

Submission to the Environment Committee on the Climate Change Response (Zero Carbon) Amendment Bill

Introduction

1. Lawyers for Climate Action NZ Inc is a society of New Zealand lawyers who have come together for the purposes of:
 - 1.1. raising public awareness and understanding of the threat of climate change;
 - 1.2. advocating for legislation and policies to ensure New Zealand meets or exceeds its commitment under the Paris Agreement and achieves net zero carbon emissions as soon as possible; and
 - 1.3. facilitating free or reduced cost legal assistance to community groups working to fight climate change.
2. We support the Climate Change Response (Zero Carbon) Amendment Bill (“the Bill”). It responds to the need for urgent action to reduce emissions and adapt to the effects of climate change. But we consider there are some aspects of the Bill that could be improved to strengthen New Zealand’s climate change response and provide greater clarity in the operation of the Bill.
3. Our submission addresses three themes: what the Bill gets right; how the Bill should be improved; and what is missing that ought to be included.
4. We would like the opportunity to make oral submissions to the Environment Committee.

What the Bill gets right

The pillars of the Bill

We support the central pillars of the Bill: a long term (2050) target, five-year budgets, an emissions reduction plan, and an independent and expert Climate Change Commission with an advisory, not decision-making, role.

5. The Bill contains the main pillars of climate change response legislation that has been enacted in other jurisdictions such as the United Kingdom. These pillars create a strong framework for an effective adaptation and mitigation response. The setting of a long term (2050) target and five-year budgets, together with the requirement for the Government to create an emissions reduction plan for how the budgets are to be met, is an accountability mechanism that will elevate climate change considerations in Government decision making, and encourage coherent and consistent policymaking. Separately, a risk assessment and adaptation plan will ensure that New Zealand adapts to the risks of climate change in a coordinated manner.
6. The advisory role of an independent and expert Climate Change Commission will ensure that budgets and plans are robust and that decision-making is insulated from political factors and preferences. We support the decision for the Commission to not be given a final decision-making or rate-setting powers, because that would circumvent the political accountability of the Minister for the important and wide-reaching decisions to be made under the Bill.

The two baskets approach

We support the 2050 target being framed as separate targets for biogenic methane and other greenhouse gases.

7. We commend the architecture of the 2050 target as adopting a “two baskets” approach. Methane is a greenhouse gas with a short lifetime, and it makes sense to approach it on a different basis to the long-lived greenhouse gases such as carbon dioxide and nitrous oxide.

Limited use of international credits

We support the restriction on the use of offshore mitigation in proposed new sections 5W and 5X(1)(e).

8. The Bill permits the use of “offshore mitigation” to meet emissions budgets. The use of offshore mitigation such as by purchasing international credits should be limited. New Zealand should demonstrate leadership to other countries by reducing its domestic emissions and transitioning to a low emissions economy. And New Zealand should avoid being exposed to increases in the price of international units. We commend the Bill for minimising the use of offshore mitigation/international credits by providing that emissions budgets must be met as far as possible through domestic emissions reductions and removals (s 5W). We also endorse the requirement for the Commission to give advice on a limit on the use of offshore mitigation as part of the budget setting process (s 5X(1)(e)), which will be an important safeguard against overreliance on international credits to meet the budget at the end of the budget period.

What needs to be improved

9. In this section we identify aspects of the Bill that should be improved.

Influence of the Bill on other legislative decision making

Section 5ZK(1) should be amended to provide that the 2050 target and emissions budgets are mandatory relevant considerations in the exercise of performance of a public function, power or duty conferred by specified legislation to be listed in a schedule. It should be the Climate Change Commission’s function to recommend changes to the schedule of legislation.

Section 5ZK(2) should be deleted.

Section 5ZL should be amended to provide that any guidance issued under that section is a mandatory relevant consideration.

