

Adrienne Young-Cooper
The Chair
Auckland Transport
Private Bag 92250
Auckland 1142

cc: Wayne Donnelly, Kylie Clegg, Mary-Jane Daly, Darren Linton, Dr Jim Mather, Dame Paula Rebstock

16 June 2020

Dear Chair and Board members

LEGAL OBLIGATIONS OF AUCKLAND TRANSPORT IN RELATION TO CLIMATE CHANGE

1. Lawyers for Climate Action NZ Inc. is a group of over 300 lawyers who have come together to advocate for legislation and policies to ensure New Zealand meets its climate change commitments under the Paris Agreement and achieves net zero carbon emissions no later than 2050. We are also working with the Equal Justice Project at the University of Auckland who have previously made presentations to the Auckland Transport Board on climate change issues.
2. We are writing to Auckland Transport (**AT**) and its Board in light of the critical role that AT has to play in ensuring that:
 - a. New Zealand can achieve the purpose of the Climate Change Response Act 2002 (**CCRA**) of contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels – noting that this requires emissions cuts of around 45% from 2010 levels by 2030;¹
 - b. New Zealand can meet the target set under the CCRA of achieving net zero emissions by 2050; and
 - c. New Zealand and the Auckland region achieve the purpose of the CCRA of preparing for and adapting to the effects of climate change in light of the risk of damage to transport infrastructure.
3. The importance of AT's role in achieving these goals is due to the large proportion of CO₂ emissions caused by road transport, particularly the light vehicle fleet, and the reality that, to achieve the required emissions reductions to limit the global average temperature increase to 1.5°C, we need to largely decarbonise road transport by 2030.²
4. We understand that AT is currently in the process of preparing its Statement of Intent for 2020-2023 (**SOI**). We strongly urge you to ensure that the SOI includes a commitment to pursue measures to

¹ According to the IPCC Special Report: Global Warming of 1.5°C (SR15), 2018, available at <https://www.ipcc.ch/sr15/>, drawing on analysis of model pathways with no or limited overshoot of 1.5°C.

² Based on analysis by Paul Winton for the 1point5 project, available at www.1point5.org.nz.

reduce Auckland's transport emissions in line with the goals set out above. Apart from the strong economic, social and ethical reasons supporting this, we consider that AT also has legal obligations to do so.

5. Specifically, we consider that AT and its directors are under legal obligations to:
 - a. Ensure that the SOI is consistent with Auckland Council's Long Term Plan, which requires AT to contribute towards reducing carbon emissions and a climate resilient future, and with Auckland Council's objectives on climate change, which include supporting the Paris Agreement targets and ensuring a major area of the city is zero carbon by 2030;
 - b. In preparing the SOI, have regard to the 2050 zero carbon target set out in the CCRA and the purposes of the CCRA including contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels (see s 3(1)(aa) of the CCRA);
 - c. Ensure that the SOI is prudent and reasonable having regard to first, the need to cut emissions by around 45% from 2010 levels by 2030 to limit the global temperature increase to less than 1.5°C and thereby avoid an increased likelihood of catastrophic and irreversible changes, and secondly, the foreseeable risks associated with climate change, even if warming is limited to less than 1.5°C, including:
 - (a) the likelihood of future regulatory changes to require emissions reductions;
 - (b) the potential impact on future transport demand as a consequence of changes in consumer preferences and behaviour, and market changes; and
 - (c) the physical impacts of climate change on infrastructure and resources.
6. These obligations also apply to AT's development and adoption of other strategic documents including the Regional Land Transport Plan and the Regional Public Transport Plan and to its material investment and policy decisions.
7. We acknowledge that AT may be affected by Auckland Council's Emergency Budget, which is currently under consultation, due to the impact of the COVID 19 crisis. We are writing separately to Council to provide feedback on the Emergency Budget and to urge it not to delay or cut transport projects or services that will assist with reducing emissions.
8. While we appreciate that the relevant statutory provisions and policies will be familiar to you, to assist you to understand our reasoning, we have set out our views on the legal basis for each of these obligations in more detail below.

Consistency with Auckland Council Long Term Plan and Climate Policy

9. It goes without saying that AT is legally obliged to act in accordance with its statutory purpose and objectives. As you know, AT's statutory purpose under s 39 of the Local Government (Auckland Council) Act 2009 (**LG(AC)A**) is to contribute to an effective, efficient, and safe Auckland land transport system in the public interest. It follows, in our view, that AT must consider the significant risks posed by climate change to the effectiveness, efficiency and safety of the transport system, as well as the impact of transport emissions on climate change as a threat to the wider public interest.
10. In addition, s 92 of the LG(AC)A requires AT to give effect to the relevant aspects of the Council's Long Term Plan and to act consistently with the relevant aspects of any other plan or strategy of the Council to the extent specified in writing by the governing body of the Council. Auckland Council's CCO Accountability Policy is part of the Long Term Plan. It provides:

“Each substantive CCO is to contribute towards reducing carbon emissions and contributing towards a climate resilient future. This is to be achieved by:

- Working with the council in the review and update of Low Carbon Auckland to deliver an integrated approach to climate change, addressing both emissions reduction and climate resilience.
- Implementing actions identified in the current and future iterations of the plan as appropriate for each CCO.
 - Embedding climate change considerations into decision-making, planning and policies regarding both emissions reduction and addressing the impacts of current and on-going climate change.”

11. In addition, as a CCO of Auckland Council, one of AT’s principle objectives is to achieve the objectives of Auckland Council (see s 59 of the Local Government Act 2002 (LGA)). As you will be aware, Auckland Council has:

- a. declared a climate emergency;
- b. signed the C40 Paris Pledge in support of the objectives in the Paris Agreement; and
- c. signed the C40 Declaration for fossil fuel free streets, which commits to procuring only zero-emission buses from 2025 and ensuring a major area of the city is zero carbon by 2030.

