IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA714/2022
[2025] NZCA 80

BETWEEN	LAWYERS FOR CLIMATE ACTION NZ INCORPORATED Appellant
AND	CLIMATE CHANGE COMMISSION First Respondent
	MINISTER OF CLIMATE CHANGE Second Respondent

Hearing:	21–23 November 2023
Court:	Cooper P, Gilbert and Goddard JJ
Counsel:	J D Every-Palmer KC, J S Cooper KC and M C Smith for Appellant V E Casey KC, S A H Bishop and H M L Farquhar for First Respondent A L Martin and P H Higbee for Second Respondent
Judgment:	28 March 2025 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make no order as to costs.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] Lawyers for Climate Action NZ Inc (LCANZI) appeals against a High Court judgment dismissing its application for judicial review of advice given in May 2021 by He Pou a Rangi | the Climate Change Commission (the Commission) to the Minister of Climate Change (the Minister)[1] and consequent decisions made by the Minister.[2]

[2] LCANZI is an incorporated society, and registered charity, comprised of lawyers who seek more effective action against climate change. Its judicial review challenge focused on two aspects of the Commission's advice:

(a) advice for the purpose of setting the first three emissions budgets under the Climate Change Response Act 2002 (the Act) covering the periods 2022–2025, 2026–2030, and 2031–2035 (Budgets Advice);[3] and

(b) advice on whether New Zealand's then current nationally determined contribution (NDC) (the 2016 NDC) — over the period 2021–2030, to reduce *net* greenhouse gas emissions to 30 per cent below 2005 *gross* emissions — was "compatible with contributing to the global effort under the Paris Agreement[4] to limit the global average temperature increase to 1.5ºC above pre-industrial levels" (the 1.5ºC goal).[5] The Commission advised that the 2016 NDC was *not* compatible with the 1.5ºC goal which would require emissions reductions of much more than 36 per cent below 2005 levels by 2030 (NDC Advice).[6]

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1 He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (31 May 2021) [Commission's advice].

2 *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064, (2022) 24 ELRNZ 358 [High Court judgment].

3 Climate Change Response Act 2002, s 5X.

4 Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force 4 November 2016), art 2(1)(a).

5 Commission's advice, above n 1, at 350 (footnote added).

6 At 349.

[3] Gross and net emissions have specialised meanings in the context of climate change accounting such that gross emissions will not always be greater than net emissions. The Commission explained the difference between gross emissions and net emissions as follows:[7]

> Gross emissions
>
> Gross emissions include total greenhouse gas emissions from agriculture, energy, industrial processes and product use (IPPU) and waste. Greenhouse gas emissions and removals from land use, land-use change, and forestry (LULUCF) are excluded.
>
> …
>
> Net emissions
>
> Net emissions differ from gross emissions in that they also include emissions from the land use, land-use change and forestry (LULUCF) sector as well as removals of carbon dioxide from the atmosphere, for example due to the growth of trees.

Accordingly, net emissions equal gross emissions plus land use, land-use change and forestry (LULUCF) emissions and removals of carbon dioxide (CO_2) from the atmosphere.

[4] In New Zealand, the major contributor in the LULUCF sector is forestry, which has resulted in the LULUCF sector acting as a sink because CO_2 removals from forestry have historically exceeded emissions from the sector. The contribution of forestry to New Zealand's overall emissions profile is highly significant,[8] but is subject to pronounced periodic swings depending on the timing of the harvest cycle. The peaks and troughs in CO_2 removals are the result of the sporadic nature of historical plantation forest planting in New Zealand, including a major spike in the

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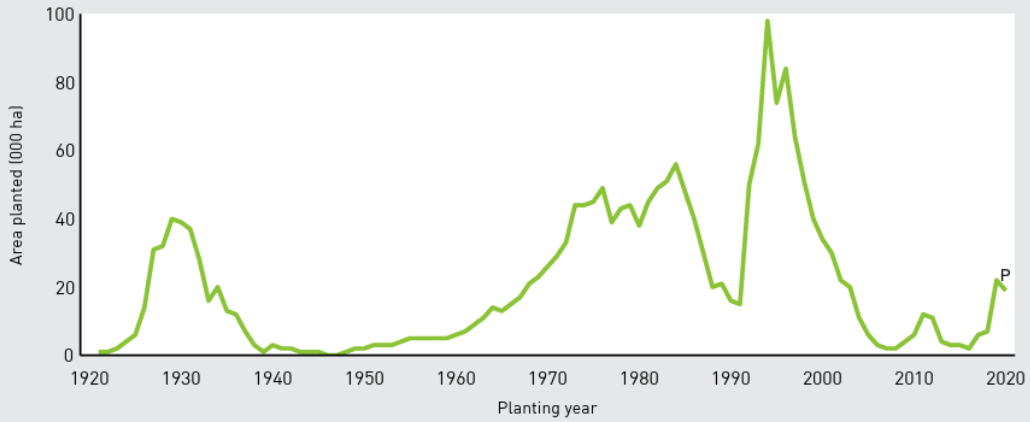
7 At 397–398.

8 For example, in New Zealand's Greenhous Gas Inventory covering emissions and removals data from 1990–2018, net CO_2 removals by forests were equal to approximately one third of New Zealand's gross greenhouse gas emissions from all sources and two thirds of gross CO_2 emissions: see He Pou a Rangi | Climate Change Commission *2021 Supporting Evidence Consultation Feedback and Updates* [Commission's supporting evidence] at [3.4]; and Ministry for the Environment | Manatū Mō Te Taiao *New Zealand's Greenhouse Gas Inventory: 1990–2018* (April 2020).

1990s (as shown in the figure below)[9], coupled with the standard management regime involving short rotations of around 28 years and clear-fell harvesting:

Figure 13: New Land Planted in Production Forest in New Zealand



[5] This means that New Zealand's *net* emissions (ie including LULUCF) will increase and decrease markedly in accordance with the harvest cycles, irrespective of any changes in human behaviour that reduce emissions and therefore contribute to the global effort to limit global warming.

[6] Despite the marked periodic swings in the level of emissions removals from forestry, gross emissions in New Zealand (ie excluding LULUCF) are projected to remain higher than net emissions. The reverse is true in many other countries where net emissions are higher than gross emissions because the LULUCF sector is an overall source of emissions, including from deforestation.[10]

[7] LCANZI claims the Commission made four judicially reviewable errors:

NDC Advice

(a) LCANZI says that when determining what level of *net* CO_2 emissions in 2030 would be consistent with the required global average reductions, the starting point for determining the necessary reductions

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9 New Zealand Farm Forestry Association, Forest Owners Association and Te Uru Rākau | Forestry New Zealand *National Exotic Forest Description* (Ministry for Primary Industries, 19 December 2020) at 15.

10 See: Commission's supporting evidence, above n 8, at [13.2.3].

in New Zealand's CO_2 emissions must be 2010 *net* CO_2 emissions, not 2010 *gross* CO_2 emissions, contrary to the approach adopted by the Commission. LCANZI says this was a mathematical error or error of logic.

Budgets Advice

(b) LCANZI says the Commission was required by the Act to meaningfully consider what is required to meet the 1.5ºC goal and to recommend budgets that are consistent with it. LCANZI argues that the Budgets Advice does not contribute to the 1.5ºC goal on any reasonable analysis and the Commission therefore failed to comply with this statutory requirement. It says this error was the result of the Commission misinterpreting the purpose of the Act.

(c) LCANZI claims the Commission erred in law in employing "modified activity-based" (MAB) accounting methodology, arguing that the Act mandates the use of land-based, or Greenhouse Gas Inventory (GHGI), accounting for recommending emissions budgets and measuring performance against them. We explain the difference between these accounting methodologies when addressing this issue.

(d) The budgets will see emissions increasing such that net emissions in the period 2021–2030 will be higher than in any of the previous three decades. LCANZI says this is a nonsensical result and is unreasonable. LCANZI contends that this outcome was the product of the Commission failing to grapple with what contributing to the 1.5ºC goal requires, failing to conduct any cost-benefit assessment of greater ambition, the alleged error referred to in subpara (a) above, and the adoption of MAB instead of GHGI accounting.

[8] LCANZI argues on appeal that the High Court was wrong to reject each of these grounds of review. It seeks an order setting aside the High Court judgment, and the following relief:

NDC Advice

(a) a declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5ºC-compliant NDC; and

(b) a declaration that the Minister took into account the Commission's unlawful advice in setting the amended NDC.

Budgets Advice

(c) a declaration that the Commission acted unlawfully in advising the Minister on the emissions budgets;

(d) a declaration that the Minister took into account the Commission's unlawful advice in setting the emissions budgets; and

(e) an order requiring the Minister to reconsider the 2026–2030 and 2031–2035 emissions budgets adopted under the Act.

[9] The Commission has filed a notice of intention to support the judgment on other grounds. In particular, the Commission's submissions focussed on the allegations that the High Court erred in the following respects:

(a) finding that the Commission's advice is the exercise of a statutory power in terms of s 5 of the Judicial Review Procedure Act 2016 (JRPA) and therefore amenable to judicial review, or alternatively, that the scope for review is narrow;

(b) failing to exclude much of the extensive evidence filed by LCANZI in support of its application for judicial review; and

(c) applying a more exacting standard of review than *Wednesbury* unreasonableness.[11]

[10] The Minister has also filed a notice of intention to support the judgment on the ground that the appropriate standard of review is *Wednesbury* unreasonableness, rather than any more exacting standard.

[11] We deal with the issues in the following order:

(a) Was the Commission's advice amenable to judicial review?

(b) Was LCANZI's evidence admissible?

(c) Was there a mathematical or logical error in the Commission's advice?

(d) Did the Commission fail to comply with a statutory requirement to meaningfully consider what is required to meet the 1.5ºC goal and recommend budgets that are consistent with it?

(e) Did the Commission make an error of law in using MAB accounting methodology?

(f) Was the Commission's advice unreasonable? The appropriate standard of review forms part of this issue.

[12] We commence by summarising the statutory context including the relevant international commitments to which the legislation gives effect, the Commission's advice, and the decisions made by the Minister following receipt of the advice.

Statutory context

[13] The purpose of the Act is, among other things, to "provide a framework by which New Zealand can develop and implement clear and stable climate change policies" that contribute to the 1.5ºC goal and enable New Zealand to meet its

[11] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

international obligations under the United Nations Framework Convention on Climate Change (the Convention),[12] the Kyoto Protocol,[13] and the Paris Agreement.[14]

[14] Pursuant to the Convention, New Zealand has committed to reducing greenhouse gas emissions, protecting and enhancing greenhouse gas sinks and reservoirs, and undertaking programmes to mitigate climate change.[15] All 197 parties to the Convention are required to develop, periodically update and publish national inventories of anthropogenic emissions by sources and removals by sinks (including forests) using methodologies agreed by the Conference of the Parties.[16]

[15] These reporting obligations, covering each year going back to 1990, are expanded under the Kyoto Protocol and the Paris Agreement. New Zealand's Greenhouse Gas Inventory is prepared by the Ministry for the Environment | Manatū Mō Te Taiao (Ministry for the Environment) and is commonly referred to using the acronym GHGI (referred to at [7(c)] above). Greenhouse gas emissions and removals are reported under five sectors:

(a) energy;

(b) industrial processes and product use;

(c) agriculture;

(d) LULUCF; and

(e) waste.

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12 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [Convention].

13 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005) [Kyoto Protocol].

14 Climate Change Response Act, s 3(1)(aa)(i) and (1)(a).

15 Convention, above n 12, art 4(2)(a).

16 Article 4(1)(a).

This inventory, while it aims for completeness,[17] cannot be said to be complete in capture nor anywhere near perfect in measurement. It currently appears to be the best available measure of what the atmosphere "sees" in terms of total greenhouse gases.[18]

[16] The Kyoto Protocol introduced commitments on Annex I parties, including New Zealand (as a developed country), to limit greenhouse gas emissions pursuant to individual emission limitation and reduction targets for 2008–2012, the first commitment period.[19] It also imposed accounting obligations on those parties, including to incorporate supplementary information into their annual inventory of anthropogenic emissions for the purpose of ensuring compliance with their commitments.[20] The focus was to track the effectiveness of actions taken by state parties as part of their climate change responses under the Kyoto Protocol relative to the base year (1990 for New Zealand).

[17] The Kyoto Protocol also provided highly prescriptive rules as to how parties were to account for these targets. Importantly, the Kyoto Protocol required that countries such as New Zealand, where LULUCF was a net sink of emissions in the base year, were to use gross-net accounting so that gross emissions in the base year (ie excluding LULUCF) would be the baseline for measuring net emissions in the target year (ie including LULUCF). On the other hand, countries where the LULUCF sector was a net source of emissions in the base year were required to use net-net accounting.[21] This meant that the higher figure (gross or net) in each case would form the baseline for the purpose of the target accounting. The aim was to track changes in human activity that parties would commit to. This allows the parties to be held accountable. So, for example, for countries like New Zealand where forestry was a net sink in 1990, ongoing cyclic emissions and removals from land already forested in 1990 would not be counted as these were not the result of any change in human activity. Only emissions and removals from new activities such as afforestation

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17 Commission's supporting evidence, above n 8, at [3.4.2].

18 At [3.4.2].

19 Kyoto Protocol, above n 13, art 3(1). Further emission limitation and reduction targets for the period 2013–2020 were provided for under the Doha Amendment to the Kyoto Protocol, which New Zealand accepted and ratified in 2015. New Zealand elected, in 2009, to take its emission limitation and reduction target for that period under the Convention, rather than under the Kyoto Protocol.

20 Article 7(1).

21 Article 3(3) and (7).

(or deforestation) relative to the 1990 base year would count towards the net emissions target.

[18] New Zealand accordingly set its emission limitation and reduction target on a gross-net basis for the first commitment period under the Kyoto Protocol (2008–2012), as it was required to do. It applied the same rules for its next target, for the 2013–2020 period.[22]

[19] As a party to the Paris Agreement, New Zealand must communicate every five years the NDC it intends to achieve.[23] NDCs are required to be progressively more ambitious and represent each party's "highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".[24] Developed countries like New Zealand should take "the lead by undertaking economy-wide absolute emission reduction targets".[25]

[20] The Paris Agreement allows greater flexibility than the Kyoto Protocol in that it does not prescribe the type of targets that parties should set (gross-net or net-net), nor does it specify the methodology to be applied in accounting for these targets. However, each party is required to:[26]

> … promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

[21] The Minister exercises the power to set and communicate the NDC.[27] However, in accordance with convention, decisions of this nature are made with the agreement of Cabinet.[28] New Zealand's NDCs have continued to be set on a gross-net basis, consistent with the Kyoto Protocol and prior practice.

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22 New Zealand opted to take this target under the Convention, rather than the Kyoto Protocol: above n 19.

23 Paris Agreement, above n 4, art 4(2) and (9).

24 Article 4(3).

25 Article 4(4).

26 Article 4(13).

27 See generally: Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [19.4.2(2)].

28 At [20.7.4].

[22] The Act establishes a target for emissions reduction, requiring that net accounting emissions of greenhouse gases in a calendar year (other than biogenic methane) are zero by the calendar year beginning 1 January 2050 and for each subsequent calendar year (the 2050 target).[29] The 2050 target also requires progressive reductions in emissions of biogenic methane. These are to be 10 per cent less than 2017 emissions by the calendar year beginning on 1 January 2030 and 24 to 47 per cent less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent calendar year.[30]

[23] The Minister has responsibility under subpt 2 of pt 1B of the Act to set successive emissions budgets for stipulated periods commencing in 2022 and to ensure that these are met.[31] The purpose of subpts 2, 3 (role of the Commission to advise the Minister on the emissions budgets) and 4 (requiring the Commission to monitor and report on progress towards meeting emissions budgets) is set out in s 5W:

> **5W Purpose of this subpart**
>
> The purpose of this subpart and subparts 3 and 4 is to require the Minister to set a series of emissions budgets—
>
> (a) 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 1.5º Celsius above pre-industrial levels; and
>
> (b) in a way that allows those budgets to be met domestically; and
>
> (c) that provides greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals that will be required.

[24] The Commission is a Crown entity established under the Act.[32] Its purposes are "to provide independent, expert advice to the Government on mitigating climate change (including through reducing emissions of greenhouse gases) and adapting to

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29 Climate Change Response Act, s 5Q(1)(a).

30 Section 5Q(1)(b).

31 Section 5X. "Minister" is defined in s 4(1) of the Climate Change Response Act as "the Minister who is, under the authority of any warrant or under the authority of the Prime Minister, responsible for the administration of this Act". This was, at the relevant time, the Minister of Climate Change.

