



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Climate Change Response (Zero Carbon) Amendment Bill

16/07/2019

Submission on Climate Change Response (Zero Carbon) Amendment Bill

Introduction

- 1 The New Zealand Law Society welcomes the opportunity to comment on the Climate Change Response (Zero Carbon) Amendment Bill (the Bill).
- 2 This submission comments on drafting and technical matters, with the aim of improving the clarity, certainty and practical workability of the Bill.
- 3 The Law Society does not seek to be heard but is available to assist officials on drafting and technical issues if that would be helpful to the select committee.

Clause 4 - Purpose

- 4 This clause inserts a new, additional purpose into the Climate Response Act 2002 (the Act).
- 5 The purposes in the Act at present are, in summary:
 - 5.1 to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change 1992 and the Kyoto Protocol 1997;
 - 5.2 to provide for the implementation, operation and administration of the greenhouse gas emission trading scheme; and
 - 5.3 to provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce emissions of synthetic greenhouse gases.
- 6 This Bill is to provide a framework to implement in New Zealand the Paris Agreement 2015 to limit the global average temperature increase to 1.5°C above pre-industrial levels.
- 7 While the Bill does not propose to repeal in any substantive way provisions of the Act, the 2050 target and the accompanying implementation provisions appear to sit above, rather than alongside, the provisions of the current Act.
- 8 It seems that the new purpose should be accorded priority over the existing statements of purpose in section 3(1)(a), (b) and (c) of the Act. The existing purposes seem to be some of the ways of achieving the 2050 target.

Recommendation

- 9 Consider according priority to the purpose of the Bill in section 3 of the Act.

Clause 6 - Definitions

New Zealand Greenhouse Gas Inventory

- 10 This phrase is defined to mean the official annual estimate of all greenhouse gas emissions that have been generated in New Zealand since 1990 by human activities.
- 11 However, when, how and by whom the calculation is to be made and whether, when, how and by whom it is to be reviewed are not specified.
- 12 As the inventory has an important role throughout the Bill, the when, how and who should be specified.

Recommendation

- 13 Add provisions specifying when, how, and by whom the inventory is to be calculated and reviewed.

Paris Agreement

- 14 This is defined as the agreement adopted in Paris on 12 December 2015 and includes any amendments that are or will become binding on New Zealand from time to time.
- 15 The current Act annexes in schedules the United Nations Framework Convention on Climate Change and the Kyoto Protocol to that Convention.
- 16 Consistency suggests the Paris Agreement should also be annexed in the Act.

Recommendation

- 17 Consider the desirability of scheduling the Paris Agreement.

Clause 8 - Climate Change Commission

Section 5E Process of appointment of members of the Commission

- 18 The Minister is required to consult representatives of all political parties in Parliament. It would seem more appropriate for the Minister to consult the leaders of all the political parties represented in Parliament.

Recommendation

- 19 That the words "*the leaders*" be substituted for "*representatives*".

Section 5G – Role of nominating committee

- 20 Proposed subsection (2) could be better expressed. The nominating committee must consult "*any ... group who may have an interest in being a member of the Commission*". A group cannot be a member.

Recommendation

- 21 Amend to "*a group which has an interest in membership of the Commission*".

Clause 8 - Part 1B, Subparts 2 and 3: Setting emissions budgets, and Role of Commission in setting emissions budgets

- 22 The flow of these two subparts is not entirely logical. These provisions may be easier to understand and follow if reordered.
- 23 In particular, the two subparts contain functions for both the Minister and the Commission. To that extent, the heading of subpart 3 does not accurately reflect the content of that subpart.
- 24 It is suggested that a better sequence may be:
- 24.1 to identify the purpose, contents and timing of emission budgets, in that order;
 - 24.2 then state the role of the Commission; and
 - 24.3 finally, set out the functions and responsibilities of the Minister.
- 25 Likewise, the Society considers emissions reduction plans warrant a separate subpart. The provisions should be ordered sequentially.

Recommendation

- 26 Reorder the provisions of subparts 2 and 3 into a more logical sequence.

Subpart 5: Effect of 2050 target and emissions budgets

Proposed section 5ZJ

- 27 Proposed section 5ZJ enables “a court” to make a declaration “if the 2050 target or an emissions budget is not met”.
- 28 The purpose of this provision seems to be to emphasise the accountability of the government for making emissions budgets work and achieving the 2050 target.
- 29 However, it is not stated which Court has jurisdiction. This should be clarified. There is an argument that the Environment Court, because of its specialist nature, is well equipped to determine such matters. On the other hand, the significance of the issues may justify the High Court having jurisdiction.

Recommendations

- 30 That proposed section 5ZJ be amended to identify the Court which has jurisdiction.

Parties

- 31 It is noted that no procedural matters are set out in the proposed section 5ZJ. Presumably any person can apply for a declaration, and the Crown is the defendant.

