.4**	**135.0**

c. a deduction should be made from the total NZU supply to account for the free allocation of NZUs described in paragraph 45.c above as represented in the table below:

	2023	2024	2025	2026	2027	Total
Total NZU supply consistent with the budgets	30.7m	29.6m	27.4m	24.9m	22.4m	135.0m
Industrial free allocation forecast	-6.4m	-6.3m	-6.3m	-6.2m	-6.1m	-31.3m
NZU supply consistent with the budgets after free allocation	**24.3m**	**23.3m**	**21.1m**	**18.7m**	**16.3m**	**103.7m**

d. finally, the NZU supply should then be reduced consistent with reducing the volume of previously banked "surplus" NZUs (estimated by the Commission at 49 million NZUs) towards zero by 2030 as represented in the table below to derive the base auction volume:

	2023	2024	2025	2026	2027	Total
NZU supply consistent with the budgets after free allocation	24.3m	23.3m	21.1m	18.7m	16.3m	103.7m
Surplus reduction	-8.0m	-7.7m	-7.1m	-6.5m	-5.9m	-35.2m
Base auction volume	**16.3m**	**15.6m**	**14.0m**	**12.2m**	**10.4m**	**68.5m**

e. a summary of the volumes described in subparagraphs a. to d. above and the resulting auction volumes is represented graphically in figure 6 of the Commission's Advice, reproduced below:

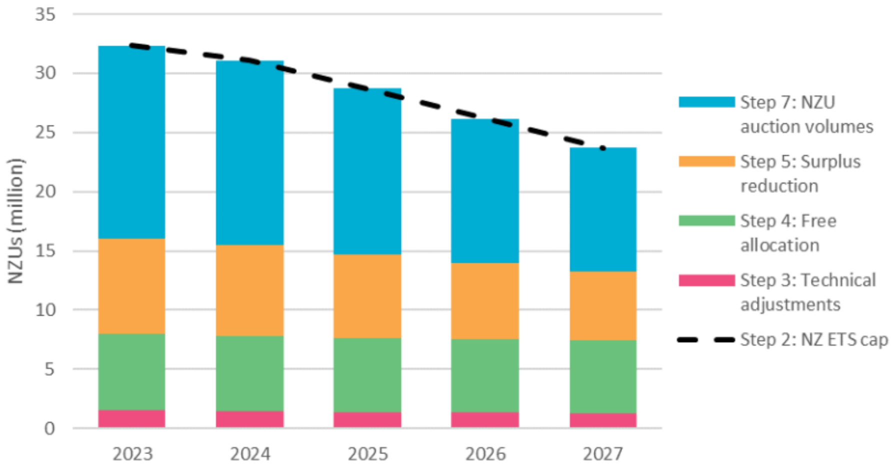

Figure 6 Proposed annual auction volumes within the NZ ETS cap

f. the recommended increase to the auction reserve price was based on the Commission's view of the minimum NZU price path compatible with achieving the Emissions Budgets.

62. The Commission considered that the surplus stockpile of 49 million NZUS referred to in paragraph 61.d above represented a significant risk to meeting the Emissions Budgets.

63. The Commission's Advice recommended the following volume and trigger price settings for the Cost Containment Reserve:

	2023	2024	2025	2026	2027
Tier 1					
Trigger price	$171	$182	$193	$203	$214
Reserve volume	2.9m	2.8m	2.6m	2.3m	2.1m
Tier 2					
Trigger price	$214	$228	$241	$254	$268
Reserve volume	5.1m	4.9m	4.6m	4.2m	3.8m
Total reserve volume					
	8.0m	7.7m	7.1m	6.5m	5.9m

64. The Commission's Recommendations were based on key judgements set out in the Commission's Advice, including that:

a. while the Cost Containment Reserve was intended to be used only rarely, it had been triggered three times in the last six auctions implying that the Cost Containment Reserve trigger price is now below market participants' future price expectations;

b. based on the repeated triggering of the Cost Containment Reserve, analysis of how uncertainties may affect the emissions prices needed to meet emissions budgets, as well as the level and trajectory of international emissions prices, the trigger prices for the Cost Containment Reserve should increase substantially to meet the intention that it be used only rarely;

c. the overall volume of NZUs included in the Cost Containment Reserve should match the planned surplus reduction volume described in paragraph 61.c above, which would provide a large enough volume to reduce the risk of excessive price increase, while avoiding adding further units to the banked surplus of NZUs; and

d. the volume of units in the Cost Containment Reserve should be divided into two Tiers, to manage the risk of strongly increasing prices if the surplus units remain illiquid, while limiting the fiscal impacts and target risks relative to triggering a single tier cost containment reserve.

