

Rt Hon Jacinda Ardern
Prime Minister
Parliament Buildings
WELLINGTON

Copy to: Hon Grant Robertson; Hon David Parker; Hon Phil Twyford; Hon Shane Jones;
Hon James Shaw

30 April 2020

Dear Prime Minister

REVIVING THE ECONOMY AND THE ENVIRONMENT – CLIMATE CHANGE AS A MANDATORY CONSIDERATION

We refer to our letter of 17 April 2020 on the Government’s proposed economic recovery plans following the Covid-19 pandemic.

We understand that the Government has now appointed a panel of Ministers (the Budget Ministers’ Group) for the purpose of considering proposals for “shovel ready” economic recovery projects, received through Crown Infrastructure Partners and the Provincial Development Unit, with decisions to be made by Cabinet over the next few weeks.

We are accordingly writing to you again, copied to the Ministers who we understand to be members of that Group, to reiterate our view that the Government is under an obligation to use the fiscal stimulus funds to help New Zealand transition to a low-emissions and climate-resilient economy.

We consider that this is not only sound policy, but required of the Government as a matter of law, despite the traditional reluctance of the courts to examine broad funding decisions.

First, the Government must act in accordance with New Zealand’s international obligations under the United Nations Framework Convention on Climate Change and the Paris Agreement. We are legally committed to limiting the global temperature increase to less than 1.5° and to doing our share of reduction activity. The Climate Change Response Act 2002 (as amended in 2019) requires the Government to contribute to the global effort under the Paris Agreement and to develop and implement policies for climate change adaptation and mitigation. The need to address climate change is also recognised by the New Zealand Infrastructure Commission/Te Waihangā Act 2019.

Secondly, we consider that our climate change commitments are so obviously material to the forthcoming Cabinet decisions that a court would regard them to be mandatory relevant considerations. A failure to take into account a mandatory consideration or to properly be informed of the factual matters reasonably bearing on a mandatory consideration could render the decision unlawful. See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172; *Thomson v Minister for Climate*

Change Issues [2017] NZHC 733; and *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.

Thirdly, under Te Tiriti o Waitangi the Crown is required to preserve and protect tino rangatiratanga, including the continuing role of Māori as kaitiaki of taonga in the environment, as discussed in Part 3 of *Ko Aotearoa Tēnei: Report on the Wai 262 Claim*, Waitangi Tribunal Report 2011. This includes a duty of active protection of the environment.

Finally, the Government must have regard to its obligations under the New Zealand Bill of Rights Act 1990. You will be aware that the Supreme Court of the Netherlands has recently confirmed in *The Netherlands v Urgenda* (20 December 2019) that the right to life under Article 2 of the European Convention on Human Rights places a positive obligation on the Dutch Government to make emissions cuts at a scale and in a timeframe that is consistent with keeping global warming below 1.5°.

We acknowledge that there are differences between the European and Dutch legal systems and New Zealand's. However, it is clear that consistency with NZBORA is a ground on which the Court may review Government action and that climate change raises human rights issues, including a foreseeable risk of loss of life as a consequence of climate change and its impacts. These impacts will affect New Zealand citizens in Tokelau, the Cook Islands and Niue most acutely but will affect all New Zealanders with increasing levels of severity over time.

In this context, we are concerned that the criteria for "shovel ready projects" published on the Crown Infrastructure Partners' website do not refer to climate change and do not specifically include either the impact on domestic greenhouse gas emissions, or New Zealand's capacity for adaptation to the effects of climate change over time, as relevant criteria by which the projects will be assessed.

We are somewhat reassured by Minister Shaw's comments in a Radio New Zealand interview on 23 April 2020, that the Government would nevertheless take climate change into account when making decisions about which economic recovery projects to support financially. We remain seriously concerned however about the need for certainty on the point, and indeed in relation to the coalition Government's overall strategic policy approach to economic recovery and climate change.

Accordingly, we urge the Government to confirm that it will make the following factors a core part of its assessment of all post-COVID-19 stimulus spending:

- the direct and indirect lifetime impact of each project on greenhouse gas emissions (i.e. the long-term impact of projects, such as new roads which are likely to lead to higher traffic levels through induced demand, must be considered, not merely the direct emissions from construction);
- the extent to which each project assists in building long-term climate change resilience into our infrastructure, or is at risk of being lost or becoming redundant due to the effects of climate change or the transition to a zero carbon economy; and
- the cumulative effects of the overall package of projects on current and future emissions and whether these are consistent with the Government's obligations under the Paris Agreement (taking into account the latest IPCC Reporting on the cuts necessary to keep warming to less than 1.5°) and with the 2050 zero carbon target.

In addition to taking advice from the Infrastructure Industry Reference Group, we believe that the Climate Change Commission should have a seat at the table in terms of assessing potential projects.

We would be grateful to receive your and Ministers' assurances on these important issues.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Jenny Cooper". The signature is fluid and cursive.

Jenny Cooper QC
President
Lawyers for Climate Action NZ Inc.

A handwritten signature in blue ink, appearing to read "James Every-Palmer". The signature is stylized and cursive.

James Every-Palmer QC
Treasurer
Lawyers for Climate Action NZ Inc.