12. As noted above, limiting the average temperature rise to less than 1.5°C above pre-industrial levels requires emissions cuts by around 45% from 2010 levels by 2030, based on the IPCC’s 2018 Special Report on Global Warming of 1.5°C.³

13. Recent independent research by transport consultancy MR Cagney shows that AT’s current plan is not only not consistent with this objective but will most likely lead to an *increase* in transport emissions by 2030 (see www.transport2030.org). This would effectively make it impossible to achieve Auckland Council’s policy objectives and would also jeopardise New Zealand’s ability to meet its obligations under the Paris Agreement. More importantly, the resulting emissions would contribute to the risk of a global overshoot of the 1.5°C target, with potentially catastrophic consequences.

14. In these circumstances, we consider that AT is under an obligation to review its strategic priorities and activities and to develop a strategy that will enable Auckland Council’s objectives (and New Zealand’s Paris Agreement obligation) to be met. This needs to be reflected in the SOI.

15. In addition, AT is required to undertake the necessary research and put in place procedures that embed climate change considerations in its ongoing decision-making, planning and policies, as required by the CCO Accountability Policy.

2050 Zero Carbon Target

16. AT is expressly permitted to take account of the 2050 zero carbon target in its decision making by s5ZN of the CCRA which provides that:

“If they think fit, a person or body may, in exercising or performing a public function, power, or duty conferred on that person or body by or under law, take into account—

- (a) the 2050 target; or
- (b) an emissions budget; or
- (c) an emissions reduction plan.”

17. Although the section is worded permissively, we consider that the 2050 target (and, once adopted, any national emissions budget or reduction plan) is a mandatory consideration for AT, based on the principle that “...there will be some matters so obviously material to a decision on a particular project

³ See note 1 above.

that anything short of direct consideration of them... would not be in accordance with the intention of the Act.”⁴ Similarly, although it is not expressly referred to in s5ZN, we also consider that the target of limiting the global temperature increase to less than 1.5°C, which is referred to in the purpose clause of the CCRA, at s 3(1)(aa), is also a mandatory consideration for AT.

18. We consider that both the 2050 target and the 1.5°C target are so obviously material to the adoption of its SOI by AT (and to its other key strategic and planning documents and decisions) that failure by AT to give them proper consideration and weight in preparing the SOI would risk the SOI being unlawful. This would expose AT to the risk of judicial review proceedings leading to orders requiring AT to prepare a new SOI.

Directors’ duties

19. Section 40 of the LG(AC)A requires AT to “prudently manage its assets and liabilities” to ensure long-term financial viability. Section 44 of the same Act requires the directors of AT to exercise the care, diligence and skill that a reasonable person would exercise in the same circumstances.

20. A director’s duty to exercise reasonable care, diligence and skill encompasses a duty to assess and manage climate change risk in the same way as any other foreseeable material risk.

21. Accordingly, we consider that each of the directors of AT is under an individual legal duty to ensure that he or she has taken prudent and reasonable steps to understand, assess and address the risks which climate change poses for AT. These include all risks to achieving AT’s statutory purpose and objectives, financial risks, and risks to its assets, whether they arise from new regulations, changes to consumer demand in relation to transport, or the physical impacts of climate change on transport infrastructure, such as flooding, coastal erosion, and temperature increases.

22. With regard to physical risks to assets, we note that Local Government New Zealand reported last year that approximately \$1.4 billion of local government infrastructure in the Auckland region is exposed at a 1.5m increase in sea level.

23. There is also an increasing risk of damages claims relating to climate change, including actions against local authorities, as highlighted by Jack Hodder QC in his paper for LGNZ: Climate change litigation – who’s afraid of creative judges? (28 March 2019). The risk of such claims against CCOs such as AT cannot be ruled out.

Conclusion

24. In conclusion, we consider that AT and its directors have legal duties to give meaningful and careful consideration to the impact of its actions on the emissions targets adopted by the Council and by government under the CCRA, as well as to the impact of climate change on its assets and activities. These considerations must be part of its preparation of its SOI, as well as its other decision-making, planning and policies.

25. We raise these issues with you now because we want to ensure that decision-makers are fully informed of both their obligations and the potential impact of their decisions on climate change, and that the best decision-making processes possible are adopted. Our interest is solely in achieving the best outcomes possible to mitigate global warming and its impacts.

26. We would be grateful for confirmation from you that AT acknowledges the obligations set out above and for details of the steps it is taking to ensure that its SOI is consistent with Auckland Council’s Long Term Plan and climate policies, the 2050 zero carbon target under the CCRA 2050, and with its obligation to prudently manage its assets to ensure long term viability.

⁴ *CREEDNZ v Governor General* [1981] 1 NZLR 172. See also *Thomson v Minister for Climate Change Issues* [2017] NZHC 722 at [94] and *R (Plan B Earth) v Secretary of State for Transport* [2019] EWHC 1070 (the Heathrow case) which held that a government policy allowing an additional runway at Heathrow was unlawful due to failure to consider the Paris Agreement.

27. We would also be grateful for details of the steps AT has taken to embed climate change considerations into its decision-making, planning and policies regarding both emissions reduction and addressing the impacts of current and on-going climate change, as required by the Auckland Council CCO Accountability Policy.

28. Finally, we would greatly welcome the opportunity to meet with you to discuss these issues further, or to present our views to the Board.

Yours faithfully

A handwritten signature in black ink, appearing to read "Jenny Cooper". The signature is written in a cursive, flowing style.

Jenny Cooper QC
President, Lawyers for Climate Action NZ Inc.