65. The Commission illustrated the intended relationship between its recommended auction reserve price and Cost Containment Reserve trigger prices and the demonstration path emissions values implied by the Commission's modelling based on the Emissions Budgets in figure 10 of the Commission's Advice, reproduced below:

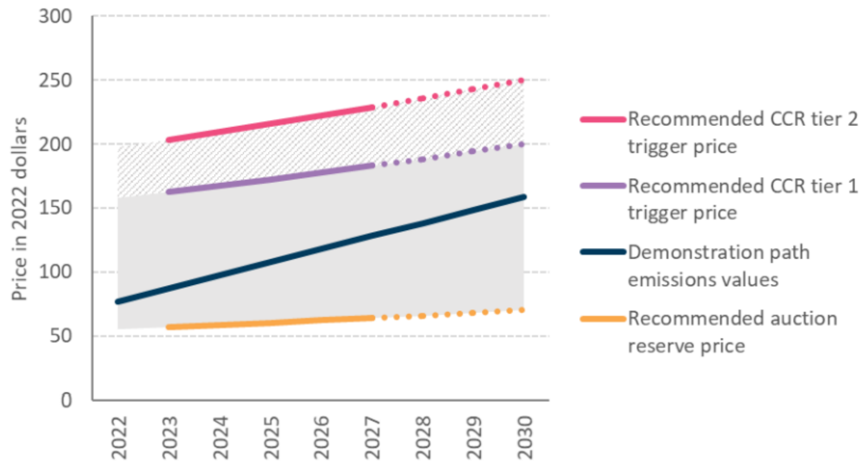

Figure 10 Recommended price control settings bracket the emissions values in the Commission's demonstration path

66. The Commission's Recommendations therefore contained three main recommended changes from the then current settings in the Regulations in order that the new settings would accord with the Emissions Budgets and the 2050 Target:

a. a significant increase in the auction reserve price (eg from $32.10 to $60 in 2023);

b. a significant reduction in the base auction volume (eg from 18.6m NZUs to 16.3m NZUs in 2023) so that the auction volume aligns with the Emissions Budgets, and the "surplus" stockpile of NZUs assessed by the Commission to represent a significant risk to meeting the Emissions Budgets would be reduced; and

c. a significant increase in the Cost Containment Reserve trigger price (eg from $70 to a first tier at $171 and a second tier at $214 in 2023) to meet the intention that the Cost Containment Reserve be triggered only rarely.

67. The Commission's Advice noted that it was not possible to ensure that the Commission's Recommendations were in accordance with the NDC, given that:

a. there is currently no clarity about when or how access to offshore mitigation will be obtained to meet the international component of the NDC, nor has the Government decided how the cost of offshore mitigation will be funded, or whether and how it will be allowed into the ETS;

b. once this information is available it could materially change the Commission's future advice on ETS settings; and

c. once the Government makes decisions about how offshore mitigation will be obtained and paid for, the NZ ETS unit limit settings can accord with them,

and recommended that until approved overseas units are available within the ETS, ETS volumes are set in line with the Emissions Budgets.

MfE Consultation

68. Subsequent to the Commission's Advice, the Ministry for the Environment (**MfE**) consulted on the proposed amended ETS price and volume settings through the consultation document *Proposed changes to New Zealand Emissions Trading Scheme limit and price control settings for units 2022* dated September 2022 (the **MfE Consultation**).

69. The MfE Consultation sought submitters feedback on the Commission's Recommendations and other alternative options, compared against the status quo.