10. In its current form the Bill stifles the potential for the 2050 target and emissions budgets to influence decision making under other legislation. As it stands, s 5ZK provides that a person *may* take the 2050 target or an emissions budget into account in the exercise of their function, duty or power. But the 2050 target and emissions budgets are only permissive considerations. The failure to consider them would not invalidate the decision. As a result, the good intent of the Bill’s targets and budgets may not be achieved or even promoted by decisionmakers and policymakers in an integrated way across all relevant areas of our legal and resource management system. Decision making and policy setting under other legislation which could have a significant impact on the ability to achieve the targets and budgets would not be constrained, and may indeed undermine or frustrate the ability to achieve those targets.

11. We have two concerns with section 5ZK in this respect.
12. First, the permissive consideration approach will prevent an argument being made in an appropriate case that the failure to consider the 2050 target or an emissions budget is grounds to overturn a decision. There will no doubt be decisions where the 2050 target or emissions budgets loom so large and would be seen as so “obviously important” that they would be found by a Court to be mandatory considerations in a given case.¹ But in its current form, s 5ZK(2) would immunise the decision or policy maker from judicial review if they had failed to take the target or budget into account, regardless of the consequences for achieving the target and budgets. This immunity could lead to short sighted decision making.
13. Second, section 5ZK is inconsistent with the New Zealand Government’s mandatory obligation under article 4(1)(f) of the United Nations Framework Convention on Climate Change to “take climate change considerations into account, to the extent feasible, in [its] relevant social, economic and environmental policies and actions”.
14. To address these concerns, we recommend that section 5ZK should be amended to provide that the 2050 target and emissions budgets are mandatory relevant considerations in the exercise or performance of public functions, powers and duties under specified legislation. There should then be a schedule listing the legislation in respect of which the target and budgets are mandatory considerations. This schedule should include legislation that empowers decision making and policy setting with potentially significant consequences for the achievement of the target and budgets, such as:
 - 14.1. Building Act 2004;
 - 14.2. Commerce Act 1986;
 - 14.3. Conservation Act 1986;
 - 14.4. Crown Minerals Act 1991.
 - 14.5. Electricity Industry Act 2010;
 - 14.6. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;
 - 14.7. Forestry Act 1949;
 - 14.8. Hazardous Substances and New Organisms Act 1996;
 - 14.9. Housing Accords and Special Housing Areas Act 2013;
 - 14.10. Local Government Act 2002;
 - 14.11. Land Transport Management Act 2003;
 - 14.12. Reserves Act 1977;
 - 14.13. Resource Management Act 1991.
15. We also recommend that the Climate Change Commission should be given the function of recommending amendments to this schedule over time.
16. Further, we recommend that section 5ZL should be amended to provide that any guidance issued by the responsible Minister to Government departments as to how to take the target and budgets into account

¹ *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA).

in the performance of their functions, duties and powers should be a mandatory relevant consideration for those departments. This will provide a method for the Government to ensure that emissions consequences are not overlooked for decisions that have significant effects on climate change but fall outside the scheduled list of legislation, and so better achieve an integrated policy response across all relevant sectors.

Inconsistencies with other legislation

We recommend that the Climate Change Commission should review the Resource Management Act 1991 and other relevant legislation and make recommendations on how it should be amended to better promote the purpose of the Bill.

The Resource Management Act should in the meantime be amended by repealing sections 70A and 104E and amending section 7 to refer to the effects on climate change.

