

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2021-404-1618

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER OF an application for judicial review

BETWEEN **ALL ABOARD AOTEAROA
INCORPORATED**
Applicant

AND **AUCKLAND TRANSPORT**
First respondent

AND **THE REGIONAL TRANSPORT
COMMITTEE FOR AUCKLAND**
Second respondent

Cont.

APPLICANT'S SUBMISSIONS

30 March 2022

Assigned judicial officer:

Next event date: Hearing on 26-28 April 2022

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AND

AUCKLAND COUNCIL

Third respondent

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APPLICANT'S SUBMISSIONS

MAY IT PLEASE THE COURT:

1. INTRODUCTION

- 1.1 The applicant, All Aboard Aotearoa Inc (**All Aboard**), seeks judicial review of decisions relating to the Auckland Regional Land Transport Plan 2021 (**RLTP 2021**).
- 1.2 RLTP 2021 is the investment plan for Tāmaki Makaurau Auckland's transport network for the 10 years from 1 July 2021 to 1 July 2031. RLTP 2021 was approved by Auckland Transport on 28 June 2021. It provides for total investment of \$37b across the decade.
- 1.3 RLTP 2021 was adopted against the backdrop of a series of commitments by the Government and Auckland Council to make deep and urgent reductions to emissions of greenhouse gases, in response to the global climate crisis:
- (a) Aotearoa New Zealand had committed, both as a signatory to the Paris Agreement and by statute, to contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels;
 - (b) New Zealand's nationally determined contribution (**NDC**) under the Paris Agreement was to reduce its greenhouse gas emissions to 30% below 2005 levels by 2030 (which it has subsequently increased to 50%);
 - (c) The New Zealand Government and Auckland Council had each declared climate emergencies;
 - (d) The Climate Change Commission had recommended reducing New Zealand's greenhouse gas emissions to 38% below 2019 levels, and carbon dioxide emissions to 47% below 2019 levels, by 2030;
 - (e) Auckland had committed, by membership of the C40 Cities Climate Leadership Group, to develop a climate plan consistent with the Paris Agreement aspiration of a 1.5°C maximum temperature rise; and
 - (f) Auckland Council's targets under Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan (**Te Tāruke-ā-Tāwhiri**), were to reduce Auckland's greenhouse gas emissions to 50% below 2016 levels by 2030, and to reduce Auckland's gross emissions from the transport sector to 64% below 2016 levels by 2030.

- 1.4 In 2018 road transport accounted for around 38.5% of Auckland’s total emissions of greenhouse gases. As RLTP 2021 itself acknowledges: “Given the scale of Auckland’s contribution to New Zealand’s transport emissions, failure to make substantial emissions reductions in Auckland will severely limit New Zealand’s ability to meet [its] climate change targets.”¹
- 1.5 Before adopting RLTP 2021, the directors of Auckland Transport, sitting as the Regional Transport Committee for Auckland (RTC), were required to be satisfied that RLTP 2021 contributed to the purpose of the Land Transport Management Act 2003 (LTMA), and that it was consistent with the Government Policy Statement on Land Transport 2021 (GPS 2021).
- 1.6 GPS 2021 included a “climate change” strategic priority, which required delivery of the following primary outcome:²
- Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission recommended to Cabinet until emissions budgets are released in 2021.
- 1.7 On Auckland Transport’s own analysis, however, the RLTP 2021 investment programme fails to make any material reduction to Auckland’s transport emissions. Rather, as RLTP 2021 itself records, it will increase land transport emissions in Auckland by 6% by 2031 compared to 2016 levels (or reduce them by 1% if proposed central government interventions are taken into account).³
- 1.8 All Aboard says that RLTP 2021 is manifestly inconsistent with GPS 2021, including the mandatory directions for investment decisions to support the rapid transition to a low carbon transport system, to reduce harmful emissions, and to give effect to the Climate Change Commission’s proposed emissions reduction targets. Given its failure to reduce emissions, RLTP 2021 is also plainly not in the public interest.
- 1.9 The process by which RLTP 2021 was developed was fundamentally flawed. The evidence makes clear that it was a business-as-usual plan that was designed from the outset to maintain Auckland Transport’s pre-existing investment programme, and that failed to make the interventions that were available and necessary to reduce transport emissions. There is no dispute about what those required interventions were: Auckland Council had already identified and committed to making them in Te Tāruke-ā-Tāwhiri.
- 1.10 The decision-makers accordingly had no proper or reasonable basis to be satisfied that RLTP 2021 was consistent with GPS 2021, nor any of the Government’s and Auckland Council’s climate commitments, nor that it contributed to the purpose of the LTMA. The decisions at issue were therefore unlawful. All Aboard seeks for the decisions to be set aside.

¹ RLTP 2021 at 34. [[301.0035]]

² GPS 2021 at 22. [[301.0152]]

³ RLTP 2021 at 79. [[301.0079]]

All Aboard Aotearoa Inc

- 1.11 All Aboard is a coalition of six non-governmental organisations, Bike Auckland Inc, Generation Zero Inc, Lawyers for Climate Action NZ Inc, Movement (charitable trust), Women in Urbanism Aotearoa Inc and Greenpeace Aotearoa Inc.
- 1.12 The central aim of All Aboard is to achieve the urgent decarbonisation of transport in Tāmaki Makaurau Auckland, in order to contribute to the global effort to limit global warming to 1.5°C above pre-industrial levels, and to avoid the worst effects of the climate crisis.
- 1.13 All Aboard brings its application for judicial review in the public interest and having regard to the urgency and severity of the climate crisis. It has no private interest in the matters at issue.

Respondents and decisions challenged

- 1.14 The three respondents are Auckland Transport, the RTC and Auckland Council.
- 1.15 The RTC is a statutory committee under the LTMA. The members of the RTC are the directors of Auckland Transport.⁴ At the time of the decision, the directors were Adrienne Young-Cooper (Chair), Wayne Donnelly (Deputy Chair), Darren Linton, Kylie Clegg, Mary-Jane Daly, Dr Jim Mather, Nicole Rosie, Abbie Reynolds and Tommy Parker.⁵
- 1.16 All Aboard challenges three decisions relating to RLTP 2021:
- (a) The decision by the RTC on 18 June 2021 to submit RLTP 2021 to the Planning Committee of Auckland Council (**Planning Committee**) for endorsement, and to the Board of Auckland Transport (**Board**) for approval (**RTC Decision**). The first cause of action challenges this decision. The RTC is the respondent.
 - (b) The decision by the Planning Committee on 24 June 2021 to endorse RLTP 2021 (**Planning Committee Decision**). The members of the Planning Committee are the mayor and all 20 ward councillors. The second cause of action challenges this decision. Auckland Council is the respondent.
 - (c) The decision by the Board on 28 June 2021 to approve RLTP 2021 (**Board Decision**). The third cause of action challenges this decision. Auckland Transport is the respondent.

⁴ See s 5 of the LTMA and s 43 of the Local Government (Auckland Council) Act 2009. The RTC includes a non-voting member to represent KiwiRail (s 105A of the LTMA).

⁵ Statement of claim at [5(a)] [[101.0003]]; Auckland Transport and RTC's statement of defence at [5]. [[101.0021]]

Legal basis for claims

- 1.17 In summary, All Aboard submits that:
- (a) In making the RTC Decision, the RTC failed to comply with s 14 of the LTMA because it had no proper or reasonable grounds to be satisfied that RLTP 2021:
 - (i) Was consistent with GPS 2021, including the “climate change” strategic priority and the associated primary outcome that had to be delivered; and
 - (ii) Contributed to the purpose of the LTMA, being to contribute to an effective, efficient and safe land transport system in the public interest.
 - (b) In making the Planning Committee Decision, the Planning Committee:
 - (i) Failed to comply with s 77 of the Local Government Act 2002 (LGA), because it failed to seek to identify all reasonably practicable options for the achievement of the objective of the decision, including the option of declining to endorse RLTP 2021 and requiring Auckland Transport to make changes to it;
 - (ii) Failed to comply with s 80 of the LGA, because the decision was significantly inconsistent with policies and plans adopted by Auckland Council, including its declaration of a climate emergency and Te Tāruke-ā-Tāwhiri; and the Planning Committee did not identify clearly the reasons for that inconsistency, and any intention of Auckland Council to amend those policies and plans to accommodate the decision; and
 - (iii) Failed to have any or proper regard to the principles in s 14 of the LGA, including the interests of future as well as current communities; the need to maintain and enhance the quality of the environment; and the reasonably foreseeable needs of future generations.
 - (c) In making the Board Decision, the Board acted contrary to its statutory purpose under s 39 of the Local Government (Auckland Council) Act 2009 (LGACA), being to contribute to an effective, efficient and safe Auckland land transport system in the public interest.
- 1.18 All Aboard says that all three decisions resulted from, and were vitiated by, fundamental failings in Auckland Transport’s process for developing RLTP 2021, and material inaccuracies in advice that Auckland Transport provided to the decision-makers.

- 1.19 Auckland Transport's own evidence shows that:
- (a) All significant decisions regarding Auckland's transport investment programme for the next decade were taken before RLTP 2021 was prepared, in the context of an earlier, non-statutory plan known as the Auckland Transport Alignment Project (**ATAP**);
 - (b) Auckland Transport started from the flawed premise that more than 93% of the projects and programmes were "mandatory" and that it had no choice but to include them in the investment programme; and
 - (c) Auckland Transport failed to assess the projects and programmes in RLTP 2021 against the strategic priorities and indicators set out in GPS 2021 (as GPS 2021 expressly required).
- 1.20 The evidence also shows that in preparing the investment programme, and advising the decision-makers, Auckland Transport proceeded on the basis of fundamental misconceptions about transport planning and policy. These included:
- (a) That investment in transport infrastructure and services only has a "very minor" impact on emissions (when in fact it is a key factor in transport emissions);
 - (b) That no plausible changes could be made to the RLTP 2021 investment programme that would yield materially different results (when in fact changes that materially reduced emissions could and should have been made);
 - (c) That increasing road capacity could decrease emissions, and decreasing road capacity could increase emissions (when in fact the reverse is true); and
 - (d) That reallocating road space to more sustainable modes (public transport, and cycling and walking) could undermine "economic, social and cultural public interests" (when in fact doing so would promote those interests).
- 1.21 All Aboard says that Auckland Transport's approach and advice in respect of these matters are at odds with all contemporary understandings of transport planning, and unsupported by any evidence. Auckland Transport's position is directly contradicted by Te Tāruke-ā-Tāwhiri; by advice from Auckland Council's own transport experts; by the Transport Emissions Reduction Plan (**TERP**) that Auckland Council and Auckland Transport are belatedly developing to reduce Auckland's transport emissions; and by the extensive expert evidence that is before the Court.
- 1.22 There was a complete failure by Auckland Transport to recognise and respond to the requirements of GPS 2021 in respect of climate change and emissions reductions.

Summary of evidence

All Aboard's evidence

- 1.23 All Aboard has filed affidavits from nine witnesses:
- (a) Nicholas Lee, the Chair of All Aboard. Mr Lee outlines All Aboard's central aims; its engagement with the ATAP/RLTP process; and its core concerns about RLTP 2021.
 - (b) Will Steffen, an Emeritus Professor and Earth System scientist at the Australian National University. Professor Steffen gives expert evidence about the scientific consensus on climate change, including its causes and future effects, and the scientific consensus on the required mitigation of greenhouse gas emissions. His evidence is that every tonne of CO₂ emitted pushes Earth closer to activating a series of "tipping points" that risk creating a "Hothouse Earth" scenario in which the habitability of Earth is threatened.
 - (c) Tim Naish, a Professor in Earth Sciences at the Antarctic Research Centre at Victoria University of Wellington. Professor Naish gives expert evidence about the most recent findings of the Intergovernmental Panel on Climate Change (IPCC), and the particular impacts of climate change on New Zealand and Auckland. He also addresses the Paris Agreement, the Zero Carbon Act and New Zealand's NDC.
 - (d) Alistair Woodward, a Professor of Epidemiology and Biostatistics at the University of Auckland. Professor Woodward gives expert evidence about the effects of climate change on human health, including the particular risks for New Zealand and for Māori. He also addresses the effects of the transport system on human health; Auckland's poor road safety record; and how the strategic priorities of GPS 2021 support one another from a health perspective.
 - (e) Ralph Chapman, an Adjunct Professor at Victoria University of Wellington, and an economist with expertise in climate change and transport policy. Professor Chapman was a negotiator of the Kyoto Protocol for New Zealand. He addresses the need to reduce Auckland's transport emissions; the relevant international, domestic and regional targets for emissions reductions; the available levers for reducing transport emissions; the impacts of reallocating road space to sustainable modes; and the costs of failing to reduce Auckland's transport emissions. In his reply affidavit, he responds to the evidence of Hamish Bunn, on behalf of Auckland Transport, regarding transport modelling and other transport policy issues.
 - (f) Todd Litman, the Executive Director of the Victoria Transport Policy Institute in British Columbia, Canada, who is a leading expert in transport policy. Mr Litman addresses the strategic priorities of GPS 2021, and how they support each other; the modelled emissions and vehicle travel impacts of the RLTP investment programme; various aspects of Auckland Transport's advice to the decision-makers; and

the limitations of traffic modelling. In his reply affidavit, he responds to Mr Bunn's evidence about Auckland Transport's traffic modelling, and addresses several technical misconceptions about transport planning. His expert view is that there is no basis to conclude that RLTP 2021 could not have achieved greater emissions reductions.

- (g) Jayne Metcalfe, a consultant engineer who specialises in air quality, emissions management and emissions modelling. Ms Metcalfe gives expert evidence about the relevant national and regional targets for emissions reduction, mode shift, and reduction of vehicle kilometres travelled (**VKT**); the inconsistency between those targets and RLTP 2021; the failure of RLTP 2021 to consider lifecycle emissions; and aspects of Auckland Transport's advice to the decision-makers. In her reply affidavit, she responds to technical aspects of Mr Bunn's evidence.
- (h) Alec Tang, a Chartered Environmentalist who was Chief Sustainability Officer (Acting) at Auckland Council until 28 April 2021. Mr Tang replies to the respondents' affidavits. In doing so, he addresses Auckland Council's development of Te Tāruke-ā-Tāwhiri and the imperative for urgent climate action in Auckland; the role of transport in Auckland's decarbonisation pathway; the need to reconsider existing investment decisions and policy directions; and the relationship between climate action and other regional priorities.
- (i) Neelima Ghanta, a Senior Transport Planner who was seconded to Auckland Transport between May and December 2021. Ms Ghanta gives expert evidence about the shortcomings of the process for preparing RLTP 2021 outlined in Auckland Transport's evidence. She replies to Mr Bunn's evidence regarding Auckland Transport's traffic model, the Macro Strategic Model (**MSM**), and to other aspects of his evidence on transport planning issues.

Respondents' evidence

1.24 The respondents have filed affidavits from four witnesses:

- (a) Hamish Bunn, Auckland Transport's Group Manager: Policy, Planning and Investment. Mr Bunn gives extensive evidence about Auckland Transport's process for preparing and approving RLTP 2021, and the ATAP process that preceded it. Mr Bunn also responds to All Aboard's expert evidence regarding transport planning and policy issues. He seeks to defend Auckland Transport's advice to the decision-makers about the impact of transport investment decisions on emissions, and whether RLTP 2021 could have delivered better emissions outcomes. Mr Bunn purports to qualify himself as an expert witness.
- (b) Jenny Chetwynd, Auckland Transport's General Manager Planning and Investment (to whom Mr Bunn reports). Ms Chetwynd addresses the role of the RLTP within the land transport system, and the process for developing ATAP and RLTP 2021.

- (c) Adrienne Young-Cooper, the chair of the Board. Ms Young-Cooper addresses the RTC Decision and the Board Decision, as well as the wider transport planning and policy system.
- (d) Megan Tyler, Auckland Council's Chief of Strategy. Ms Tyler addresses Auckland Council's climate commitments, including Te Tāruke-ā-Tāwhiri; the reasons why the Planning Committee was required to endorse RLTP 2021; the Planning Committee Decision itself; and the TERP that Auckland Council and Auckland Transport are now developing.