32 Sections 5A and 5C (inserted by s 8 of the Climate Change Response (Zero Carbon Act) Amendment Act 2019).

the effects of climate change"; and "to monitor and review the Government's progress towards its emissions reduction and adaptation goals".[33]

[25] The Commission must advise the Minister on matters relevant to setting the emissions budgets, including recommending the quantity of emissions to be permitted in each budget period, the rules that will apply to measure progress towards meeting the budgets and the 2050 target, and how the budgets and the 2050 target may realistically be met.[34] The Budgets Advice was provided by the Commission under s 5ZA of the Act in furtherance of these obligations.

[26] Section 5Z of the Act provides that: "Emissions budgets must be met, as far as possible, through domestic emissions reductions and domestic removals."

[27] Section 5ZC(2) of the Act sets out the matters that must be taken into account by the Commission in preparing advice on emissions budgets and by the Minister in determining the budgets:[35]

> (2) The Commission and the Minister must—
>
> (a) have particular regard to how the emissions budget and 2050 target may realistically be met, including consideration of—
>
> (i) the key opportunities for emissions reductions and removals in New Zealand; and
>
> (ii) the principal risks and uncertainties associated with emissions reductions and removals; and
>
> (b) have regard to the following matters:
>
> (i) the emission and removal of greenhouse gases projected for the emissions budget period:
>
> (ii) a broad range of domestic and international scientific advice:
>
> (iii) existing technology and anticipated technological developments, including the costs and benefits of early adoption of these in New Zealand:

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33 Climate Change Response Act, s 5B.
34 Section 5ZA(1)(a)–(c).
35 Section 5ZC(1) provides for the application of the considerations to the Commission and the Minister.

(iv) the need for emissions budgets that are ambitious but likely to be technically and economically achievable:

(v) the results of public consultation on an emissions budget:

(vi) the likely impact of actions taken to achieve an emissions budget and the 2050 target, including on the ability to adapt to climate change:

(vii) the distribution of those impacts across the regions and communities of New Zealand, and from generation to generation:

(viii) economic circumstances and the likely impact of the Minister's decision on taxation, public spending, and public borrowing:

(ix) the implications, or potential implications, of land-use change for communities:

(x) responses to climate change taken or planned by parties to the Paris Agreement or to the Convention:

(xi) New Zealand's relevant obligations under international agreements.

[28] At the time of setting and notifying an emissions budget, the Minister must provide a written response to the advice received from the Commission, including the proposed emissions budget, present this to the House of Representatives, and make it publicly available.[36] If the proposed emissions budget departs from the advice of the Commission, the Minister must decide whether it is necessary to carry out further consultation with persons likely to have an interest in the emissions budget and explain the reasons for any departures.[37]

[29] The emissions budgets are linked to emissions reduction plans prepared by the Minister following advice from the Commission. For each emissions budget period, the Minister "must prepare and make publicly available a plan setting out the policies and strategies for meeting the relevant emissions budget".[38] This may include policies and strategies for the two succeeding emissions budget periods.[39] The plan must include "sector-specific policies to reduce emissions and increase removals" and

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36 Section 5ZB(3).
37 Section 5ZB(4).
38 Section 5ZG(1)(a).
39 Section 5ZG(1)(b).

"a multi-sector strategy to meet emissions budgets and improve the ability of those sectors to adapt to the effects of climate change".[40] The plan must also include a "strategy to mitigate the impacts that reducing emissions and increasing removals will have on employees and employers, regions, iwi and Māori, and wider communities, including funding for any mitigation action" and "any other policies or strategies that the Minister considers necessary".[41]

[30] The Commission must provide advice to the Minister on the direction of policy required in the emissions reduction plan for the upcoming emissions budget period.[42] In "preparing a plan and supporting policies and strategies for an emissions budget period, the Minister must … consider the advice received from the Commission [about] meeting emissions budgets".[43] Except for the first emissions budget period, the plan must be published in the *New Zealand Gazette*, made publicly available, and presented to the House of Representatives at least 12 months prior to the commencement of the budget period.[44]

[31] The Commission "must regularly monitor and report on progress towards meeting an emissions budget and the 2050 target".[45] The Commission must prepare an annual report on measured emissions and removals "for the most recent year of the emissions budget period for which data is available from the New Zealand Greenhouse Gas Inventory".[46] This report must include "the latest projections for current and future emissions and removals" and "an assessment of the adequacy of the emissions reduction plan and progress in its implementation, including any new opportunities to reduce emissions".[47] Within two years after the end of an emissions budget period, the Commission must prepare a report for the Minister evaluating progress made in that emissions budget period toward meeting the emissions budget for that period including "an evaluation of how well the emissions reduction plan has contributed to that progress", "recommendations on any banking and borrowing that would be

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40 Section 5ZG(3)(a)–(b).
41 Section 5ZG(3)(c)–(d).
42 Section 5ZH(1).
43 Section 5ZI(1)(a).
44 Section 5ZI(2)–(2A).
45 Section 5ZJ(1).
46 Section 5ZK(1).
47 Section 5ZK(2).

appropriate" and "an assessment of the amount of offshore mitigation required to meet that emissions budget for that period".[48] The Minister must prepare reports in response to the Commission's monitoring reports and make these publicly available as well as present them to the House of Representatives.[49]

[32] The Commission is also required to prepare reports to the Government if requested to by the Minister on "matters related to reducing emissions of greenhouse gases and adapting to the effects of climate change".[50] The NDC Advice was provided in response to such a request by the Minister, made under s 5K of the Act.

[33] The Commission must consider a wide range of scientific, economic, social, cultural, and environmental factors as set out below in performing its functions and duties under the Act:[51]

> (a) current available scientific knowledge; and
>
> (b) existing technology and anticipated technological developments, including the costs and benefits of early adoption of these in New Zealand; and
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> (c) the likely economic effects; and
>
> (d) social, cultural, environmental, and ecological circumstances, including differences between sectors and regions; and
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> (e) the distribution of benefits, costs, and risks between generations; and
>
> (f) the Crown-Māori relationship, te ao Māori … and specific effects on iwi and Māori; and
>
> (g) responses to climate change taken or planned by parties to the Paris Agreement or to the Convention.

[34] The Commission must consult with the public where it considers it necessary, including by inviting submissions on draft reports.[52]

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48 Section 5ZL(1). Banking refers to, where the total emissions in an emissions budget period are lower than the emissions budget for that period, the ability to increase the subsequent emissions budget by the amount of excess reduction. Borrowing refers to, where the total emissions in an emissions budget period are greater than the emissions budget for that period, the ability to reduce the subsequent emissions budget by an amount not exceeding one per cent of the subsequent emissions budget: see s 5ZF.

49 Sections 5ZK(4) and 5ZL(2)–(3).

50 Section 5K(1) and (3).

51 Section 5M. "Te ao Māori" is defined in this section as "the Māori world": ss 5M(f) and 5H(2).

52 Section 5N.

The Commission's advice

Budgets Advice

[35] The Commission's advice on the proposed emissions budgets was the product of a lengthy process involving evidence gathering, modelling, analysis, testing, and extensive public consultation. The Commission received over 15,000 submissions (including from LCANZI) on its draft advice. The Commission's final advice (including the NDC Advice) is set out in a detailed report comprising some 1,200 pages in all, taking account of two companion volumes containing supporting evidence and consultation feedback.

[36] The Commission advised that New Zealand was not on track to meet its targets. Successive governments had adopted a series of emissions reduction targets focused on planting trees and purchasing offshore mitigation rather than pursuing actual emissions reductions at source.[53] The Commission continued:[54]

> 87 Instead of putting policies in place to decarbonise the economy and develop low-emissions technologies, practices and behaviours, Aotearoa used forests planted in the 1990s to offset its emissions and meet its targets. The [CO_2] removal benefits of these forests are now coming to an end. Gross emissions have increased by 26% since 1990 and Aotearoa is in a position that is more difficult than it might have been if it had started developing the structures, strategies and plans it needs to create a low emissions system earlier.

[37] The Commission stated that the short-term thinking that had led to the current position in addressing climate change needed to be replaced by long-term direction to achieve transformational change.[55] However, the Commission cautioned that the necessary transformation was fundamental and would take time:[56]

> 94 We need to be careful that in our haste to achieve more immediate emissions reductions, we do not constrain the ability of the economy to support deeper reductions later. Our recommended budgets suggest smaller reductions to emissions at first that accelerate over time. This reflects the time it will take to fundamentally change the way we do things.

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53 Commission's advice, above n 1, at 12.
54 At 12.
55 At 13.
56 At 13.

[38] The Commission stated that in reaching conclusions on its advice, it had balanced the need to be ambitious with the evidence as to what is achievable now, reflecting New Zealand's position after years of delayed action.[57] The Commission summarised the challenges involved in striking the right balance in setting a sustainable pace for change that achieves enduring emissions reductions:[58]

> **Setting a sustainable pace for change**
>
> 97 A key challenge in preparing this advice has been to find the balance between pushing hard to catch up after years of limited action and moving at a sustainable pace. Aotearoa needs to move at a pace that gives people time to plan and change in a way that does not threaten wellbeing, and further disenfranchise those already disadvantaged.
>
> 98 Moving too slowly will push the burden of addressing climate change onto young people and future generations. Many rangatahi told us that older generations had already left them with costs, and that delayed or weak action would add to those.
>
> 99 However, moving too fast will also impact people. Jobs could be lost unnecessarily and some industries and businesses forced to close even though there may have been solutions if they had more time. This could undermine public support for the transition and delay it even further. A thriving economy and society is vital for ensuring that both current and future generations can make continual and enduring emissions reductions over time.
>
> 100 For our budgets to be ambitious and achievable, they must be met in a way that is fair, equitable and inclusive. This means government must manage potential negative impacts and encourage positive benefits that come with climate action.
>
> …

[39] The Commission proposed the following emissions budgets, using global warming potential over 100 years (GWP_{100}) values as in the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report (AR4):[59]

(a) emissions budget 1 (2022–2025) — 278 megatonnes of CO_2 equivalent ($MtCO_2e$);

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57 At 10.
58 At 14.
59 At 74.

(b) emissions budget 2 (2026–2030) — 298 $MtCO_2e$; and

(c) emissions budget 3 (2031–2035) — 240 $MtCO_2e$.

[40] Taking account of forecast emissions for 2021, these budgets would see total emissions over the period 2021–2030 of 648 $MtCO_2e$.[60] To meet the then current NDC of 596 $MtCO_2e$, the Commission estimated a further 52 $MtCO_2e$ would need to be reduced over the nine-year period.[61] The Commission advised that attempting to achieve the current NDC through domestic action alone would be "highly challenging" and "likely lead to severe social and economic impacts on communities, people and businesses — far more than would be necessary to achieve the same amount of emissions reductions given more time".[62] Offshore mitigation would be "critical to meeting the [then] current NDC".[63]

[41] The Commission's final recommendation was expressed using GWP_{100} values as in the IPCC's Fifth Assessment Report (AR5):[64]

(a) emissions budget 1 (2022–2025) — 290 $MtCO_2e$;

(b) emissions budget 2 (2026–2030) — 312 $MtCO_2e$; and

(c) emissions budget 3 (2031–2035) — 253 $MtCO_2e$.

NDC Advice

[42] As noted, the Commission advised the Minister that the 2016 NDC was not compatible with the 1.5ºC goal.[65] It advised that this required emissions "of much less than 568 $MtCO_2e$ over the 2021–2030 period, or reductions of much more than 36 [per cent] below 2005 levels by 2030".[66] The Commission emphasised that it was

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60 At 363.
61 At 364.
62 At 363.
63 At 364.
64 At 74.
65 At 349.
66 At 357.

not making any specific recommendation on what the NDC should be as that was a political decision for elected representatives to make:[67]

> [The Commission] has not provided a specific recommendation on what the NDC should be. This is a political and ethical issue, which will require elected representatives to make decisions on the importance of factors that contribute to the 1.5ºC goal. Factors include the cost Aotearoa is willing to bear, social and economic impacts, international expectations and reputation, relative comfort with climate risk, and the balance of how much we do at home versus how much we do internationally.
>
> There is a big gap between what we can do domestically and what we must do to meet our international commitment with the NDC. This is because to meet previous climate change targets, Aotearoa has relied on offsetting through forestry and offshore carbon credits, rather than reducing total emissions. This gap will need to be bridged with offshore mitigation.

The Minister's decisions

[43] The Commission's final advice was provided to the Minister on 31 May 2021. An amended NDC was publicly announced on 31 October 2021 and communicated to the Convention secretariat on 4 November 2021. The Minister, in an affidavit, outlined the complex process followed during this five-month period to arrive at the amended NDC. This included receiving a number of briefings covering a wide range of issues and attending various meetings of a ministerial working group on climate matters. At the end of this process, the Minister submitted a detailed Cabinet paper presenting five options for an updated NDC, expressed using emissions reductions below gross 2005 levels, ranging from 54 per cent (option one — the Minister's preferred option) to 39 per cent (option five).

[44] The paper was discussed at a Cabinet meeting on 26 October 2021. Option 2 was adopted, and it was agreed that New Zealand's updated NDC would be:[68]

> To reduce net greenhouse gas emissions by 50 per cent below gross 2005 levels by 2030.
>
> This corresponds to 41 per cent when managed using a multi-year emissions budget starting from New Zealand's 2020 emissions target. Based on New Zealand's most recent [GHGI], this budget provisionally equates to 571 [$MtCO_2e$] over 2021–2030.

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67 At 349.

68 *Submission under the Paris Agreement: New Zealand's first Nationally Determined Contribution* (4 November 2021) at 1.

[45] The amended NDC (to reduce net greenhouse gas emissions by 50 per cent below gross 2005 levels by 2030) represented a significantly increased commitment compared to the original NDC which was to reduce net greenhouse gas emissions by 30 per cent below gross 2005 levels by 2030.

[46] The Minister provided his written response to the Commission's advice, pursuant to s 5ZB of the Act, and published the first three emissions budgets in the *New Zealand Gazette* on 16 May 2022.[69] The Minister explained that the first emissions budget was set at the same value recommended by the Commission. The second and third emissions budgets departed from the Commission's recommendations to "take account of new information relating to increased afforestation intentions that was unavailable to the Commission at the time it provided its advice".[70]

Preliminary issues

Was the Commission's advice amenable to judicial review?

[47] The Commission contends that its advice is not amenable to judicial review because it does not involve the exercise of a statutory power of decision and does not fall within any of the other categories of statutory power referred to in s 5(2) of the JRPA. While acknowledging that its advice is intended to be highly influential in informing decision-making by the Minister, the Commission says its advice forms only part of the Minister's subsequent statutory decision-making process and is not separately reviewable under the JRPA. The Commission argues that it is not relevant to the lawfulness of the NDC or the budgets whether the Commission acted reasonably or met the statutory purposes in the judgements it makes so long as the Minister does so in the decisions he makes. The Court's concern must be confined to the lawfulness of the decisions and actions taken by the Minister because that is ultimately what matters.

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69 Ministry for the Environment | Manatū Mō Te Taiao *Response to the Climate Change Commission's advice on setting emissions budgets* (16 May 2022) [Minister's response]; and "Emissions Budgets for 2022 to 2025, 2026 to 2030 and 2031 to 2035" (16 May 2022) *New Zealand Gazette* No 2022-go1816.

70 Minister's response, above n 69, at 7.

[48] We do not accept this submission. For the reasons that follow, we consider that the Commission's advice involves the exercise of a statutory power of decision and is reviewable.

[49] The High Court has supervisory jurisdiction by way of judicial review to maintain the rule of law by ensuring that public power is exercised within the limits of lawful authority. In principle, all exercises of public power are reviewable.[71]

[50] The JRPA contains wide procedural provisions facilitating judicial review of the exercise of a statutory power, the failure to exercise a statutory power, and the proposed or purported exercise of a statutory power.[72] The JRPA is procedural. It does not limit the High Court's jurisdiction to undertake review, including at common law.[73]

[51] A statutory power of decision is expansively defined in s 4 of the JRPA and includes:

> … a power or right conferred by or under any Act … to make a decision deciding or prescribing or affecting—
>
> (a) the rights, powers, privileges, immunities, duties, or liabilities of any person …

This provision is cast in broad terms and should be given a liberal interpretation.[74]

[52] As noted above at [13], two of the main purposes of the Act are to provide a framework for the development and implementation of clear and stable climate change policies that contribute to the 1.5ºC goal, and to enable New Zealand to meet its international obligations under the Convention, the Kyoto Protocol, and the Paris Agreement. The Commission's role is more than just influential, it is critical to the achievement of these objectives. The Commission is required to chart the

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71 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1].

72 Judicial Review Procedure Act 2016, s 3(1).

73 See: *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [75], n 62, citing *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 676 and 678.