MfE and Treasury advice

70. After receiving the Commission's Advice and before making his decision to recommend the volume and price settings in the 2022 Amendment Regulations, the Minister also received and had regard to:

a. the Ministry for the Environment's *Regulatory Impact Statement: Annual update to New Zealand Emissions Trading Scheme limits and price control settings for units 2022* dated 3 November 2022 (the **MfE RIS**); and

b. the Treasury report *Supporting decisions on updating NZ ETS settings* dated 28 October 2022 (the **Treasury Report**).

71. The MfE RIS contained the advice of the Ministry for the Environment that:

a. the supply of NZUs under the ETS should be aligned with the Emissions Budgets, as the Commission recommended;

b. the large stockpile of NZUs accumulated in private accounts could cause challenges in meeting emissions budgets because it allows emissions outside the ETS cap in the short term, so ETS auction volumes should be set to reduce this stockpile, as the Commission recommended;

c. the technical volume adjustments recommended by the Commission as described at paragraph 61.b above should not be made, but otherwise the Commission's auction volume recommendations set out in paragraph 60 above should be adopted;

d. there is a need for the auction floor price to increase to better incentivise emissions reductions, and act to safeguard investments already being made to reduce emissions;

e. while MfE did not recommend any single alternative auction reserve price to the (inflation adjusted) status quo, all options considered by MfE that involved material increases to the auction reserve price, including the Commission's Recommendation, improved accordance with emissions reduction targets against the status quo;

f. the Commission's Cost Containment Reserve total volume recommendations set out in paragraph 61.f above should be adopted;

g. the structure for the Cost Containment Reserve should comprise a single trigger price and volume, rather than the two tiers recommended by the Commission;

h. triggering of the Cost Containment Reserve is intended to be rare, however the Cost Containment Reserve had been fully sold in both years of auctions to date;

i. the triggering of the Cost Containment Reserve results in additional supply of NZUs and the intended stockpile reduction is negated by the amount of the Cost Containment Reserve Volume that is sold;

j. price controls that constrain price too much or too little or add additional NZU supply may be inconsistent with meeting targets and budgets;

k. fundamentally, there is a trade-off between allowing prices high enough to achieve sufficient emissions reductions and removals to achieve emissions targets and the point at which the resulting economic impacts are considered too severe;

l. the trigger price for the Cost Containment Reserve should accordingly be increased from the status quo to a 2023 setting of between $120 and $214, but the Ministry did not recommend any specific alternative trigger price; and

m. the assessment of being in accordance with the NDC should be considered against the Government's intention that offshore mitigation would contribute to meeting the NDC.

72. The Treasury Report contained the advice of the Treasury that:

a. it agreed in principle with an approach that aligns the NZU volume limits with the Emissions Budgets and attempts to manage the existing stockpile over time;

b. however, a more cautious approach to updating the volume and price settings should be taken than the Commission's Recommendations, given the state of a number of closely related work programmes currently underway, the broader economic context and a concern that the Cost Containment Reserve trigger price may be acting as a "magnet" driving higher auction prices; and

c. while it recommended against raising the Cost Containment Reserve trigger price to the levels recommended by the Commission, it saw merit in considering smaller increases to mitigate the risk presented by the secondary market price currently exceeding the legislated trigger price for 2023.

Cabinet consideration and Minister's decision

73. The Minister sought Cabinet approval for his proposed decision in a paper *2022 update to New Zealand Emissions Trading Scheme limits and price control setting for units* (the **Cabinet Paper**).

74. In the Cabinet Paper the Minister recommended following the Commission's Recommendations in full.

75. In the Cabinet Paper the Minister summarised his key considerations in adopting the Commission's Recommendations as to the limits for units and Cost Containment Reserve as follows:

a. the Commission's Recommendations as to base auction volumes are consistent with the Emissions Budgets and will work to address the unacceptably high stockpile of privately held units;

b. an auction reserve price higher than the status quo encourages investments in gross emissions reductions;

c. existing settings for the Cost Containment Reserve have encouraged speculative behaviour, driving up prices and exhausting the Cost Containment Reserve, which increasing the Cost Containment Reserve trigger price aims to avoid in future;

d. higher Cost Containment Reserve trigger prices will allow the ETS to function as intended, enabling the market to identify the NZU price required to achieve the emissions reductions New Zealand needs; and

e. unacceptable impacts from high emissions prices should be dealt with via complementary measures that provide targeted assistance to impacted populations groups and sectors of the economy, rather than blunting the ETS price incentive for high emissions firms to reduce their emissions.

