

Climate Change Response (Zero Carbon) Amendment Bill

Submissions by ADLS

1.0 Introduction

The ADLS Environment & Resource Management Law Committee ("Committee") welcomes the opportunity to submit on the Climate Change Response (Zero Carbon) Amendment Bill ("Bill").

The Committee would like the opportunity to make oral submissions.

2.0 Resource Management Act 1991

The Committee is concerned that the Resource Management Act 1991 ("RMA") does not have a greater role in the Bill. The Committee accepts that the role of the RMA in climate change mitigation has become one of not directly regulating greenhouse gas polluters, but mainly promoting renewable energy generation.¹ Nonetheless, our feedback is that the RMA deserves a greater focus in how it might be used or 'better used' to shift New Zealand to a low-emissions economy, especially in terms of its role in land use decisions. The RMA is also the key local and regional mechanism for ensuring Māori interests are explicitly recognised in land use decisions.

3.0 Cities and local government

Cities and local government are increasingly taking the lead in implementing climate change initiatives. The Committee supports local government having a stronger role in addressing climate change mitigation and adaptation. This is consistent with the Committee's view that the RMA should have a role under the Bill given that the RMA is principally effected by local government.

A greater role for local government would mean a more coordinated approach under the RMA, which regulates activities causing emissions. All sectors produce greenhouse gases and the key to effectively mitigating emissions and adapting to the effect of climate change will be cross-sector action. The RMA, through the decisions of local government, cuts across

¹ Amendments in 2004 (see sections 70A, 70B, 104E, 104F) redirected the role of the RMA in climate change away from a direct role in 'climate mitigation'. Section 7 was amended to ensure that all decision-makers have particular regard to "the efficiency of the end use of energy", "the effects of climate change" and "the benefits to be derived from the use and development of renewable energy". See also: *Greenpeace New Zealand Inc v Genesis Power Ltd* [2009] 1 NZLR 730; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133; and, Annie Cao, Climate Change Considerations in Energy Decision-Making: A Comparative Analysis, *New Zealand Journal of Environmental Law*, (2014) 18 NZJEL 111.

these sectors by controlling land use. These decisions become most relevant in cities (and in particular Auckland, New Zealand's largest city) where a low emissions economy can only be achieved through interconnected and integrated land use decisions that have climate change mitigation as their focus and priority. Resource management decisions are primarily made regionally or locally, and the RMA and local government are critical to achieving that. The Bill must recognise that.

A cross-sector approach will require amendments to other relevant legislation.²

4.0 Inclusion of Te Ao Māori

The Committee recommends stronger inclusion of Te Ao Māori in the Bill. This includes appropriate representation at governance and executive levels. It also includes greater incorporation and use of mātauranga Māori within the Climate Change Commission. The Committee supports the greater role of partnerships with tangata whenua, iwi and hapū.

5.0 Specific comments

5.1 The 2050 target and the emissions budget - permissive considerations

Making the 2050 target and the emissions budget permissive considerations for public authorities making decisions is confusing and will lead to inconsistency and uncertainty. Proposed section 5ZK of the Bill states that the 2050 target and the relevant emissions budget are permissive considerations for decision makers exercising public functions. Proposed section 5ZL states that guidance on this will be issued for government departments. However, once proposed section 5ZK is enacted, it will introduce uncertainty for decision makers exercising public functions, given the lack of guidance provided as to how and when this is to be done. That uncertainty will in turn likely lead to inconsistent decision making.

The Committee supports the role of local government in combating climate change, but with greater guidance than currently offered by proposed section 5ZK. The Committee does not find comfort in proposed section 5ZL (the Minister may issue guidance to departments as to how the 2050 target and emissions budget should be taken into account) as this may not be issued in a timely manner and may not 'cover the field' of decision-makers undertaking a public function. Uncertainty will be particularly concerning for decision-makers under the RMA in light of existing provisions that require consent authorities to disregard the adverse effects of an activity on climate change (RMA, sections 70A and 104E).

Inconsistencies between the Bill and existing legislation must be addressed if the intention of proposed section 5ZK is to introduce climate change as a consideration for public decision-makers.³

In addition, proposed subsection 5ZK(2) is inconsistent with the New Zealand Government's obligation under article 4(1)(f) of the United Nations Framework Convention on Climate Change. Article 4(1)(f) provides that climate change considerations be taken into account by Governments, to the extent feasible, in their social, economic and environmental policies and actions.

² For example, section 10 of the Local Government Act 2002 could include addressing climate change as a purpose of local government.

³ Relevant legislation includes: Building Act 2004; Local Government Act 2002; and, Resource Management Act 1991.

5.2 The Commission and the Minister should take a precautionary approach to issuing advice and making decisions under the Bill

In performing their duties under the Bill, the Minister and the Climate Change Commission (“Commission”) must consider various sets of factors. For example, under proposed section 5L, when performing its function and duties under the Bill, the Commission must consider: currently available scientific knowledge and technology; economic, social, cultural, environmental, economic and ecological circumstances; intergenerational effects; and steps being taken by other Paris Agreement signatories. The precautionary principle has an important role in modern decision making where the effects of activities are uncertain. The Committee considers that the Minister and the Commission should be required to consider the precautionary principle when performing their functions and duties under the Bill. This approach would better ensure that a lack of full scientific certainty does not dissuade the Minister from setting budgets and making plans to address threats and risks.