74 See: *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA) at 651 which held that "the definition of statutory power of decision was widened to include the word 'affecting' and in other respects. … Thereby Parliament underlined that the modern and flexible procedural provisions of the Act are intended to have a liberal scope". That case concerned the meaning of statutory power of decision under the Judicature Amendment Act 1972, the definition of which is replicated in the Judicial Review Procedure Act.

appropriate course and hold successive governments to account for maintaining course over the decades to come. Specifically, the Commission's purposes are to provide independent, expert advice to the Government on mitigating climate change, including through reducing emissions of greenhouse gases, adapting to the effects of climate change, and monitoring and reviewing the Government's progress towards emissions reduction and adaptation goals.[75] These are vitally important matters that affect all New Zealanders. In recognition of this, the Commission is required to undertake wide public consultation and take account of a very broad suite of scientific, technological, social, cultural, economic, and environmental factors in formulating the emissions budgets and carrying out its other obligations under the Act.[76]

[53] The Act provides for the Commission to be equipped with the necessary specialist expertise to be able to carry out its various obligations, which are onerous, highly challenging, and critically important.[77] The Act ensures the Commission's independence, another feature of singular importance in furthering the Act's objectives by holding successive governments to account. Section 5O(1) expressly requires the Commission to act independently in performing its functions and duties, and in exercising its powers under the Act. The central role of the Commission in the statutory scheme established for managing New Zealand's response to the existential risk to humanity of climate change cannot be overemphasised.

[54] The Commission's advice on the emissions budgets is not just one factor among many for the Minister to take into account. When setting the budgets, the Minister must provide a written response to the advice received from the Commission. This response must be presented to the House of Representatives and made publicly available. If the emissions budget departs in any way from the advice of the Commission, the Minister must explain the reasons for any departures and decide whether further consultation is necessary.[78] Given the central importance of the advice in the statutory scheme we consider it falls readily within the ambit of a statutory power of decision because it affects the powers and duties of the Minister.

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75 Climate Change Response Act, s 5B.
76 Sections 5M–5N.
77 Part 1A, subpt 1.
78 Section 5ZB.

[55] We agree with LCANZI that the fact that the Minister may depart from the Commission's advice does not immunise the advice from review. Irrespective of any decision subsequently made by the Minister or Cabinet, the Commission must perform its vitally important public role lawfully, within the legal constraints set out in the Act, and in a manner consistent with the statutory purpose. The courts have an important role in enforcing compliance with the statutory scheme. Of course, not every error of fact or law in the advice will render that advice unlawful. The error must be shown to have been material to the advice that was given.[79] The question is ultimately whether the Commission stepped outside the limits of its lawful authority.

[56] The grant of relief in judicial review proceedings is discretionary.[80] The Court will be mindful of the utility of reviewing the Commission's advice rather than the Minister's decision, particularly if this would involve pre-empting the statutory process which allows for the ability to consult further and remedy any errors identified in the advice. The critical issue will be whether any relevant defects in the advice are likely to have a material effect on the decision made by the Minister. However, given the pivotal role of the Commission in the statutory process for setting emissions budgets, this may not be difficult to establish.

Was LCANZI's evidence admissible?

[57] Given that this was an application for judicial review on limited grounds, the High Court was presented with unusually voluminous evidence (comprising some 450 pages of text and numerous exhibits) from 19 witnesses (including evidence from the respondents in response and from LCANZI in reply). Although the admissibility of much of LCANZI's evidence was challenged by the Commission, the Judge did not address the objection in any detail and made no specific ruling other than that the evidence she referred to in the judgment was substantially helpful and admissible.[81]

[58] There is little utility in this Court revisiting the admissibility issue on appeal because it will not affect the substantive outcome. However, there is considerable

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79 *Glaxo Group Ltd v Commissioner of Patents* [1991] 3 NZLR 179 (CA) at 184; and *Ririnui v Landcorp Farming Ltd*, above n 71, at [91].

80 See: Judicial Review Procedure Act, ss 18–19; and *Unison Networks Ltd v Commerce Commission* CA284/05, 19 December 2006 at [82].

81 High Court judgment, above n 2, at [77]–[80], citing Evidence Act 2006, s 25.

force in the Commission's concern that the well-established limits on the admissibility of evidence in judicial review applications should be more closely observed in any future challenges to the exercise of its powers. A failure to do so is likely to have costs consequences.

[59] Judicial review applications are normally decided on the basis of the material before the decision-maker. Expert opinion evidence is admissible only if it is substantially helpful to the court in determining whether the decision under review was lawful.[82] This could include evidence as to the relevant context or explaining technical concepts the court is not familiar with. Evidence can also be admitted for the purpose of illuminating an incontrovertible technical error supporting an irrationality claim if it would not otherwise be obvious to the court.[83] However, the error must be incontrovertible once explained. Evidence offering a different view or otherwise directed to the merits is not admissible. So, for example, ex-post facto expert evidence challenging the quality of the decision making or the substantive reasonableness of an expert decision-maker's assessments is not admissible because it is simply not relevant to the lawfulness issues before the court on judicial review.[84]

[60] We consider that much of the evidence adduced in this case was not admissible because it was not substantially helpful in determining whether the Commission's advice was lawful. For example, all seven of LCANZI's expert witnesses (Dr Stephen Gale, Professor Piers Forster, Dr Joeri Rogelj, Professor Donald Wuebbles, Dr William Taylor, Dr Ivo Geoffrey Bertram and Professor Ralph Sims) gave evidence that the Commission made a mathematical error by applying modelled percentage reductions required to global net CO_2 emissions to New Zealand's gross CO_2 emissions when assessing compatibility with the 1.5ºC goal. With respect, it should be obvious to anyone with a reasonable grasp of basic mathematics that required percentage reductions in net emissions globally cannot be applied to gross emissions at a national

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82 Evidence Act, s 25(1).

83 *Regina (End Violence against Women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350, [2021] 1 WLR 5829 at [20]–[21], citing *Regina (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649.

84 *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 658; *CD v Immigration and Protection Tribunal* [2015] NZCA 379, [2015] NZAR 1494 at [22]; and *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 at [81]–[85].

level to obtain a like-for-like pro rata comparison. A layperson can readily understand, without expert assistance, that this is an apples with oranges comparison that is not mathematically valid.[85]

[61] LCANZI's evidence was not confined to the alleged mathematical error. Purely by way of example and not wishing to single him out, Professor Sims was asked to provide evidence on the following general and largely uncontentious topics which are of limited, if any, relevance to whether the Commission's advice was lawful:

> 3. I have been asked by [LCANZI] to provide evidence on the following issues:
>
> a. The IPCC framework and why the IPCC assessments and reports … are an authoritative source of evidence in relation to the climate crisis;
>
> b. New Zealand's contribution to the climate crisis, including its historical and current emissions and decade-on-decade movement in New Zealand's gross and net emissions and how these compare to other countries; and
>
> c. The likely impacts on New Zealand of a temperature increase of 1.5ºC and how this might compare with a temperature increase of 2ºC or more.

[62] Professor Sims concluded his reply affidavit by stating:

> I therefore strongly believe that although New Zealand is responsible for only a small share of annual total emissions, we have a major obligation to take urgent action in order to rapidly reduce our annual and per capita emissions, and hence show leadership in this regard.

This personal belief, which no doubt many would share, is of no help to the court in carrying out its limited task of determining whether the Commission's advice was lawful.

[63] In saying this, we intend no criticism of these eminent experts who have endeavoured to assist the court on highly complex issues in a matter of great importance. We agree with the Judge that some of the evidence was substantially helpful to the court to gain an adequate understanding of the complex technical issues needed to comprehend and resolve the legal issues. This will have assisted the

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[85] However, as we explain below, we do not think the alleged mathematical error was in fact made.

determination of the lawfulness challenges to the Commission's advice. However, in our view, much of the evidence strayed well beyond acceptable limits and should not have been adduced. It will have added unnecessarily to the cost of the proceeding for all parties.

Ground one — mathematical error

Pleading

[64] For the purposes of the NDC Advice, LCANZI pleaded that the Commission applied the modelling and conclusions in the 2018 Special Report of the IPCC (the 2018 Special Report)[86] to determine the maximum level of greenhouse gas emissions in New Zealand that would be compatible with contributing to the 1.5ºC goal. The 2018 Special Report concluded that to achieve the goal with no or limited overshoot a global reduction of 2010 total net CO_2 emissions of between 40 and 58 per cent was required by 2030 (applying the interquartile range).[87] LCANZI claimed that the Commission made a mathematical error, or an error of logic, by applying the modelled reductions to New Zealand's gross CO_2 emissions in 2010 (which exclude removals from forestry and are therefore significantly higher) rather than to its net CO_2 emissions (taking account of such removals).

[65] LCANZI claimed that the Commission's conclusion that New Zealand would need to limit emissions in the 2021–2030 period to less than 568 $MtCO_2e$ (referred to at [42] above) was the result of this error. Had the Commission applied the required reduction to 2010 net CO_2 emissions (5.048 Mt) instead of 2010 gross CO_2 emissions (35.031 Mt), it would have determined a 2030 limit for net CO_2 emissions of 2.120–3.029 Mt (instead of 14.713–21.019 Mt) and a total limit for net emissions of all gases over that period of 484 $MtCO_2e$ (instead of 568 $MtCO_2e$).

[66] LCANZI pleaded that the NDC Advice was unlawful and irrational due to this error.

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86 IPCC *Global Warming of 1.5ºC: An IPCC Special Report on the impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to irradicate poverty* (Cambridge University Press, 2022) [2018 Special Report].

87 At 14.

High Court judgment

[67] Mallon J was satisfied that the Commission understood how the IPCC global pathways in the 2018 Special Report had been constructed.[88] It made a deliberate choice to use these pathways only as an indirect comparator rather than applying them on their terms (ie net-net) and explained in the supporting volumes to its advice why it had done so (ie why it had adopted a gross-net approach). This was a matter of judgment, which the Commission considered was justified by the Kyoto Protocol, to avoid New Zealand being penalised for having planted trees to meet its past international commitments and imposing an undue burden.[89]

[68] The Judge accepted that the Commission's advice was potentially misleading, particularly for lay readers or those who did not read the full report.[90] However, the Minister understood the issue and was not misled, including because LCANZI wrote to him about it in June 2021.[91] The matter was also specifically addressed in the Cabinet paper.[92] The Judge quoted extracts from the Cabinet paper to illustrate this.[93]

[69] In rejecting this ground of review, the Judge concluded as follows:

> [127] I conclude that this ground of review is not made out. The NDC Advice was deliberately not based on a precise comparison with the IPCC 1.5ºC global pathways. It incorporated value judgments in making that comparison. While it might have been more transparent to carry out a strictly mathematical comparison and to then adjust for value judgments, the Commission did not make a serious logical error that led to an irrational recommendation. The Commission knew what it was doing and had reasons for its approach. It meant that its NDC Advice on consistency with the 1.5ºC global effort was not based entirely on a truly mathematical comparison with the IPCC 1.5ºC global pathways. The NDC Advice could have presented this more clearly and, by not doing so, risked misleading some readers (especially lay readers or those with insufficient time to study the full detail of the Commission's Advice) about this. However, it did not in fact mislead the Minister. The Minister's decision on the updated NDC was not made on the mistaken assumption that it represented a level of ambition that was mathematically in line with an ambition greater than the average IPCC 1.5ºC global pathways.

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88 High Court judgment, above n 2, at [113].
89 At [114].
90 At [119].
91 At [120]–[123].
92 At [124].
93 At [125]–[126].

Submissions on appeal

[70] The 2018 Special Report indicates that a global reduction in net CO_2 emissions of around 49 per cent is required between 2010 and 2030 to be consistent with the 1.5ºC goal.[94] Mr Every-Palmer KC, for LCANZI, says that to convert this global average to the national level requires no more than basic mathematics. One must take New Zealand's 2010 net CO_2 emissions (5.0 Mt) and subtract 49 per cent to produce a 2030 target for net CO_2 emissions of around 2.6 Mt. He submits that the Commission made a logical error in the NDC Advice by applying the 49 per cent reduction to New Zealand's 2010 gross CO_2 emissions of 35 Mt to produce a 2030 target for net CO_2 emissions of around 17.9 Mt. He says this apples with oranges calculation is an incoherent application of the 2018 Special Report and yields the "nonsensical" result that net CO_2 emissions can increase more than threefold from 5.0 Mt to 17.9 Mt and still be consistent with the 2018 Special Report that states these need to fall by 49 per cent.

[71] Mr Every-Palmer acknowledges that the ultimate level of ambition is a political matter. However, if the IPCC pathways in the 2018 Special Report are to be used as a starting point, then these must be applied to 2010 net CO_2 emissions in order to do the calculation correctly. The Commission's approach of applying the reductions to 2010 gross CO_2 emissions has the pretence of rigour but is methodologically flawed and masks the value judgments made by the Commission and the extent of their impact on the recommended figures. He says the consequence of this error is that the figures of 568 $MtCO_2e$ and 36 per cent derived by the Commission in the NDC Advice are incorrect. Mr Every-Palmer says this will have had an anchoring effect in the Minister's decision on the amended NDC because it suggests that 36 per cent correlates to the average of the IPCC 1.5ºC global pathways. He says it is likely a different NDC may have resulted if Cabinet had been correctly advised.

[72] Mr Every-Palmer submits it is no answer to say that the Minister understood what the Commission had done and was not misled. While the NDC Advice was requested by the Minister, the advice is given to the Government in terms of s 5K of the Act and was relied on by Cabinet as a whole. Further, the advice serves a broader

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[94] 2018 Special Report, above n 86, at 14. 49 per cent is the midpoint of the 40–58 per cent range.

public function as is reflected in the statutory requirements in s 5L of the Act for the Minister to present a copy of the advice to the House of Representatives and for the Commission to make it publicly available.

Assessment

[73] The 2018 Special Report modelled the required global reductions in global net CO_2 emissions to achieve the 1.5°C goal based on a range of possible future scenarios. The report concluded that steep reductions in net CO_2 emissions globally would be required by 2030 to meet the goal. The relevant modelled percentage reductions apply to global net CO_2 emissions, not gross CO_2 emissions.

[74] LCANZI is self-evidently correct that if the modelling is to be applied directly, the percentage reductions must be applied to net CO_2 emissions in the base year. Therefore, if the Commission had been attempting to apply the modelling directly, it would have failed due to the mathematical error or error of logic asserted by LCANZI. This much is beyond argument. However, as we explain below, that is not what the Commission did. Rather, it deliberately chose to apply the modelled reductions to New Zealand's 2010 gross CO_2 emissions and explained why it had done so. The Minister understood this, as LCANZI accepts. The Minister explained the position clearly in the paper he prepared for Cabinet. There is no reason to suppose that a more ambitious NDC would have been set if the Commission's analysis had been undertaken differently, applying the percentage reduction to 2010 net CO_2 emissions as a starting point and then making adjustments to reflect value judgments in the light of New Zealand's particular circumstances.

[75] The 2016 NDC was set by the government on a gross-net approach consistent with the requirements of the Kyoto Protocol and the Commission was not asked to comment on that. The Commission stated that the IPCC did not consider reductions for individual countries and the global pathways could not be applied directly to Aotearoa:[95]

> 28 The global IPCC pathways provide useful insights for considering how our recommended emissions budgets contribute to the global

[95] Commission's advice, above n 1, at 191–192.

> 1.5°C effort. However, the pathways represent global averages and do not set out prescriptive pathways for individual nations. There is no 'right way' to reduce emissions. Care needs to be taken when applying the IPCC pathways to Aotearoa for three key reasons:
>
> - Many of the emissions reduction opportunities that will be most important for the world will not be as important in Aotearoa given our major sources of emissions. For example, globally, coal power generation accounts for a much larger share of emissions and it is here that the sharpest early reductions in the IPCC pathways occur. Most electricity generation in Aotearoa however is already renewable, so this large reduction opportunity does not exist for Aotearoa.
>
> - The IPCC pathways group the emissions of the individual gases in different ways to those in the Act. For example, the IPCC assessed reductions in methane from agriculture, while emissions budgets are set for biogenic methane.
>
> - The IPCC pathways are set relative to a 2010 base year, while the targets in the Act are set relative to 2017.

[76] The Commission said it drew out the key features and considered how these applied in the Aotearoa context.[96] The Commission acknowledged that applying global-scale modelling to Aotearoa was "a blunt approach".[97] Importantly, the Commission made it clear that it had calculated the required CO_2 reductions using a *gross-net* approach. The apples with oranges (gross-net) comparison was acknowledged and the Commission explained why it had adopted a gross-net approach:[98]

> Gross-net accounting
>
> Consistent with the Kyoto Protocol-based target accounting approach, we have chosen to exclude forestry from the base year in developing the comparator NDCs (i.e., we have selected a gross-net accounting approach). The IPCC 1.5°C pathways adopt a net-net approach. Some submissions have pointed to this apparent inconsistency.
>
> Under the agreed accounting rules for the Kyoto protocol, emissions and removals of [CO_2] from [LULUCF] are excluded from the base year in calculating targets if the sector was a net sink of emissions in the base year — which it was in Aotearoa.
>
> This is because [CO_2] removals from new plantation forestry deliver a one-off removal from the atmosphere over the first decades of the life of the forest. After that time, the forest is neither a sink nor a source of emissions as

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96 At 56.
97 At 354.
98 Commission's supporting evidence, above n 8, at [13.2.3].