1.25 All Aboard notes the following matters in relation to the respondents' evidence:

- (a) Auckland Council has not filed affidavits from any of the members of the Planning Committee, being the decision-makers in respect of the Planning Committee Decision. As addressed in section 7 of these submissions, All Aboard says the unexplained failure to do so entitles the Court to draw inferences about what their evidence would have been.⁶
- (b) Mr Bunn's evidence makes clear he had a central role in developing the ATAP/RLTP investment programme, and in preparing the advice to the decision-makers at issue. He is of course a witness of fact, and his evidence is admissible on that basis. To the extent Mr Bunn is also seeking to give expert opinion evidence, however, it is submitted that his evidence should be treated with considerable caution given his lack of independence and his direct involvement in the matters at issue.
- (c) The respondents have not filed any independent expert evidence to support the views that Mr Bunn advances. Nor have they filed evidence from Auckland Council's transport advisers. As addressed in section 6 of these submissions, it is evident that (in common with All Aboard's experts) those advisers do not accept Mr Bunn's views. Again, these are matters on which the Court will be entitled to draw inferences.

Hearing bundle

1.26 The hearing bundle comprises four volumes:

- (a) Volume 1 contains the pleadings;
- (b) Volume 2 contains the affidavits, with All Aboard's affidavits first and then the respondents';
- (c) Volume 3 contains RLTP 2021, GPS 2021 and Te Tāruke-ā-Tāwhiri; and
- (d) Volume 4 contains the exhibits to the affidavits, arranged in chronological order.

⁶ *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153].

2. CLIMATE CRISIS

2.1 The submissions below draw on the expert evidence of Professor Steffen, Professor Naish and Professor Woodward, each of whom has authored reports of the IPCC. It is noted that the respondents have not sought to rebut the evidence of those witnesses. That is the appropriate approach given Auckland Council's declaration of a climate emergency,⁷ Auckland's membership of the C40 Cities Climate Leadership Group,⁸ and the respondents' pleaded admissions regarding climate change and its effects.⁹

Climate consensus and IPCC reports

2.2 The IPCC is the United Nations body charged with assessing the science related to climate change. The IPCC is the most authoritative assessment body on the science of climate change.¹⁰

2.3 Since it was established in 1988, the IPCC has published five Assessment Reports (**ARs**), and is presently completing its sixth (**AR6**). Each report is prepared by approximately 900 authors, all of whom are recognised scientific experts nominated and selected by governments.¹¹

2.4 Drawing on the IPCC reports, Professor Steffen's evidence in respect of the climate consensus is as follows:¹²

- (a) "The scientific consensus is that the global temperature has increased since the 1850-1900 period, and at an extraordinarily rapid rate since the mid-20th century. This rate of temperature increase is almost unprecedented in the entire 4-billion-year geological record."
- (b) "It is accepted without doubt by the expert scientific community that human activity – specifically the emission of greenhouse gases, primarily carbon dioxide (CO₂), into the atmosphere – is the cause of this rapid global temperature increase."
- (c) "The effects of climate change are already being felt and will continue to intensify depending on future emissions scenarios. These include extreme heat events, sea level rises, and increases in the intensity of droughts, floods and tropical cyclones."
- (d) "To keep the global temperature increase to less than 1.5°C (in accordance with the Paris Agreement), only 320 billion tonnes of CO₂ may be emitted in the future. At the current rate of emissions

⁷ Exhibit MT1-0503 [[303.1004]].

⁸ Affidavit of Alec Tang in reply at [17(a)] [[201.0246]].

⁹ See Auckland Transport and RTC's statement of defence at [8] [[101.0021]]; Auckland Council's statement of defence at [8] [[101.0047]].

¹⁰ Affidavit of Will Steffen at [19] [[201.0022]].

¹¹ Affidavit of Tim Naish at [14] [[201.0044]].

¹² Affidavit of Will Steffen at [9(a)]-[9(d)] [[201.0019]].

(approximately 40 billion CO₂ per year), that will occur by the end of 2029. Significant reductions in greenhouse gas emissions by 2030 are required to have a reasonable chance of keeping the global temperature increase at less than 1.5°C.”

2.5 The contribution of the IPCC Working Group I to AR6, *Climate Change 2021: The Physical Science Basis*, was released on 9 August 2021.¹³ As Professor Naish notes, the accompanying Summary for Policymakers “states more strongly than ever the urgent need to rapidly reduce greenhouse gas emissions”. Professor Naish highlights the following passages from the Summary for Policymakers:¹⁴

- (a) “It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.”
- (b) “The scale of recent changes across the climate system as a whole and the present state of many aspects of the climate system are unprecedented over many centuries to many thousands of years.”
- (c) “Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since AR5.”
- (d) “Improved knowledge of climate processes, paleoclimate evidence and the response of the climate system to increasing radiative forcing gives a best estimate of equilibrium climate sensitivity of 3°C with a narrower range compared to AR5.”
- (e) “Global surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades.”
- (f) “Many changes in the climate system become larger in direct relation to increasing global warming. They include increases in the frequency and intensity of hot extremes, marine heatwaves, and heavy precipitation, agricultural and ecological droughts in some regions, and proportion of intense tropical cyclones, as well as reductions in Arctic sea ice, snow cover and permafrost.”
- (g) “Continued global warming is projected to further intensify the global water cycle, including its variability, global monsoon precipitation and the severity of wet and dry events.”

¹³ <https://www.ipcc.ch/report/ar6/wg1/>.

¹⁴ Affidavit of Tim Naish at [16] [[201.0044]]. See also affidavit of Will Steffen at [28] [[201.0024]].

- (h) “Under scenarios with increasing CO2 emissions, the ocean and land carbon sinks are projected to be less effective at slowing the accumulation of CO2 in the atmosphere.”
- (i) “Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level.”
- (j) “In the longer term, sea level is committed to rise for centuries to millennia due to continuing deep ocean warming and ice sheet melt, and will remain elevated for thousands of years. Over the next 2,000 years, global mean sea level will rise by about 2 to 3 m if warming is limited to 1.5°C, 2 to 6 m if limited to 2°C and 19 to 22 m with 5°C of warming, and it will continue to rise over subsequent millennia.”
- (k) “Due to relative sea level rise, extreme sea level events that occurred once per century in the recent past are projected to occur at least annually at more than half of all tide gauge locations by 2100.”

2.6 Professor Naish notes that AR6 uses a new, more advanced methodology for calculating the impacts of global warming. AR6 now predicts that doubling of atmospheric CO2 concentration above the preindustrial level will cause 3°C of global warming. In AR5, the figure was 2.5°C.¹⁵

Hothouse Earth scenario

2.7 Professor Steffen addresses the potential for human emissions of greenhouse gases to result in changes to the Earth system that lead to a “Hothouse Earth” scenario. That is a scenario in which the Earth system is (i) very much hotter than pre-industrial conditions (at least 4°C hotter), (ii) stable for thousands of years, and (iii) an extremely difficult state of the Earth system for humans to live in.¹⁶

2.8 There are two pathways that could lead to Hothouse Earth conditions. The first is the high emissions scenario identified by the IPCC, where human emissions continue to rise over coming decades, resulting in a temperature rise of 4.4°C by 2100.¹⁷ Professor Steffen describes the second pathway as follows:¹⁸

The second pathway consists of a combination of direct human forcing via greenhouse gas emissions, coupled with feedback processes within the Earth System, which, once triggered by the temperature rise resulting from human emissions, drive the Earth System to even hotter conditions and ultimately to Hothouse Earth.

2.9 This second pathway involves “tipping elements” leading to “tipping cascades”. A “tipping element” is a feature of the Earth system that can undergo significant change when it is pushed beyond a critical point by an external factor, such as rising temperature driven by human greenhouse gas

¹⁵ Affidavit of Tim Naish at [16(d)] [[201.0044]].

¹⁶ Affidavit of Will Steffen at [40] [[201.0029]].

¹⁷ Affidavit of Will Steffen at [30]-[31] [[201.0025]] and [41] [[201.0029]].

¹⁸ Affidavit of Will Steffen at [41] [[201.0029]].

emissions.¹⁹ Professor Steffen and Professor Naish both give examples of tipping elements, including the melting of the Antarctic ice sheet, the melting of Arctic sea ice, increasing drought in the Amazon basin, and melting permafrost.²⁰

2.10 Professor Steffen describes “tipping cascades” as follows:²¹

Tipping cascades refer to a process whereby one or two tipping elements can activate other feedbacks or tipping elements in the Earth System (of which the climate system is a major feature), leading to a cascading effect. This cascading effect could create a global tipping point beyond which the system is driven into a new state, that is, into fundamentally different conditions... A good analogy is a row of dominoes, where tipping one or two dominoes causes the whole row of dominoes to fall.

2.11 He goes on:²²

As the global average surface temperature rises towards 2°C and beyond, the risk of activating such feedbacks increases. Given that many of these feedback processes are linked ..., a global tipping cascade could form that takes the trajectory of the Earth System out of human control or influence and leads to a much hotter Earth. This scenario is often called the ‘Hothouse Earth’ scenario...

2.12 Professor Steffen’s evidence is that the implications of the Hothouse Earth scenario for humanity are profound. The Earth system would be irreversibly driven into very hot and inhospitable conditions, with global average surface temperature about 4-5°C above pre-industrial levels.²³ He says: “That would be an exceptionally difficult world to survive in, much less live in with any decency, with collapse of human civilisation a possible outcome.”²⁴

2.13 Professor Steffen notes that there is much uncertainty about the level of global temperature rise that could activate a global tipping cascade, and a trajectory to a Hothouse Earth.²⁵ The IPCC’s assessment, however, is that there is a moderate risk of activating tipping points at a global temperature rise of 1°C above pre-industrial levels (which has already been exceeded), and a moderate-high risk at a 3°C rise.²⁶

2.14 Professor Steffen concludes that climate change resulting from human emissions of greenhouse gases is an existential threat to humanity:²⁷

In summary, every additional emission of GHGs to the atmosphere matters as it contributes to the warming of the atmosphere. With every increment of additional warming, the risk of a global tipping cascade increases, thereby ultimately threatening the habitability of the Earth for

¹⁹ Affidavit of Will Steffen at [43] [[201.0029]].

²⁰ Affidavit of Will Steffen at [48] [[201.0030]]; affidavit of Tim Naish at [23] [[201.0047]].

²¹ Affidavit of Will Steffen at [44] [[201.0029]].

²² Affidavit of Will Steffen at [49] [[201.0031]].

²³ Affidavit of Will Steffen at [52] [[201.0032]].

²⁴ Affidavit of Will Steffen at [59] [[201.0035]].

²⁵ Affidavit of Will Steffen at [53] [[201.0033]].

²⁶ Affidavit of Will Steffen at [55] [[201.0034]].

²⁷ Affidavit of Will Steffen at [57] [[201.0034]].

humans, and for many other forms of life. In my opinion, the risk of a tipping cascade is not only credible, but of increasing concern.

Impacts of climate change on New Zealand and Auckland

- 2.15 Professor Naish addresses the particular impacts of climate change on New Zealand, summarising reports from the Ministry for Environment, NIWA and the IPCC.
- 2.16 Under the most optimistic scenario (with no additional warming), by 2060 global sea levels will have risen by 20-30cm. By 2100 global sea levels will be on average 50cm higher if warming stabilises at 1.5°C, or 60cm higher at 2°C.²⁸ For many places in New Zealand, even the best-case scenario means that a one in 100-year coastal flooding event will occur every year by 2060.²⁹
- 2.17 In relation to Auckland, Professor Naish says:³⁰
- However, low-lying parts of the Auckland region may well suffer adverse effects at considerably lower rises in sea level, due to the increasingly regular damage from flooding events (direct or indirect coastal inundation from rainfall and river flooding or via groundwater rising) in low-lying pockets. Considering tides only, putting aside storm events, the rising sea level will result in an increasing percentage of normal high tides exceeding given present-day design for coastal infrastructure and roads.
- 2.18 Under a worst-case scenario, where emissions continue to rise and are unrestricted by mitigation policy, actual local sea level rise for many parts of Auckland will be at least 1.4m higher by 2100.³¹
- 2.19 The quantified potential losses associated with a 1.5m sea level rise around New Zealand are “\$19 billion for replacement buildings, affecting 133,000 people, 382 critical facility buildings, 1547 jetties and wharves, 5 airports, 2,121 km of roads and 46 km of railway”.³²
- 2.20 In addition to sea level rises, under global warming of 2.7°C Auckland and Northland will get warmer and drier than the national average, and will experience a significant increase in extreme weather events such as extreme rainfall, drought, fire and cyclones.³³

Effects of climate change on human health

- 2.21 Professor Woodward addresses the effects of climate change on human health.
- 2.22 Climate change has direct health effects, such as injuries and illnesses caused by extreme weather like heat, fire, drought and storms. It also causes indirect health problems resulting from ecosystem disruption (e.g. hunger due to scorched or flooded food crops) or social disturbances (such as the health

²⁸ Affidavit of Tim Naish at [27] [[201.0049]].

²⁹ Affidavit of Tim Naish at [28] [[201.0049]].

³⁰ Affidavit of Tim Naish at [29] [[201.0049]].

³¹ Affidavit of Tim Naish at [31]-[32] [[201.0050]].

³² Affidavit of Tim Naish at [32] [[201.0050]].

³³ Affidavit of Tim Naish at [34] [[201.0050]].

effects of forced migration, or conflict over diminishing resources). The effects of climate change (e.g. sea level rises, higher temperatures, and long-term changes in rainfall patterns) are threatening the livelihoods of hundreds of millions of people around the world.³⁴

- 2.23 Climate change will also have direct and indirect effects on human health in New Zealand. Water-borne infections, sensitive to increased variations in rainfall, are a particular challenge in New Zealand, as shown by the massive *Campylobacter* outbreak in Havelock North in 2016.³⁵
- 2.24 In the Māori worldview, good health for people and populations requires an environment that is in balance and thriving. A damaged environment, such as one affected by climate change, undermines identity and wellbeing of iwi and whanau.³⁶
- 2.25 Māori are at higher risk of the physical and mental health impacts of climate change because they presently experience a disproportionate burden of many health issues that are affected by climate (such as childhood diarrhoeal diseases and chronic lung disease).³⁷

Effects of climate change on future generations

- 2.26 Climate change will have a disproportionate effect on those who were born recently, and on future generations.³⁸
- 2.27 As Professor Steffen explains, that is the case in all scenarios, but the effects on young people and future generations will be worse if global temperature increases are higher.³⁹ His evidence is that:
- (a) The 1.4°C global temperature increase that would result from the most ambitious emissions reduction scenario would be a more difficult world to live in than today's world;
 - (b) A world with a 2.4°C increase would be very difficult to live in given the escalating climate impacts, particularly the much more extreme weather; and
 - (c) A Hothouse Earth scenario with global temperatures reaching 4°C and beyond would be an exceptionally difficult world to survive in, with the risk of societal collapse.

³⁴ Affidavit of Alistair Woodward at [12]-[21] [[201.0068]].

³⁵ Affidavit of Alistair Woodward at [22]-[28] [[201.0071]].

³⁶ Affidavit of Alistair Woodward at [29] [[201.0073]].

³⁷ Affidavit of Alistair Woodward at [30]-[33] [[201.0074]].

³⁸ Affidavit of Alistair Woodward at [34]-[37] [[201.0074]].

³⁹ Affidavit of Will Steffen at [58]-[60] [[201.0034]].

3. RELEVANT CLIMATE COMMITMENTS

United Nations Framework Convention on Climate Change

- 3.1 Aotearoa New Zealand is a party to the United Nations Framework Convention on Climate Change (UNFCCC). New Zealand signed the UNFCCC on 4 June 1992 and ratified it on 16 September 1993.
- 3.2 The objective of the UNFCCC is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁴⁰
- 3.3 In order to achieve this objective, the UNFCCC provides that parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.⁴¹
- 3.4 New Zealand is listed as an Annex I (developed) country under the UNFCCC. The UNFCCC requires Annex I countries to take the lead to reverse the long-term trends in anthropogenic emissions.⁴²

Paris Agreement

- 3.5 On 12 December 2015 the parties to the UNFCCC adopted the Paris Agreement. New Zealand signed the Paris Agreement on 22 April 2016 (the date it opened for signature), and ratified it on 4 October 2016. The Paris Agreement came into force on 4 November 2016.
- 3.6 The central aim of the Paris Agreement is to “strengthen the global response to the threat of climate change” by:⁴³
- Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.
- 3.7 In order to achieve this goal, signatories to the Paris Agreement must “aim to reach global peaking of greenhouse gas emissions as soon as possible” and agree to “undertake rapid reductions thereafter”.⁴⁴
- 3.8 The Paris Agreement does not set binding targets for individual countries. Rather, it requires each party to submit to the UNFCCC secretariat a “nationally determined contribution” (or NDC) to the global response to climate change that it intends to achieve. NDCs must be submitted every five years.⁴⁵

⁴⁰ UNFCCC, Article 2.