5.3 The independence of the Commission should be explicitly secured in the Bill

The Committee supports the legislative creation of the Commission. The Commission’s advisory functions, including its annual report on the adequacy of implementation of the emissions reduction plans, will hopefully prevent the Government from overshooting towards the 2050 target. The Commission’s reports will also provide an important degree of public assurance that the Government is making progress towards the 2050 target and emissions budgets. The Committee supports the Commission being an Independent Crown entity under the Crown Entities Act 2004 and the freedom that this status implies.

That said, the Committee considers that the Bill should clarify the degree of control of the Minister over the Commission. The Committee holds some concerns that the Minister can direct the Commission under section 103 of the Crown Entities Act with respect to the matters in proposed section 5N(2)(a) and (b), which relate to recommending unit supply settings of the emissions trading scheme and providing advice regarding New Zealand’s nationally determined contributions under the Paris Agreement. Otherwise, the Commission appears free from Ministerial control (under section 113 of the Crown Entities Act). The Committee supports this strongly independent role. The relationship between the two Acts should be made explicit in the Bill.

5.4 Membership of the Commission

The matters that the Minister must have regard to before recommending appointment of a member to the Commission are contained in proposed section 5H. The membership of the Commission is vital to the success of the Commission. The matters outlined in proposed section 5H should be mandatory, not permissive (“Minister must have regard to”).

5.5 The recommendations of the Commission should always be taken into account by the Minister and if departed from the reasons should be given for this

There are inconsistencies in the Bill relating to how the Minister can treat advice that they receive from the Commission. In some cases, the Minister must take the Commission’s advice into account (proposed section 5ZB relating to CCC recommendations on future emissions budgets or revised emissions budgets). However, in other cases, the Minister is under different obligations in respect of the Commission’s advice (proposed section 5ZC - ‘have regard to’, 5ZF - ‘consider’, 5X - no duty at all). The Committee’s view is that the Commission’s advice should always be “taken into account” by the Minister and if departed from then reasons for the departure should be provided (as set out in proposed section 5Y relating to the setting of emissions budgets). This will ensure that the Minister remains

publicly accountable in respect of the Commission's advice, and the Commission can continue to be effective across different governments, which is one of its stated purposes.

5.6 The role of international emissions, banking and borrowing need clarification

The wording around meeting emissions budgets through domestic mechanisms and offshore mitigation is unclear. Proposed section 5W(1) states that emissions budgets must be met *as far as possible* through domestic emissions reduction and domestic removals. Proposed section 5W(2) then sets criteria as to how an emissions budget will *realistically* be met. The different standards of 'as far as possible' and 'realistic' are inconsistent and exactly when New Zealand can apply international mitigation measures to meet an emissions budget is unclear.

The Bill should also consider defining what 'as far as possible' means. A similar approach has been taken in section 22 of the Health and Safety at Work Act 2015 in defining what is meant by 'as far as reasonably practicable'. The question of the relationship between 'banking and borrowing' against future emissions budgets and the use of international mitigation measures is raised in proposed section 5ZI but not answered. The ability to "bank" and "borrow" between emissions budget periods could be prescribed in greater detail in the Bill. As currently drafted, proposed section 5ZC permits an excess reduction of emissions to be "banked" and carried forward to the next budget period, with no limit on the ability to bank other than a requirement for the Minister to obtain advice from the Commission. The Committee suggests that there might be a percentage limit on the ability to bank an excess reduction of emissions, so that the clarity of subsequent budgets is not obscured by the possibility of banking.

5.7 Ensuring New Zealand's 2050 target is correct

The Bill's target is to reduce biogenic emissions to 90% of 2017 levels by 2030 and 53-76% of 2017 levels by 2050. This is inconsistent with the IPCC's target. First, the IPCC's target is calculated based on 2010 emissions. Second, the IPCC's interim target for methane emissions reduction is 11%-30% (not 10% as contained in the Bill) by 2030. It is therefore not clear whether the target in the Bill will comply with the emissions target set by the IPCC in the Paris Agreement. This needs to be clarified and expressly stated.

5.8 Consistent adaptation and mitigation assessments

The timing of climate change risk assessments and adaptation plans is on a six-year cycle. By contrast, the mitigation reporting is on a five-year cycle. While there is only a one-year offset during the first round of work, over time this will increase by one year each year. The Committee is concerned that, over time, this will lead to misalignment between risk assessment and adaptation and mitigation work streams. The Committee considers there would be benefit in adaptation and mitigation measures occurring together and supports a change in the timing of either process to facilitate this.

5.9 Clarity around costs

The Bill provides for the Court to grant a declaration for the Government's failure to meet the 2050 target or an emissions budget. A declaration may be accompanied by an award of costs.

On a fundamental level, the Committee considers that the judicial remedies should not be stipulated (and therefore limited) in the Bill. The Committee considers judicial remedies should be allowed to develop organically. This will allow the Courts to address each case in a more bespoke and equitable manner.

If the Government is not minded to remove proposed section 5ZJ in its entirety, then the scope of the costs award should be clarified. It is unclear what costs are to be awarded (for example, legal costs). It is also unclear whether the costs award is intended to function as a deterrent – if this is the case, then framing such an award as ‘costs’ would be inappropriate from a legal perspective because generally, costs awards do not have a punitive function.

Thank you for the opportunity to make our submission. ADLS would like the opportunity to make oral submissions to the Select Committee. The ADLS Environment & Resource Management Law Committee acknowledges the contributions to this submission by the following members of the ADLS Environment & Resource Management Law Committee:

- Patrick Senior
- Grant Hewison

If you have any questions or queries please contact the Professional Services Manager, Melissa Fini, by email: melissa.fini@adls.org.nz or DDI: 09 306 5744.

Yours faithfully,



Helen Andrews
Convenor
ADLS Environment & Resource Management Law Committee