> [CO_2] removals from growth are balanced by emissions at harvest. Including these emissions removals in the base year would mean an ongoing level of new forest planting would be required to maintain net emissions at a constant level. This does not accurately represent the level of effort in the base year and would not be sustainable indefinitely.
>
> At a global level however emissions from land-use change represent additional emissions every year through deforestation and need to be reduced in the same way gross emissions do.
>
> The IPCC 1.5°C pathways use a net-net approach, because this is the most appropriate approach at the global level (because globally, the forestry sector is a net source of emissions). Aotearoa uses a gross-net approach, because our forestry sector has been a net sink of emissions. Both these approaches are consistent with the international accounting guidance and appropriate to the circumstances they are being applied to.

[77] The Commission included two tables in the immediately following section of the supporting evidence chapter under the heading "Application to Aotearoa".[99] The first of these tables show the percentage emissions reductions for each greenhouse gas required by 2030 to reflect the interquartile range modelled in the IPCC pathways. The second table is headed "Aotearoa NDC emissions trajectory start and end point calculations by gas" and applies the modelled reductions to New Zealand's emissions profile — specifically, CO_2, methane and nitrous oxide.[100] Both of these tables start with net CO_2. However, the figure alongside "Net carbon dioxide" in the second table in relation to 2010 emissions shows 35,031 kilotonnes gas which is the relevant gross figure for New Zealand, not net. But this should not confuse the reader because it is explained in the accompanying text and in a footnote reference appearing directly alongside the words "Net carbon dioxide":[101]

> Reductions of net [CO_2] emissions have here been applied to gross [CO_2] levels consistent with target accounting. This accounting recognises that land sector emissions need to be reduced, but land sector removals do not need to continue indefinitely. This is discussed in the forest accounting section above, and in further detail in *Chapter 3: How to measure progress*.

[78] We agree with the Judge that there was no mathematical error or error of logic in the formulation of the NDC Advice. The IPCC pathways were considered as a starting point, but only ever as an indirect comparator. The reason for comparing modelled reductions in global net CO_2 emissions with New Zealand's gross

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99 At [13.2.4].
100 At [13.2.4].
101 At [13.2.4], n 6 (emphasis in original).

CO_2 emissions for the purposes of the NDC Advice was a deliberate choice and was fully explained. It was not an error or an oversight. To the extent it can be argued that the Commission's advice could have been clearer, in this case that is a matter of expression rather than a flaw in the methodology and does not bear on the lawfulness of the advice.

[79] Moreover, as we will demonstrate, the Minister clearly understood the methodology employed by the Commission in the NDC Advice and he explained the issue in clear terms in the paper he presented to Cabinet.[102]

[80] On 12 June 2021, the Minister signed a detailed briefing paper that he had received from the Ministry for the Environment headed "Consistency of NDC1 with efforts to limit global warming to 1.5°C".[103] This paper set out the key issues and provided various quantifications for New Zealand's NDC to be compatible with the global effort to achieve the 1.5°C goal according to different equity measures. The paper explained the value judgments embedded in the gross-net approach taken by the Commission:[104]

> 24. The Commission applied a gross-net approach in its quantitative analysis: it calculated the rate of reductions for [CO_2] by comparing New Zealand's net emissions in 2030 with gross emissions in 2010, and relating this to the rate of reductions of global net [CO_2] emissions between 2010 and 2030 (which are on a net-net basis). The reason the Commission gives for this approach is that removals in New Zealand in 2010 due to past afforestation measures do not provide on-going removals, and hence on-going planting would be required merely to sustain that level of net emissions. Using net emissions in 2010 as [the] reference point for the required reductions by the year 2030 would therefore constitute an undue burden.
>
> 25. The Commission's approach embodies an additional value judgment about how past efforts should be treated when allocating future responsibilities among countries. An alternative approach would be to apply the global rate of net [CO_2] emissions reductions to New Zealand's net [CO_2] emissions both in 2010 and 2030. This would represent the downside of grandfathering, that a country with low emissions in the past would be required to have even lower

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102 Cabinet Paper "Agreement to Update New Zealand's first Nationally Determined Contribution under the Paris Agreement" [Minister's Cabinet paper].

103 Ministry for the Environment | Manatū Mō Te Taiao "Consistency of NDC1 with efforts to limit global warming to 1.5°C" (10 June 2021).

104 Footnote omitted.

> emissions in [the] future. Using this alternative method would result in a lower NDC1 budget consistent with 1.5°C (quantified below).

[81] Comparative figures using gross-net and net-net approaches were set out later in the briefing paper:[105]

> 82. An alternative approach would be to apply the global net-net reductions between 2010 and 2030 in 1.5°C-consistent pathways equally to New Zealand's net emissions, i.e. to require net CO_2 emissions in 2030 to be reduced below net CO_2 emissions in 2010. For this approach, using inventory-based emissions and removals would be more appropriate since this is more similar to how emissions in global emission pathways are described (i.e. those pathways do not exclude removals from pre-1990 forests).
>
> 83. Using otherwise the same methodology as in the Commission's final advice, the following NDC budgets could therefore be considered as consistent with 1.5°C, updated based on the latest (2021) emissions inventory (interquartile ranges shown in brackets):
>
> a. **568 (527–608)** [**$MtCO_2e$**] using a gross-net approach and net target accounting
>
> b. **484 (458–510)** [**$MtCO_2e$**] using a net-net approach and inventory-based removals
>
> 84. These two budgets are not directly comparable since they differ not only in their use of gross-net or net-net approaches, but the former excludes removals from pre-1990 forests, whereas the latter includes emissions and removals regardless of planting date.
>
> 85. As for the other equity principles, the results can be made comparable by translating the inventory-based budget into a net target accounting based budget that would ensure the same effort, i.e. the same actual emissions and removals over the 2021–2030 period. This conversion is done in a separate section below.

[82] The briefing paper set out ranges of updated NDC budgets and 2030 reduction targets that would be consistent with the 1.5°C goal based on different equity principles, as follows:[106]

> (a) equal rate of reductions (gross-net);
>
> (b) equal rate of reductions (net-net);
>
> (c) equal emissions per capita (2021–2030);

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105 Emphasis in original.
106 At 3.

(d) equal emissions per capita in 2030;

(e) equal emissions per capita in 2050;

(f) equal share of global mitigation cost (current share of GDP);

(g) equal responsibility for warming (from emissions since 1850); and

(h) equal responsibility for warming (from emissions since 1990).

[83] The paper concluded that the global equity approaches used represented only "a very simple lens on equity and fairness" and added that: "What is possible will also depend on our specific national circumstances, including our current emissions profile, policy architecture and the availability and integrity of offshore abatement."[107]

[84] On 17 June 2021, LCANZI wrote to the Minister setting out its concern that the Commission had made a mathematical error in preparing the NDC Advice and spelt out why it took that view:[108]

> In your consideration of the Commission's advice, we wish to draw your attention to what we believe to be an important error in the Commission's analysis.
>
> In order to assess the current NDC, the Commission considered what level of net emissions between [2021–2030] would be consistent with the findings of [the 2018 Special Report]. The Commission calculated that net emissions over this period should not exceed 568 [$MtCO_2e$] to be compatible with contributing to limiting warming to 1.5°C.
>
> As you are aware, the 2018 Special Report determined the percentages by which anthropogenic emissions of different greenhouse gases must each be reduced in order to limit global warming to 1.5°C. The reductions required relative to 2010 levels to have a [50–66%] chance of limiting warming to 1.5°C with no or limited overshoot are:
>
> - for net [CO_2], -40% to -58% by 2030 and -94% to -107% by 2050; and
> - for agricultural methane, -11% to -30% by 2030 and -24% to -47% by 2050.
>
> In implementing this approach, however, the Commission made a logical error as to the required reductions in net [CO_2].

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107 At [105].

108 Footnotes omitted; emphasis in original.

Based on the April 2021 Greenhouse Gas Inventory report, in 2010:

- the level of gross [CO_2] emissions in Aotearoa New Zealand was 35.031 Mt; and

- the level of net [CO_2] emissions in Aotearoa New Zealand was 5.048 Mt.

So, applying the 2018 Special Report, the maximum level of net [CO_2] emissions in Aotearoa New Zealand should have been calculated as 2.120 to 3.029 Mt by reducing 5.048 Mt by -40% to -58%.

However, the Commission applied the -40% to -58% range to the 2010 level of *gross* [CO_2] emissions. On the Commission's view, the 2030 limit for net [CO_2] is 14.713 to 21.019 Mt and the overall net emissions limit for [2021–2030] is 568 Mt. In our view, this is a clear mathematical error.

If the Commission had correctly applied the -40% to -58% to net [CO_2] emissions, then:

- the 2030 limit for net [CO_2] would have been 2.120 to 3.029 Mt; and

- the overall net emissions limit for 2021–2030 would have been 484 Mt.

The Commission's explanation for its approach is that:

> Reductions of net [CO_2] emissions have here been applied to gross [CO_2] levels consistent with target accounting. This accounting recognises that land sector emissions need to be reduced, but land sector removals do not need to continue indefinitely.

This explanation, however, conflates target accounting with the mathematical application of the 2018 Special Report findings to Aotearoa New Zealand's 2010 net [CO_2] emissions to calculate an appropriate limit for 2030. This calculation can *only* be carried out by reference to 2010 net [CO_2] emissions.

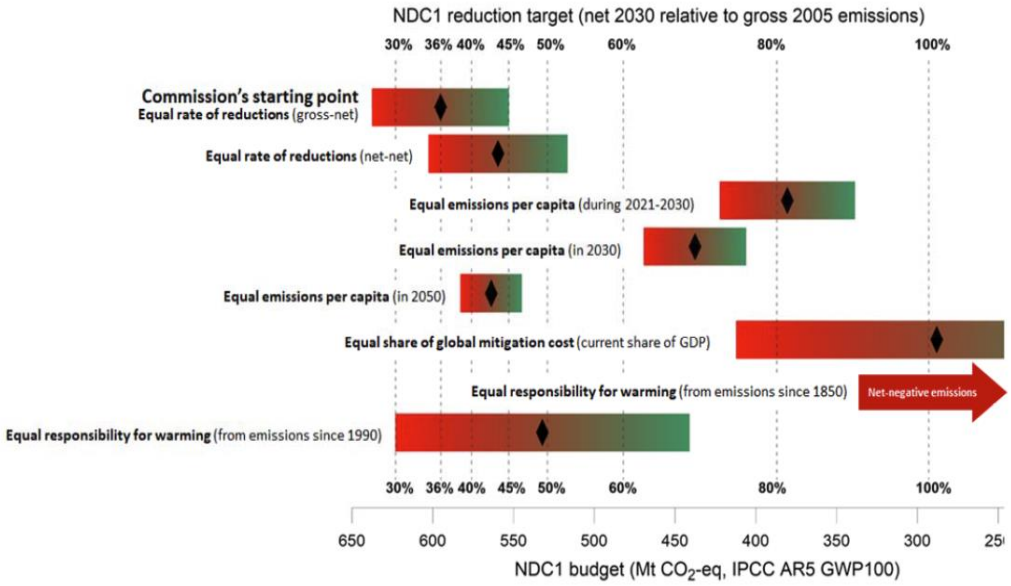
…

On our calculation, this would require limiting overall net emissions in 2030 to 37.3 Mt. In NDC terms this would be a 55% reduction relative to 2005 gross emissions (or a 35% reduction relative to 2005 net emissions).

[85] The Minister set out in the Cabinet paper different ways of assessing conformity of New Zealand's proposed NDC using various possible global equity criteria, including by adopting a net-net basis for determining the appropriate percentage reductions. He did this by including the following chart to illustrate the

significantly higher percentage reductions indicated by these alternative equity measures:[109]

Figure 1: NZ NDC levels assessed against global equity criteria



[86] As the Judge observed, this chart showed that emissions reductions of at least 44 per cent below 2005 levels by 2030 would be required for New Zealand to accord with the global (net-net) pathways modelled in the 2018 Special Report.[110]

[87] We do not accept LCANZI's submission that the NDC Advice had an inappropriate "anchoring effect", resulting in a lower NDC than might otherwise have been set. This chart graphically illustrated the range of reductions that would be required according to various equity comparators, providing further support and context for the Commission's advice that in order for the NDC to be compatible with the 1.5°C goal, it would need to reflect emissions reductions of *much more than* 36 per cent below 2005 levels by 2030. The Minister's preferred option (option 1) was to reduce emissions by 54 per cent below 2005 gross levels. This may be compared with LCANZI's submission in correspondence with the Minister in

109 Minister's Cabinet paper, above n 102, at 13.
110 High Court judgment, above n 2, at [123].

June 2021 (referred to above at [84]) that the NDC should be 55 per cent below 2005 gross emissions to be consistent with the findings in the 2018 Special Report.[111]

[88] The Minister also explained the choice of gross-net accounting methodology in an appendix to the Cabinet paper and drew attention to the fact that the IPCC pathways in the 2018 Special Report used a global net-net calculation. The Minister observed that comparing New Zealand's NDC with the global pathways modelled by the IPCC was not "a simple mathematical calculation", but required the exercise of judgment based on a range of factors:[112]

> **Appendix 2: Choice of accounting methodology**
>
> 1 The proposed NDC emissions reduction targets are expressed on a gross-net basis, i.e. they commit New Zealand to reduce its net emissions in the target year (or budget period) relative to gross emissions in the reference year. This is the basis on which [the Commission] gave its advice on the NDC, and is the basis on which New Zealand's first NDC was expressed. It is also the basis on which New Zealand stated and reported against its international emissions reduction target under the Kyoto Protocol in 2008–2012, and in its target under the Convention in the period 2013–2020.
>
> 2 Monitoring and demonstrating achievement of these targets is done using a target accounting approach. Target accounting uses gross emissions estimates from the national inventory report but accounts for land emissions differently: it excludes removals from pre-1990 forests unless they result from changes in forest management, and it excludes emissions or removals occurring on non-forest land for which data are currently limited and have high uncertainty. The removals used for target accounting are a subset of total removals and are part of the annual New Zealand [GHGI]. In addition, New Zealand has stated that for accounting under the Paris Agreement, it will apply averaging to removals on commercial forest land. This smooths out peaks and troughs arising from forest harvest and replanting. This accounting approach formed the basis for the Commission's advice on domestic emission budgets and the [original NDC].
>
> 3 An alternative way to account for New Zealand's NDC target would be on a net-net basis that considers all land-based emissions and removals, including removals occurring in forests planted before 1990. *It can be argued that accounting on a net-net basis is more consistent with the approach taken by the IPCC in its 2018 Special Report that provided global pathways for reaching the 1.5°C goal,*

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111 The Minister provided evidence to show that if the calculations are done correctly, the amended NDC is in fact more stringent than the starting point suggested by LCANZI based on the modelled percentage reductions in the 2018 Special Report. However, it is not necessary to address this evidence in detail.

112 Emphasis added.

because the IPCC used a global net-net calculation for the global pathways. However, the methodology to determine net [CO_2] emissions in these global pathways is not identical to that used in country inventories.

4 *If the Commission had used a net-net approach, this would have resulted in a different recommendation regarding the NDC emission target. In short, this is because if the emissions figure for the baseline year is calculated on a net basis (i.e. taking into account all [LULUCF] emissions and removals in the baseline year), there is a lower floor from which further reductions must be made. Accounting towards such a net-net target would also need to include removals on forest land planted prior to 1990.*

5 Officials have considered whether a net-net approach should be used and, on balance, recommend that the gross-net target formulation and target accounting method be used because

i. New Zealand's contribution towards global efforts ultimately depends only on the actions New Zealand takes to reduce emissions domestically and offshore, not on how it expresses its target.

ii. The emissions budget implied in the updated NDC constitutes New Zealand's highest possible ambition, having given due consideration of all relevant opportunities and risks. How this target is expressed (gross-net or net-net) is a matter of communication as it does not change our national ambition and contribution to global efforts.

iii. The purpose of the target accounting is to drive action, so it is appropriate to adopt it as a measurement framework designed to count (and provide an incentive for) emissions-reducing actions. In New Zealand's case, there are large business-as-usual changes (e.g. through planting and harvest cycles) in the level of emissions and removals from pre-1990 forests that if not "factored out" would dominate net emissions trends and delink the measurement framework from the results of later actions.

iv. The target accounting approach is consistent with three objectives, to provide:

(1) a continued incentive to establish new forests

(2) a disincentive to deforest

(3) an incentive to increase carbon stocks of pre-1990 forest above [business as usual]

v. Gross-net target setting and accounting recognises that countries with significant removals in the reference year would be significantly disadvantaged. A country with high removals in the base year would have to continue planting trees just for its net emissions to remain constant, whereas a

country with no removals in the base year would have to take no additional action for its emissions to remain constant. Targets that represent comparable effort between countries would therefore appear weaker in terms of headline rates of reduction for countries with high rates of removals in the base year, which is challenging to communicate internationally.

vi. The target accounting approach captures the key actions being undertaken on land after the reference year that affect emissions and removals, and for which scientific uncertainty is limited.