⁴¹ UNFCCC, Article 3.

⁴² UNFCCC, Article 4.

⁴³ Paris Agreement, Article 2(1).

⁴⁴ Paris Agreement, Article 4(1).

⁴⁵ Paris Agreement, Article 4(9).

- 3.9 New Zealand submitted its first NDC on 4 October 2016 when it ratified the Paris Agreement. That NDC was to reduce net greenhouse gas emissions to 30% below gross 2005 levels by 2030. New Zealand revised its NDC on 31 October 2021. The new NDC is to reduce net greenhouse gas emissions to 50% below gross 2005 levels by 2030.⁴⁶

Zero Carbon Act

- 3.10 Parliament passed the Climate Change Response (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**) on 7 November 2019, and it came into force on 14 November 2019.
- 3.11 The Zero Carbon Act made various amendments to the Climate Change Response Act 2002. Among other things, it:
- (a) Set a new domestic target for New Zealand to reduce net emissions of all greenhouse gases (except biogenic methane) to zero by 2050;
 - (b) Established a system of emissions budgets, to act as stepping stones towards long-term climate targets;
 - (c) Required the Government to develop and implement policies for climate change adaptation and mitigation; and
 - (d) Established the Climate Change Commission.

Local Government Leaders' Climate Change Declaration 2017

- 3.12 In 2017 Mayor Phil Goff signed the Local Government Leaders' Climate Change Declaration 2017 on behalf of Auckland Council.⁴⁷
- 3.13 The declaration recorded that the signatories were "representing local government" to "outline key commitments our councils will take in responding to the opportunities and risks posed by climate change".
- 3.14 The declaration included a "council commitment" to develop and implement ambitious action plans that reduce greenhouse gas emissions and support resilience, including plans to promote walking, cycling, public transport and other low carbon transport options.

C40 Cities Climate Leadership Group

- 3.15 Auckland Council joined the C40 Cities Climate Leadership Group, a network of world cities committed to taking urgent action to confront the climate crisis, in 2015.
- 3.16 In 2018 Auckland Council successfully reapplied for membership of the C40 Cities Climate Leadership Group, which included a requirement to develop a

⁴⁶ <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/nationally-determined-contribution/>.

⁴⁷ Exhibit MT1-0105 [[302.0469]].

climate plan consistent with the Paris Agreement aspiration to hold global temperature rises to 1.5°C.⁴⁸

Declaration of climate emergency by Auckland Council

3.17 On 11 June 2019 the members of Auckland Council’s Environment and Community Committee (being the mayor and all ward councillors) voted unanimously to declare a climate emergency.

3.18 In making the declaration, Auckland Council committed “to continue to robustly and visibly incorporate climate change considerations, in practical terms, into council work programmes and decisions”.⁴⁹

3.19 At the time Mayor Goff said publicly:⁵⁰

By unanimously voting to declare a climate emergency, we are signalling the council’s intention to put climate change at the front and centre of our decision-making.

Our obligation is to avoid our children and grandchildren inheriting a world devastated by global heating. Scientists tell us that if we don’t take action, the effects of heating will be catastrophic, both environmentally and economically.

In declaring an emergency, we are signalling the urgency of action needed to mitigate and adapt to the impact of rising world temperatures and extreme weather events. The Intergovernmental Panel on Climate Change says we have only around 12 years to reduce global carbon emissions to limit temperature rises to 1.5 degrees.

Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan

3.20 Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan was adopted by Auckland Council on 21 July 2020.

3.21 Te Tāruke-ā-Tāwhiri describes itself as Auckland Council’s “roadmap to a zero-emissions, resilient and healthier region”.⁵¹ It expressly recognises that climate action can deliver multiple benefits:⁵²

In declaring a climate emergency, Auckland Council recognises that urgent climate action is necessary to build a better future.

But the actions we take can also deliver social, environmental, economic and cultural wellbeing. These four wellbeings underpin quality of life in our communities. By recognising and maximising all benefits in the actions we take we can create a more equal, happy, prosperous, climate-positive region.

⁴⁸ Te Tāruke-ā-Tāwhiri at 16 [[301.0205]]; affidavit of Alec Tang in reply at [17(a)] [[201.0246]].

⁴⁹ Exhibit MT1-0503 [[303.1004]].

⁵⁰ Exhibit NJL2-1403 [[308.3462]].

⁵¹ Te Tāruke-ā-Tāwhiri at 6 [[301.0195]].

⁵² Te Tāruke-ā-Tāwhiri at 10 [[301.0199]].

- 3.22 Te Tāruke-ā-Tāwhiri sets the "core goal" of reducing Auckland's greenhouse gas emissions by 50% by 2030, and reaching net zero emissions by 2050.⁵³
- 3.23 Te Tāruke-ā-Tāwhiri acknowledges that Auckland's current (business-as-usual) pathway is not aligned with that core goal,⁵⁴ and that the current pathway would result in Auckland exceeding its carbon budget by 2030. The carbon budget is the "total cumulative greenhouse gas emissions that Auckland can produce to play its part in keeping global emissions within the 1.5°C temperature rise threshold".⁵⁵
- 3.24 Te Tāruke-ā-Tāwhiri sets out a decarbonisation pathway based on modelling of the potential for emissions reductions across different sectors in Auckland's greenhouse gas emission profile.⁵⁶ For the transport sector, the decarbonisation pathway models a 64% reduction in gross emissions between 2016 and 2030.⁵⁷
- 3.25 Alec Tang, who was Auckland Council's Chief Sustainability Officer (Acting) at the time Te Tāruke-ā-Tāwhiri was adopted, highlights the following points in relation to the decarbonisation pathway:
- (a) "[T]he targets and actions set out within the modelled pathway need to be considered as a holistic and interconnected set. To achieve the region's emissions reduction commitments through this modelled pathway, all targets across all sectors need to be achieved. Any attempts to downscale the emissions reduction ambition in one sector will require an equivalent increase in ambition in other sectors for Te Tāruke-ā-Tāwhiri to remain a 1.5°C compliant climate action plan endorsed by the C40 Cities Climate Leadership Group."⁵⁸
 - (b) "[T]he modelled pathway for reducing Auckland's emissions has taken into consideration the currently available technologies and possible interventions across the key sectors identified within the region's greenhouse gas emission profile – transport; stationary energy; waste; industrial processes and product use; and agriculture forest and land use..."⁵⁹
 - (c) "The heavy focus on the transport sector (with a modelled 64% reduction) in order to achieve a halving of regional greenhouse gas emissions by 2030 stems from the ease of achieving these reductions compared to other sectors. There are many available interventions to reduce our transport emissions – for example, provision of infrastructure for walking and cycling; provision of public transport services and infrastructure; road pricing; and incentives for electric

⁵³ Te Tāruke-ā-Tāwhiri at 7 [[301.0196]].

⁵⁴ Te Tāruke-ā-Tāwhiri at 41 [[301.0230]]; affidavit of Alec Tang in reply at [17(c)] [[201.0247]].

⁵⁵ Te Tāruke-ā-Tāwhiri at 50 and 53 [[301.0239]], [[301.0242]]; affidavit of Alec Tang in reply at [17(e)] [[201.0247]].

⁵⁶ Te Tāruke-ā-Tāwhiri at 43 [[301.0232]].

⁵⁷ Te Tāruke-ā-Tāwhiri at 52 [[301.0241]].

⁵⁸ Affidavit of Alec Tang in reply at [21] [[201.0247]].

⁵⁹ Affidavit of Alec Tang in reply at [25] [[201.0248]].

vehicles. However, there are fewer viable interventions in other sectors such as agriculture and industrial processes.”⁶⁰

3.26 Te Tāruke-ā-Tāwhiri’s “transport priority” sets the goal of “[a] low carbon, safe transport system that delivers social, economic and health benefits for all”. It identifies actions for achieving that goal, and the modelled 64% reduction of emissions in the transport sector. These include:⁶¹

- (a) “Changing the way we all travel”;
- (b) “Make travelling by public transport more appealing than using personal vehicles”;
- (c) “Increase access to bicycles, micro-mobility devices and the safe, connected and dedicated infrastructure that supports their use”;
- (d) “Improve safety, connectivity and amenity of walking infrastructure”;
- (e) “Accelerate the transition of our passenger and light vehicle and public transport fleets to low or zero emissions vehicles”;
- (f) “Make heavy freight systems more efficient and low carbon”; and
- (g) “Enhance the resilience of our transport network”.

3.27 It also identifies the specific interventions that are necessary for delivering each of those actions, and the agencies from which the action is required.⁶² Auckland Council and Auckland Transport are identified as having “direct control” and/or a “lever” over many of the interventions.

3.28 Te Tāruke-ā-Tāwhiri gives indicative targets for the transport sector aligned to the decarbonisation pathway, including the following targets for 2030:⁶³

- (a) Vehicle kilometres travelled by private vehicles to reduce by 12%;
- (b) Public transport mode share to increase from 7.8% to 24.5%;
- (c) Cycling mode share to increase from 0.9% to 7%; and
- (d) Walking mode share to increase from 4.1% to 6%.

3.29 As Mr Tang notes, “the scale and pace for change and climate action in Auckland is set by Te Tāruke-ā-Tāwhiri”.⁶⁴ It represents Auckland Council’s own experts’ assessment about the scale of the emissions reductions that are required in Auckland generally, and in the transport sector specifically. It also represents those experts’ assessment of the specific interventions in the transport sector that are necessary to deliver emissions reductions, and social, environmental, economic and cultural wellbeing for Aucklanders.

⁶⁰ Affidavit of Alec Tang in reply at [26] [[201.0248]].

⁶¹ Te Tāruke-ā-Tāwhiri at 83-84 [[301.0273]].

⁶² Te Tāruke-ā-Tāwhiri at 142-145 [[301.0331]].

⁶³ Te Tāruke-ā-Tāwhiri at 142 [[301.0331]].

⁶⁴ Affidavit of Alec Tang in reply at [22] [[201.0248]].

Declaration of climate emergency by Government and Parliament

- 3.30 On 2 December 2020 Parliament passed a Government motion declaring a climate emergency⁶⁵ The motion also:
- (a) Recognised the IPCC's findings that in order to avoid global warming of more than 1.5°C global emissions would need to fall by around 45% from 2010 levels by 2030, reaching "net zero" by around 2050;
 - (b) Recognised the advocacy of New Zealanders in calling for action to protect the environment and to reduce the impact of human activity on the climate;
 - (c) Committed to reducing emissions to avoid a more than 1.5°C rise in global warming;
 - (d) Recognised the devastating impact that volatile and extreme weather will have on New Zealand and the wellbeing of New Zealanders, including on primary industries, water availability and public health, through flooding, sea level rise and wildfire damage;
 - (e) Noted that climate change is one of the greatest challenges of our time; and
 - (f) Committed to implementing the policies required to meet the targets in the Zero Carbon Act, and to increase support for striving towards 100% renewable electricity generation, and low carbon energy and transport systems.

Climate Change Commission advice to the Government

- 3.31 The Climate Change Commission published its draft advice to the Government on 31 January 2021. It provided its final advice to the Government on 31 May 2021, and published the advice on 9 June 2021.⁶⁶
- 3.32 The Climate Change Commission advice proposed the following for the upcoming emissions budget periods:⁶⁷
- (a) Emissions budget 1 (2022-2025): 290 Mt CO₂e⁶⁸ (being an average of 72.4 Mt CO₂e per year);
 - (b) Emissions budget 2 (2026-2030): 312 Mt CO₂e (being an average of 62.4 Mt CO₂e per year); and
 - (c) Emissions budget 3 (2031-2035): 253 Mt CO₂e (being an average of 50.64 Mt CO₂e per year).

⁶⁵ Exhibit NJL2-0421 [[304.1774]].

⁶⁶ Exhibit NJL2-0605 [[307.2755]].

⁶⁷ Exhibit NJL2-0694 [[307.2844]].

⁶⁸ The Climate Change Commission's emissions budgets are expressed in units of megatonnes of carbon dioxide equivalent (**Mt CO₂e**).

3.33 The Climate Change Commission's advice records that the proposed budgets equate to reducing net emissions by 2030 (against a 2019 baseline):⁶⁹

(a) By 38% in respect of long-lived greenhouse gases; and

(b) By 47% in respect of carbon dioxide.

Scale of Auckland's road transport emissions

3.34 Between 2009 and 2018 road transport emissions of greenhouse gases in Auckland increased by around 11%.⁷⁰

3.35 Between 2009 and 2019 total vehicle kilometres travelled by private motor vehicles, light commercial vehicles and heavy vehicles in Auckland increased by around 28%.⁷¹

3.36 In 2018 road transport emissions in Auckland were around:

(a) 38.5% of total emissions in Auckland; and

(b) 5.5% of total emissions in New Zealand.⁷²

3.37 RLTP 2021 acknowledges that substantial reductions to transport emissions in Auckland are essential in order for New Zealand to meet its climate change targets:⁷³

Given the scale of Auckland's contribution to New Zealand's transport emissions, failure to make substantial emissions reductions in Auckland will severely limit New Zealand's ability to meet [its] climate change targets.

3.38 The respondents have denied that proposition in their statements of defence.⁷⁴ The basis for the denial is unclear. All Aboard submits that the proposition, which Auckland Transport evidently accepted at the time it prepared RLTP 2021, is plainly correct.

⁶⁹ Exhibit NJL2-0697 [[307.2847]]; statement of claim at [50] [[101.0008]]; Auckland Transport and RTC's statement of defence at [50] [[101.0028]]; Auckland Council's statement of defence at [50] [[101.0053]].

⁷⁰ RLTP 2021 at 35 [[301.0036]]; statement of claim at [51] [[101.0008]]; Auckland Transport and RTC's statement of defence at [51] [[101.0028]]; Auckland Council's statement of defence at [51] [[101.0053]].

⁷¹ RLTP 2021 at 35 [[301.0036]]; statement of claim at [52] [[101.0008]]; Auckland Transport and RTC's statement of defence at [52] [[101.0028]]; Auckland Council's statement of defence at [52] [[101.0053]].

⁷² RLTP 2021 at 34 [[301.0035]]; statement of claim at [53] [[101.0008]]; Auckland Transport and RTC's statement of defence at [53] [[101.0029]]; Auckland Council's statement of defence at [53] [[101.0054]].

⁷³ RLTP 2021 at 34 [[301.0035]]; statement of claim at [54] [[101.0008]].

⁷⁴ Auckland Transport and RTC's statement of defence at [54] [[101.0029]]; Auckland Council's statement of defence at [54] [[101.0054]].

4. GOVERNMENT POLICY STATEMENT ON LAND TRANSPORT 2021

Statutory context

- 4.1 Under s 66(1) of the LTMA, the Minister of Transport is required to issue a GPS, covering a period of six financial years, before the start of the first financial year to which it applies, and before the current GPS expires.⁷⁵
- 4.2 The Minister must also review the Crown's land transport investment strategy (which forms part of the GPS) once in every period of three financial years (s 67(2)). In practice, the Minister has issued a new GPS every three years.⁷⁶
- 4.3 Section 68 prescribes the content of the GPS. Among other things, the GPS must include the results that the Crown wishes to see from the allocation of funding from the national land transport fund over a period of at least ten consecutive financial years (s 68(1)(a)), and the Crown's land transport investment strategy (s 68(1)(b)). The GPS may also set out national land transport objectives, policies and measures for the same period (s 68(3)(a)).
- 4.4 Under s 14(a)(ii), regional land transport plans are required to be consistent with the GPS. The requirements of s 14 are addressed in section 6 of these submissions.

Draft GPS 2021 and new "climate change" strategic priority

- 4.5 The Ministry of Transport published the draft GPS 2021 for consultation on 19 March 2020.⁷⁷ The draft included a new "climate change" strategic priority, which the consultation materials addressed as follows: "By including Climate Change as a strategic priority, the GPS highlights the Government's commitment to reducing greenhouse gas emissions in the transport system."⁷⁸
- 4.6 The "climate change" strategic priority was:⁷⁹

Transform to a low carbon transport system that supports emission reductions aligned with national commitments, while improving safety and inclusive access.

- 4.7 The primary outcome of the "climate change" strategic priority was:⁸⁰

Investment decisions will support the rapid transition to a low carbon transport system, taking account of the ICCC target recommended to Cabinet until emissions budgets are released in 2021, and contribute to a resilient transport sector that reduces harmful emissions, taking account of the emissions reduction target recommended to Cabinet until emissions budgets are released in 2021.