17. The Bill does not adequately deal with the potential for inconsistencies with other legislation, such as the Resource Management Act 1991 (RMA) and the Exclusive Environmental Zone and Continental Shelf (Environmental Effects) Act 2012. For example, sections 70A and 104E of the RMA direct consenting and planning authorities to disregard the adverse effects of an activity on climate change. This would appear to override the possibility of the 2050 target and emissions budgets being permissive considerations under s 5ZK of the Bill, and creates a risk of confusion and litigation.
18. There are potentially a large number of pieces of legislation that could obstruct progress towards the 2050 target and the emissions budgets (some of which are listed above in paragraph 14). We recommend that, once the Bill is enacted, the Climate Change Commission should be requested under proposed section 5K to scrutinise all relevant legislation for consistency with the Bill's mechanisms and 2050 target and report to the Government as a matter of priority on any necessary reforms. The RMA will merit particular attention as part of the Commission's review.
19. We also suggest that some amendments to the RMA should be made immediately and as part of this Bill. It is clear that sections 70A and 104E of the RMA will obstruct local authorities from addressing the effects of consents and plans on climate change. Those provisions should be repealed. As well, section 7 of the RMA should be amended to specify that the effects on climate change are a matter to which decision makers must have particular regard.

Mandatory considerations for advising on and setting of emissions budgets

We recommend that section 5Z should provide that the Minister and the Commission must have regard to the Intergovernmental Panel on Climate Change's reports and the goal of limiting temperature increases to 1.5°C.

20. It is important that the Commission and the Minister take into account the correct considerations when setting emissions budgets. Section 5Z provides a list of matters to which the Commission and the Minister must have regard. We recommend that this section should specify that the Commission must have regard to the reports from the Intergovernmental Panel on Climate Change (IPCC). The IPCC's reports (such as the IPCC's October 2018 report as to what is required to stabilise global temperature increases at 1.5°C) represent the best guidance for policymakers on climate change science, and should be a starting point for the Commission and the Minister's setting of budgets. We also recommend that section 5Z should contain explicit reference to the new purpose provision (section 3(1)(aa)), which refers to the global effort to limit the global average temperature increase to 1.5°C above pre-industrial levels. The budgets must be consistent with limiting the temperature increase to 1.5°C.

Leaving room for the development of judicial remedies

We recommend that proposed new section 5ZJ should be deleted.

21. The Bill goes too far in excluding the development of judicial remedies for failures to meet the 2050 target or emissions budgets. Section 5ZJ in its current form will provide that the only remedy or relief for failure to meet the target or a budget is a declaration and an award of costs.
22. We understand that the thinking behind this provision is that Government departments should not be exposed to damages claims for failing to meet the target or budgets. While that rationale is understandable, section 5ZJ goes too far because it ousts the courts from applying or creating remedies in appropriate cases in a proportionate and reasonable manner. The approach that has been taken by courts to granting remedies for breaches of important legislation such as the New Zealand Bill of Rights Act 1990, as well as in judicial review, has developed over the last thirty years. The prospect of further development in the next thirty years leading up to 2050 should not be curtailed. For example, one remedy that has been suggested as appropriate for failing to meet a target or budget is that the Government be ordered to invest in appropriate infrastructure an amount of money equivalent to the cost of purchasing emissions credits on international markets to make up the shortfall.²
23. We recommend that section 5ZJ should be deleted and the Bill left silent on the question of what remedies are available for failing to meet the target or a budget. Alternatively, s 5ZJ could be amended to carve out only the possibility of damages claims, with the door left open to other remedial options being developed and applied by courts.

Greater information on the use of offshore mitigation and international credits

Section 5ZI should be amended to require the Commission and the Minister to report on the details of any offshore mitigation used to meet an emissions budget.

24. One potential concern with the Bill's allowance for the limited use of offshore mitigation will be whether international credits are reliable. There have been major issues in the past with the purchase of fraudulent carbon credits that do not represent any verifiable emissions reduction. The Bill goes some way towards addressing this concern by defining "offshore mitigation" as emissions reductions and removals that are "robustly accounted for", ensure "double counting is avoided", and "represent an actual additional, measurable, and verifiable reduction of an amount of carbon dioxide equivalent". But there is no provision requiring the Commission and the Minister to confirm and transparently record that offshore mitigation meets these requirements.
25. We recommend that section 5ZI(1)(c) and (4)(b) should be amended to provide that the Commission's report and the Minister's decision on any use of offshore mitigation should record a description of the offshore mitigation to be used and how it meets the statutory definition of "offshore mitigation".