6 *Fundamentally, using a gross-net approach to compare New Zealand's rate of reduction with those in global emission pathways assessed by the IPCC is not a simple mathematical calculation, but requires New Zealand to exercise its judgment about the appropriate level of burden sharing between countries with different amounts and types of emissions and removals. Officials note that, as a result, the 36% median rate of reduction calculated by the Commission (as well as any greater reduction expressed as a gross-net target) necessarily includes some of the value judgments set out above.*

[89] In summary, we agree with the Judge that the Commission did not make any logical or mathematical error in its NDC Advice. The Commission did not purport to apply directly and without qualification the global percentage emissions reductions modelled in the 2018 Special Report for the purpose of assessing whether the current NDC was consistent with the 1.5°C goal. As was apparent from the NDC Advice, this was used only as an indirect comparator. It is clear that the Minister understood the issue, including because of LCANZI's correspondence and the briefings he received from officials. The Cabinet paper explained the issue with commendable clarity, including the underlying reasons for the approach taken by the Commission.

[90] We consider the Judge was correct to decline to make the orders sought in the second amended statement of claim, relevantly "a declaration that the Commission acted unlawfully in advising the Minister on what would constitute a 1.5°C-compliant NDC" (no such advice was given) and "a declaration that the Minister acted unlawfully in determining the [a]mended NDC in reliance on the Commission's advice on what would constitute a 1.5°C-compliant NDC". The alleged unlawfulness in the NDC advice is not established. It is also clear that in determining the amended NDC, neither the Minister nor Cabinet were misled by the approach taken by the Commission.

Ground two — misinterpretation of statutory purpose?

Pleading

[91] LCANZI pleaded that the purpose provisions in the Act create a substantive obligation on the Commission, not outweighed or qualified by the mandatory considerations set out in ss 5ZC and 5M, to recommend emissions budgets for the purposes of:

(a) contributing to the global effort under the Paris Agreement to limit global average temperature increase to 1.5°C above pre-industrial levels (ss 3(1)(aa) and 5W); and

(b) enabling New Zealand to meet its international obligations, including under the Paris Agreement (s 3(1)(a)), which require New Zealand to pursue ambitious emissions reductions.

[92] LCANZI alleged that the Commission erred in law in its Budgets Advice, including by:

(a) failing to determine, first, what level of emissions reductions were required over the relevant periods to contribute to the 1.5°C goal and to meet New Zealand's obligations under the Paris Agreement, and second, how those reductions may realistically be met, having regard to the matters set out in ss 5ZC and 5M;

(b) incorrectly taking the view that any emissions budgets consistent with the 2050 target would also be consistent with what is required to contribute to the 1.5°C goal and meet New Zealand's obligations under the Paris Agreement;

(c) basing its advice on what was required to meet the 2050 target and failing to consider what further domestic action was required over the period covered by the first three emissions budgets to contribute to the

1.5°C goal and meet New Zealand's obligations under the Paris Agreement;

(d) misconstruing the mandatory considerations in ss 5ZC and 5M as matters that could be balanced against the purpose of the Act and of subpt 3 of pt 1B; and

(e) failing to consider how reliance on offshore mitigation to bridge the gap between the proposed NDC and the emissions budgets could be minimised.

[93] LCANZI alleged that the proposed emissions budgets do not contribute to the 1.5ºC goal because they represent an increase in New Zealand's net emissions, and this falls well short of what is required based on the 2018 Special Report. Further, the proposed emissions budgets do not meet New Zealand's obligations under the Paris Agreement because they do not constitute ambitious emissions reductions that aim to achieve the objectives of the NDC by domestic action.

High Court judgment

[94] The Judge accepted that s 5W of the Act creates a dual purpose of reaching the 2050 target and contributing to the 1.5°C goal. The latter purpose reflects the fact that the timing of emissions reductions is important, not just the 2050 target.[113] However, the Judge rejected LCANZI's submission that the purpose of contributing to the 1.5°C goal sets a bottom line for each budget period. The words "contribute to" are more consistent with an aspiration than an obligation.[114] The Judge found that the Commission is required to make an overall assessment of the stipulated considerations in s 5ZC with the s 5W purposes in mind.[115] The Commission was therefore required to consider:[116]

> … whether its proposed budgets, that have taken into account the relevant considerations, will put [New Zealand] on a path to meet the 2050 [t]arget and whether they contribute to the 1.5°C goal.

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113 High Court judgment, above n 2, at [151]–[154].
114 At [162].
115 At [170].
116 At [171].

The Judge was satisfied that the Commission followed this approach in proposing the emissions budgets.[117]

Submissions on appeal

[95] Ms Cooper KC, who presented LCANZI's submissions on this ground, submits that the dual purpose in s 5W of the Act — meeting the 2050 target and contributing to the 1.5°C goal — have operative force and are not merely aspirations to be kept in mind when advising on or setting emissions budgets. She submits that the Budgets Advice did not meet the 1.5°C goal purpose. Whether the emissions budgets contribute to the 1.5°C goal can be assessed against objective criteria and must reflect commitments made under the Paris Agreement, including by taking the lead as a developed country and pursuing the highest possible ambition through domestic mitigation. While Ms Cooper acknowledges there is no single correct answer, she contends there is an outer limit to the permissible range. She says that the budgets, showing net emissions increasing in the critically important period to 2030, when they are supposed to fall by around 50 per cent, clearly fall outside the permissible range.

[96] In any event, Ms Cooper submits that the Commission and the Minister were required, at a minimum, to meaningfully engage with what was needed to meet the 1.5°C goal but failed to do so. She submits some form of analysis was required to determine whether incrementally increased ambition was likely to be "technically and economically achievable" in terms of s 5ZC(2)(b)(iv) of the Act. She says that the Commission did not consider any intermediate option between domestic emissions reductions at the level of the NDC and the recommended budgets.

[97] Ms Cooper makes a number of additional points in support of her overall contention that the Commission failed to meet this important purpose of the Act. She argues that the Commission took a conservative view of what is "affordable", noting its assessment that the proposed budgets would mean an overall reduction to the level of GDP in 2035 of around 0.55 per cent.[118] She says the Commission did not test alternative pathways of higher ambition to see whether greater emissions

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117 At [172]–[185].
118 Citing Commission's advice, above n 1, at 147.

reductions would be "economically achievable", as the Act requires. Nor did the Commission undertake any cost-benefit analysis of meeting the NDC through domestic measures rather than through offshore mitigation. She says it is unclear what evidence or analysis the Commission relied on for its conclusion that meeting the NDC through domestic action would create unmanageable consequences. In particular, she says the Commission did not consider the extent to which the negative impacts of greater domestic action could be mitigated by policy measures funded by the costs that would otherwise be incurred in paying for offshore mitigation. She says that the Commission has not weighed the economic impact of emissions reduction in the short-term against the future consequences of failing to meet the 1.5°C goal, which she says are likely to be orders of magnitude higher, and irreversible.

Assessment

[98] The 2018 Special Report highlighted the critical importance of limiting global warming to 1.5°C and concluded that 2010 net emissions needed to be reduced by around half by 2030 for this to be achieved.[119] While the 2050 target is critical, steep reductions in net emissions this decade are also critically important if global warming is to be kept to 1.5°C above pre-industrial levels. The 2018 Special Report was approved in October 2018 and provides important context for the amendments to the Act that were introduced by the Climate Change Response (Zero Carbon) Amendment Act 2019, including the introduction of the dual purpose set out in s 5W and the inclusion of the reference to the 1.5°C goal in s 3(1)(aa).[120]

[99] It is helpful to set out again the relevant parts of the purpose provisions in the Act:

> **3 Purpose**
>
> (1) The purpose of this Act is to—
>
> (aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—
>
> (i) contribute to the global effort under the Paris Agreement to limit the global average

[119] 2018 Special Report, above n 86, at 14.
[120] Climate Change Response (Zero Carbon Act) Amendment Act, ss 4 and 8.

temperature increase to 1.5° Celsius above pre-industrial levels; and

…

(a) enable New Zealand to meet its international obligations under the Convention, the [Kyoto] Protocol, and the Paris Agreement, including (but not limited to)—

…

(2) A person who exercises a power of discretion, or carries out a duty, under this Act must exercise that power or discretion, or carry out that duty, in a manner that is consistent with the purpose of this Act.

…

5W Purpose of this subpart

The purpose of this subpart and subparts 3 and 4 is to require the Minister to set a series of emissions budgets—

(a) 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 1.5º Celsius above pre-industrial levels; and

(b) in a way that allows those budgets to be met domestically; and

(c) that provides greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals that will be required.

[100] There can be no dispute that emissions budgets are intended to serve the dual purpose of the Act, being the 2050 target *and* contributing to the 1.5°C goal. This is evident from a plain reading of s 5W and is confirmed by the legislative history.

[101] When introducing the Climate Change Response (Zero Carbon) Amendment Bill (the Zero Carbon Bill) at its first reading on 21 May 2019, the Minister stated:[121]

> … As far as we're aware, we are the first country in the world to locate that commitment to hold global warming to no more than 1.5[°C] in primary legislation.
>
> This ensures that whatever else we choose to do, it must further that critical outcome — and nothing we do should undermine it. …

[121] (21 May 2019) 738 NZPD 11027; and Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) [Zero Carbon Bill].

[102] The Minister made a statement to similar effect at the second reading of the Bill on 5 November 2019, with specific reference to the need for emissions budgets to align with the 1.5°C goal:[122]

> Third, the purpose of emissions budgets in the bill will now include a reference to the need for New Zealand to contribute to global efforts to limit the average temperature increase to 1.5[°C] above pre-industrial levels. This will align emissions budgets with the overall purpose of the bill and reinforce the need for [decision-makers] to consider the global response to climate change when determining the level of emissions budgets.

[103] The dual purpose must guide the decision-making process for setting emissions budgets under the Act. Section 3(2) of the Act expressly requires all persons exercising a power or discretion or carrying out a duty under the Act to do so in a manner consistent with the purpose of the Act. The purpose of contributing to the 1.5°C goal is therefore of central importance and cannot be downplayed.

[104] However, we do not consider the purpose provision can be elevated to a substantive bottom line requirement having operative force in the sense described by the Supreme Court majority in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[123] The purpose provision under consideration in that case — s 10 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) — included, in relation to specified zones, "to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter".[124] Glazebrook J considered that this purpose provision amounted to "an operative restriction for discharges and dumping and thus an environmental bottom line in the sense that, if the environment cannot be protected from pollution through regulation, then discharges of harmful substances or dumping must be prohibited".[125] Williams J and Winkelmann CJ agreed.[126]

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122 (5 November 2019) 742 NZPD 14719.

123 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [240], [245] and [250] per Glazebrook J, at [292] per Williams J, and at [303]–[305] per Winkelmann CJ.

124 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10(1)(b).

125 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 123, at [245].

126 At [292] and [303] respectively.

[105] We consider that the purpose provision in the Act is of a different character to that in the EEZ Act considered by the Supreme Court in *Trans-Tasman Resources Ltd*. There, the statutory purpose of protecting the environment from pollution can be understood as an absolute operative requirement, creating an unambiguous bottom line. If protection from pollution (the bottom line) cannot be achieved by regulating the stipulated activity, it must be prohibited. By contrast, the purpose in the Act is not cast in such absolute or clearly defined terms capable of creating a separately enforceable legal duty. The relevant requirement is for the Minister to set a *series* of emissions budgets *with a view* to *contributing* to the 1.5°C goal. What may qualify as a contribution to the 1.5°C goal by an individual country is not defined in the Paris Agreement or in the Act. The Act does not prescribe any framework or parameters for assessing the adequacy of the envisaged contribution across a series of budgets, let alone for a particular budget period.

[106] LCANZI's claim proceeds on what we consider to be the false premise that the Commission was obliged to "determine" as a first step what level of emissions reductions were *required* over the relevant periods to contribute to the 1.5°C goal. As Ms Cooper acknowledges, there is no single right answer to this question. Section 5W does not establish an objectively ascertainable, operative bottom line requirement that can be "determined" so that it can be said to be met, or not met, in specific budget periods. There is also no prescribed methodology for determining this.

[107] LCANZI claims that the proposed budgets do not contribute to the 1.5°C goal and represent "an increase in [New Zealand]'s net emissions on the net GHGI measure and on any measure [fall] well short of what is required based on the 2018 Special Report". In other words, LCANZI claims that any budget allowing for an increase in net emissions over the budget period will be contrary to the purpose of the Act and unlawful. However, it does not necessarily follow that an increase in net emissions in a particular budget period means that the series of emissions budgets of which it forms part will have not been set with a view to contributing to the global effort to achieve the 1.5°C goal. As we have already explained, New Zealand's net emissions profile is subject to major periodic swings without any change in human behaviour (good or bad) impacting climate change simply because of the significant contribution of the forestry sector as a carbon sink and the timing of the harvest and

replanting cycle. This means that a constructive contribution by New Zealand to the global effort to limit global warming by reducing gross CO_2 emissions at source can be obscured by the happenstance of historical forest planting decisions leading to fluctuating levels of CO_2 removals. For example, a budget could forecast a significant decrease in gross emissions from positive behavioural changes that are nevertheless completely obscured (if one focuses solely on net emissions) because of temporarily reduced removals that reflect no change in human behaviour at all.

[108] For these reasons, we are unable to accept LCANZI's submission that the Commission was obliged to determine at the outset the level of emissions reductions required over the relevant periods to contribute to the 1.5°C goal and to meet New Zealand's commitments under the Paris Agreement. There is no required level of contribution susceptible to precise determination. Nor do we accept that a budget providing for an increase in net emissions in a particular period necessarily contravenes the purpose of the Act to contribute to the global effort to limit global warming. Rather, we agree with the Judge that the Commission was required to consider whether its proposed budgets will put New Zealand on a path to meet the 2050 target *and* contribute to the 1.5°C goal. The Commission's duty to recommend budgets had to be exercised consistently with the dual purpose in mind but the Act does not set a bottom line.

[109] We are not persuaded that the Commission overlooked or misinterpreted the purpose of contributing to the 1.5°C goal in formulating the Budgets Advice. This topic was extensively covered in chs 4, 5 and 9 of the Advice. The following extracts are sufficient to illustrate this.

[110] Chapter 4 summarised the approach it took in formulating the emissions budgets as follows:[127]

> The Commission's focus has been on developing advice that is achievable and ambitious and puts Aotearoa on track to meet its targets for long-lived greenhouse gases and biogenic methane in a way that is focused on the long term. We want Aotearoa to reach the 2050 targets and sustain them beyond 2050.

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[127] Commission's advice, above n 1, at 47–48 (emphasis in original).

The stages the Commission went through in determining the emissions budgets are:

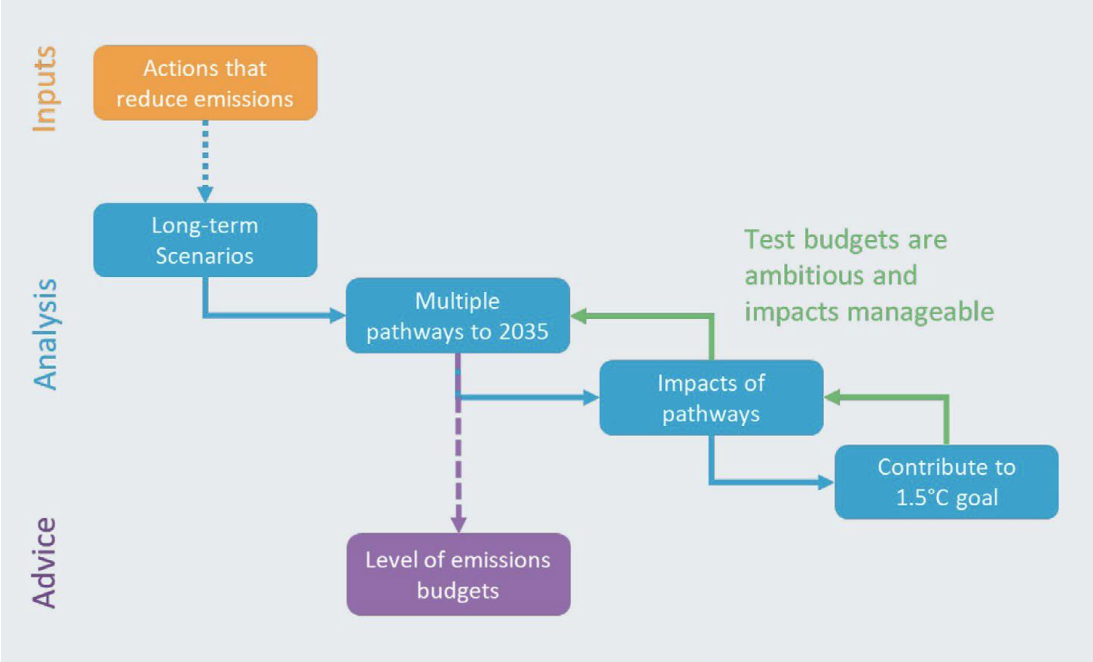
- **Pulling together evidence to help us understand the actions that reduce emissions.** We have drawn on international evidence and evidence from Aotearoa. We have tested our evidence and assumptions through our technical reference groups and through consultation, and have made amendments in light of this feedback. We have engaged widely with government agencies, NGOs, business, industry groups and other stakeholders and considered the 15,000 submissions we received during consultation.