⁷⁵ "Financial year" is defined in s 5(1) of the LTMA to mean a period of 12 months beginning on 1 July and ending on 30 June.

⁷⁶ New GPSs were issued for each of the 2009/10, 2012/13, 2015/16 and 2018/19 financial years.

⁷⁷ Exhibit NJL2-0089 [[303.1182]].

⁷⁸ Exhibit NJL2-0143 [[303.1236]].

⁷⁹ Exhibit NJL2-0110 [[303.1203]].

⁸⁰ Exhibit NJL2-0110 [[303.1203]].

4.8 The associated short to medium term results (“what will be delivered by 2031”) were: “reduced greenhouse gas emissions”; “reduced air and noise pollution”; and “improved resilience of the transport system”.

4.9 Auckland Council submitted on the draft GPS 2021 on 11 May 2020.⁸¹ The submission described the “climate change” strategic priority as “critical” and “welcomed”, but it sought several changes to the draft to strengthen references to climate change in the document. One of those was:⁸²

amending the primary outcome statement (paragraph 69) to give stronger direction on the need for investment decisions to “give effect to” (not just “take account of”) the Interim Climate Change Commission (ICCC) emission reduction target (to support the rapid transition to a low carbon transport system and contribute to a resilient transport sector that reduces harmful emissions).

4.10 The final GPS 2021 was released on 3 September 2020. The “climate change” strategic priority was unchanged from the consultation draft, as were the short to medium term results. The primary outcome, however, was amended as follows, to provide the strong direction that Auckland Council had sought (emphasis added):⁸³

Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, **giving effect** to the emissions reduction target the Climate Change Commission recommended to Cabinet until emissions budgets are released in 2021.

Other strategic priorities and primary objectives of GPS 2021

4.11 “Climate change” is one of four strategic priorities in GPS 2021. The others are:

(a) “Safety”:⁸⁴ “Developing a transport system where no-one is killed or seriously injured.” The primary outcome is: “The primary focus of this priority is to develop a transport system that advances New Zealand’s vision that no-one is killed or seriously injured while travelling. New Zealand roads will be made substantially safer.” The short to medium term results are: “reduced number of deaths and serious injuries”; and “safer land transport network”.

(b) “Better travel options”:⁸⁵ “Providing people with better travel options to access places for earning, learning, and participating in society.” The primary outcome is: “The primary focus of this priority is to improve people’s transport choices in getting to places where they live, work and play, and to make sure our cities and towns have transport networks that are fit for purpose and fit for the future.” The short to medium term results are: “improved access to social and economic opportunities”; “public transport and active modes are more available and/or accessible”; “increased share of travel by public

⁸¹ Exhibit NJL2-0176 [[303.1275]].

⁸² Exhibit NJL2-0179 [[303.1278]].

⁸³ GPS 2021 at 22 [[301.0152]].

⁸⁴ GPS 2021 at 16 [[301.0146]].

⁸⁵ GPS 2021 at 18 [[301.0148]].

transport and active modes”; “reduced greenhouse gas emissions”; and “reduced air and noise pollution”.

- (c) “Improving freight connections”:⁸⁶ “Improving freight connections to support economic development.” The primary outcome is: “Well-designed transport corridors with efficient, reliable and resilient connections will support productive economic activity.” The short to medium term results are: “freight routes that are more reliable”; “freight routes that are more resilient”; “reduced greenhouse gas emissions”; and “reduced air and noise pollution”.

- 4.12 It is noted that Auckland Transport had already identified safety as its “top” priority. On 3 September 2019 it had adopted a new transport safety strategy and action plan to 2030, Vision Zero for Tāmaki Makaurau. Vision Zero sets targets of no transport deaths or serious injuries in Auckland by 2050, with an interim target of no more than 250 deaths and serious injuries by 2030 (being approximately a 65% reduction).⁸⁷

Requirement to assess investments against indicators of success

- 4.13 Section 2.6 of GPS 2021 sets out “indicators of how progress will be measured” for each of the four strategic priorities.⁸⁸ For the “climate change” strategic priority, the indicators include “tonnes of greenhouse gases emitted per year from land transport”, “tonnes of harmful emissions per year from land transport”, and “vehicle kilometres travelled”.
- 4.14 Section 3.2 ([89]) of GPS 2021 requires investment decisions to be assessed against the indicators in section 2.6:⁸⁹

Making the right investment decisions requires responses to be scoped correctly and show meaningful contributions to the identified results. Funding applicants need to show that they considered alternatives, and how they compare in meeting the results set out in Section 2.6.

Co-benefits of strategic priorities

- 4.15 GPS 2021 identifies the purpose of the transport system as being to improve people’s wellbeing, and the liveability of places, by contributing to five key outcomes identified in the Ministry of Transport’s Transport Outcomes Framework: “inclusive access”, “healthy and safe people”, “economic prosperity”, “resilience and security”, and “environmental sustainability ([1]).⁹⁰
- 4.16 GPS 2021 expressly acknowledges that each of the strategic priorities will deliver co-benefits across the outcomes in the Transport Outcomes Framework ([7]):⁹¹

⁸⁶ GPS 2021 at 20 [[301.0150]].

⁸⁷ Exhibit NJL2-0007 [[303.1012]]; affidavit of Neelima Ghanta in reply at [23(b)] [[201.0227]].

⁸⁸ GPS 2021 at 24 [[301.0154]].

⁸⁹ GPS 2021 at 29 [[301.0159]].

⁹⁰ GPS 2021 at 5 [[301.0135]].

⁹¹ GPS 2021 at 7 [[301.0137]].

Some priorities are more directly linked to specific outcomes – for example the Safety priority has a direct link to the Healthy and Safe People outcome. However, as the outcomes are inter-related, each strategic priority will deliver co-benefits across the Transport Outcomes Framework. For example, a reduction in greenhouse gas emissions will be achieved through action across all priorities, programmes and activity classes.

- 4.17 The recognition in GPS 2021 that the strategic priorities (and the associated primary outcomes) are interrelated, and will deliver co-benefits across other outcomes, is supported by uncontested expert evidence on behalf of All Aboard.
- 4.18 Professor Woodward’s evidence is that the responses to the strategic priorities in GPS 2021 can have positive effects on multiple outcomes. In particular, he describes how a low-carbon transport system can meet each of the other three strategic priorities of GPS 2021 (safety, better travel options, and better freight connections), and how each of those other strategic priorities can deliver emissions reductions.⁹²
- 4.19 Similarly, Mr Litman’s evidence is that there is no inconsistency between the four strategic priorities, and that they can be addressed by the same interventions:⁹³

In my view, these four strategic priorities do not pull in opposing directions or call for different interventions. Rather, they all point to and require reducing the demand for private vehicle travel and providing resource-efficient alternatives. In other words, the same interventions can be deployed to deliver all four priorities. Specifically, all four priorities justify more multimodal planning, and policies that reduce private vehicle travel.

- 4.20 Mr Litman goes on to explain how policies and initiatives directed at reducing travel by private vehicle advance each of the four strategic priorities.⁹⁴
- 4.21 Auckland Council reached the same conclusion in Te Tāruke-ā-Tāwhiri, noting that actions to reduce emissions (including transport emissions) “can also deliver social, environmental, economic and cultural wellbeing”.⁹⁵
- 4.22 The evidence of Auckland Council’s former Chief Sustainability Officer (Acting), Mr Tang, also strongly supports the position that the interventions to reduce transport emissions will benefit other transport-related objectives, including safety, supporting Auckland’s quality compact urban approach, delivering better transport options, and improving resilience in the transport system.⁹⁶

⁹² Affidavit of Alistair Woodward at [64]-[78] [[201.0080]].

⁹³ Affidavit of Todd Litman at [12] [[201.0100]].

⁹⁴ Affidavit of Todd Litman at [12] [[201.0100]].

⁹⁵ See [3.20]-[3.29] above.

⁹⁶ Affidavit of Alec Tang in reply at [56]-[63] [[201.0255]].

Reconciling different objectives and policies – *King Salmon*

- 4.23 The issue of how to reconcile and give effect to different objectives and policies in a policy statement was addressed by the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.⁹⁷
- 4.24 That case concerned an application for changes to the Marlborough Sounds Resource Management Plan so that salmon farming would change from a prohibited to a discretionary activity in certain locations, and an application for resource consents to undertake salmon farming at some of those locations. The applications were granted by a Board of Inquiry, and the High Court dismissed an appeal against that decision.
- 4.25 Under s 67(3) of the Resource Management Act 1991 (RMA), the plan in question was required to “give effect to” the New Zealand Coastal Policy Statement (NZCPS). The Board had taken the view that the various objectives and policies articulated in the NZCPS compete or “pull in different directions”, with the consequence that an “overall broad judgment” is required to reach a decision about sustainable management, and “whether the instrument as a whole is generally given effect to”.⁹⁸
- 4.26 The Supreme Court held that “give effect to” simply means “implement”, and that: “On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.”⁹⁹ The Court noted, however, that the implementation of such a directive will be affected by what it relates to: “A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.”¹⁰⁰
- 4.27 The Court rejected the Board’s “overall judgment approach”, the effect of which was to reduce the objectives and policies in the NZCPS to a list of potentially relevant considerations, to be given varying weight in different fact situations.¹⁰¹ The Court considered that the policies and objectives in the NZCPS were not “inevitably in conflict or pulling in different directions”.¹⁰² The Court also highlighted that the policies and objectives were expressed in different ways, with some giving decision-makers more flexibility or being less prescriptive than others.¹⁰³

⁹⁷ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

⁹⁸ At [37].

⁹⁹ At [77].

¹⁰⁰ At [80].

¹⁰¹ At [83] and [128].

¹⁰² At [126].

¹⁰³ At [127].

4.28 The Court described the proper approach as follows:¹⁰⁴

When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, “avoid” is a stronger direction than “take account of”. That said however, we accept that there may be instances where particular policies in the NZCPS “pull in different directions”. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. [...]

4.29 The Court held that certain policies in the NZCPS were “strongly worded directives” that had the effect of being an “environmental bottom line”, and that the plan change should not have been granted.¹⁰⁵

4.30 Although *King Salmon* concerned a plan change application under the RMA, and a different policy statement, the principles articulated by the Supreme Court are relevant to the interpretation of GPS 2021 and what it required of the decision-makers in this case.

4.31 In summary, All Aboard submits that:

- (a) The evidence is that the strategic priorities in GPS 2021 do not compete or “pull in different directions”. GPS 2021 makes clear that the strategic priorities, and the primary outcomes associated with each of them, are consistent and mutually supporting. Decision-makers do not have to weigh up the strategic priorities or trade them off against each other. That position is supported by uncontested expert evidence that the four strategic priorities can be delivered by the same interventions and responses, and by Te Tāruke-ā-Tāwhiri.
- (b) The primary outcome of the “climate change” strategic priority requires investment decisions to “support the rapid transition to a low carbon transport system”; “contribute to a resilient transport sector that reduces harmful emissions”; and “[give] effect to the emissions reduction target the Climate Change Commission recommended to Cabinet”. As the Supreme Court held in *King Salmon*, that is a “strong directive, creating a firm obligation on the part of those subject to it”. The importance and strength of the directive was expressly recognised by Auckland Council in its submission on the draft GPS 2021.

¹⁰⁴ At [129]-[130].

¹⁰⁵ At [103], [132] and [153].

- (c) GPS 2021 also gives a clear directive that investment decisions are to be assessed against the indicators of success prescribed in section 2.6, which includes “tonnes of greenhouse gases emitted per year from land transport”. That is consistent with the recognition in GPS 2021 that “a reduction in greenhouse gas emissions will be achieved through action across all priorities, programmes and activity classes”.

5. REGIONAL LAND TRANSPORT PLAN FOR AUCKLAND 2021

Statutory context

- 5.1 Under s 13(2) of the LTMA, Auckland Transport is required to prepare and approve an RLTP for Auckland every six years.¹⁰⁶ In addition, the RTC must review the RLTP during the six month period before the expiry of the third year of the RLTP (s 18CA). In practice, Auckland Transport has prepared and adopted a new RLTP every three years.¹⁰⁷
- 5.2 Section 14(1)(a) provides that before submitting an RLTP to Auckland Transport for approval, the RTC must be satisfied that the RLTP:
 - (a) Contributes to the purposes of the LTMA (being to contribute to an effective, efficient and safe land transport system in the public interest); and
 - (b) Is consistent with the GPS.
- 5.3 Section 16 prescribes the form and content of an RLTP. An RLTP must set out the region’s land transport objectives, policies and measures for at least ten financial years from the start of the RLTP (s 16(1)). It must also include, among other things, a statement of transport priorities for the region for the ten financial years from the start of the RLTP (s 16(2)(a)), and an assessment of how the RLTP complies with s 14 (s 16(6)(a)).
- 5.4 The significance of the RLTP in the context of Auckland’s land transport system is captured in the introduction to RLTP 2021 by the Chair of Auckland Transport, Ms Young-Cooper:¹⁰⁸

This 2021-2031 Regional Land Transport Plan (RLTP) represents a significant step in shaping how Aucklanders travel within the region over the next 10 years and beyond. It contains a \$37 billion investment programme – more than any transport programme in Auckland’s history – and builds on the shift in focus toward more sustainable travel modes included in the 2018 RLTP.

¹⁰⁶ Preparing the RLTP for Auckland is also one of Auckland Transport’s statutory functions (s 45(a) of the LGACA).

¹⁰⁷ New RLTPs were prepared and adopted in 2009, 2012, 2015 and 2018.

¹⁰⁸ RLTP 2021 at 3 [[301.0004]].

- 5.5 RLTP 2021 includes the “vast majority of publicly funded land transport activities in Auckland”.¹⁰⁹
- 5.6 It is important to highlight that the 10 year period covered by RLTP 2021 (from 1 July 2021 to 1 July 2031) extends beyond 2030, the year by which New Zealand is required to have met its NDC under the Paris Agreement, and Auckland is required to have met its first emissions reduction target under Te Tāruke-ā-Tāwhiri: RLTP 2021 covers the full period in which those ambitious emissions reduction targets must be met.

Relationship between ATAP and RLTP

- 5.7 ATAP is a non-statutory political agreement between the Government and Auckland Council on transport priorities for Auckland.
- 5.8 The first ATAP was developed in 2015/2016, and it was updated in 2017 and 2018.¹¹⁰ In 2020 the Government and Auckland Council decided that ATAP should be updated again.¹¹¹
- 5.9 An Auckland Transport presentation in July 2020 recorded that “ATAP does not replace existing statutory processes but seeks to inform them”.¹¹² The presentation recognised there were several significant tensions between ATAP (a political process) and the RLTP (a statutory plan):¹¹³
- (a) The RTC and Auckland Transport, who were responsible for preparing and approving the RLTP, were not a party to ATAP;
 - (b) ATAP had become progressively more prescriptive and detailed;
 - (c) RLTP development should precede ATAP development, but the reverse was planned to occur; and
 - (d) ATAP had historically focussed on transport investments, rather than a whole system approach.

¹⁰⁹ RLTP 2021 at 21 [[301.0022]]. The activities listed in RLTP 2021 include: transport planning and investment in improvements for customers; the road network, including state highways; road safety activities; public transport (bus, rail and ferry) services; improvements to bus stops, rail stations and ferry wharves; creation of transport interchanges and park and ride facilities; footpaths, shared paths and cycleways; management and improvement of rail track infrastructure; parking provision and enforcement activities; and travel demand management.

¹¹⁰ Exhibit HB1-0059 [[304.1423]].

¹¹¹ Affidavit of Jenny Chetwynd at [76] [[201.0397]].

¹¹² Exhibit HB1-0058 [[304.1422]].

¹¹³ Exhibit HB1-0065 [[304.1429]].