Commission's role in relation to offshore mitigation/international credits

We recommend amendments to clarify that the Minister must set a limit on the use of offshore mitigation when he or she sets an emissions budget.

26. The Bill could be clearer about the Commission's role in relation to the use of offshore mitigation to meet an emissions budget. In its current form the Bill says that emissions budgets are to be met as far as possible through domestic reductions and removals (s 5W), and that the Commission may "advise the Minister" on the appropriate limit on the amount of offshore mitigation that may be used to meet the

² Jonathan Church "Enforcing the Climate Change Act" (2015) 4 UCL Journal of Law and Jurisprudence 109 at 131-132.

emissions budget (s 5X(1)(e)). It appears the intention is that the Commission would advise on the offshore mitigation limit, with the limit subject to Ministerial confirmation. We support that intention, given the Commission's role is advisory only. But there is no provision for the Minister to make a decision limiting the use of offshore mitigation at the start of a budget period. We recommend that this is clarified by:

- 26.1. adding a new paragraph 5Y(1)(ba) stating that emissions budget must include a limit on the amount of offshore mitigation that may be used to meet the emissions budget;
- 26.2. making consequential amendments to sections 5Z(1)(c) and (4)(b) to refer to the limit on offshore mitigation set by the Minister under section 5Y(1)(ba).

Banking and borrowing

We recommend that the consequences of any banking or borrowing should be stated explicitly.

We recommend that proposed new section 5ZC(1) should be amended to limit the banking of an excess reduction of emissions in any budget period to a maximum of 1% of that period's emissions budget.

27. The Bill permits the Minister to bank and borrow emissions between budget periods. Emissions can be banked if the actual emissions were lower than the budget. Banked emissions are applied to the next budget period. Emissions can be borrowed if the actual emissions were higher than budgeted. Borrowed emissions are "carried back" from the next emissions budget, subject to a limit of 1%.
28. The consequences of banking and borrowing are not made explicit. In terms of "borrowing," section 5ZC(2) implies that emissions that are "borrowed" or "carried back" from the next emissions budget are subtracted from that subsequent emissions budget. This should be specified. It should also be spelled out that the consequence of banking is that the banked emissions can be used to meet the next budget.
29. The ability to "bank" between emissions budget periods should be prescribed in greater detail. The Bill as drafted sets no limit on the ability to bank other than a requirement for the Minister to obtain advice from the Commission. We recommend that there should be a limit of 1% on the ability to bank an excess reduction of emissions, so that the clarity of subsequent budgets as a market signal is not obscured by the possibility of banking.

Safeguarding the independence of the Commission

We recommend an amendment to section 5N(2) to clarify that the Commission must act independently in preparing any report prepared by the Commission under section 5K.

30. The Climate Change Commission must retain a strong degree of independence. It must be respected and trusted by the public. The Commission's advisory functions, including its annual report on the adequacy of implementation of the emissions reductions plans, will hopefully prevent the Government from slipping off pathway towards the 2050 target. The Commission's reports will also provide an important degree of assurance to the public that the Government is making progress towards the 2050 target and emissions budgets. We therefore commend section 5N(1)'s stipulation that the Commission is to act independently, as well as the choice for the Commission to be an independent Crown entity subject to the Crown Entities Act 2004.
31. Section 5N(2) appears on first blush to make inroads into the Commission's independence by enabling the Minister to require the Commission to have regard to Government policy. Our understanding is that this is so the Commission can be asked to assume certain policy settings are in place in the terms of

reference of a report requested under section 5K on the unit supply settings of the emissions trading scheme or on New Zealand's nationally determined contribution under the Paris Agreement. Any report on those topics should still be prepared in an independent manner within the scope of the terms of reference. We therefore recommend that section 5N(2) should be amended to say:

Notwithstanding subsection (1), the Minister may direct the Commission to have regard to Government policy for the purposes of the Commission preparing a report requested under section 5K—

- (a) recommending unit supply settings of the New Zealand emissions trading scheme; and
- (b) providing advice about New Zealand's nationally determined contributions under the Paris Agreement.