- **Modelled long-term scenarios to 2050 and beyond, and multiple paths to 2035, and used the results to calculate draft emissions budgets.** This involved running a series of scenarios, looking at what impact current policy will have on emissions, a range of long-term scenarios to 2050 and beyond, and focusing in more detail on the paths to 2035. We modelled three different paths and tested how sensitive these paths are. This was to determine that our recommended emissions budgets would be achievable as well as ambitious.

- **Tested these draft emissions budgets and made adjustments to ensure that any impacts were manageable, that they were sufficiently ambitious, and that they were a sufficient contribution to the global 1.5°C effort.** This involved looking at the potential impacts on the economy, different sectors, regions, communities, households, different socioeconomic groups, Iwi/Māori and different generations. Where there were negative impacts, we considered whether these impacts were manageable or whether they could be reduced or changed through changes to government policy. We looked at the positive impacts and co-benefits, such as to health and equitable access to health, and considered how these could be maximised.

[111] The Commission included the following diagram to illustrate the stages of analysis undertaken in formulating the Budgets Advice. This shows that consideration of New Zealand's contribution to the 1.5°C goal was an integral part of the analysis:[128]

[128] At 51.



[112] Chapter 5, which contains the recommended emissions budgets, states in the summary at the beginning that the Commission has been "guided by the requirements and considerations under the Act, which are grouped around achieving three key outcomes",[129] one of which is that the budgets are to be:[130]

> … ambitious and put Aotearoa on track to meet its emissions reduction targets, sustain those targets and contribute to the global effort of limiting warming to within 1.5°C of pre-industrial levels.

[113] Chapter 9 of the advice was entirely devoted to the topic of whether the proposed emissions budgets contributed to the 1.5°C goal. Chapter 9 contains five sections:

(a) the science of the different greenhouse gases;

(b) global efforts to limit warming to 1.5°C;

(c) global 1.5°C compatible pathways;

(d) assessing how our emissions budgets contribute to the global 1.5°C effort; and

(e) overall domestic contribution to the global 1.5°C effort.

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129 At 60.
130 At 60.

[114] The summary for this chapter reads:[131]

> **Summary**
>
> Limiting warming requires a global effort with each country playing its part by meeting its international climate change commitments to reduce emissions. Global ambition is increasing with many of the world's largest emitters committing to strengthened climate targets.
>
> The domestic emissions reduction targets for Aotearoa are set at a level the Government has judged to be in line with contributing to global efforts to limit warming to 1.5°C. This is a requirement under [the Act]. To make sure [the Commission's] budgets are compatible with this, we have carried out a detailed assessment.
>
> **Our assessment of how the recommended budgets contribute to the global 1.5°C effort:**
>
> We have considered two components when assessing whether our emissions budgets are compatible with the global 1.5°C effort.
>
> 1. We looked at whether the emissions budgets are compatible with the 2050 emissions reduction targets. The country's [CO_2] and methane targets were set by the government as our domestic contribution to the 1.5°C global effort.
>
> 2. We looked at how the emissions reductions for the different greenhouse gases in our work compare to the [IPCC] 1.5°C pathways. We looked at the relative reductions and global trajectories for the different greenhouse gases in the IPCC's work, drew out the key features, and then applied these in the Aotearoa context.
>
> The Commission's analysis shows our recommended emissions budgets put Aotearoa on track to reach net-zero [CO_2] emissions by 2038. This is ahead of the range in the IPCC pathways of [2045–2055]. The recommended budgets also put us on track to reach net zero for all long-lived greenhouse gases before 2050.
>
> The reductions in agricultural methane for our emissions budgets put Aotearoa just outside the IPCC's interquartile range for 2030. However, by 2050 we consider it is likely Aotearoa will be within the interquartile range.
>
> The Act sets targets for reductions in total biogenic methane, this includes biogenic methane emissions from waste as well as agriculture. Our analysis shows Aotearoa has an opportunity to significantly reduce emissions from waste. This would lead to a reduction of total biogenic methane between 2010 and 2030 of 12%, which is within the IPCC range.
>
> Our recommended budgets see reductions in nitrous oxide between 2010 and 2030 of 3%, which is inside the IPCC's interquartile range. This path also puts nitrous oxide reductions on track to reach the lower emissions end of the IPCC interquartile range by 2050.

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131 At 184–185.

> **Changes in our final advice**
>
> This is a new chapter in our final advice. It answers questions that were raised during consultation about the contribution of Aotearoa to the global 1.5°C effort.

[115] As can be seen, whether the proposed budgets served the purpose of contributing to the 1.5°C goal was a central consideration in finalising the Budgets Advice. We are not persuaded that the Commission misunderstood its task in this respect or misdirected itself in law in carrying it out.

[116] We view LCANZI's specific complaints that the Commission ought to have undertaken other or more extensive analyses such as cost-benefit assessments, or recommended budgets reflecting higher ambition, as effectively complaints going to the merits. Complaints about the merits of a decision are not open to scrutiny on judicial review unless the advice can be shown to be unreasonable and therefore unlawful. We address that question under the fourth ground of review.

Ground three — wrongful use of MAB accounting methodology?

Introduction

[117] Section 5ZA of the Act requires the Commission to advise the Minister on various matters relevant to setting an emissions budget, including the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target:

> **5ZA Commission to advise Minister**
>
> (1) The Commission must advise the Minister on the following matters relevant to setting an emissions budget:
>
> (a) the recommended quantity of emissions that will be permitted in each emissions budget period; and
>
> (b) the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target; and
>
> (c) how the emissions budgets, and ultimately the 2050 target, may realistically be met, including by pricing and policy methods; and
>
> (d) the proportions of an emissions budget that will be met by domestic emissions reductions and domestic removals, and the amount by which emissions of each greenhouse gas

should be reduced to meet the relevant emissions budget and the 2050 target; and

(e) the appropriate limit on offshore mitigation that may be used to meet an emissions budget, and an explanation of the circumstances that justify the use of offshore mitigation (*see* section 5Z).

…

[118] The Commission dealt with the second of these topics — the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target — in ch 10 of its advice. The Commission recorded its understanding that the rules for measuring progress referred to the system of accounting for greenhouse gas emissions that will be used to track progress towards emissions budgets and the 2050 target. The Commission noted that various emissions accounting methods were already in use including those used to prepare New Zealand's GHGI, to track NDCs and other targets, and to "produce emissions accounts that align with economic statistics".[132] The Commission saw its task as being to determine which of these existing methods would be best suited to setting emissions budgets and delivering the 2050 target.[133]

[119] The Commission identified that a key purpose of the emissions reduction targets is to drive actions that will reduce human impacts on the climate. The Commission considered that the link to policy and driving behavioural change meant that emissions accounting for targets may differ from the methods used for national GHGIs.[134] The high-level objective was for a "robust, transparent accounting system that tracks genuine environmental gains while balancing completeness with practicality".[135]

[120] Six principles were identified for accounting for emissions budgets and the 2050 target:[136]

1. seek to cover all material human caused emissions sources and sinks;

2. be grounded in robust science and evidence;

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132 At 196.
133 At 196.
134 At 197.
135 At 197 (emphasis omitted).
136 At 197.

3. send a clear signal for climate action;

4. be accurate and reduce uncertainty as far as practicable;

5. be transparent, practical and acceptable; and

6. be consistent and maintain the integrity of the targets.

[121] The Commission then assessed the accounting methodologies against the objective by applying these principles.

[122] The first key choice was whether emissions should be calculated on a production or a consumption basis. The Commission explained that the production approach "records emissions at the point where human activity causes their release to the atmosphere", for example where a manufacturing plant uses a coal-fired burner.[137] The consumption approach on the other hand accounts for emissions embodied in a good or service taking account of all emissions created during the supply chain required to produce it. The Commission considered that production-based estimates were more suitable to account for emissions budgets and the 2050 target.[138] There is no challenge to this aspect of the Commission's advice. It is not suggested that this choice of accounting methodology fell outside the scope of the Commission's duty to advise on the rules to measure progress in terms of s 5ZA(1)(b).

[123] The contest concerns the next issue addressed by the Commission, namely, how to account for land emissions. The Commission explained the importance of the issue and identified the two existing frameworks for accounting for land emissions in Aotearoa:[139]

> **10.3 Accounting for land emissions**
>
> 23 We need to decide on a framework for land emissions accounting, given the significance of these emissions for Aotearoa. Given the role forests can play [in] meeting the net zero target in 2050 and beyond, a fit-for-purpose accounting framework is key.

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137 At 198.
138 At 198.
139 At 199.

24 There are two frameworks for land emissions accounting currently used in Aotearoa:

1. a 'land-based' approach that uses 'stock change' accounting for both pre-1990 and post-1989 forests … This is used in the [GHGI] for [the Convention] reporting; or

2. a modified 'activity-based' approach that uses 'averaging' accounting for post-1989 forests. This is used in the country's NDC.

[124] The Commission then explained the difference between a land-based approach used for GHGI reporting under the Convention and a MAB approach as used for the NDC:[140]

10.3.1 A land-based approach, as used in the national inventory

26 'Land-based' accounting aims to cover all emissions and removals from soil, trees, plants, biomass, and wood products. Emissions and removals by forests are reported in a way that corresponds to tree growth, harvest and deforestation — known as stock change accounting. By trying to record emissions and removals when they occur, it gives a truer representation of 'what the atmosphere sees'.

10.3.2 A [MAB] approach, as used in the NDC

27 This accounting approach uses a smaller subset of activities and land types than the land-based approach. It focuses on significant sources and sinks whose emissions can be most affected by changes to people's behaviour now. It does this by filtering out the effects of past actions, such as regrowth of previously harvested native forests.

28 This approach will be used for the country's first NDC. The NDC will account for land areas and uses corresponding to the *afforestation, reforestation, deforestation* and *forest management* activities accounted for in the country's 2020 target covering the second commitment period of the Kyoto Protocol, 2013–2020. It is not yet known if the NDC will include the land areas or uses related to the activities of *cropland management, grazing land management, revegetation* or *wetland drainage and rewetting*.

29 The NDC will use 'averaging' to account for afforestation and reforestation of post-1989 forests. This approach smooths out the cyclical peaks and troughs in emissions due to harvesting of post-1989 exotic production forests. It does this by accounting for removals only up until the forests reach their long-term average carbon stock. This occurs around 23 years after planting for a production pine forest on a 28-year rotation (if harvested wood products are included). Averaging focuses on the long-term effect of these forests on carbon stocks.

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140 At 199 (emphasis in original).

[125] The Commission assessed the relative merits of these two accounting approaches against the principles it had identified and concluded that the NDC's MAB approach for land emissions accounting, with a 1990 base year and "averaging" for post-1989 forests, was the better approach for measuring progress towards the emissions budgets and the 2050 target.[141] The Commission considered that the main advantage of the land-based approach was that it covered more sources and sinks than the MAB approach because the NDC currently only includes forest-related activities. However, this was more than offset by the advantages of the MAB approach in sending a clear signal for climate action, consistency, maintaining integrity of targets, accuracy, and reduced uncertainty.[142]

[126] The land-based approach was viewed as being inferior in terms of sending a clear signal for climate action because of the significant fluctuations in net emissions due to harvest cycles. The Commission observed that these significant fluctuations are temporary and "obscure underlying, more enduring trends, confusing policy and price signals about the action needed".[143] The fluctuations make it easier to reach net zero by 2050 on the land-based approach because government projections indicate a peak in CO_2 removals around that time. However, this would be followed by an increase in emissions due to cyclical harvesting.[144]

[127] The Commission illustrated this by reference to the figure below which compares land-based (GHGI) accounting with MAB (NDC) accounting methodologies.[145] This figure graphically demonstrates the significant distortions caused by the marked periodic swings in removals from forestry attributable to the harvest cycle. Noting that the figures depicted are all negative, the graph shows that removals drop markedly due to cyclical harvesting from around 2026 and then peak after those same forests are replanted and reach maturity around 2048.

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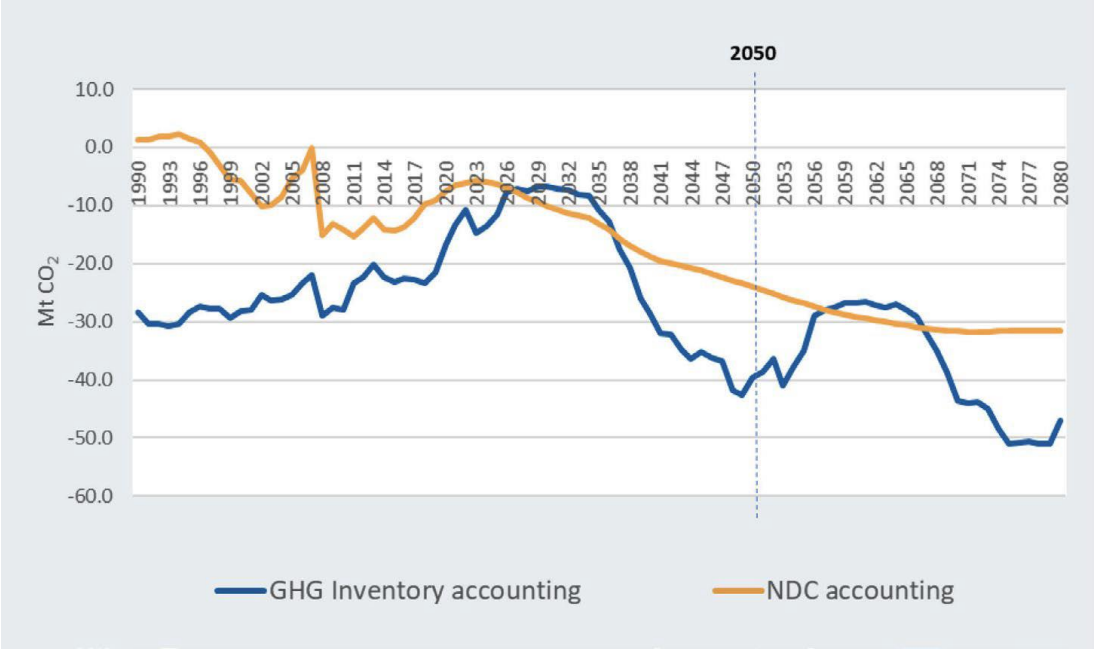
141 At 200.
142 At 200–201.
143 At 201.
144 At 201.
145 At 202.



[128] A further advantage of using MAB in preference to land-based accounting was said to be that it was consistent with the analysis that informed the 2050 target. A land-based accounting approach would reduce the effort required to achieve the 2050 target and would therefore undermine the commitment that was made when the target was set.[146]

[129] MAB was also seen to have the advantage of increased accuracy and less uncertainty:[147]

> 35 **Accuracy and reducing uncertainty:** The land-based approach results in emissions estimates with higher overall uncertainty. Reasons for this include: having to combine carbon stock gains and losses, each with their own uncertainty, to determine net change; estimating uncertain factors related to the management of production forests such as harvest age and area; and including some land areas with highly uncertain emissions factors such as wetlands. As an example, pre-1990 production forests introduced uncertainty of ±61.4% into the inventory land emissions estimates for 2019. Netting off significant amounts of land emissions with high uncertainties against gross emissions with much lower uncertainties is problematic.

[130] The merits of the choice of MAB in preference to land-based accounting are beyond the scope of this judgment. The issue is simply whether the methodology

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146 At 201.
147 At 201.

advised by the Commission comes within "the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target" in terms of s 5ZA(1)(b). This is purely a question of statutory interpretation.

Pleading

[131] LCANZI pleaded that the Act mandates the use of the land-based (GHGI) accounting approach for setting emissions budgets and measuring performance against them and the 2050 target. LCANZI says there is no choice under the Act and accordingly MAB accounting cannot be used.