Development of ATAP update

- 5.10 Mr Bunn describes the development of the ATAP update. He says that:
- (a) Although Auckland Transport was not a party to ATAP, it was closely involved in the ATAP update process and decision-making.¹¹⁴
 - (b) Terms of reference for the ATAP update were agreed in May 2020, with the purpose of the update being “to update the 2018-28 ATAP package in light of a number of emerging considerations”.¹¹⁵
 - (c) For Auckland Transport, “[a] key consideration was preserving the core of the AT programme initiated as a result of the 2018 RLTP”.¹¹⁶
 - (d) Auckland Transport formed the view that ATAP was “consistent” with GPS 2021, and “prioritising projects to deliver ATAP objectives was considered to be working towards achievement of the GPS objectives”.¹¹⁷
- 5.11 As Ms Ghanta observes, it is evident that Auckland Transport adopted an additional objective, “business enablers”, which was not derived from the strategic priorities in GPS 2021 or the agreed ATAP objectives. The “business enablers” objective was tied to renewing existing infrastructure.¹¹⁸
- 5.12 Mr Bunn describes the methodology for developing the ATAP investment programme. He says an initial task was to divide the project into two parts:¹¹⁹
- (a) “Baseline” projects and programmes that were regarded as “mandatory”; and
 - (b) “Discretionary” projects and programmes where there was a choice about whether to include them, and thus prioritisation was required.
- 5.13 Mr Bunn’s evidence as to how the “baseline” projects and programmes were selected is that:
- (a) The “definition of the baseline ... reflected the existing commitment to the 2018 ATAP/RLTP programme”. He notes that the ATAP terms of reference said: “The ATAP 2020 Update will use the agreed decade one (2018-2028) package of projects as a base given the existing commitment to its delivery.”¹²⁰
 - (b) The “baseline” included projects that had a formal contract or agreement to complete the relevant project phase; projects that had a “formal political commitment”; and programmes and projects that

¹¹⁴ Affidavit of Hamish Bunn at [29] [[201.0271]].

¹¹⁵ Affidavit of Hamish Bunn at [38]-[40] [[201.0274]]; exhibit HB1-0050 [[303.1270]].

¹¹⁶ Affidavit of Hamish Bunn at [41(b)] [[201.0277]].

¹¹⁷ Affidavit of Hamish Bunn at [43]-[49] [[201.0276]].

¹¹⁸ Exhibit HB1-0085; affidavit of Neelima Ghanta in reply at [27]-[28] [[201.0228]].

¹¹⁹ Affidavit of Hamish Bunn at [52]-[54] [[201.0280]].

¹²⁰ Affidavit of Hamish Bunn at [55] [[201.0281]]; exhibit HB1-0051 [[303.1271]].

were considered “essential” to achieving the policy objectives of ATAP.¹²¹

- (c) “Each project or programme proposed for inclusion in the baseline was tested by the ATAP Working Group, based on evidence of project commitment, business case evidence or subject matter expert advice.”¹²² Mr Bunn does not elaborate on what the “testing” involved.
- (d) Final funding sources for ATAP totalled \$31.4b, and the “baseline” programme (for which there was said to be no discretion) had a total cost of \$29.6b.¹²³

5.14 In short, the starting position for the ATAP update was that Auckland Transport was committed to delivering its 2018 investment programme. \$29.6b (more than 93%) of the available expenditure was regarded as “mandatory”, with only \$1.8b available for “discretionary” projects. ATAP was a business-as-usual plan from the outset.

5.15 Mr Bunn goes on to describe the process by which that remaining 7% of “discretionary” expenditure was allocated to projects.¹²⁴ Even for that sliver of funding, there was no assessment of individual projects and programmes against the strategic priorities of GPS 2021 (as GPS 2021 required). Rather, seven different “packages” were developed, each representing a blend of different investments, and only some of those were modelled.¹²⁵

5.16 In a presentation to stakeholders, including All Aboard, on 9 December 2020, Auckland Transport described the ATAP package as “largely a continuation of ATAP 2018-28”.¹²⁶

Climate impacts of ATAP update

5.17 On 10 August 2020 All Aboard had published an open letter to the Minister of Transport, the Chief Executive of the Ministry of Transport, the Mayor, Chief Executive and Councillors of Auckland Council, and the Boards and Chief Executives of Waka Kotahi and Auckland Transport, calling for transport in Auckland to be largely decarbonised by 2030.¹²⁷

5.18 Mr Bunn says there was a workstream to “determine how a climate change lens could be applied to addressing ATAP projects”.¹²⁸ He does not give any details about what that work involved, or how it influenced the selection of projects and programmes for ATAP.¹²⁹ Auckland Transport’s discovery in the

¹²¹ Affidavit of Hamish Bunn at [56]-[57] [[201.0281]].

¹²² Affidavit of Hamish Bunn at [59] [[201.0282]].

¹²³ Affidavit of Hamish Bunn at [61] and [63] [[201.0282]], [[201.0283]].

¹²⁴ Affidavit of Hamish Bunn at [76]-[87] [[201.0287]].

¹²⁵ Affidavit of Neelima Ghanta in reply at [36] [[201.0231]].

¹²⁶ Affidavit of Nicholas Lee at [12] [[201.0003]]; exhibit NJL1-0018 [[304.1781]].

¹²⁷ Affidavit of Nichols Lee at [10] [[201.0003]]; exhibit NJL1-0001[[304.1464]] .

¹²⁸ Affidavit of Hamish Bunn at [50(b)] [[201.0279]].

¹²⁹ Affidavit of Neelima Ghanta in reply at [31] [[201.0229]].

proceeding does not shed any light (and any relevant documents that existed would have been captured by the discovery order).

5.19 It is apparent that Auckland Transport formed an early view that the planned investment programme would not deliver any material improvements to climate outcomes. An Auckland Transport presentation at a Board workshop on 12 August 2020 identified a “very high likelihood that capital programme will not materially impact greenhouse gas emissions”. That was said to be “due to limited ability to change programme and modest impact from capital programme interventions themselves”. The presentation’s proposed mitigation for this risk was not to seek to improve the emissions outcomes of the investment programme, but rather to “[s]hift the ATAP conversation to include policy lever initiatives in the packages (in addition to capex improvements)”.¹³⁰

5.20 In other words, Auckland Transport’s strategy was to move the focus away from transport investment decisions – which it could control and influence via its involvement in the ATAP and RLTP processes – and onto other levers that were outside its control.

5.21 The final GPS 2021 was released on 3 September 2020, including the amended primary outcome for the “climate change” strategic priority, with the mandatory direction for investment decisions to give effect to the Climate Change Commission’s emissions reduction target. It appears from Auckland Transport’s evidence and its discovery, however, that this did not prompt any change of approach.

5.22 On 26 November 2020 Auckland Transport presented the results of modelling of the ATAP “baseline investment” to the Board. The presentation identified “[i]ssues that arise”, one of which was:¹³¹

Although per capita emissions decrease due to a combination of improved fuel efficiency and mode shift, these are not sufficient to offset the increase in private vehicle travel associated with population growth and, as a result, emissions increase by 6%.

5.23 The ATAP package was endorsed by the ATAP Governance Group on 15 December 2020.¹³² The final ATAP programme was released on 12 March 2021.¹³³ An accompanying summary recorded that the assessment of the emissions impacts remained unchanged:¹³⁴

Significant population increase means that while there is a decrease per person, overall emissions increase slightly by 6% when the package is viewed in isolation of other Government and Council policies.

¹³⁰ Exhibit NJL2-0229 [[304.1478]].

¹³¹ Exhibit NJL2-0401 [[304.1744]].

¹³² Affidavit of Hamish Bunn affidavit at [87] [[201.0291]]; exhibit NJL2-0423 [[304.1808]].

¹³³ Exhibit NJL2-0488 [[305.2121]].

¹³⁴ Exhibit NJL2-0473 [[305.2106]].

Development of RLTP 2021

- 5.24 Ms Chetwynd and Mr Bunn each say that Auckland Transport always “envisaged” that ATAP would form the basis of RLTP 2021.¹³⁵
- 5.25 Ms Chetwynd’s evidence makes clear that preparation of RLTP 2021 was primarily a drafting exercise, incorporating the pre-agreed ATAP programme and other information that was required to be in an RLTP.¹³⁶ Similarly, Mr Bunn says “the agreed ATAP programme essentially became the draft RLTP programme”.¹³⁷
- 5.26 In effect, RLTP 2021 was prepared and adopted in a context where all significant decisions regarding Auckland’s transport investment programme for the next decade had already been taken during the non-statutory ATAP process. That meant there was little or no practical scope for RLTP 2021 to change the programme, or to improve its emissions outcomes: by the time Auckland Transport came to prepare it, RLTP 2021 was a fait accompli.
- 5.27 Auckland Transport began preparing the draft RLTP 2021 in late January 2021.¹³⁸ On 11 March 2021 the Planning Committee endorsed RLTP 2021 for consultation.¹³⁹ The RTC approved the draft RLTP 2021 for consultation on 23 March 2021, and Auckland Transport published it on 29 March 2021.¹⁴⁰ Only very minor changes were made to the draft RLTP 2021 following the consultation, representing a tiny fraction of the total investment of \$37b.¹⁴¹ The projected emissions outcome in the final RLTP 2021 were the same as for ATAP.¹⁴²

Concerns about failure of ATAP and RLTP 2021 to cut emissions

- 5.28 On 1 December 2020 All Aboard presented to the Board of Auckland Transport about how transport in Auckland could be decarbonised, and the investments and other interventions that would achieve that.¹⁴³ All Aboard gave a similar presentation to the Planning Committee on 4 February 2020, including the political and legal risks of failing to act.¹⁴⁴

¹³⁵ Affidavit of Jenny Chetwynd at [82] [[201.0398]]; affidavit of Hamish Bunn at [141] [[201.0304]].

¹³⁶ Affidavit of Jenny Chetwynd at [88] [[201.0399]].

¹³⁷ Affidavit of Hamish Bunn at [149] [[201.0307]].

¹³⁸ Affidavit of Jenny Chetwynd at [88] [[201.0399]]; affidavit of Hamish Bunn at [141] [[201.0304]].

¹³⁹ Affidavit of Jenny Chetwynd at [89] [[201.0399]]; affidavit of Hamish Bunn at [165] [[201.0314]]; exhibit MT1-1460 [[305.2071]].

¹⁴⁰ Affidavit of Jenny Chetwynd at [90] [[201.0399]]; affidavit of Hamish Bunn at [166] [[201.0314]]; affidavit of Nicholas Lee at [17] [[201.0004]].

¹⁴¹ Affidavit of Hamish Bunn at [170]-[173] [[201.0315]]; affidavit of Nicholas Lee at [20] [[201.0005]].

¹⁴² RLTP 2021 at 79 [[301.0079]].

¹⁴³ Affidavit of Nicholas Lee at [11] [[201.0003]]; exhibit NJL1-0003 [[304.1756]]; exhibit NJL1-0009 [[304.1762]].

¹⁴⁴ Affidavit of Nicholas Lee at [14] [[201.0004]]; exhibit NJL1-0045 [[304.1866]]; exhibit NJL1-0052 [[304.1873]]; exhibit NJL1-0054 [[304.1875]].

5.29 Although Auckland Council has failed to file affidavits from any of the members of the Planning Committee, the available evidence is that they were seriously concerned about the failure of the ATAP/RLTP investment programme to reduce emissions:

- (a) Mr Bunn says that some Planning Committee members raised concerns about ATAP's emissions at a workshop on 3 February 2021.¹⁴⁵
- (b) An Auckland Transport presentation to the RTC on 25 February 2021 recorded: "Some Councillors remain uncomfortable with ATAP particularly in relation to the extent to which it supports improved climate change and cycling outcomes".¹⁴⁶
- (c) On 26 February 2021 Auckland Council provided written responses to questions from Councillors about ATAP and the draft RLTP 2021, including the climate impacts.¹⁴⁷ The document noted, among other things, that: "[a] vast majority of the programme was identified as committed and essentials"; the ATAP package alone would "not make a significant contribution to the region's climate goals"; and "**emissions reduction was not prioritised** over the other objectives in the package development process" (emphasis added).
- (d) Although the Planning Committee endorsed the draft RLTP for consultation on 11 March 2021, it did so "with the expectation" that the Auckland Council Group would take various actions. These included: "fully utilis[ing] the levers available to it to reduce transport emissions"; "prioritising the delivery of public transport and active modes including walking, cycling"; and "investigat[ing] complementary levers to reduce transport-related emissions", including a transport emissions reduction plan for Auckland.¹⁴⁸
- (e) On 16 March 2021 Mayor Goff wrote to the Chair of Auckland Transport in relation to ATAP and RLTP 2021, highlighting Councillors' concerns regarding Auckland Transport's performance:¹⁴⁹ "The overarching concern was around the modelled increase in emissions over the next decade, though concerns were also expressed around Auckland Transport's delivery in a range of areas that could support emissions reduction. A key concern is the slow pace of delivering cycling infrastructure in Auckland."
- (f) On 17 March 2021 four Councillors wrote to Auckland Transport highlighting concerns about Auckland Transport's "slow and often ineffectual or non-delivery" of its cycleway programme and "healthy streets" projects. The letter described the potential of these projects to address Auckland's transport challenges; Auckland Transport's

¹⁴⁵ Affidavit of Hamish Bunn at [144] [[201.0306]].

¹⁴⁶ Exhibit NJL2-0441 [[304.1899]].

¹⁴⁷ Exhibit NJL2-0460 [[305.1919]].

¹⁴⁸ Exhibit MT1-1462 [[305.2073]].

¹⁴⁹ Exhibit NJL1-0136 [[305.2186]].

“excuses” for non-delivery; and the need for a “fundamental reset of cycling policy and delivery within Auckland Transport”.¹⁵⁰

5.30 At a meeting on 23 March 2021, All Aboard was given a briefing paper regarding the ATAP/RLTP package, which confirmed that emissions were forecast to increase under the package. It contained a table showing that nearly 40% of the budget was proposed to be spent on projects that would maintain or increase emissions, including roading expansions, and renewals of the existing roading network.¹⁵¹

5.31 On 8 April 2021 Auckland Transport responded to an information request from Movement, one of All Aboard’s member organisations, about how RLTP 2021 was said to be consistent with GPS 2021. The response reiterated Auckland Transport’s view that it was sufficient that RLTP 2021 aligned with ATAP, and that it was not required to do any separate assessment of the projects and programmes within RLTP 2021 against GPS 2021:¹⁵²

Auckland’s draft RLTP achieves consistency [with GPS 2021] by aligning with the Auckland Transport Alignment Project (ATAP). [...]

Auckland’s draft RLTP has been prioritised against the objectives agreed by ATAP and is consistent with the indicative ATAP programme. Given that the ATAP programme has been agreed by Cabinet and Council we do not anticipate further assessment at a programme level against GPS indicators. Further assessment may, however, be carried out for projects that require a programme business case.

5.32 All Aboard submitted on the draft RLTP 2021 on 2 May 2021.¹⁵³ The submission observed that a transport plan that increased emissions was plainly not in the public interest and would be inconsistent with GPS 2021. It noted, among other things, that the draft RLTP 2021 allocated substantial funds to roading projects; that it made no attempt to reduce VKT, which was essential for reducing total carbon dioxide emissions; and that the plan needed a complete overhaul.

5.33 On 10 May 2021 All Aboard presented to the RTC on the need to decarbonise transport in Auckland, and the RTC’s legal obligations in respect of the RLTP, including under the LTMA.¹⁵⁴

5.34 On 24 May 2021 Auckland Council prepared a climate assessment of the draft RLTP 2021.¹⁵⁵ The assessment identified that:

- (a) Much of the draft RLTP programme was “emissions neutral” (i.e. it would maintain emissions at current levels) or “emissions adding” (i.e. it would increase them);

¹⁵⁰ Exhibit NJL1-0138 [[305.2188]].

¹⁵¹ Exhibit NJL1-0061 [[305.2193]].

¹⁵² Exhibit NJL1-0089 [[305.2242]].

¹⁵³ Affidavit of Nicholas Lee at [17] [[201.0004]]; exhibit NJL1-0092 [[305.2406]].

¹⁵⁴ Affidavit of Nicholas Lee at [18] [[201.0005]]; exhibit NJL1-0105 [[306.2419]].

¹⁵⁵ Exhibit NJL1-0143 [[306.2660]].

- (b) 56% of Auckland Transport’s programme was “large unallocated funding buckets” that would maintain emissions;
- (c) There was “potential to move beyond like-for-like renewals [of roading infrastructure], but process and culture change [were] needed”; and
- (d) “More fundamental change” required “improving AT’s internal processes” and a “pipeline of climate positive projects”.

6. FIRST CAUSE OF ACTION – RTC DECISION

Section 14 of LTMA

- 6.1 The RTC Decision was made under s 14 of the LTMA. Section 14 provides (relevantly):

Before a regional transport committee submits a regional land transport plan to a regional council or Auckland Transport (as the case may be) for approval, the regional transport committee must—

- (a) be satisfied that the regional land transport plan—
 - (i) contributes to the purpose of this Act; and
 - (ii) is consistent with the GPS on land transport; and
- 6.2 All Aboard submits that the RTC failed to comply with s 14 because it had no proper or reasonable grounds to be satisfied that RLTP 2021:
- (a) Was consistent with GPS 2021, including the “climate change” strategic priority and the associated primary outcome that had to be delivered; and
 - (b) Contributed to the purpose of the LTMA, being to contribute to an effective, efficient and safe land transport system in the public interest.