76. On 28 November 2022, Cabinet met and made decisions to update the ETS volume and price settings as follows (the **Cabinet Decision**):

a. the technical volume adjustments recommended by the Commission as described at paragraph 61.b above should not be made, but otherwise the Commission's auction volume recommendations set out in paragraph 60 above should be adopted;

b. the auction reserve price recommended by the Commission set out in paragraph 60 above should not be adopted, but instead the status quo auction price should be extended and adjusted for inflation;

c. the Cost Containment Reserve total volume recommended by the Commission set out in paragraph 61.f above should be adopted;

d. the Cost Containment Reserve should be a single volume, rather than the two tiers recommended by the Commission; and

e. the Cost Containment Reserve price recommended by the Commission set out in paragraph 61.f above should not be adopted, but instead the status quo trigger price should be extended and adjusted for inflation.

77. In respect of the Cabinet Decision set out at paragraph 76.e above, Cabinet noted that:

   a. the previous price control settings appear to have encouraged market participants to bid up prices in order to trigger and exhaust the Cost Containment Reserve fully each year;

   b. secondary market NZU prices have to date risen to the level of the upper price control setting;

   c. a significant increase to the Cost Containment Reserve trigger price would be an attempt to decouple NZU prices from the upper price control setting; and

   d. if NZU prices rise to the level of the recommended cost containment reserve trigger prices, this would have impacts on costs faced by households and the economy, including increased fossil fuel and electricity prices.

78. The Minister adopted the Cabinet Decision in his decision to recommend the promulgation of the 2022 Amendment Regulations to the Governor-General (the **Minister's Decision**).

79. The 2022 Amendment Regulations include the following base volume and reserve price settings for the auctions:

	2023	2024	2025	2026	2027	Total
NZU base auction volumes	17.9m	17.1m	15.3m	13.5m	11.7m	75.5m
Auction reserve price	$33.06	$35.90	$38.67	$41.45	$44.35	

80. The 2022 Amendment Regulations include the following volume and trigger price settings for the Cost Containment Reserve:

	2023	2024	2025	2026	2027
Trigger price	$80.64	$91.61	$103.24	$115.84	$129.97
Reserve volume	8.0m	7.7m	7.2m	6.5m	5.9m

81. None of the MfE RIS, the Treasury Report, the Cabinet Paper, the Cabinet Decision nor the Minister's Decision contained any analysis of whether the combination of volume and price settings agreed by Cabinet were:

   a. strictly in accordance with the Emissions Budgets, the NDC and the 2050 Target; or

b. if not strictly in accordance with the Emissions Budgets or the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and s 30GC(6).

The Minister's report to Parliament and the Commission's response

82. Given that the Minister's recommended limits and price control settings differed from the Commission's Recommendation, the Minister was required to prepare a report of the reasons for the difference and to present a copy of the report to the House of Representatives and make the report publicly available (s 30GC(7)).

83. The Minister's Decision differed from the Commission's Recommendations:

a. as to the base auction volumes as set out in the table below:

	2023	2024	2025	2026	2027	Total
2021 Regs	18.6m	18.0m	16.5m	15.0m		
Commission's Recommendation	16.3m	15.6m	14.0m	12.2m	10.4m	68.5m
2022 Regs	17.9m	17.1m	15.3m	13.5m	11.7m	75.5m

b. as to the auction reserve prices as set out in the table below:

	2023	2024	2025	2026	2027
2021 Regs	$32.10	$34.35	$36.75	$39.32	
Commission's Recommendation	$60	$64	$68	$71	$75
2022 Regs	$33.06	$35.90	$38.67	$41.45	$44.35

c. as to the Cost Containment Reserve volumes and trigger prices as set out in the table below:

	2023	2024	2025	2026	2027
2021 Regs	7.0m $78.40	7.0m $87.81	6.8m $98.34	6.7m $110.15	
Commission's Recommendation	T1: $171 2.9m T2: $214 5.1m	T1: $182 2.8m T2: $228 4.9m	T1: $193 2.6m T2: $241 4.6m	T1: $203 2.3m T2: $254 4.2m	T1: $214 2.1m T2: $268 3.8m
2022 Regs	8.0m $80.64	7.7m $91.61	7.2m $103.24	6.5m $115.84	5.9m $129.97

84. The Minister presented a report to Parliament dated 14 December 2022 entitled *Report on reasons for differences between prescribed NZ ETS limits and price control settings for units and the Climate Change Commission's advice on these settings* (the **Minister's Reasons**).

