

**21 June 2020**

**TO:**

Committee Secretariat  
Environment Committee  
Parliament Buildings  
Wellington

## Submission on COVID-19 Recovery (Fast-track Consenting) Bill 2020

### Introduction

1. Lawyers for Climate Action NZ Inc. is a group of over 300 lawyers who seek to advocate for legislation and policies to ensure New Zealand meets or exceeds its commitment under the Paris Agreement to achieve net zero carbon emissions as soon as possible and no later than 2050.
2. The IPCC's 2018 Special Report on Global Warming of 1.5°C found that global warming above 1.5°C would have catastrophic and potentially irreversible impacts and that 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.<sup>1</sup> Recent analysis by Paul Winton for the 1point5 Project shows that, to achieve the required emissions reductions in New Zealand, we need to largely decarbonise road transport by 2030.<sup>2</sup>
3. Daily, evidence is emerging that warming is proceeding at or in advance of some of the highest modelling estimates that informed the Paris Agreement.<sup>3</sup>
4. The response of the NZ government to the COVID 19 pandemic has to date been exceptional. The underlying principle of its approach has been that if the state perceives that there is an extraordinary large-scale threat to its population, it intervenes immediately and aggressively to reduce the risk for its citizens, so far as that is within its control. This principled approach should apply equally to climate change.

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1 IPCC Special Report: Global Warming of 1.5°C (SR15), 2018, available at <https://www.ipcc.ch/sr15/>.

2 Available at [www.1point5.org.nz](http://www.1point5.org.nz).

3 <https://www.theguardian.com/commentisfree/2020/jan/03/we-are-seeing-the-very-worst-of-our-scientific-predictions-come-to-pass-in-these-bushfires> and <https://www.theguardian.com/environment/2020/jun/13/climate-worst-case-scenarios-clouds-scientists-global-heating>

5. There is much talk internationally about the need to ensure that the economic recovery following the COVID 19 pandemic is a 'green recovery' which is climate change resilient and does not entrench existing high emitting industries and activities.<sup>4</sup>
6. All of this means that the recovery cannot be a return to 'business as usual', but should be taken as a providential opportunity to speed up the economic transformation to a low emitting economy. Any other approach would not simply squander an opportunity, but also lock-in lasting economic and social harm for this and immediate future generations.
7. We also note that in May 2020, Cabinet was advised that NZ is currently failing to meet its Nationally Determined Contribution (NDC) under the Paris Agreement and will have to rely on emissions reductions 'picking up significantly in the second half of the decade.'<sup>5</sup>
8. In a letter of 30 April 2020 we raised concerns about the developing policy to fast-track so-called "shovel ready" projects and suggested the following safeguards in any fast-track scheme (attached):

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.

9. In a further letter on 20 May 2020 we supported detailed submissions by David Bullock and Davey Salmon of 16 May commenting on the Cabinet Paper for the fast track bill proposal, before a draft bill had been released (attached).

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4 Including the International Energy Agency:

<https://www.icas.com/explore/resources/news/2020/06/18/10520719/coronavirus-pandemic-offers-chance-for-sustainable-recovery-iea>

5 Cabinet Paper of May 2020 "New Zealand Emissions Trading Scheme settings regulations" reads: "32.

Officials have advised me that meeting the NDC entirely with domestic abatement will impose significant costs on the NZ economy. This concern is compounded by the fact emissions have not fallen in the five years since the NDC was developed. As a result, our starting point for reductions in the 2021-30 period is higher than if cuts in emissions had been achieved since 2015. Despite this challenge, the NDC could still be met domestically if emissions reductions were to pick up significantly in the second half of the decade."

## Provisions in the Bill addressing climate change

10. While responding to one or two of these concerns which we have raised, the Bill as currently drafted is clearly missing the policy opportunity and legal imperative to address climate change.
11. The proposed purpose of the Act is simply “to urgently promote employment growth to support New Zealand’s recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.”
12. Specific references to climate change in the Bill are limited:

### **Clause 19 Whether project helps to achieve purpose of Act**

13. For referred projects, the Minister may consider, at whatever level of detail the Minister considers appropriate:<sup>6</sup>

(b) the project’s effect on the social and cultural wellbeing of current and future generations:

....

(d ) whether the project may result in a public benefit by, for example,—

(vii) contributing to New Zealand’s efforts to mitigate climate change and transition more quickly to a low-emissions economy (in terms of reducing New Zealand’s net emissions of greenhouse gases):

(viii) promoting the protection of historic heritage:

(ix) strengthening environmental, economic, and social resilience, in terms of managing the risks from natural hazards and the effects of climate change:

### **Clause 20 Application for referral**

14. The applicant for a referred project must include:

(m) a description of whether and how the project would be affected by climate change and natural hazards.