Recommendation

- 32 Clarify who are the parties to any proceedings.

Costs

- 33 The provision for “an award of costs” in proposed section 5ZJ(2) is unclear. It is presumed to mean that a successful applicant for a declaration will be entitled to costs, and that the award will be in accordance with the rules of the Court having jurisdiction.
- 34 The Bill is silent as to whether all unsuccessful applicants are to be exposed to costs.

Recommendation

- 35 Clarify that if successful, the applicant is entitled to seek costs in accordance with the rules of the Court having jurisdiction.
- 36 Clarify whether, if unsuccessful, the applicant may be liable for costs in accordance with the appropriate rules of Court.

Effect of 2050 target and emissions budget

- 37 Under proposed sections 5ZK and 5ZL, neither the target nor any emissions budgets impose any duties on any person.
- 38 That leaves open the question of how budgets and targets will be met. On the face of it implementation is left to voluntary means adapted by the government and others.
- 39 The Bill is also silent on the interface between the Bill, if enacted, and other legislation which relates to the effects of human activities on climate change and the effects of climate change on people and the environment.
- 40 In addition, neither the targets, emissions budgets nor emissions reduction plans have regulatory force and effect. As a result, it is unclear how the stepping stones and targets contained in the Bill will be achieved.
- 41 There appear to be potential gaps in the statutory framework proposed by the Bill as a result.

Recommendation

42 Consider whether apparent gaps in the statutory framework should be addressed and, if so, how.

Part 1C: Adaptation

Proposed section 5ZM

43 Proposed section 5ZM requires a national climate change risk assessment. In the list of matters considered, Māori, iwi and their values are not included. This appears to be an omission, when compared, for example, to proposed section 5ZQ(4)(a).

44 The assessment does not include any provisions for the Commission to make recommendations. This too appears to be an omission.

Recommendation

45 Consider whether section 5ZM should include reference to Māori and iwi (to correspond to the approach taken in proposed section 5ZQ(4)(a)).

46 Consider whether the national climate risk assessment should include recommendations by the Commission.

Proposed section 5ZN

47 The same comment applies to proposed section 5ZN, which does not currently include Māori and iwi in the list of matters to be considered.

Recommendation

48 Consider whether section 5ZN(2)(a) should include reference to Māori and iwi.

49 While there is provision for national climate risk assessment and then a National Adaptation Plan, there is no provision for any regulatory methods to implement the National Adaptation Plan. The plan itself would seem to have no legal force and effect.

Recommendation

50 Consider whether the provisions for implementation of a national adaptation plan are adequate.

Miscellaneous: Timeframes

51 The timeframes in the Bill are not expressed consistently. Sometimes action must be taken within specified periods of weeks and in other cases it is within a specified period of months. Consistent terminology is desirable.

Recommendation

52 That timeframes should be expressed consistently throughout the Bill (and it is suggested the timeframes should be expressed in terms of weeks rather than months).

Miscellaneous: Drafting

53 The clarity and precision of language used in the Bill is of critical importance.

54 In particular, when reviewing the Bill the committee should ensure there is no confusion between the effects on climate change (that is the emissions which cause climate change) and the effects of climate change (the outcomes of climate change).

55 The importance of the distinction has been highlighted in litigation under the RMA¹, where the words “*the effects of climate change*” in section 7(i) have been held not to comprehend the matters which cause climate change; “*the effects of climate change*” has been confined to the consequences of climate change. Emissions have an effect on climate change while adaptation is a response to the effects of climate change.

56 There is an example of the distinction between the causes and consequences of climate change being lost, in proposed section 5B. The purposes of the Commission include providing advice “*on mitigating the effects of climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change*”. This problem could be resolved by simply replacing the first “of” with an “on”. An alternative would be to omit the words “*mitigating the effects of climate change (including through ...)*”. The phrase “*effects of climate change*” in section 5B(a) covers both causes and consequences. It is better to keep them distinct. “*Consequences*” might replace “*effects*”.

57 Section 5B(a) would then read as either:

“to provide independent, expert advice to the Government on mitigating the effects on climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change”

or

“to provide independent, expert advice to the Government on reducing emissions of greenhouse gases and adapting to the consequences of climate change”.

58 In the balance of the Bill, the Commission does not have a wider role in limiting climate change. Its functions in that respect relate solely to achieving emission reductions.

Recommendation

59 That the Bill is carefully reviewed to ensure a clear distinction is maintained between addressing the causes of climate change and managing the consequences of climate change.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal line extending to the right.

Andrew Logan
Vice President

16 July 2019

¹ E.g. *Genesis Power Ltd v Greenpeace New Zealand Inc* [2009] 1 NZLR 730 (SC) and *West Coast ENT Inc v Buller Coal Ltd* [2014] 1 NZLR 32 (SC)