Scope of the Minister's power to request information

We recommend that section 5ZV should be amended to enable the Minister to request information on what certain organisations are doing to mitigate the effects of climate change.

- 32. Section 5ZV confers a useful information gathering power. It enables the Minister to request information from central and local government and related entities on what they are planning to do to adapt to the effects of climate change. This will enable the Commission to be provided with reliable data relevant to its national climate change risk assessment (section 5ZN) and progress reports (section 5ZS).
- 33. However, the power is limited to information concerning the adaptation response to the effects of climate change. This may prevent the Minister and Commission from obtaining data on what organisations are doing to mitigate climate change by reducing emissions within their sphere of control.
- 34. We recommend that section 5ZV(1)(b) be amended so that it refers to a "statement of the organisation's proposals and policies for mitigating the effects of climate change and addressing the effects of climate change", with similar amendments to paragraphs (b)(i)-(iii).

Reference year for the methane target

The biogenic methane target in section 5O should be 24% to 47% below 2010 levels, rather than 24% to 47% below 2017 levels.

- 35. Section 5O sets the 2050 target for biogenic methane as at least 24% to 47% less than 2017 emissions by 2050. It appears that the reference to 24% to 47% has been drawn from the IPCC's October 2018 report as what is required to stabilise global temperature increases at 1.5 °C. However, the IPCC report refers to methane emissions being 24% to 47% below 2010 levels, rather than 2017 levels. We recommend that the methane target should be expressed by reference to 2010 levels. This would be consistent with the IPCC report and the Bill's stated purpose of contributing to the global effort to limit the global average temperature increase to 1.5 degrees Celsius.

Clarification to section 5ZI(1)

Section 5ZI appears to contain a drafting error that should be fixed.

- 36. Section 5ZI has the heading "Commission to report at end of emissions budget period". Our understanding of the purpose of this section is that the Commission will produce a public report within two years of the end of a budget period on the extent of emissions reductions, whether there is an excess reduction that can be banked, whether there is a shortfall that should be borrowed, and whether offshore mitigation is required to meet the emissions budget. The Minister must then respond by making formal decisions on banking, borrowing, and offshore mitigation.

37. Subsection 5ZI(1) is not clearly drafted. It says:

Not later than 2 years after the end of an emissions budget period, the Commission must prepare a report evaluating the progress made in that emissions budget period towards meeting the emissions budget **in the next emissions budget period, ...**

38. The emphasised words appear to be a drafting error. They should be deleted.

What needs to be added

39. In this section we identify provisions that should be added to strengthen the Bill.

International aviation and shipping

We recommend that the Bill should require the Commission and the Minister to consider international aviation and shipping emissions when preparing emissions reduction plans, and that the Commission’s annual reports should record the level of these emissions.

We recommend that the Minister should ask the Commission for a report on how New Zealand can reduce its international aviation and shipping emissions.

40. The Bill does not contain any reference to emissions from international aviation and shipping (IAS). New Zealand’s IAS emissions do not count towards the 2050 target and emissions budgets. These emissions are significant for New Zealand as an isolated island nation. We understand the omission of IAS emissions is intended for consistency with the Paris Agreement. But in its current form the Bill provides no accountability or transparency over New Zealand’s IAS emissions whatsoever. This will be a significant gap in the regulatory framework. By 2050, global IAS emissions are expected to contribute almost 40% of global carbon dioxide emissions unless further mitigation actions are taken.
41. The best way to improve this would be to count IAS emissions associated with New Zealand towards the 2050 target and emissions budgets. However, that is unlikely to be practical at present given the absence of an international consensus about how those emissions are to be treated.
42. We therefore recommend a “soft” treatment of New Zealand’s IAS emissions by:
- 42.1. Amending sections 5ZE and 5ZF to require the Commission and the Minister to consider IAS emissions when preparing emissions reductions plans (without any requirement to reduce those emissions to a particular level); and
 - 42.2. Amending section 5ZH to provide that the Commission’s annual reports must record the level of IAS emissions for:
 - 42.2.1. aircraft and ships commencing their journey in New Zealand;
 - 42.2.2. aircraft and ships concluding their journey in New Zealand; and
 - 42.2.3. aircraft and ships registered in New Zealand.
43. At the very least, following the Bill’s enactment the Minister should request a report from the Commission on how New Zealand can reduce its IAS emissions, including how IAS emissions should be counted towards emissions budgets.