85. The Minister's Reasons for not adopting the Commission's Recommendations as to the Cost Containment Reserve trigger price are as follows:

> "As can be seen above, the price components of the price control regulation settings, vary from those advised by the Commission. Instead, they reflect the status quo, although adjusted to account for higher-than-expected inflation and extended to include settings for the 2027 year.
>
> As the Minister of Climate Change, I have decided to prescribe these regulations following discussion at Cabinet.
>
> There are two key reasons for these differences:
>
> 1. Increasing the upper price control settings (the CCR) may not mitigate any "magnet effect" on market NZU prices. a. If increasing the CCR failed to eliminate the magnet effect, then the risk existed of driving materially higher carbon prices in the short-term. b. If NZU prices were to increase to levels approaching the Commission's recommended CCR trigger prices, this could abruptly increase household costs through higher fuel and electricity prices.
>
> 2. The Government's equitable transition strategy and associated policies to address the distributional impacts of potentially higher NZU prices in the future are still being developed. a. The risk exists that, if increasing the upper price control exacerbated the magnet effect and lead to materially higher prices in the short term, then there would be insufficient policy settings in place to mitigate the immediate impact on household costs."

86. By open letter dated 17 February 2023, the Commission replied to the Minister's Reasons stating that:

    a. in the Commission's view the level of detail in the Minister's Reasons fell short of meeting the intention of Parliament and the requirements of the Act;

    b. the Minister's Reasons should have provided a reason for each of the key points where the Government to depart from the Commission's Recommendations, but did not; and

    c. the Minister's Reasons did not provide an explanation of how the Government's decisions fulfil the requirements of the Act around according with the Emissions Budgets, the NDC and the 2050 Target or how discrepancies might be managed over time.

87. The Minister's Reasons do not contain any consideration of whether the volume and price settings in the 2022 Amendment Regulations were:

a. strictly in accordance with the Emissions Budgets, the NDC and the 2050 Target; or

b. if not strictly in accordance with the Emissions Budgets or the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and s 30GC(6).

The Commission's 2023 advice

88. The Commission published its recommendations under s 5ZOA of the Act in respect of the volume and price settings to be included in the 2023 amendment in its *Advice on NZ ETS unit limits and price control settings for 2024-2028* released in March 2023 (the **Commission's 2023 Recommendations**).

89. The Commission's 2023 Recommendations substantially reiterate the Commission's Recommendations contained in the Commission's Advice and:

a. characterises this as "*required to bring the scheme back on path to meet emissions budgets*";

b. says that "*[w]ithout such action, Aotearoa New Zealand risks failing to meet its emissions budgets – or experiencing a more severe price adjustment in the future*"; and

c. advises that:

> "If the Government chooses to adjust the settings in line with our advice, the NZ ETS will play a strong role in aligning emissions with emissions budgets.
>
> If Government chooses to constrain price discovery, the NZ ETS will play a weaker role and the Government – now and in the future – is more likely to need to adjust the emissions reduction plan to include further regulations and other policies to drive emissions reductions and ensure budgets will be met.
>
> If the Government expects the NZ ETS to contribute significantly to the abatement needed for budgets and targets, the NZ ETS must be given the room to do so."

FIRST GROUND OF REVIEW: ULTRA VIRES

90. The Minister cannot recommend amendments to the Regulations to the Governor-General unless the Minister is satisfied that the settings contained in the amendments are:

    a. strictly in accordance with the Emissions Budgets, the NDC and the 2050 Target; or

    b. if not strictly in accordance with the Emissions Budgets or the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the Main Matters or the Additional Matters.