### **Clause 21 Process after Minister receives application**

15. Before determining whether an application should be referred to an expert panel, the Minister must invite comment within 10 working days from the Minister for Climate Change among others.

### **Schedule 6 - Applications and decision making for listed and referred projects**

16. For a Listed Project, the panel must invite comment from the Minister responsible for Climate Change.<sup>7</sup>

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<sup>6</sup> Clause 19(d)(vii) & (ix).

<sup>7</sup> Clause 17(4)(g)(ii) 6th Schedule.

17. For a referred project, the panel must invite comment only from the Climate Change Commission, Environmental Defence Society Incorporated, Generation Zero Incorporated, Greenpeace of New Zealand Incorporated and Royal Forest & Bird Protection Society of New Zealand Incorporated.<sup>8</sup>

18. Clause 30 provides:

**30 Further matters relevant to considering consent applications for referred projects**

(1) Sections 104A to 104D, 105 to 107, and 107F of the Resource Management Act 1991 apply to a panel's consideration of a consent application for a referred project.

19. Section 104E is left out of this list of the sections between 104A and 105. Section 104E, introduced in 2004, prevents any consideration of the effects of discharges of greenhouse gases on climate change. Removing reference to it is consistent with the government's current intention to repeal section 104E.<sup>9</sup> However, it is unclear whether this counts as an 'exclusion' in terms of clause 12(4) which provides that all relevant provisions of the RMA 1991 apply "[u]nless replaced, modified, or excluded by this Act."

20. There is a ten working day period to give comments, and no hearing unless the panel determines that one should be held. But the panel must determine the application within 25 working days, although it can double this to 50 working days for large scale projects.

21. Large scale projects can also be split up and have their first stages determined under the Act with these limited climate change references (with subsequent stages proceeding through ordinary consent processes).<sup>10</sup>

**Explanatory papers and comments**

22. Papers provided with the Bill support stronger references to climate change. The Explanatory Note refers to climate change resilience as a key reason for the legislation:

*The Bill also seeks to address New Zealand's infrastructure deficit, improve long-term productivity, and encourage projects that will promote New Zealanders' future wellbeing and resilience. This includes supporting the transition to a low-emissions economy and improving resilience to climate change and natural hazards while supporting sustainable management.*

23. The Cabinet paper for the Bill states:

*This is also an opportunity to support projects that will enable New Zealanders' future wellbeing, including our transition to a low-emissions, climate-resilient economy.*

....

*The Climate Change Commission has also encouraged the Government to apply a climate change lens to economic recovery measures. The Climate Change Commission notes that an economic stimulus package can either speed up or stall progress towards climate goals. It recommends six principles for the Government to use in decision-making to help deliver an economic recovery:*

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8 Clause 17(6)(l),(n),(o),(p),(u).

9 Clause 25A Resource Management Amendment Bill 180-2 as reported from the Environment Committee.

10 Clause 24(2)(b)

- a) consider how stimulus investments can deliver long-term climate benefits;
- b) bring forward transformational climate change investments that need to happen anyway;
- c) prepare our workforce for the jobs of tomorrow;
- d) work in partnership with iwi/Māori, consistent with the principles of Te Tiriti o Waitangi;
- e) maintain incentives to reduce emissions and adapt to climate change;
- f) change how we measure the success of economic recovery, including use of the wellbeing indicators.

24. But we also note that emissions impacts of referred projects have not been assessed:

*99. The Climate Portfolio division within MfE has been consulted and confirms that the climate implications of policy' assessment (CIPA) requirements do not apply to this proposal. The emissions impacts are unable to be accurately determined in quantitative terms due to the uncertainty around what infrastructure projects this will affect. The extent of any emissions increase or reduction will be determined by each project granted consent through processes established by this proposed legislation.*

## Elements which LCANZI supports

- 25. The listed projects in Schedule 2 appear in general to support the transition to a low emissions economy.
- 26. It is pleasing to see in the Bill the mandatory requirement to seek the views of NGOs specifically concerned with climate change, i.e. EDS, Greenpeace, and Generation Zero.
- 27. It is also pleasing to see the requirement to consider the views of the Climate Change Commission on referred projects.
- 28. The Bill also responds to some of the points made in the submission of David Bullock and Davey Salmon.