Precautionary principle

The Bill should provide that the Minister and the Commission must take a precautionary approach to the exercise of their functions, powers and duties.

44. Decisions that touch on climate change will often be made against a backdrop of scientific and economic uncertainty. Environmental legislation and regulation frequently requires a precautionary approach towards adverse effects to be taken in situations of uncertainty. In its current form, the Bill requires certain factors to be considered by the Minister and the Commission in the performance of their roles and functions, but it does not require a precautionary approach. That is a notable omission. It may be interpreted as an indication that decision makers should not take a precautionary approach, especially in light of the direction in section 5L(a) for the Commission to consider “*current* available scientific knowledge”.
45. We recommend that a provision with similar wording to section 7 of the Hazardous Substances and New Organisms Act 1996 should be inserted into the Bill, requiring a precautionary approach to be taken to the exercise of functions, powers and duties under the Bill.

Climate impact disclosure statements

The Bill should require the Minister to provide a report to the House of Representatives on the introduction of any Bill to Parliament that appears to make the 2050 target or an emissions budget more difficult to achieve.

46. Achieving the 2050 target and emissions budgets will no doubt require the passage of other legislation to promote emissions reductions. On the other hand, Parliament may from time to time be presented with bills that will make achievement of the 2050 target more difficult. While the Commission and the Minister cannot override Parliament’s sovereignty to enact legislation, they can ensure that any such legislation is not enacted without a proper assessment of the climate risks and difficulties. We therefore recommend that the Minister for Climate Change should be required to present a report to Parliament on any provision in a bill that appears to make the 2050 target or an emission budget more difficult to achieve.
47. Our recommendation is similar to the Attorney-General’s responsibility to report on legislation that appears to be inconsistent with the New Zealand Bill of Rights Act 1990. That requirement has ensured that Parliament faces up to the fact it is passing legislation inconsistent with the Bill of Rights. Given the importance of the 2050 target and emissions budgets being met, we consider that a similar approach should be taken by the Bill.

National Adaptation Plan to have the status of a National Policy Statement under the RMA

The Bill should provide that the National Adaptation Plan prepared under section 5ZQ has the status of a National Policy Statement prepared under the RMA

48. Section 5ZQ requires the Minister to prepare a national adaptation plan setting out the Government’s objectives for adapting to the effects of climate change, and the strategies, policies and proposals for meeting those objectives. In preparing the plan, the Minister must undertake public consultation. As the Bill stands, however, there is no mechanism for the National Adaptation Plan to have any legal consequence. Its implementation will depend on central and local government making policies, rules, regulations, and possibly promoting amendment to primary legislation.
49. The National Adaptation Plan will have a significant degree of similarity in its structure to a National Policy Statement created under the RMA. A National Policy Statement gives direction to local authorities

as to the content of their planning documents. We recommend that the Bill should provide that a National Adaptation Plan has the status of a National Policy Statement approved under the RMA. That would be an efficient way to give legal effect to the National Adaptation Plan and ensure it filters down to planning decisions by local authorities.

Lawyers for Climate Action NZ Inc

15 July 2019

Contact:

Duncan Ballinger

Duncan.Ballinger@stoutstreet.co.nz

Jenny Cooper QC

jcooper@shortlandchambers.co.nz