91. In order for the settings ultimately contained in the 2022 Amendment Regulations to be in accordance with the Emissions Budgets and the 2050 Target, the Commission recommended (and the Minister agreed in his recommendation to Cabinet in the Cabinet Paper):

    a. significantly increasing the auction reserve price (eg in 2023 from $32.10 to $60);

    b. reducing the base auction volume to align with the Emissions Budgets and so that the "surplus" stockpile would need to be drawn down (eg in 2023 from 18.6m to 16.3m);

    c. significantly increasing the Cost Containment Reserve trigger price so that it would be very unlikely to be triggered (eg in 2023 from 7m units at $70 to 2.9m units at $171 and 5.1m units at $214).

92. However, the Minister's Decision adopted the Cabinet Decision which:

    a. rejected the Commission's proposed increase in the auction reserve price which the Commission considered would accord with the budgets and instead adopted the status quo auction reserve price with an inflation adjustment;

    b. agreed with the Commission's recommendation to reduce the auction volume so that the "surplus" stockpile would need to be drawn down; but

    c. undermined this decision by setting the Cost Containment Reserve trigger price at a level where it was expected it to be triggered and the reduction in the "surplus" stockpile thereby negated.

93. The Minister's Decision, and hence the 2022 Amendment Regulations, were ultra vires s 5ZOA of the Act because:

    a. the Cabinet Decision (and accordingly the Minister's Decision) was internally inconsistent because it sought to set the base auction volume at a level that would draw down part of the surplus stockpile but set the Cost Containment Reserve trigger price at a level that undermined this;

    b. Cabinet and the Minister failed to consider the extent to which the NDC would be met by reductions in domestic emissions in ETS covered sectors, reductions in domestic emissions in non-ETS covered sectors or the use of offshore mitigation, and accordingly failed to consider whether the combination of settings preferred by Cabinet (and adopted by the Minister) was in accordance with the NDC;

    c. Cabinet and the Minister failed to consider whether the combination of settings preferred by Cabinet (and adopted by the Minister) were:

        i. strictly in accordance with the Emissions Budgets, the NDC and the 2050 Target; or

        ii. if not strictly in accordance with the Emissions Budgets or the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and s 30GC(6);

    d. to the extent that the settings preferred by Cabinet (and adopted by the Minister) departed from the Commission's recommended settings, there was no evidence before Cabinet or the Minister that this combination of settings was in accordance with the Emissions Budgets, the NDC or the 2050 Target; and

    e. they were based on an error of law because the advice given to Cabinet and the Minister, and implicitly the Cabinet Decision and the Minister's Decision, wrongly assumed that the settings need not be in accordance with the Emissions Budgets, the NDC or the 2050 Target and that accordance with these matters could be traded off against other considerations such as the cost of living; and

    f. the Minister did not have reasonable grounds to be satisfied that the combination of settings preferred by Cabinet (and adopted by the Minister) were either:

i. strictly in accordance with the Emissions Budgets, the NDC and the 2050 Target; or

ii. if not strictly in accordance with the Emissions Budgets or the NDC, nonetheless in accordance with them with any discrepancy justified by one or more of the matters specified under s 30GC(5) and s 30GC(6);

SECOND GROUND OF REVIEW: REPUGNANCY TO THE ACT

94. The relevant purpose of the Act is to:

> … provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—
>
> (i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and
>
> (ii) assisting New Zealand to meet its 2050 target and emissions budgets.

95. The combination of settings preferred by Cabinet (and adopted by the Minister) was inconsistent with this purpose because they prioritised cost of living concerns over meeting the Emissions Budgets, the 2050 Target and Aotearoa New Zealand's international obligations in relation to the NDC.

Relief

96. The Applicant seeks the following relief:

a. a declaration that the 2022 Amendment Regulations were ultra vires and repugnant to the purposes of the Act;

b. an order requiring the 2022 Amendment Regulations to be remade in accordance with the law as set out in the Court's judgment with the precise terms of the order to be considered at the hearing in light of the timing of the 2023 annual update to the Regulations; and

c. costs.

This document is filed by Martin Smith, solicitor for the applicant, of the firm Gilbert Walker. The address for service of the applicant is at the offices of Gilbert Walker, Level 35, 48 Shortland Street, Auckland.

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

(a) posted to the solicitor at PO Box 1595, Shortland Street, Auckland 1140; or

(b) emailed to the solicitor at martin.smith@gilbertwalker.com.