## LCANZI concerns

- 29. Nevertheless, LCANZI remains firmly of the view that the Bill must do more to boost projects that lower emissions, for the reasons outlined above.
- 30. In fact, without further clarification of the need to consider climate change and reduce emissions, and because MfE's climate implications of policy' assessment (CIPA) requirements have not been applied, the Bill as currently drafted may allow projects to be fast tracked that increase emissions. That would lead to the construction of infrastructure 'white elephants' that would be a net cost to the economy and an unjust debt burden on future generations who will be facing their own climate challenges.
- 31. Our concerns in particular relate to fast-track projects that might be proposed for:
  - New roads and road extensions

- Subdivisions which increase urban sprawl
- The expansion of high emission farming operations
- Airport runway extensions
- Coal mining, combustion and export projects
- Oil and gas drilling, pipeline and refining projects
- Projects in support of any of the above.

32. The lack of any requirement for a hearing, and limitations on submissions and appeals also remains a concern.

## Amendments required

### Improved references to climate change

#### 4 Purpose

33. Consistent with the arguments above and the reference in the Explanatory Note to the “opportunity to support projects that will enable New Zealanders’ future wellbeing, including our transition to a low-emissions, climate-resilient economy”, the purpose should include an express reference to climate change. We suggest:

#### 4 Purpose

The purpose of this Act is to urgently promote employment growth to support New Zealand’s recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, **[in a manner that will enable New Zealanders’ future wellbeing, including the transition to a low-emissions, climate-resilient economy]** while continuing to promote the sustainable management of natural and physical resources.

#### 19 Whether project helps to achieve purpose of Act

34. Clause 19 as currently drafted is ambiguous as to whether projects which increase emissions over their lifetime, potentially breaching international legal obligations, and/or have low climate resilience may be referred to the fast track process, when those should be disqualifying factors.
35. Indeed, as currently drafted, clause 19 potentially places “economic benefits and costs for people or industries affected by COVID-19” in the short term in direct conflict with climate change mitigation and adaptation, since the Minister can choose which matters to prioritise on any particular project.
36. Government papers make clear that projects that increase emissions and/or have low climate resilience will be a net detriment to NZ citizens.
37. This is also true of many other matters in the list in clause 19(d) once environmental and social costs are properly accounted for.
38. It also makes little sense to leave it to the discretion of the Minister to consider “whether there is potential for the project to have significant adverse environmental effects” (19(e)). That contradicts the purpose of the Act and the RMA 1991.

39. Accordingly, we suggest that clause 19 is amended in two respects.

40. First, to amend paragraph (vii) to read:

(vii) contributing to New Zealand’s efforts to mitigate climate change, **[including its ability to achieve the emissions targets set out in the Climate Change Response Act and to meet its obligations under the Paris Agreement to contribute to global efforts to limit global warming to 1.5C,]** and transition more quickly to a low-emissions economy (in terms of reducing New Zealand’s net emissions of greenhouse gases):

41. Second, to add a further subsection or caveat:

**provided that, if a project has a net detriment in terms of any of the matters (d) to (e), it may not be referred.**

#### **Clause 20 Application for referral**

42. The applicant for a referred project must include “m) a description of whether and how the project would be affected by climate change and natural hazards”.

43. This should be amended to add the words:

**as well as any impacts on, or contributions to, climate change adaption and/or mitigation over the short and long term.**

#### **Schedule 6 - Applications and decision making for listed and referred projects**

##### **Clause 11 Matters to be covered in assessment of environmental effects**

44. Both listed and referred projects must include an assessment of environmental effects (clause 9(4)(b)) covering various matters set out in this clause. The clause should specifically refer to effects on and of climate change. The Bill already provides that this matter be considered in part when a project is referred from the Minister. This should be amended to add an additional matter:

**(h) any impacts of climate change on the project as well as any impacts of the project on, or contributions to, climate change adaption and/or mitigation over the short and long term.**

##### **30 Further matters relevant to considering consent applications for referred projects**

45. The Bill must be clarified to make clear that s104E is excluded from consideration for listed projects. The clause should be amended to read:

(1) Sections 104A to 104D **[(but not 104E or 104F)]**, 105 to 107, and 107F of the Resource Management Act 1991 apply to a panel’s consideration of a consent application for a referred project.

## **Other matters**

46. We have read in draft the submission of David Bullock and Davey Salmon on the Bill, following from their pre-Bill submission noted above. LCANZI supports the amendments proposed in their

submission, which are consistent with the amendments above relating to climate change, but also address concerns we share about restrictions on appeal rights.

47. If committee hearings are to be held on this Bill, which we consider to be essential given the extremely short time given to make submissions, we wish to be heard.

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.