High Court judgment

[132] The Judge noted that the data recorded in the GHGI is not confined to that required to enable New Zealand to meet its reporting obligations under the Convention (which LCANZI contends must be used) but includes (or would include) the data needed to meet its commitments under the Kyoto Protocol and the Paris Agreement (employing MAB accounting).[148] The Judge considered the accounting methodology for measuring progress against emissions budgets and the 2050 target came within the ordinary meaning of "rules" in terms of s 5ZA(1)(b) of the Act.[149] She also considered that the relevant provisions in the Act and Cabinet and Ministry for the Environment papers supported the Commission and Minister's interpretation.[150]

[133] The Judge's conclusion on this issue was as follows:

> [274] I therefore conclude that [the Act] authorised the Commission to advise the Minister on, and for the Minister to determine, the accounting methodologies for assessing progress towards meeting the emissions budgets and the 2050 Target. The definition of "net accounting emissions" refers to the emissions and removals reported in the GHGI. The definition of the GHGI did not just include national inventory reporting under [the Convention]. It also included Kyoto Protocol and Paris Agreement reports. The legislative history, context and the plain and ordinary meaning of "rules" all support the conclusion that it was intended that the Commission would give advice on the accounting methodology. There is no Henry VIII issue that arises from this interpretation. This ground of review is therefore not made out.

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148 High Court judgment, above n 2, at [254].
149 At [259].
150 At [260].

Submissions on appeal

[134] LCANZI submits that the Act is concerned with the level of "net accounting emissions" in New Zealand. As noted, s 5Q(1)(a) requires that:

> … net accounting emissions of greenhouse gases in a calendar year, other than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year …

Similarly, each emissions budget contains "the quantity of emissions that will be permitted" for the relevant emissions budget period and is "expressed as a net quantity of [CO_2] equivalent".[151] Section 5X(4) requires the Minister to ensure that "the net accounting emissions do not exceed the emissions budget for the relevant emissions budget period".

[135] LCANZI submits that the quantity of emissions in a particular budget and the 2050 target has no meaning separate from the accounting methodology used to measure emissions. The Act does not confer power on the Minister or the Commission to change the way net accounting emissions, as defined in s 4 of the Act, are measured. That would amount to an extraordinary delegation of legislative power that would require clear language because it would effectively permit the Commission to redefine the 2050 target and alter the substance of the Minister's obligation to ensure that budgets are met. This is the "Henry VIII issue" the Judge was referring to, relevantly here the constitutional principle and principle of statutory interpretation that primary legislation cannot be amended through the exercise of delegated power unless this has been clearly authorised in the primary legislation.[152]

[136] LCANZI contends that the obvious function of "the rules that will apply to measure progress", within s 5ZA(1)(b), is for the Commission, or Minister, to set advance markers to track progress within a budget period and towards the 2050 target. This might involve how budgets should be divided up within the five-year budget period, including by taking account of variable expected rates of decarbonisation within different industries. But the rules do not authorise the Commission, or Minister, to choose what emissions to count.

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151 Climate Change Response Act, s 5Y(1); and definition of "emissions budget" in s 4(1).
152 See: Joseph, above n 27, at [26.6.2(3)].

Assessment

[137] The issue is whether the Commission's obligation to advise the Minister on matters relevant to setting an emissions budget — specifically the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target — extend to the accounting methodologies to be employed in measuring that progress. We make three inter-related contextual points at the outset.

[138] First, New Zealand has never set its targets or measured progress towards them on the basis of land-based accounting. As noted above at [17], because New Zealand forests were a carbon sink in 1990, New Zealand was required under the Kyoto Protocol to adopt gross-net accounting and an activity-based approach to LULUCF emissions and removals. In essence, this was intended to exclude ongoing legacy effects of activities that occurred in the period prior to the base year and account only for the impact of additional human-caused activities starting from the 1990 base year. The object of this target accounting methodology was to measure positive changes in human activity affecting the climate that state parties would commit to and be held accountable for. So, for example, afforestation and reforestation on land that did not contain forests at the start of the 1990 base year would be counted as would deforestation, being the conversion of forested land to a non-forested state. However, land already forested prior to 1990 and remaining in that state would form part of the baseline with emissions and removals from the ongoing cycle of harvesting and replanting being excluded from the accounting. This recognises that production forests do not provide additional CO_2 removal benefits after the first rotation because the CO_2 sequestered as the trees grow is emitted after they are harvested.

[139] Secondly, as the Commission recorded in its advice, activity-based accounting is consistent with the analysis that informed the 2050 target.[153] Adoption of land-based accounting to account for LULUCF emissions and removals would reduce the effort required to achieve the target and undermine the commitment made when it was set. New Zealand would achieve the 2050 target without making any change to current climate policy settings, purely because of the temporarily increased removals caused

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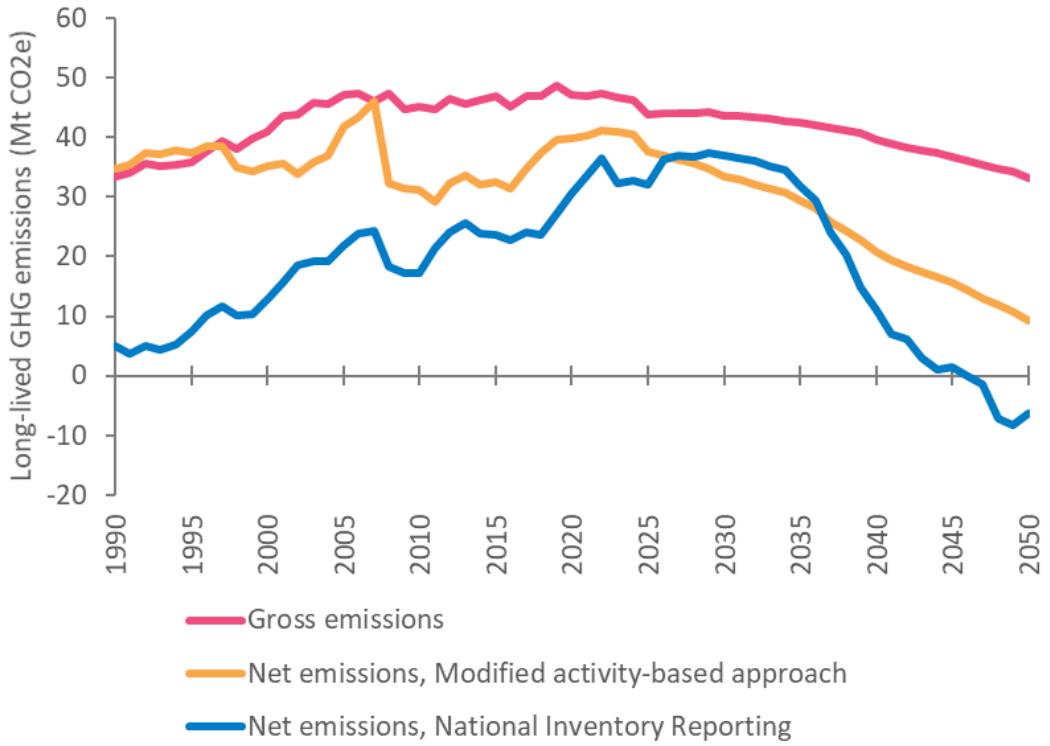
153 Commission's advice, above n 1, at 201.

by the forestry cycle at that time as shown in the figure below provided by a witness for the Commission:



[140] Thirdly, given the extent of the cyclical swings in forestry removals in New Zealand, due to the timing of significant exotic tree planting in past decades, land-based inventory reporting is arguably ill-suited for the purpose of setting and monitoring performance against budgets because it can obscure enduring emissions reductions achieved through policy settings incentivising positive behavioural change affecting the climate. In these circumstances, it might be considered odd if Parliament had mandated such inventory reporting, without any consultation or debate, for the purpose of setting emissions budgets and monitoring progress towards their achievement and the 2050 target.

[141] The 2050 target relevantly requires that "net accounting emissions" of greenhouse gases in a calendar year, other than biogenic methane, are zero by 1 January 2050 and for each subsequent calendar year.[154] Each emissions budget must include all greenhouse gases (defined in s 4(1) to mean CO_2, methane, nitrous oxide,

[154] Climate Change Response Act, s 5Q(1)(a).

hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride) and "state the total emissions that will be permitted for the relevant emissions budget period, expressed as a net quantity of [CO_2] equivalent".[155] The Minister is obliged to ensure that "net accounting emissions do not exceed the emissions budget for the relevant emissions budget period".[156]

[142] The term "net accounting emissions" is defined in s 4(1) of the Act as follows:

> **net accounting emissions** means the total of gross emissions and emissions from [LULUCF] (as reported in [New Zealand's GHGI]), less—
>
> (a) removals, including from [LULUCF] (as reported in [New Zealand's GHGI]); and
>
> (b) offshore mitigation

[143] As the Judge observed, the legislative history shows that the expression "net accounting emissions" (which includes offshore mitigation) was inserted into the Act to differentiate it from "net emissions" as used in New Zealand's GHGI reporting and clarify that offshore mitigation can be counted towards both the 2050 target and emissions budgets.[157]

[144] "Gross emissions" are defined to mean "New Zealand's total emissions from the agriculture, energy, industrial processes and product use, and waste sectors (as reported in [New Zealand's GHGI])".[158]

[145] "New Zealand Greenhouse Gas Inventory" is defined to mean:[159]

> … the reports that are required under Articles 4 and 12 of the Convention, Article 7.1 of the [Kyoto Protocol], and Article 13.7 of the Paris Agreement and that are prepared in accordance with section 32(1)

[146] Article 4(1)(a) of the Convention relevantly requires parties to publish, in accordance with art 12, "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases … using comparable methodologies"

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155 Section 5Y.
156 Section 5X(4).
157 High Court judgment, above n 2, at [245].
158 Climate Change Response Act, s 4(1).
159 Section 4(1).

agreed by the Conference of the Parties. Article 7(1) of the Kyoto Protocol requires each party to incorporate in their annual inventory the necessary supplementary information for the purposes of ensuring compliance with art 3 of the protocol. Article 13(7) of the Paris Agreement requires regular provision of the national inventory report referred to and other information "necessary to track progress made in implementing and achieving [the NDC]".

[147] As the Judge observed, data showing emissions and removals for LULUCF for activity-based accounting under the Kyoto Protocol and the Paris Agreement as well as land-based accounting data required for reporting under the Convention are (or would be) included in New Zealand's GHGI.[160] Emissions and removals from LULUCF accounted for under MAB accounting are included in the inventory and therefore fit the description "as reported in [New Zealand's GHGI]". It follows that the definition of "net accounting emissions" is wide enough to capture emissions and removals from the land sector accounted for under MAB accounting.

[148] We therefore do not accept that the definition of "net accounting emissions" shows that Parliament mandated land-based accounting data or GHGI reporting in setting and measuring progress towards meeting emissions budgets. Had that been the intention, one would expect this to have been clearly stated. Instead, the definition of "net accounting emissions" appears to have been crafted in sufficiently wide terms to leave it to the Commission to advise on the accounting methodology best suited to further the purposes of the Act. Target accounting methodologies are highly specialised, complex and evolving. It is therefore not surprising that Parliament would have charged the Commission, as the independent expert body, with the responsibility of providing this specialist advice on an ongoing basis.

[149] This interpretation serves the purposes of the Act, including the requirement to provide "greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals that will be required".[161] It also fits with the immediate statutory context summarised above including the requirement for emissions reduction plans and

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160 High Court judgment, above n 2, at [254].
161 Climate Change Response Act, s 5W(c).

monitoring reports.[162] The emissions reduction plans link to the emissions budgets and are directed to achieving real and enduring emissions reductions through policies and strategies that will drive behavioural change in the relevant periods.[163] Legacy effects of actions taken decades ago may form part of the baseline against which progress must be measured, but otherwise may be viewed as a distraction.

[150] If emissions budgets were set based on GHGI data, and progress towards meeting them was to be measured using land-based accounting, adjustments would be required to take account of the significant swings in removals caused by the harvest cycle in order to maintain the same level of ambition. As the Commission observed, the adjusted budgets, factoring out the noise created by these cyclical swings that reflect no change during the relevant period, may send confusing signals to the market as to the real reductions required.[164]

[151] The Commission illustrated this point, that the difference between MAB and land-based is one of expression only, in submissions by postulating three mock budgets — an initial budget of 100 $MtCO_2e$ and two successive budgets each reflecting a 20 $MtCO_2e$ real reduction in emissions. Under MAB accounting, the budgets would provide clarity about the reductions required, being:

(a) Budget 1 — 100 $MtCO_2e$;

(b) Budget 2 — 80 $MtCO_2e$; and

(c) Budget 3 — 60 $MtCO_2e$.

[152] These budgets would be expressed differently if GHGI data, and land-based accounting, was used, thereby factoring back in cyclical fluctuations in CO_2 removals from existing plantation forests. In the example given by the Commission it is assumed for illustrative purposes that the removals are 30 $MtCO_2e$ in the first budget period, 60 $MtCO_2e$ in the second due to rapid tree growth, and 5 $MtCO_2e$ in the third due to it coinciding with the harvest phase of the cycle. In order to reflect the same

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162 Sections 5ZG–5ZL.
163 Zero Carbon Bill (explanatory note) at 3.
164 Commission's advice, above n 1, at 201.

level of ambition using land-based accounting, the budgets would be expressed as being:

(a) Budget 1 — 70 $MtCO_2e$ (100 $MtCO_2e$ less 30 $MtCO_2e$);

(b) Budget 2 — 20 $MtCO_2e$ (80 $MtCO_2e$ less 60 $MtCO_2e$); and

(c) Budget 3 — 55 $MtCO_2e$ (60 $MtCO_2e$ less 5 $MtCO_2e$).

[153] As the Commission's example demonstrates, the same budgets that reflect the same level of ambition are able to be communicated more effectively using MAB accounting. The wildly varying headline numbers using GHGI data would be likely to confuse the target audience and misrepresent the real reductions required in each period. It is strongly arguable that MAB accounting is a superior method of measuring real progress towards enduring emission reductions, which is ultimately what matters. We agree with the Judge that the accounting methodologies to be applied would come within the ordinary meaning of "the rules" to measure progress in this context. We consider that this interpretation is consistent with the statutory scheme and the purposes of the Act.

[154] There is also some support in the legislative history for the contention advanced by the Commission and the Minister that the reference in the Act to "the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target" was intended to encompass the applicable accounting methodology for LULUCF emissions and removals, as well as other accounting rules the Commission determined. The regulatory impact statement referred to in the explanatory note to the Zero Carbon Bill as first introduced stated that the Commission's advice would include the accounting methodologies that will apply.[165]

[155] While attention must be focused on the wording ultimately adopted by Parliament in the Act, it is notable that there is nothing in any of the legislative history to suggest that a departure from this position was ever discussed or intended. This

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[165] Zero Carbon Bill (explanatory note) at 7; and Ministry for the Environment | Manatū Mō Te Taiao "Regulatory Impact Statement: Zero Carbon Bill" at 142.

suggests that the generalised reference in the Act to "the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target" was intended to include the accounting methodologies to be applied in measuring that progress.

[156] In summary, we agree with the Judge's analysis and conclusion that this ground of unlawfulness was also not established.

Ground four — unreasonableness?

Pleading

[157] LCANZI pleaded that the Commission acted outside its legal powers because the budgets it recommended are inconsistent with the purposes of the Act and subpt 3 of pt 1B of the Act which addresses the role of the Commission in advising on emissions budgets. It alleged that no reasonable decision-maker in its position could have given the Budgets Advice and the NDC advice.

[158] This contention was supported by the following particularised allegations:

(a) The budget for 2021–2030 should be at least equivalent to the level of reductions in global greenhouse gases between 2010 and 2030 modelled by the IPCC in the 2018 report as having a 50–66 per cent chance of limiting global warming to 1.5ºC with no or limited temporary overshoot, applied to New Zealand's net 2010 emissions.

(b) On that approach, emissions for the period 2021–2030 should be less than 568 $MtCO_2e$ based on the Commission's gross-net calculation (or 484 $MtCO_2e$ based on LCANZI's net-net calculation advanced in ground one).

(c) New Zealand's "fair share" of the global carbon budget as a substantial past emitter and as a developed country requires a more ambitious target than 568/484 $MtCO_2e$.

(d) Setting emissions budgets that would allow 648 $MtCO_2e$[166] of net emissions over this period is inconsistent with the Commission's analysis that the NDC is not compatible with the 1.5ºC goal, as well as with the purposes of the Act.

(e) The Commission failed to assess options involving more ambitious emissions reduction and removal targets that would better meet the statutory criteria.

(f) The Commission failed to assess the relative costs, benefits and risks of further domestic emissions reductions and domestic removals, including as compared with the proposed purchase of offshore mitigation to meet the NDC.