Meaning of “be satisfied”

- 6.3 The authorities make clear that the requirement for a decision-maker to be “satisfied” of a matter does not exclude judicial review. A decision-maker must be sufficiently and relevantly informed, and the Court will assess whether the decision-maker had an adequate factual basis to be satisfied of the matter in question. The Supreme Court has described this as a “significant obligation”.¹⁵⁶
- 6.4 In *Secretary of State for Education and Science v Metropolitan Borough of Tameside*,¹⁵⁷ the House of Lords considered a challenge to a ministerial decision

¹⁵⁶ *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [23].

¹⁵⁷ *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014, [1976] 3 All ER 665.

that a local authority had acted unreasonably in making decisions about the school system. The Secretary of State was empowered under the relevant statute to issue such a direction if satisfied that a local authority's proposed action was unreasonable.

6.5 Lord Wilberforce said:¹⁵⁸

The section is framed in a 'subjective' form—if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account.

6.6 The House of Lords held there were no grounds for concluding the local authority was acting unreasonably. It followed that although the Secretary of State might consider the authority's decision was misguided or wrong, there were no grounds on which he could decline the proposal.

6.7 The High Court of Australia took a similar approach in *R v Connell*.¹⁵⁹ The issue was whether the decision-maker had been properly "satisfied" that certain rates of remuneration were "anomalous" within the meaning of a regulation made under the Coal Production (War-Time) Act 1944. It was held that the decision-maker had not been properly satisfied, as there was "no evidence upon which the [decision-maker] could be satisfied that the rates were anomalous".

6.8 The New Zealand Courts take the same general approach. In *Air Nelson Ltd v Minister of Transport*, the Court of Appeal held that an inadequate briefing to the Minister of Transport, which failed to properly inform the Minister of key facts relevant to the decision, constituted a material error of fact.¹⁶⁰

6.9 The Court of Appeal held that a public-law decision-maker must be "sufficiently informed" of material factors, so they can take them into account when making the decision, and that any documents prepared by government officials for decision-making must directly communicate a "fair, accurate and adequate report" of the relevant issues and objections so that the decision-maker can "form a balanced judgment on the strength of the objections and merits".¹⁶¹

¹⁵⁸ At 681.

¹⁵⁹ *R v Connell* [1944] HCA 42.

¹⁶⁰ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139. Note that the relevant statutory power did contain a requirement for the Minister to be "satisfied".

¹⁶¹ At [48]

- 6.10 In *Ennor v Auckland Council*, Whata J held that “there must be adequate information upon which to make ... decisions”, which “is a basic requirement of reasonable and procedurally fair decision making”.¹⁶²
- 6.11 In *Discount Brands Ltd v Westfield (NZ) Ltd*, the Supreme Court considered provisions of the RMA that required a consent authority “to be satisfied” it had adequate information to proceed to the substantive decision-making stage on notification.¹⁶³ The Court held unanimously that the authority did not have adequate information to satisfy itself of the statutory pre-condition.
- 6.12 The judgments emphasise the onus that the requirement “to be satisfied” places on a decision-maker. Keith J noted:¹⁶⁴

Significant in the basic requirements stated in ss 93(1) and 94(2) are the double emphases on “satisfied”, the strongest decisional verb used in the Act, the etymology of “satisfy” (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty.

- 6.13 Elias CJ also commented on the stringency with which the language “to be satisfied” is to be applied:¹⁶⁵

The requirement that the consent authority must be “satisfied” that adverse effects on the environment are minor before it decides not to notify a resource consent application for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for resource consent for a discretionary activity under s 105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the district plan. Such decisions may be finely judged. That is not the approach required of the decision maker by s 94(2). The requirement that the consent authority be “satisfied” that adverse effects on the environment are minor is a pointer to additional conviction and the need for some caution.

- 6.14 Blanchard J said that while information “is not required to be all-embracing ... it must be sufficiently comprehensive to enable the consent authority to consider” the relevant issues before it “on an informed basis”.¹⁶⁶

Importance of judicial review in climate cases

- 6.15 The New Zealand Courts have recognised the particular importance of judicial review in relation to decisions that affect the climate.
- 6.16 In *Thomson v Minister for Climate Change*, Mallon J noted (in the context of justiciability) that “the importance of the matter for all and each of us warrants some scrutiny of the public power in addition to accountability through

¹⁶² *Ennor v Auckland Council* [2018] NZHC 2598 at [31].

¹⁶³ *Discount Brands Ltd v Westfield (NZ) Ltd*, above n 156.

¹⁶⁴ At [52].

¹⁶⁵ At [23].

¹⁶⁶ At [114].

Parliament and the General Elections”.¹⁶⁷ At issue in that case were decisions by the Minister for Climate Change Issues regarding targets for greenhouse gas emissions.

- 6.17 In *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* Palmer J held:¹⁶⁸

The evidence, including the Council’s own documents, establishes that the potential and likely effects of climate change, and the measures required to mitigate those effects, are of the highest public importance... There is a strong public interest in decision-making by the Council on such issues being subject to judicial review. Given the nature, effects and significance of the decision, it is reviewable. [...]

I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here.

- 6.18 In *Smith v Fonterra Co-operative Group Ltd*, the Court of Appeal reinforced the role of the Courts in relation to exercises of public power relating to climate change.¹⁶⁹

All of that is not to suggest the courts have no meaningful role in responding to the exigencies of climate change. They do in fact have a very important role in supporting and enforcing the statutory scheme for climate change responses and in holding the Government to account...

- 6.19 There is also growing judicial recognition of the overlap between climate change and human rights. As the Supreme Court of the Netherlands held in *Urgenda Foundation v Kingdom of the Netherlands*, climate change directly threatens human rights.¹⁷⁰ Winkelmann CJ, Glazebrook J and Ellen France J have written extrajudicially about the human rights implications of climate change.¹⁷¹

- 6.20 All Aboard submits that the nature and gravity of the challenge presented by climate change requires more expansive supervision by the Courts. That is particularly so in the present case given the scale of Auckland’s transport emissions, and the direct bearing (acknowledged in RLTP 2021) that they have on New Zealand’s ability to meet its climate change targets.

¹⁶⁷ *Thomson v Minister for Climate Change* [2018] 2 NZLR 160 at [134]. See the comments of Winkelmann CJ, Glazebrook J and France J writing extrajudicially in “Climate Change and the Law”, Asia Pacific Judicial Colloquium, May 2019 at [59].

¹⁶⁸ *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228 at [40] and [51].

¹⁶⁹ *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 at [35].

¹⁷⁰ *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 13 January 2020) at [5.7.9].

¹⁷¹ “Climate Change and the Law”, Winkelmann CJ, Glazebrook J and France J, above n 167, at [20].

RTC meeting of 18 June 2021

- 6.21 The RTC Decision was made at the RTC meeting of 18 June 2021. Ahead of the meeting Auckland Transport prepared a decision document for the RTC (**RTC Decision Document**).¹⁷²
- 6.22 Among other things, the RTC Decision Document:
- (a) Recommended that the RTC should agree that it was satisfied that RLTP 2021 complied with s 14 of the LTMA;
 - (b) Recommended that the RTC should recommend RLTP 2021 to the Planning Committee for endorsement, and to the Board for approval;
 - (c) Attached RLTP 2021;
 - (d) Attached a document prepared by Auckland Transport headed “How the draft RLTP 2021-2031 meets the requirements of section 14 of the LTMA” (**Section 14 Analysis**);¹⁷³ and
 - (e) Advised the RTC that if it did not approve RLTP 2021 (as prepared by Auckland Transport):
 - (i) The existing RLTP 2018 would remain in effect;
 - (ii) Auckland Transport’s ability to access funds from the national land transport fund would be affected; and
 - (iii) There would be a likely impact on new and existing activities.

Section 14 Analysis

- 6.23 The Section 14 Analysis purported to demonstrate how RLTP 2021 met the requirements of s 14 of the LTMA.
- 6.24 In relation to the “climate change” strategic priority of GPS 2021, it asserted (at [24]): “Consistency with the GPS approach to achieving Climate Change outcomes is achieved by a range of initiatives within this RLTP”. It identified certain “initiatives”, including various investments in public transport and active modes. It then set out the primary outcome for the “climate change” strategic priority (at [25]).
- 6.25 It went on to note that RLTP 2021 was not expected to make any significant reduction to emissions (at [27]): “the combination of RLTP investment, improved vehicle efficiency as forecast in Vehicle Emissions Prediction Model 6.1 and planned government interventions such as the Clean Car Standard and biofuels improvements are expected to lead to a small absolute emissions reduction (in the order of -1%) for Auckland between 2016 and 2031.”
- 6.26 It then purported to assess whether RLTP 2021 was consistent with the “climate change” primary outcome. It said (at [30] and [31]):

¹⁷² Exhibit JC1-0365 [[309.3471]].

¹⁷³ Exhibit JC1-1069 [[309.4175]].

Forecast emissions reductions are consistent with the priority of ‘Transforming to a low carbon transport system that supports emissions reductions that align with national commitments.’ They are also consistent with key elements of the Primary Outcome – particularly:

- *supporting* a rapid transition to a low carbon transport system and
- *contributing* to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission (CCC) recommended to Cabinet until emissions budgets are released in 2021.

Forecast emissions reductions are, however, likely to be less than the CCC’s emission budget in its advice to the Government. Nevertheless, as required by the Primary Outcome the investment decisions as incorporated in the RLTP do *contribute* to and support this outcome.

6.27 The Section 14 Analysis then said (at [31]): “In addition, as the points below illustrate, there is little ability to further reduce overall emissions through RLTP direct investment in infrastructure and services”. A list of bullet points followed in which the following assertions were made:

- (a) “Fundamentally, investment in infrastructure or services only has a very minor impact on total emissions, whether positive or negative.”
- (b) “There is limited practical scope to relocate [sic] elements of the programme from roading projects to further increase investment in public transport and active modes.”
- (c) “It is not a given that roading projects will automatically lead to increased tailpipe emissions. For example, Penlink is likely to result in a net reduction in tailpipe emissions...”
- (d) “General road space reallocation towards cycling and other sustainable modes has also been proposed by submitters as a way of addressing climate issues... As noted, there is no available funding for further reallocation.”
- (e) “In practice, it is also likely that gains from deterring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion and diversion amongst the remaining traffic.”
- (f) “Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP’s contribution to LTMA objectives around effectiveness and economic, social and cultural public interests.”

6.28 The Section 14 Analysis expressed the hope that future central government policy interventions would yield further emissions reductions (at [34]). It also suggested that the Government’s agreement to ATAP “implicitly supports consistency of [RLTP 2021] with [GPS 2021]” (at [40]).

Inconsistency between RLTP 2021 and GPS 2021

6.29 All Aboard submits that there was no basis for the RTC to be satisfied that RLTP 2021 was consistent with GPS 2021, and the RTC accordingly erred in law in making the RTC Decision.

6.30 RLTP 2021 described the impact it would have on emissions as follows:¹⁷⁴

GHG emissions

Our transport modelling forecasts that Auckland's per capita transport emissions will reduce by 13 percent between 2016 and 2031. However, the 22 percent increase in population over the same period means that the region's total emissions are expected to increase by six percent between 2016 and 2031.

In addition to these two factors, the Government has committed to its Clean Car policy and a shift to biofuels. These are expected to yield a cumulative reduction of one to two megatonnes of CO₂ over the next decade. This is equivalent to around seven percent of annual emissions in 2031.

The overall impact of these three factors is forecast to be a reduction in transport GHG emissions of around one percent from 2016 to 2031.

6.31 In summary, the investment programme would, on its own, result in a 6% *increase* in emissions by 2031, but the effect of anticipated government interventions was to *decrease* emissions by 7%. It was those other interventions, and not the investment decisions, that would generate the (very marginal) overall emissions reduction of 1%.

6.32 In addition, RLTP 2021 recorded that the investment programme would result in a 22% *increase* in VKT, with no reduction in VKT per capita at all (a matter that the RTC Decision Document failed to draw to the attention of the decision-makers):¹⁷⁵

Vehicle Kilometres Travelled (VKT)

The RLTP investment package is forecast to see public transport's share of motorised distance travelled increase from 12 percent to 20 percent in the morning peak, and from five percent to 10 percent in the inter-peak period. Nevertheless, private vehicle trips are still forecast to increase and, when combined with an increase in average vehicle trip distance, total VKT between 2016 and 2031 increases roughly in line with the expected 22 percent increase in population.

6.33 All Aboard says those outcomes are manifestly inconsistent with GPS 2021. As Mr Litman says:¹⁷⁶

A 1% reduction in emissions after \$37 billion worth of investment over the course of a decade is insignificant. It is smaller than the statistical uncertainty in this type of modelling. It represents no material progress towards the greenhouse gas emissions reduction targets identified in the applicant's statement of claim.

¹⁷⁴ RLTP 2021 at 79 [[301.0079]].

¹⁷⁵ RLTP 2021 at 78 [[301.0079]].

¹⁷⁶ Affidavit of Todd Litman at [25] [[201.0103]].

- 6.34 All Aboard also says that Auckland Transport’s Section 14 Analysis proceeded on an erroneous understanding of what the “climate change” strategic priority and primary outcome required.
- 6.35 On Auckland Transport’s interpretation, it would be sufficient if the RLTP investment decisions could be said to lend *any* support to a transition to a low carbon transport system, and make *any* contribution to a transport sector that reduces emissions, and there would be no obligation for the investment decisions themselves to deliver on the Climate Change Commission’s targets (or emissions reductions generally). The “climate change” strategic priority would be rendered toothless – the opposite of the position for which Auckland Council had advocated during consultation on GPS 2021.¹⁷⁷
- 6.36 All Aboard submits that the proper interpretation of the “climate change” primary outcome was that the investment decisions themselves were required to (i) support the rapid transition to a low carbon transport system; (ii) contribute to a transport sector that reduces emissions; and (iii) give effect to the Climate Change Commission’s emissions reduction targets.
- 6.37 That is the natural and ordinary meaning of the words used in the primary outcome.¹⁷⁸ It is also consistent with:
- (a) The “short to medium term result” of “reduced greenhouse gas emissions” that investment decisions were required to deliver by 2031;
 - (b) The “indicators for progress” (section 2.6), which included “tonnes of greenhouse gases emitted per year” and “vehicle kilometres travelled”, against which investments were required to be scoped ([89]); and
 - (c) GPS 2021’s recognition that “a reduction in greenhouse gas emissions will be achieved through action across all priorities, programmes and activity classes” ([7]).
- 6.38 The primary outcome was, to use the Supreme Court’s language in *King Salmon*, a “strong directive, creating a firm obligation on the part of those subject to it”.¹⁷⁹
- 6.39 It is common ground that investment in transport infrastructure and services is not the only available lever to reduce emissions. Others include (for example) road pricing, parking management, and incentives to purchase low emissions vehicles.¹⁸⁰ It is also not in dispute that transport investment decisions, although plainly necessary, may be unable to deliver the emissions reductions required by Te Tāruke-ā-Tāwhiri and the Climate Change Commission’s advice without additional policy measures.

¹⁷⁷ See [4.9] above.

¹⁷⁸ GPS 2021 at 22 [[301.0152]].

¹⁷⁹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 97.

¹⁸⁰ See, for instance, the advice provided by Auckland Council to the Environment and Climate Change Committee on 10 June 2021 (exhibit NJL2-1036 [[308.3441]]); and the affidavit of Alec Tang in reply at [26] [[201.0248]].

- 6.40 All Aboard’s case is that, in order to be consistent with GPS 2021, RLTP 2021 had to make the greatest contribution it could to reducing transport emissions and meeting the Climate Change Commission’s target. In other words, Auckland Transport had to pull the transport investment lever as far as it could, notwithstanding that delivering the “climate change” primary outcome might require additional actions outside of RLTP 2021.
- 6.41 What Auckland Transport could not do was abdicate its responsibility to pull the investment lever that it controlled via RLTP 2021, and rely on other agencies to make other interventions to make up for RLTP 2021’s lack of contribution. As Auckland Council reported to the Environment and Climate Change Committee on 2 December 2021, “all levers across transport and a range of other sectors will need to be pulled as hard as they can be within the timeframe available”.¹⁸¹
- 6.42 Auckland Transport’s position appears to be that it was not possible for RLTP 2021 to deliver better emissions outcomes. All Aboard says that position is demonstrably wrong, and that (in addition to the erroneous interpretation of GPS 2021 addressed above) it derived from:
- (a) Flaws in the process Auckland Transport adopted for developing the investment programme;
 - (b) Misconceptions about transport policy and planning, including the ability of investment decisions to impact emissions; and
 - (c) An apparent view that the public interest might require something other than rapid emissions reductions from Auckland’s transport sector.
- 6.43 These points are addressed in turn below.

