

# Memorandum

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To: Vector Limited

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## THE COMMISSION'S ROLE IN CLIMATE CHANGE RESPONSE

### Executive summary

- 1 In its Process and Issues Paper for resetting the default price-quality paths for gas pipeline businesses from 1 October 2022,<sup>1</sup> the Commerce Commission:
  - 1.1 acknowledged that section 5ZN of the Climate Change response Act 2022 (**CCRA**) allowed it to take into account the Government's 2050 net zero emissions target, emissions budgets and emissions reductions plans; but
  - 1.2 determined that its ability to consider those matters was "limited" given that section 52A of the Act does not reference decarbonisation or mitigating climate change as outcomes to be promoted to achieve the purpose of Part 4.<sup>2</sup>
- 2 We advised that the Commission had incorrectly interpreted the relationship between s 5ZN and s 52A and, as a result, had understated the relevance of the Government's emissions target, budgets, and reduction plans. We said that:
  - 2.1 the emissions target, budgets and reduction plans are relevant considerations when applying the s 52A purpose statement; and
  - 2.2 section 5ZN is an enabling provision that empowers the Commission to make decisions that are consistent with, or contribute to the achievement of, the emissions target, budgets and reduction plans, alongside the outcomes set out in s 52A(1)(a)-(d).

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<sup>1</sup> Commerce Commission, *Resetting default price-quality paths for gas pipeline businesses from 1 October 2022: Process and Issues paper* (4 August 2021).

<sup>2</sup> Ibid at paragraphs 2.12 to 2.16.



- 3 The Commission in its final decision on the Gas DPP3 reset agreed with the first of those propositions but rejected the latter.<sup>3</sup>
- 4 The Commission has now explained further in its Framework Paper for the 2023 IM Review the extent to which it may take into account the considerations under s 5ZN. In summary, the Commission's view is that:<sup>4</sup>
  - 4.1 the considerations in s 5ZN are permissive rather than mandatory;
  - 4.2 the Commission may take account of the permissive considerations in s 5ZN only where doing so is consistent with promoting the s 52A purpose of Part 4;
  - 4.3 taking account of the s 5ZN considerations within the above constraints is a matter for the Commission's expert judgement in the context of a particular decision, based on the available evidence;
  - 4.4 the Government's emissions target, budgets and reduction plans are part of the factual matrix and may be a relevant consideration when applying the s 52A purpose; but
  - 4.5 the section 5ZN considerations are not of equal weight to the outcomes under s 52A(1)(a)-(d), which are mandatory considerations.
- 5 You have asked us to revisit our earlier advice in light of the Commission's latest commentary.
- 6 The Commission's analysis of the relationship between s 5ZN and s 52A has advanced since its initial indication in the Gas DPP3 Process and Issues Paper that its ability to consider climate change responses was "limited" because the 52A outcomes did not include decarbonisation. The Commission is now explicitly proposing to take into account the s 5ZN considerations "where relevant and consistent with promoting the section 52A purpose of Part 4".<sup>5</sup>
- 7 However, the Commission's approach appears to subordinate the s 5ZN considerations in a way that is inconsistent with Parliament's intent and the plain meaning of s 5ZN. In our view:
  - 7.1 Although the s 5ZN considerations are permissive rather than mandatory, if the Commission determines not to take them into account in circumstances where they are relevant, it should have a rational basis for doing so. In certain circumstances the s 5ZN considerations will be so obviously relevant to a decision that it would be untenable for the Commission not to take them into account.

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<sup>3</sup> Commerce Commission, *Default price-quality paths for gas pipeline businesses from 1 October 2022: Final Reasons Paper* (31 May 2022) at paragraphs 2.27 to 2.28.

<sup>4</sup> Commerce Commission, *Part 4 Input Methodologies Review 2023: Framework Paper* (13 October 2022) at paragraphs 2.31 to 2.43.

<sup>5</sup> *Ibid* at paragraph 3.16.2.