(g) A reasonable decision-maker would have recommended 2021–2030 emissions budgets and an amended NDC allowing net emissions of no more than 400 $MtCO_2e$.

High Court judgment

[159] The Judge noted that Parliament did not require New Zealand to meet a 2030 target despite submissions to the select committee urging this. It was left to the Commission to provide advice on the pathway to 2050 via a series of emissions budgets.[167]

[160] The Judge considered it was reasonably open to the Commission "not to mirror the IPCC global pathways".[168] Contributing to the 1.5ºC goal was one of the purposes of the Act and "a very important consideration", but the manner of contribution "was not fixed to those pathways".[169] New Zealand may appropriately contribute less in GHGI terms in the period to 2030 but exceed the IPCC global pathways assessed on that basis shortly thereafter. Further, the Judge observed that "emissions budgets are

166 Using GWP_{100} values as in AR4.
167 High Court judgment, above n 2, at [306].
168 At [307].
169 At [307].

not the only contribution New Zealand will make to global efforts to combat climate change" because the NDC "includes extensive offshore mitigation".[170]

[161] The Commission carried out extensive analysis. The Judge considered that in the absence of a clear and material error in the analysis or in the information relied on by the Commission, there was no proper basis for the Court to interfere. The mathematical error alleged in ground one would have fallen into this category but had not been established. The Judge considered that the absence of a partial quantitative analysis of various levels of ambition was not sufficient to show that the Commission's advice was unreasonable.[171]

[162] The Judge concluded her analysis as follows:

> [313] Ultimately, a reasonable decision depends on what Parliament tasked the [decision-maker] to decide. Parliament did not task the Commission with a particular model by which to recommend budgets that would contribute to [the 1.5ºC goal]. I am not satisfied that [LCANZI] has shown that the Commission's Advice fell outside its statutory task to provide Advice consistent with the purpose of [the Act]. Its Advice was driven by the need for clear and stable climate change policies that would meet net zero by 2050 and would contribute to [the 1.5ºC goal]. It did not act unreasonably or irrationally. I accept that MAB was chosen to provide a stable accounting method, intended to drive changes that would lead to emissions reductions in ways above and beyond relying on existing forestry removals. Any opportunistic change when GHGI removals exceed MAB removals will no doubt be met with challenge should that be contemplated at some future point.

Submissions on appeal

[163] The basis for LCANZI's submission that the Budgets Advice is unreasonable arises from grounds one to three, already covered. It submits that the forecast outcomes are clearly inconsistent with contributing to the 1.5ºC goal and therefore with the purpose of the Act. The budgets are said to "fly in the face" of the uncontested need for urgent collective effort to halve net CO_2 emissions by 2030. LCANZI submits that the Budgets Advice, and the Minister's decision to adopt it, are therefore unreasonable, regardless of the intensity of review undertaken. Accordingly, it says it is not necessary to determine the applicable standard of review for the purposes of this case.

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170 At [307].
171 At [310].

[164] LCANZI's submissions can be summarised as follows:

(a) The 1.5ºC goal is critically important for humanity. This requires around a 50 per cent reduction in global net CO_2 emissions by 2030.

(b) Despite this, the budgets recommended by the Commission will see an increase in net emissions in GHGI terms in 2021–2030 relative to 2011–2020 (and the two decades prior to that). Net CO_2 is forecast to be 310 per cent higher in 2030 than it was in 2010 (increasing from 5.0 Mt to 20.7 Mt).

(c) The budgets forecast net emissions in 2021–2030 of 648 $MtCO_2e$ when, on the Commission's own analysis, the maximum consistent with the 1.5ºC goal is 568 $MtCO_2e$, before taking into account the need for increased ambition as a developed country.

(d) The Commission envisages that the purchase of offshore mitigation will be critical to meeting the 2030 NDC. However, as the Commission acknowledges, it is uncertain how much offshore mitigation will cost.[172] The projected cost could range from $4.3 billion to $30.5 billion in 2030 depending on the number of units required to be purchased, the price per tonne and the final NDC adopted.[173]

[165] Although it did not affect the outcome, the Commission and the Minister submit that the Judge erred by applying a more exacting standard of review than *Wednesbury* unreasonableness. The Judge considered that the intensity of review varies according to the context. She stated that the present context concerns New Zealand's climate change response to a climate emergency and is therefore indisputably a matter of significant importance.[174] In those circumstances, the Judge

172 Citing Commission's advice, above n 1, at 364, 366 and 368–369.
173 Citing 361–362.
174 High Court judgment, above n 2, at [74].

considered that a more exacting standard than *Wednesbury* unreasonableness was appropriate.[175] She described the proper approach as being to examine:[176]

> … whether the challenged decisions have been reached on sufficient evidence, have been fully justified and whether [the] decisions were open to a reasonable [decision-maker] in light of the legislative purpose while recognising that reasonable [decision-makers] could reach different decisions.

[166] The Commission submits that the test applied by the Judge is close to being a merits review of the advice. Courts lack the necessary expertise and competence to second-guess statutorily-appointed experts on core questions that Parliament has tasked them to decide. Courts should not assume the role of judging whether an expert body such as the Commission has acted on "sufficient" evidence or adequately "justified" its advice, particularly on a matter involving complex, polycentric issues as here. The Commission makes the further point that the court is only hearing from one submitter, whereas the Commission considered over 15,000 submissions. The Commission suggests this Court should have regard to the observations of the England and Wales Divisional Court in *Regina (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government*:[177]

> [6] … Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. …

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175 At [75].

176 At [76] (footnote omitted).

177 *Regina (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin), [2021] PTSR 553. See also: *Regina (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), [2023] 1 WLR 225 at [22].

[167] The Minister is concerned that a move away from *Wednesbury* in respect of general unreasonableness challenges amounts to an invitation to courts to move beyond their supervisory role and could encourage litigation to be viewed as an extension of political lobbying. The Minister supports the approach taken by Cooke J in *Students for Climate Change Solutions Inc v Minister of Energy and Resources* that the court's role in judicial review is simply to ensure that decisions are made lawfully.[178] The court must identify the legal controls and limits on the decision-maker's powers and ensure that the powers are exercised within those limits. The nature and extent of the legal control over discretions will vary, but the intensity with which the court undertakes its task of scrutinising whether the decision was lawful should not change.[179]

Assessment

[168] Because the standard of review does not need to be determined on LCANZI's case, we do not need to address the issue in any detail. For our part, we are not particularly attracted by the idea that the degree of scrutiny the court will bring to bear in assessing a reasonableness challenge will vary according to the nature and importance of the decision under review. The legal requirements that apply to such a decision, and the reasonableness of the particular decision will of course depend on the factual and legal context. But the level of attention the court brings to its task of determining whether the decision is consistent with the legislation under which it is made should not vary. However, the issue is controversial and not yet settled. The Supreme Court has specifically left the "standard of review" question open, and resolution of the issue should be left for a case where it matters.[180]

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178 *Students for Climate Change Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 at [41].

179 At [41].

180 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [51].

[169] The reasonableness issue ultimately comes down to whether the decision was not reasonably open to the decision-maker and was therefore one that no reasonable decision-maker could have made. The Judge adopted that test but added that the decision would be unreasonable if it had not been reached on "sufficient evidence" and "fully justified".[181] The first of these additional requirements may be unobjectionable depending on how it is applied. For example, where the exercise of the particular power depends on the determination of a factual prerequisite, it would be unreasonable and irrational for the decision-maker to make that determination in the absence of any relevant supporting evidence or contrary to the evidence.[182] However, we have distinct reservations about the "fully justified" requirement, which arguably exceeds the applicable test on a merits review in the context of a general appeal that permits this.

[170] LCANZI's unreasonableness claim is largely dependent on the success of the earlier grounds of alleged unlawfulness. Because we have found against LCANZI on each of those grounds, the overall unreasonableness claim mostly falls away.

[171] LCANZI makes the bold claims (in view of the Commission's expertise and the extensive process it undertook, including wide public consultation) that the budgets are "nonsensical" and "fly in the face" of the widely accepted need to approximately halve global net CO_2 emissions by 2030 to achieve the 1.5°C goal. The headline claim is that the budgets contemplate a threefold increase in net CO_2 emissions by 2030 in comparison to 2010 levels over the period when these should reduce by around half. At first blush, this appears to be an alarming statistic. However, once the distortions created by the significant peaks and troughs in CO_2 removals from established plantation forests are understood and taken into account, an entirely different picture emerges as we have already discussed.

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[181] High Court judgment, above n 2, at [76], citing *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 at [13] and [15]; and *Kim v Attorney-General* [2019] NZCA 209 at [45]–[47].

[182] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26], applying *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36.

[172] The IPCC pathways in the 2018 Special Report were not intended to be applied to individual countries to set emissions reduction targets or budgets, particularly not without regard to their individual circumstances. More importantly, neither the Commission nor the Minister were required by the Act to recommend or set budgets on that basis. We therefore reject LCANZI's claim that the budgets had to be at least equivalent to the level of reductions in global greenhouse gases allegedly "stipulated" in the 2018 Special Report.

[173] Nor are we persuaded that it was unlawful for the Commission to recommend emissions budgets based on forecast reductions in gross CO_2 emissions that ignored repeating cyclical swings in removals from existing plantation forests. We do not consider it was unreasonable or irrational to focus attention on new and enduring emissions reductions achievable in budget periods through behavioural change driven by policy settings. Such an approach was consistent with the scheme and purposes of the Act for the reasons already given.

[174] The recommended emissions budgets forecast steadily declining average annual emissions:[183]

(a) 72.4 $MtCO_2e$ in the period 2022–2025 (budget 1);

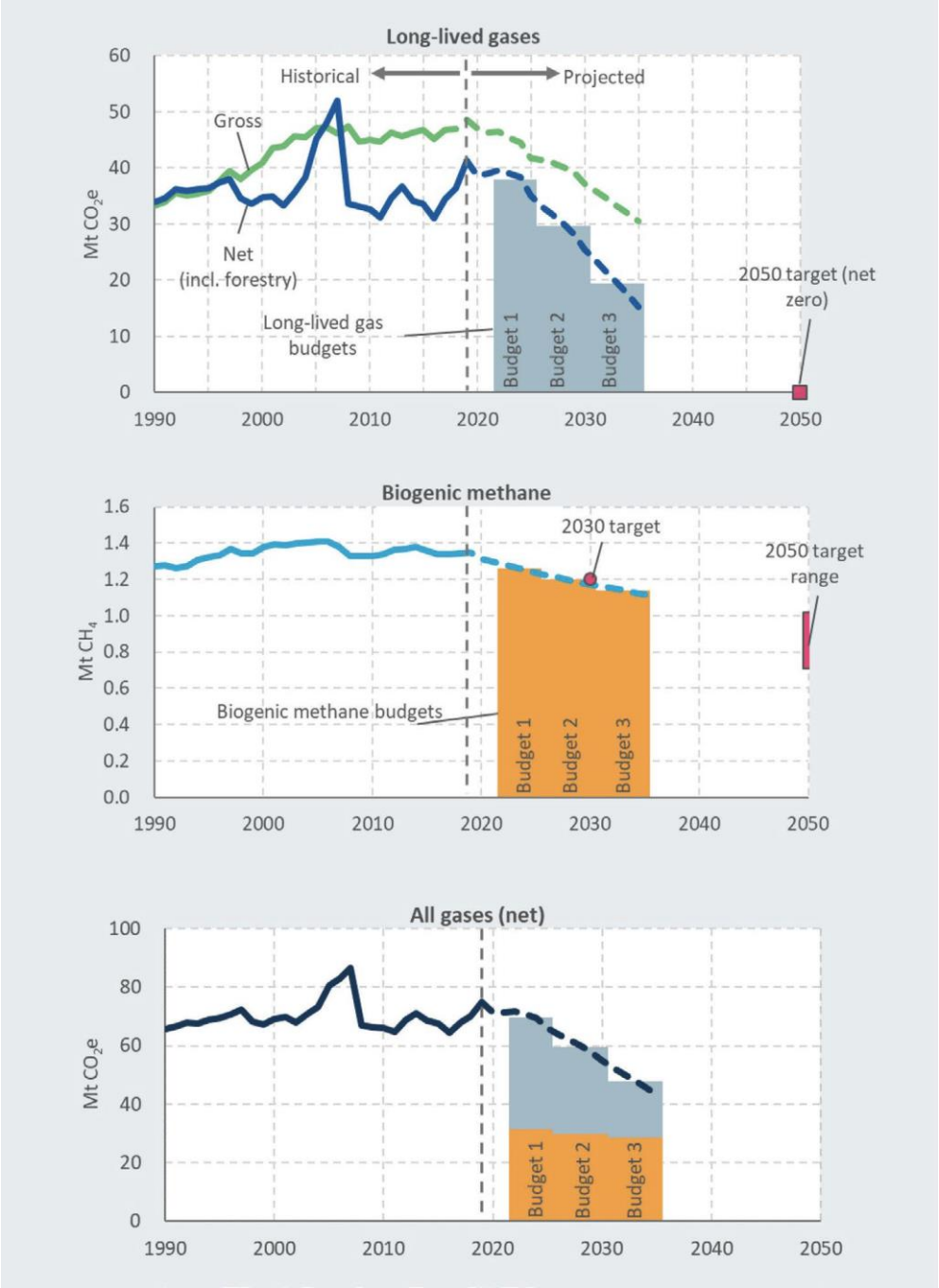
(b) 62.4 $MtCO_2e$ in 2026–2030 (budget 2); and

(c) 50.6 $MtCO_2e$ in 2031–2035 (budget 3).

These annual average figures compare with the higher emissions of 78.0 $MtCO_2e$ in 2019. Assuming the budgets are met, the downward trajectories of long-lived gases,

[183] Commission's advice, above n 1, at 74 (using AR5 values).

biogenic methane, and all gases combined, were graphically illustrated in the advice as follows:[184]



184 At 81.

[175] The Commission was the independent expert body tasked with the responsibility of advising the Minister on the proportions of an emissions budget to be met by domestic reductions and removals, and the appropriate limit on offshore mitigation that may be used to meet it. The Act does not direct the Commission on how it should approach this task, only that it is required to give consideration to an extremely wide range of potentially conflicting factors in furthering the purposes of the Act.[185] The claim that the Commission ought to have conducted further analysis such as cost-benefit assessments or tested other budget scenarios goes to the merits, and to choices made by the Commission about how detailed certain aspects of its analysis should be, not to irrationality or unlawfulness.

[176] We are far from persuaded that the Budgets Advice or the NDC Advice was outside the scope of what a reasonable decision-maker could have recommended. In our view, the Judge was right to dismiss this ground of review.

Costs

[177] The Commission seeks costs. The Minister does not. LCANZI submits that costs should lie where they fall.

[178] Costs generally follow the event.[186] However, the Court may refuse to make an award of costs, or order reduced costs, if "the appeal concerned a matter of public interest and the party opposing costs acted reasonably in the conduct of the appeal".[187] For the reasons summarised below, we are satisfied that these criteria are met, and the appropriate course is not to make any order for costs on this appeal.

[179] The statutory provisions considered in this case lie at the heart of the ongoing process of setting successive emissions budgets and monitoring performance against them. The correct interpretation of these provisions is therefore of central importance to the proper application of the statutory scheme which was established as part of New Zealand's response to the existential threat to humanity posed by climate change.

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185 Climate Change Response Act, s 5ZC.
186 Court of Appeal (Civil) Rules 2005, r 53A(1)(a).
187 Rule 53F(e).

It follows that the issues raised by the appeal directly or indirectly affect all New Zealanders.

[180] The provisions in issue have not previously been considered. Accordingly, there is a high public interest in confirming how these provisions operate, now and into the future. There is a benefit to the Commission and the Minister from having their interpretation tested and confirmed.

[181] LCANZI is a charitable organisation which has pursued the appeal in the public interest. LCANZI does not stand to derive any financial or other personal gain from the outcome. The issues raised were arguable and we consider LCANZI acted reasonably in its conduct of the appeal. The arguments were pursued skilfully and with reasonable economy given the complexity of the underlying subject matter. The approach LCANZI took to adducing evidence, erring on the side of providing more rather than less assistance to the Court, is understandable in circumstances where the relevant provisions had not previously been before the courts, though as we explain at [57]–[63] above some of the evidence was not properly admissible. The well-established limits on the admissibility of evidence in judicial review applications should be more closely observed in any future challenges to the exercise of the Commission's powers: failure to do so is likely to have costs consequences.

[182] Costs were reserved on LCANZI's unsuccessful application to adduce further evidence in support of the appeal.[188] The proposed evidence was authoritative and uncontroversial. We do not consider LCANZI acted unreasonably in seeking to place this additional material before the Court, even though it was subsequently ruled to be inadmissible. We therefore also decline to make an award of costs in respect of the application.

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[188] *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2023] NZCA 443 at [27].

Result

[183] The appeal is dismissed.

[184] We make no order as to costs.

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