Flaws in process for developing RLTP 2021

- 6.44 The shortcomings in the process for developing RLTP 2021 are apparent from the chronology addressed in section 5 of these submissions. In summary:
- (a) All significant decisions regarding the transport investment programme for the next decade were taken before RLTP 2021 was prepared, in the context of developing the ATAP programme. By the time Auckland Transport came to prepare RLTP 2021, the investment programme was largely fixed.¹⁸² The risk that ATAP would subvert the statutory RLTP process was one that Auckland Transport had identified at the outset.¹⁸³
 - (b) Throughout the process, Auckland Transport was committed to delivering its pre-existing (2018) investment programme. It started from the flawed premise that more than 93% of the investment was

¹⁸¹ Exhibit NJL1-0184 [[312.5235]].

¹⁸² See [5.23]-[5.26] above.

¹⁸³ See [5.9] above.

required for projects and programmes that it deemed to be “mandatory”.¹⁸⁴

- (c) When Auckland Transport realised the investment programme was unlikely to reduce emissions, its strategy was to “shift the conversation” away from transport investment decisions (which it could control and influence) and onto other levers outside its control.¹⁸⁵
- (d) There was no change to the approach following the release of the final GPS 2021 on 3 September 2020, which included the strengthened primary outcome for the “climate change” strategic priority that Auckland Council had sought.¹⁸⁶
- (e) By its own admission, Auckland Transport failed to assess any of the individual projects and programmes in RLTP 2021 against the strategic priorities and indicators set out in GPS 2021 (despite GPS 2021 expressly requiring that).¹⁸⁷ The only assessment it conducted related to less than 7% of the investment, but even that was only on a blended “package” basis.¹⁸⁸
- (f) Auckland Transport failed to apply a proper climate lens in selecting projects and programmes for the investment programme, and (as Auckland Council candidly acknowledged) there was no priority given to climate outcomes.¹⁸⁹
- (g) Much of the budget was allocated to like-for-like renewals of infrastructure. As Auckland Council identified, process and culture change within Auckland Transport, and a pipeline of climate positive cases, were needed to move past that.¹⁹⁰

6.45 As Ms Ghanta puts it:¹⁹¹

Based on my experience of good transport planning practice, I do not consider that the approach to allocating funds that Mr Bunn describes was appropriate, particularly given the very material changes that had occurred to the strategic priorities and objectives for the transport system in the period since RLTP 2018 had been developed. If some \$30b of transport expenditure (representing more than 93% of the total budget) is allocated without interrogating its effectiveness at reaching prescribed goals, it is logical to expect that results will not align with goals.

¹⁸⁴ See [5.10]-[5.14] above.

¹⁸⁵ See [5.19]-[5.20] above.

¹⁸⁶ See [5.21] above.

¹⁸⁷ See [5.31] above.

¹⁸⁸ See [5.15] above.

¹⁸⁹ See [5.18] and [5.29(c)] above.

¹⁹⁰ See [5.34] above.

¹⁹¹ Affidavit of Neelima Ghanta in reply at [37] [[201.0231]].

6.46 Ms Ghanta's evidence is that a proper process would have delivered different outcomes:¹⁹²

In my professional experience, when the required outcomes include steep targets for emissions reductions, modal shift and road safety, the best process to follow is an iterative one, which starts with quantifying the impact of every project and programme that is under consideration for the investment programme against those required outcomes.

This would have brought any projects and programmes within what Auckland Transport identified as the "baseline" package that have perverse impacts on those goals to the attention of Auckland Transport, its Board and other agencies. This iterative process would have resulted in the following:

- (a) Elimination of business-as-usual spending that results in those perverse outcomes;
- (b) Reallocation of the funding to projects and programmes that have high alignment with required outcomes; and
- (c) Development of projects and programmes that have a strong alignment with strategic goals.

6.47 At its heart, RLTP 2021 was a business-as-usual plan that failed to recognise and respond to the mandatory requirements of GPS 2021, and the urgent need to cut transport emissions.

6.48 Mr Tang's evidence highlights the importance of reconsidering investment decisions and policy directions that were put in place before climate commitments were adopted. He raised the issue with Auckland Council during his tenure as Chief Sustainability Officer (Acting).¹⁹³

6.49 In a paper regarding the TERP, prepared for the Environment and Climate Change Committee on 2 December 2021, Auckland Council expressly acknowledged the failure to depart from a business-as-usual approach to transport planning and investment:¹⁹⁴

The future of Auckland's transport system is crucial to our response to climate change, as transport currently accounts for over 40 per cent of the region's emissions. Achieving the modelled 64 per cent reduction in transport emissions will require transformational change in how people and goods travel in Tāmaki Makaurau. Local and central government will also need to reform many of their planning and investment processes in order to move away from business-as-usual approaches.

6.50 All Aboard says that reconsidering the approach to transport investment decisions was something Auckland Transport was required to do before (and not after) RLTP 2021 established Auckland's transport investment programme for the next decade.

¹⁹² Affidavit of Neelima Ghanta in reply at [38]-[39] [[201.0231]].

¹⁹³ Affidavit of Alec Tang in reply at [41]-[44] [[201.0251]].

¹⁹⁴ Exhibit NJL1-0183 [[312.5234]].

Misconceptions about transport policy and planning

- 6.51 It is apparent from the Section 14 Analysis and Auckland Transport’s evidence that in preparing the investment programme it proceeded on the basis of several fundamental misconceptions about transport planning and policy.

Impact of transport investments on emissions

- 6.52 The Section 14 Analysis asserted: “Fundamentally, investment in infrastructure or services only has a very minor impact on total emissions, whether positive or negative.”
- 6.53 In his affidavit Mr Bunn seeks to defend that statement. He says it was based on his experience of the MSM traffic model used by Auckland Transport, and that “the modelling evidence demonstrated that investment in infrastructure and services has only a minor impact on regional emissions”.¹⁹⁵
- 6.54 The proposition is thoroughly rebutted by the expert evidence filed by All Aboard.¹⁹⁶ As Ms Metcalfe notes, quoting the Waka Kotahi Keeping Cities Moving Plan (emphasis added): “giving people safe, efficient, reliable, affordable and convenient travel choices is an **essential pre-requisite** to achieving mode shift and reducing car dependency”.¹⁹⁷ Mr Litman gives several examples of how transport investment decisions in peer cities have significantly reduced vehicle traffic and emissions.¹⁹⁸
- 6.55 Mr Bunn’s understanding that transport investments do not impact emissions appears to derive from the faith he places in MSM. As All Aboard’s expert explain, however, traffic models such as MSM have inherent biases towards private vehicle traffic, and are unsuitable for estimating the mode shift and emissions reductions potential of a city-wide investment plan such as RLTP 2021.¹⁹⁹
- 6.56 Ms Ghanta, who has personal experience of MSM from her time at Auckland Transport, describes the limitations of the model. Her evidence is that the limitations, and the model’s unsuitability for estimating the potential for mode shift, are known to the staff of the Auckland Forecasting Centre, the agency

¹⁹⁵ Affidavit of Hamish Bunn at [207] [[201.0328]] and [224] [[201.0335]].

¹⁹⁶ See the affidavits of Todd Litman [[201.0097]], Todd Litman in reply [[201.0151]], Ralph Chapman [[201.0197]], Ralph Chapman in reply [[201.0211]], Jayne Metcalfe [[201.0175]], Jayne Metcalfe in reply [[201.0191]], and Neelima Ghanta in reply [[201.0221]].

¹⁹⁷ Affidavit of Jayne Metcalfe in reply at [10] [[201.0194]]; exhibit NJL2-0059 [[303.1064]].

¹⁹⁸ Affidavit of Todd Litman at [32]-[33] [[201.0104]]; affidavit of Todd Litman in reply at [35]-[42] [[201.0161]].

¹⁹⁹ Affidavit of Todd Litman at [36] [[201.0105]]; affidavit of Todd Litman in reply at [12]-[34] [[201.0156]]; affidavit of Jayne Metcalfe at [30] [[201.0104]]; affidavit of Ralph Chapman at [26] [[201.0202]]; affidavit of Ralph Chapman in reply at [4]-[13] [[201.0213]].

that developed MSM.²⁰⁰ The Auckland Forecasting Centre is a partnership between Auckland Council, Auckland Transport and Waka Kotahi.²⁰¹

6.57 Importantly, the proposition that transport investments only have a “very minor” impact on emissions has also been roundly rejected by Auckland Council’s own transport experts (whose evidence Auckland Council has not put before the Court). By way of example:

(a) The decarbonisation pathway for transport in Te Tāruke-ā-Tāwhiri is premised on a series of actions that require delivery of infrastructure for public transport and active modes.²⁰²

(b) On 10 June 2021 (just two weeks before RLTP 2021 was adopted) Auckland Council advised the Environment and Climate Change Committee:²⁰³

Accelerating mode shift toward public and active transport is one area where there may be potential to deliver relatively rapid emissions reductions. But this will require urgent action across a number of challenging policy levers in a funding constrained environment, including:

- reallocating funding away from projects that will increase capacity on the roading network for private vehicles
- providing more funding for public transport services to enable greater coverage and frequency
- a much stronger emphasis on road space reallocation as a relatively cost effective means of providing for bus priority and safe active mode infrastructure

(c) On 12 August 2021, in a paper regarding the TERP, Auckland Council advised the Environment and Climate Change Committee:²⁰⁴

Comprehensive implementation of ‘avoid’ and ‘shift’ interventions is especially important for a large, urbanised region such as Auckland. Auckland Council and Auckland Transport have control of, or at least some influence over, several of these interventions, including accelerating mode shift, reallocating road space, reprioritising investment, and shaping urban form.

(d) In a further paper regarding the TERP on 2 December 2021 Auckland Council advised that (emphasis in original):²⁰⁵

²⁰⁰ Affidavit of Neelima Ghanta in reply at [57] [[201.0234]].

²⁰¹ Affidavit of Neelima Ghanta in reply at [51] [[201.0234]].

²⁰² Te Tāruke-ā-Tāwhiri at 142-145 [[301.0331]]; affidavit of Alec Tang in reply at [26]-[27] [[201.0248]].

²⁰³ Exhibit NJL2-1041 [[308.3446]].

²⁰⁴ Exhibit NJL1-0172 [[311.4811]].

²⁰⁵ Exhibit NJL1-0184 [[312.5235]].

among the levers, mode shift is by far the most powerful to meet the 2030 target. However, significant mode shift to *all* sustainable modes is required, especially active modes. A compact urban form and accelerated decarbonisation of the public and private vehicle fleet are also crucial.

- 6.58 All Aboard agrees with Auckland Council's position on these issues. There is no serious question that investment in infrastructure and transport services is a key factor in transport emissions. Auckland Transport erred in assuming otherwise when it prepared RLTP 2021.

Impact of road capacity on congestion and emissions

- 6.59 The Section 14 Analysis asserted:
- (a) "It is not a given that roading projects will automatically lead to increased tailpipe emissions. For example, Penlink is likely to result in a net reduction in tailpipe emissions..."; and
 - (b) "In practice, it is also likely that gains from deterring car travel through lane reallocation alone would be largely offset by the increase in emissions associated with increased congestion and diversion amongst the remaining traffic."

- 6.60 Again, Mr Bunn seeks to defend those propositions by reference to the modelling outputs of MSM.²⁰⁶

- 6.61 As All Aboard's experts explain, however, Auckland Transport's assertions simply demonstrate the limitations of the model. The view that new roading projects could be expected to decrease tailpipe emissions, and that road space reallocation to more sustainable modes could be expected to increase tailpipe emissions, has been thoroughly debunked by studies on induced demand and road space reallocation.²⁰⁷ As Mr Litman explains:²⁰⁸

The research on induced vehicle travel consistently demonstrates that urban roadway expansions generally provide only short-term increases in traffic speeds. Congestion generally returns to previous levels within a few years, with greater traffic volumes and regional emissions. If the roadway improvements cause more sprawled, car-dependent development, this will further increase regional emissions.

- 6.62 Mr Litman also explains that road space reallocation is an accepted way to provide affordable improvements to the sustainability of the transport system, and that it can increase roadway efficiency and equity, and reduce vehicle emissions.²⁰⁹

- 6.63 In addition, as Ms Metcalfe notes in her affidavit, Auckland Transport's emissions modelling only considers tailpipe emissions, and fails to take

²⁰⁶ Affidavit of Hamish Bunn at [235]-[238] [[201.0339]] and [257] [[201.0346]].

²⁰⁷ Affidavit of Todd Litman in reply at [20]-[26] [[201.0158]]; affidavit of Neelima Ghanta in reply at [63]-[64] [[201.0236]]; affidavit of Jayne Metcalfe in reply at [13] [[201.0194]].

²⁰⁸ Affidavit of Todd Litman in reply at [26] [[201.0159]].

²⁰⁹ Affidavit of Todd Litman in reply at [50]-[54] [[201.0165]].

account of lifecycle emissions, being embodied and operational emissions from construction, maintenance, and operation of roads and car parks.²¹⁰ Mr Bunn does not address this issue in his affidavit.

- 6.64 The evidence of All Aboard’s experts on these issues is not controversial: it simply represents orthodox contemporary understandings of transport planning.²¹¹ It is clear that Auckland Council’s own transport experts share these understandings. As their 10 June 2021 paper for the Environment and Climate Change Committee said:²¹²

Reconsideration of roading projects

Investment in large scale transport infrastructure can lock in travel patterns, and help shape urban form, for decades. Investment decisions are therefore a crucial element in determining the potential to reduce emissions generated by the transport sector. While not government policy, Hikina te Kohupara emphasises the need to ensure that available funding is targeted at public and active transport rather than highway expansion...

Effect of road space reallocation on economic, social and cultural public interests

- 6.65 In response to the suggestion that road space should be allocated towards sustainable modes, the Section 14 Analysis asserted: “Reallocation of general traffic lanes without additional effective alternatives (which cannot be funded) would also materially reduce the RLTP’s contribution to LTMA objectives around effectiveness and economic, social and cultural public interests.”
- 6.66 In his evidence Mr Bunn says this was a statement about removing lanes but not reallocating them to other modes.²¹³ That misses the point, however: what was being proposed – and what Te Tāruke-ā-Tāwhiri requires – is reallocating road space away from private vehicles to public transport and active modes (walking and cycling). The unrebutted expert evidence overwhelmingly supports the notion that reallocating road space can serve economic, social and cultural public interests, as well as delivering emissions reductions.²¹⁴

Failure to prioritise rapid emissions reductions

- 6.67 Mr Bunn’s affidavit concludes by setting out two broad approaches to reducing Auckland’s transport emissions:²¹⁵
- (a) “Rapid change, which will require implementation of comprehensive and high price distance-based pricing schemes – supported by recycling the revenue into public transport and cycling capacity.

²¹⁰ Affidavit of Jayne Metcalfe at [24]-[27] [[201.0181]].

²¹¹ Affidavit of Todd Litman in reply at [3]-[4] [[201.0153]]; affidavit of Neelima Ghanta in reply at [47] [[201.0233]]; affidavit of Jayne Metcalfe in reply at [13] [[201.0194]].

²¹² Exhibit NJL2-1041 [[308.3446]].

²¹³ Affidavit of Hamish Bunn at [255] [[201.0345]].

²¹⁴ See, for instance, affidavit of Todd Litman at [41]-[42] [[201.0106]]; affidavit of Ralph Chapman at [34]-[43] [[201.0204]]; affidavit of Alec Tang in reply at [61]-[63] [[201.0255]].

²¹⁵ Affidavit of Hamish Bunn at [347] [[201.0369]].

There is no other intervention that achieves the necessary scale of change. This will, however, have a substantial negative impact on economic, social and cultural wellbeing – particularly from an equity point of view.”; and

- (b) “Less disruptive change, which can be achieved primarily through a much greater emphasis on shifting to low emissions vehicles – supported by continued priority investment in better transport choices. This will, however, take longer to achieve substantial emissions reductions.”

6.68 He suggests that major decisions are yet to be made by the Government and Auckland Council over timing and approach.²¹⁶ Similarly, Ms Young-Cooper suggests that it is “the [TERP], developed after the current RLTP was adopted in June 2021, will set the scale and pace of change for Auckland”.²¹⁷

6.69 All Aboard says that is a further error. As Mr Tang explains, Auckland Council has already set the scale and pace of change for Auckland in Te Tāruke-ā-Tāwhiri:²¹⁸

It is important to recognise that the scale and pace for change and climate action in Auckland is set by Te Tāruke-ā-Tāwhiri. It cannot and should not be set by any subsequent policies, plans or programmes established to deliver on the climate commitments. Any attempt to do so would require a wholesale review of the proposed decarbonisation pathway across all sectors.

6.70 In preparing RLTP 2021, Auckland Transport was not required to revisit the scale and pace of emissions reductions in the transport sector. Decisions about what the public interest required, and the necessary interventions, had already been taken by the Auckland Council Group in Te Tāruke-ā-Tāwhiri. Auckland Transport’s responsibility was to implement them.

6.71 Moreover, as Ms Metcalfe explains (and as Te Tāruke-ā-Tāwhiri confirms), the dichotomy that Mr Bunn describes is a false one:²¹⁹

Mr Bunn appears to believe the choice is between a pathway that will impact negatively on wellbeing, or a pathway that will fail to meet the emissions goals in the timeframe required. This dichotomy is false. It is recognised and accepted throughout the transport sector, both in New Zealand and internationally, that there are many interventions that can meet both wellbeing and climate objectives.

6.72 This was expressly acknowledged in Auckland Council’s paper of 2 December 2021 regarding the TERP:²²⁰

Many of the low carbon policies and investments introduced for emissions reduction purposes would also achieve other social, cultural, environmental, and financial objectives for the region. These include greater access and travel choice, improved public health and road safety,

²¹⁶ Affidavit of Hamish Bunn at [348] [[201.0369]].

²¹⁷ Affidavit of Adrienne Young-Cooper at [26(g)] [[201.0414]].

²¹⁸ Affidavit of Alec Tang in reply at [22] [[201.0248]].

²¹⁹ Affidavit of Jayne Metcalfe in reply at [21] [[201.0180]].

²²⁰ Exhibit NJL1-0191 [[312.5242]].

reduced transport costs, improved air quality and noise levels, and greater community resilience.

Failure of RLTP 2021 to contribute to purpose of LTMA

- 6.73 Prior to the RTC Decision, Auckland Council had:
- (a) Declared a climate emergency;
 - (b) Committed, by membership of the C40 Cities Climate Leadership Group, to develop a climate plan consistent with the Paris Agreement aspiration of a 1.5°C maximum temperature rise;
 - (c) Recognised in Te Tāruke-ā-Tāwhiri that the public interest required a 50% reduction in Auckland’s emissions by 2030 (and a 64% reduction in transport emissions); and
 - (d) In the same document, acknowledged that “the legacy of our ancestors that we leave for future generations lies in the balance”.²²¹
- 6.74 The uncontested expert evidence is that every additional emission of greenhouse gases contributes to global warming and risks activating global tipping cascades that threaten the habitability of Earth.²²²
- 6.75 Against that background, All Aboard says that an investment programme that fails to make any material reduction to transport emissions over the next decade is plainly not in the public interest; will not deliver social, economic and cultural wellbeing; and cannot contribute to an effective, efficient and safe land transport system in the public interest. The RTC had no proper or reasonable grounds to be satisfied otherwise, and the RTC Decision was therefore unlawful.

7. SECOND CAUSE OF ACTION – PLANNING COMMITTEE DECISION

Justiciability of Planning Committee Decision

- 7.1 Auckland Council’s statement of defence asserts that the Planning Committee Decision was not a formal statutory step in the process of adopting RLTP 2021, and was not the exercise of a statutory power in terms of the Judicial Review Procedure Act 2016 (**JRPA**).²²³
- 7.2 The Planning Committee Decision was made under the delegated powers given to it by Auckland Council. The Planning Committee, for example, has delegated responsibility for relevant regional strategy and policy, and transportation.²²⁴ It was a decision of a committee of Auckland Council in the

²²¹ Te Tāruke-ā-Tāwhiri at 9 [[301.0198]].

²²² Affidavit of Will Steffen at [57] [[201.0034]].

²²³ Auckland Council’s statement of defence at [58(c)] [[101.0055]].

²²⁴ Auckland Council Governing Body Terms of Reference 2019-2022 (<https://www.aucklandcouncil.govt.nz/about-auckland-council/how-auckland->

exercise of statutory powers and functions under the LGA and/or the LGACA. It was therefore an exercise of a statutory power in terms of s 3 of the JRPA.

7.3 In any event, the Planning Committee Decision is plainly amenable to judicial review. As Palmer J recognised in *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council*: “New Zealand courts take a generous view of the extent of the rights, powers, privileges, immunities, duties or liabilities of a person that could found a judicial review. That is consistent with the purpose of judicial review in constraining the potential abuse of power.”²²⁵

7.4 It is immaterial that the approval of the Planning Committee was not an express statutory step in relation to the preparation and adoption of an RLTP under the LTMA. Auckland Council’s own evidence is that it was agreed following the CCO review of July 2020 that the Planning Committee would be required to endorse the RLTP before it was submitted to the Board for approval.²²⁶ The Planning Committee plainly had an effective veto over the adoption of RLTP 2021.

Sections 77, 80 and 14 of LGA

7.5 Sections 76-81 of the LGA provide a framework for local government decision-making. The provisions are expressed in “strong mandatory terms”, and “the obligations relating to significant decisions are stringent”. The objective of the provisions is to “enhance the quality of the decision-making process, by ensuring that local authorities arrive at fully informed decisions by way of an open and transparent process”.²²⁷

7.6 Section 76 is the anchor provision, providing that every decision made by a local authority must be made in accordance with ss 77, 78, 80, 81 and 82 as applicable.²²⁸

7.7 Sections 77(1)(a) and (b) require a local authority, in the course of the decision-making process, to seek to identify all reasonably practicable options for the achievement of the objective of a decision, and to assess the options in terms of their advantages and disadvantages. Section 79 provides a “degree of flexibility for local authorities to determine how they should comply” with s 77.

7.8 In *Council of Social Services in Christchurch v Christchurch City Council*, the High Court held that the respondent council had not assessed all reasonably practicable options, as it had failed to consider the option of government funding.²²⁹ The Court noted that the expression “reasonably practicable option” is not defined in the LGA, and adopted a pragmatic assessment of

[council-works/governing-body-wards-committees/Documents/governing-body-terms-of-reference.pdf](#)).

²²⁵ *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council*, above n 168, at [38].

²²⁶ See affidavit of Megan Tyler at [3.14]-[3.19] [[201.0423]].

²²⁷ *Council of Social Services in Christchurch Inc v Christchurch City Council* [2009] 2 NZLR 123 at [23].

²²⁸ At [24].

²²⁹ *Council of Social Services in Christchurch v Christchurch City Council*, n 227.

whether government funding was a reasonable option. In reaching its conclusion, the Court had regard to the council's own internal documentation and processes, and considered the seriousness and impact of the council not having regard to that option.²³⁰

- 7.9 Section 80 requires that if a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority, the local authority must, when making the decision, clearly identify the inconsistency, the reason for it, and any intention of the local authority to amend the policy to accommodate the decision. Section 80 has been said to require a local authority "to give careful consideration to the impact of [the decision] on the overall integrity of the policy".²³¹
- 7.10 Section 14 sets out principles in accordance with which a local authority must act in performing its role. These include:
- (a) When making a decision, a local authority should take account of the interests of future as well as current communities (s 14(1)(c)(ii)); and
 - (b) In taking a sustainable development approach, a local authority should take into account:
 - (i) the social, economic, and cultural wellbeing of people and communities (s 14(1)(h)(i));
 - (ii) the need to maintain and enhance the quality of the environment (s 14(1)(h)(ii)); and
 - (iii) the reasonably foreseeable needs of future generations (s 14(1)(h)(iii)).

Planning Committee meeting of 24 June 2021

- 7.11 The Planning Committee Decision was made at the Planning Committee meeting of 24 June 2021. Ahead of the meeting Auckland Transport prepared a decision document for the Planning Committee (**Planning Committee Decision Document**).²³²
- 7.12 Among other things, the Planning Committee Decision Document:
- (a) Recommended that the Planning Committee endorse RLTP 2021 for submitting to the Board for final approval;
 - (b) Attached RLTP 2021; and
 - (c) Advised the Planning Committee that if RLTP 2021 was not approved by the Board:

²³⁰ At [60].

²³¹ *Wellington City Council v Minotaur Custodians Ltd* [2017] 3 NZLR 464 (CA) at [81].

²³² Exhibit MT1-1123 [[310.4222]].

- (i) The existing 2018 RLTP would remain in effect;
- (ii) Auckland Transport’s ability to access funds from the national land transport fund would be affected; and
- (iii) There would be a likely impact on new and existing activities.

7.13 As recorded in the minutes of the meeting, at the same time as making the Planning Committee Decision, the Planning Committee passed resolutions noting that:²³³

- (a) “Auckland Council’s commitment to Te Tāruke-ā-Tāwhiri to halve emissions by 2030 requires further change to transport and land use policy and the mix of transport investment”; and
- (b) “[A]s requested by the Planning Committee on 11 March [2021], [Auckland Council] and Auckland Transport staff are jointly developing a Transport Emissions Reduction Plan for Auckland that will identify the pathways to support the required emissions reductions reflected in Te Tāruke-ā-Tāwhiri”. The resolution went on to note that the TERP included (among other things) “investigating the mix of future complementary transport investments that support emissions reduction”, and “investigating road space reallocation”.

Inconsistent decisions

7.14 All Aboard submits that the Planning Committee Decision did not comply with s 80 of the LGA.

7.15 As RLTP 2021 itself recorded, it was not expected to make any material reductions to transport emissions by 2031. Te Tāruke-ā-Tāwhiri, on the other hand, required emissions to be reduced by 50% by 2030, with a modelled 64% reduction in the transport emissions. Auckland Council had also declared a climate emergency.

7.16 There was a manifest inconsistency between RLTP 2021 on the one hand, and Te Tāruke-ā-Tāwhiri and the declaration of a climate emergency on the other. There was also manifest inconsistency between the anticipated consequences of the respective plans.

7.17 Auckland Council has failed to file affidavits from any of the members of the Planning Committee. It is evident from the minutes of the meeting of 24 June 2021, however, as well as the minutes of the earlier meeting of 11 March 2021,²³⁴ and other documents and correspondence that are in evidence,²³⁵ that:

²³³ Exhibit MT1-1111 [[310.4510]].

²³⁴ See [5.29(d)] above and exhibit MT1-1462 [[305.2073]].

²³⁵ See [5.29] above.

- (a) The Planning Committee was seriously concerned about the failure of RLTP 2021 to reduce emissions;
- (b) It recognised the inconsistency between RLTP 2021 and Te Tāruke-ā-Tāwhiri (and their respective anticipated consequences); and
- (c) It recognised that changes were therefore required to the “mix of transport investment” in RLTP 2021.

7.18 Despite that, the Planning Committee failed, as required by s 80, to identify clearly the reasons for the inconsistency, and any intention of Auckland Council to amend Te Tāruke-ā-Tāwhiri, or Auckland Council’s declaration of a climate emergency, to accommodate the Planning Committee Decision.

Failure to identify alternative options

7.19 All Aboard also submits that the Planning Committee Decision also failed to comply with s 77 of the LGA, because the Planning Committee failed to seek to identify all reasonably practicable options for the achievement of the objective of the Planning Committee Decision.

7.20 The Planning Committee Decision Document presented the Planning Committee with a binary choice between approving RLTP 2021 (as prepared by Auckland Transport) and the existing RLTP 2018 remaining in effect (with the alleged consequent impacts on Auckland Transport’s activities and access to funds).

7.21 The Planning Committee failed to identify and consider the option of declining to endorse RLTP 2021 and requiring Auckland Transport to make changes to it (for instance, to provide further reallocation of road space, or to make changes to the mix of transport investments, in order to support emissions reductions).

Failure to have regard to principles in s 14 of LGA

7.22 All Aboard also says that, in endorsing a transport investment plan that will make no material reduction to emissions over the next decade, the Planning Committee cannot have had any or proper regard to the interests of future as well as current communities (s 14(1)(c)(ii)); the social, economic, and cultural wellbeing of people and communities (s 14(1)(h)(i)); the need to maintain and enhance the quality of the environment (s 14(1)(h)(ii)); and the reasonably foreseeable needs of future generations (s 14(1)(h)(iii)). All Aboard repeats the submissions at [6.73]-[6.75] above.

8. **THIRD CAUSE OF ACTION – BOARD DECISION**

Board meeting of 28 June 2021

- 8.1 The Board Decision was made at the Board meeting of 28 June 2021. Ahead of the meeting Auckland Transport prepared a decision document for the Board (**Board Decision Document**).²³⁶
- 8.2 Among other things, the Board Decision Document:
- (a) Recommended that the Board approve RLTP 2021;
 - (b) Attached RLTP 2021;
 - (c) Attached the Section 14 Analysis; and
 - (d) Asserted that RLTP 2021 was consistent with the purpose of Auckland Transport under s 39 of the LGACA in contributing to an effective, efficient and safe Auckland land transport system in the public interest.

Board Decision contrary to Auckland Transport’s statutory purpose

- 8.3 All Aboard submits that the Board Decision was contrary to Auckland Transport’s statutory purpose under s 39 of the LGACA.
- 8.4 Auckland Transport’s statutory purpose is the same as the purpose of the LTMA. All Aboard accordingly repeats the submissions at [6.73]-[6.75] above.

9. **RELIEF**

- 9.1 All Aboard seeks the following relief:
- (a) A declaration that the RTC acted unlawfully in making the RTC Decision;
 - (b) A declaration that Auckland Council (or alternatively the Planning Committee) acted unlawfully in making the Planning Committee Decision;
 - (c) A declaration that Auckland Transport (or alternatively the Board) acted unlawfully in making the Board Decision;
 - (d) Orders setting aside each of the RTC Decision, the Planning Committee Decision and the Board Decision;

²³⁶ Exhibit JC1-1092 [[311.4613]].

- (e) Orders that Auckland Transport and the RTC prepare, submit and approve a new regional land transport plan for Auckland, in accordance with ss 13(2)(a), 14 and 13(2)(b) of the LTMA; and
 - (f) Such other relief as the Court thinks fit.
- 9.2 Relief in applications for judicial review is discretionary, but the default position is that once the Court is satisfied a decision was affected by a material error, relief should be granted unless there are extremely strong reasons not to do so.²³⁷
- 9.3 In *Just One Life Ltd v Queenstown Lakes District Council*, the Court of Appeal said: "...a discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision. If some form of relief could have a practical value then it ought to be granted."²³⁸
- 9.4 In *Air Nelson Ltd v Minister of Transport*, the Court of Appeal addressed the approach to relief as follows:²³⁹
- Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
- Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkley v Secretary of State for the Environment*, Lord Bingham described the relief discretion as being "very narrow", whereas Lord Hoffman said the cases in which relief would be declined were "exceptional".
- In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief.
- 9.5 The Court of Appeal endorsed that approach in *Vipassana Foundation Charitable Trust Board v Auckland Council*.²⁴⁰
- 9.6 The respondents' evidence does not identify any reasons why the relief sought should not be granted. There is no reason why Auckland Transport and the RTC cannot prepare, submit and approve a new RLTP in compliance with their legal obligations under the LTMA. There is no issue of prejudice to third parties.
- 9.7 It is submitted that the gravity of the respondents' errors, the importance of sound decision-making by public authorities, and the urgent need to cut Tāmaki Makaurau Auckland's transport emissions, all require the granting of the relief sought.

²³⁷ *Air Nelson Ltd v Minister of Transport*, above n 160, at [60].

²³⁸ *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39].

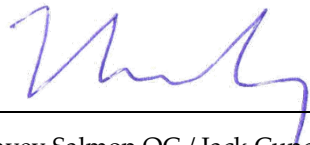
²³⁹ *Air Nelson Ltd v Minister of Transport*, above n 160, at [59]-[61].

²⁴⁰ *Vipassana Foundation Charitable Trust Board v Auckland Council* [2019] NZCA 100, [2019], NZRMA 380 at [94].

10. **COSTS**

10.1 All Aboard wishes to be heard on the question of costs.

Date: 30 March 2022



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