- 7.2 Within the range of options consistent with s 52A, the Commission may *in addition* take into account the s 52N considerations in making its decision, even if taking into account those considerations would not itself promote the 52A purpose. In other words, the s 52N considerations are applied *alongside* the 52A purpose, rather than applied only to the extent they *promote* the 52A purpose.
- 7.3 The emissions target, emissions budgets and emissions reductions plans are part of the factual matrix when the Commission is exercising its functions, and may therefore be relevant considerations under s 52A. But the Commission may also take account of the s 52N considerations in addition to any considerations that would ordinarily be relevant under the s 52A purpose statement, provided taking into account those considerations would not be inconsistent with the s 52A purpose.
- 7.4 The Commission's discussion suggests that, even when it takes the s 52N considerations into account, they will be afforded lesser weight in its analysis. While the permissive framing of the s 52N considerations means the Commission need not always take them into account, it does not follow that, where the Commission does take them into account, they are invariably of lesser weight than the mandatory considerations in s 52A.
- 7.5 While the Commission is required to make decisions that produce the outcomes in paragraphs (a) to (d) of s 52A, it does not follow that paragraphs (a) to (d) are exhaustive of the outcomes that would be observed in a workably competitive market. In conditions of workable competition, suppliers would be expected to take actions in response to the Government's emissions target, budgets and reduction plans. We therefore see no interpretive difficulty in placing the s 52N considerations alongside the outcomes in paragraphs (a) to (d) of s 52A.
- 7.6 Alternatively, climate change responses are within the scope of s 52A because consumers demand that suppliers take action to prevent, mitigate or adapt to climate change and this is therefore increasingly part of the "quality" of the service they demand.
- 8 In the balance of this note we address the key points in the Commission's analysis of the relationship between s 52N and s 52A.
- 9 At your suggestion, we have discussed this advice with Stephen Hunter KC, who has confirmed he agrees with our analysis and conclusions.

### **Background**

- 10 Climate change is an existential threat.
- 11 Parliament has committed to meeting this threat through the emissions reduction framework of the CCRA. The purpose of the CCRA includes: (i) to provide a framework for the development and implementation of climate change policies that contribute to the global effort under the Paris Agreement to limit global average temperature rise to 1.5° Celsius, and to prepare for and adapt to the effects of



climate change; and (ii) to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change (**Convention**), the Kyoto Protocol and the Paris Agreement.<sup>6</sup>

- 12 Central to the achievement of the Act's purpose is the 2050 target, which requires that net accounting emissions of greenhouse gases (other than biogenic methane) are zero by 1 January 2050.<sup>7</sup> Amongst other matters, the Act provides for:
- 12.1 the Minister to set a series of emissions budgets with a view to meeting the 2050 target;<sup>8</sup> and
- 12.2 emissions reductions plans setting out the policies and strategies for meeting the relevant emissions budget.<sup>9</sup>
- 13 Section 5ZN provides a person or body may, in exercising or performing a public function, power or duty conferred by or under law, take into account the 2050 target, an emissions budget, or an emissions reduction plan. The explanatory note to the amending bill introducing s 5ZN states that the purpose of s 5ZN is to allow those considerations to "influence broader Government decision making where they are relevant".<sup>10</sup>
- 14 The 2050 target, and the framework for establishing budgets and reduction plans to meet that target, reflects Parliament's commitment to meeting the challenge of climate change. On 2 December 2020, the House passed a motion declaring a climate emergency. Speaking to the motion, the Prime Minister emphasised the need for an all of government response, saying: <sup>11</sup>

*It's a declaration that now serves as a directive to all aspects of the public service around the urgency that we as a Government require and the urgency that we require around action. It acts as a catalyst for change.*

- 15 The first emissions reduction plan outlines the importance of electrification to reducing emissions.<sup>12</sup> As one of the two primary regulators of the electricity sector, the Commerce Commission has a critical role in facilitating that change. Section 5ZN is the mechanism that enables the Commission to do so. It should be taken seriously.

**The considerations in s 5ZN are permissive rather than mandatory**

- 16 We agree that the considerations in s 5ZN are permissive rather than mandatory. Section 5ZN allows the Commission to take into account the 5ZN considerations "if it

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<sup>6</sup> Section 4.

<sup>7</sup> Section 5Q.

<sup>8</sup> Section 5W.

<sup>9</sup> Section 5ZG.

<sup>10</sup> Climate Change Response (Zero Carbon) Amendment Bill (136-1) (explanatory note) at 11.

<sup>11</sup> (2 December 2020) 749 NZPD 239.

<sup>12</sup> *Te hau mārohi ki anamata: Towards a productive, sustainable and inclusive economy* (May 2022), at page 214.



thinks fit". The permissive character of the s 5ZN considerations was affirmed in *Students for Climate Solutions Incorporated v Minister of Energy and Resources*.<sup>13</sup>

17 As the Commission noted in its Framework Paper, the Departmental Report prepared at the Committee Stage of the Bill suggests that Parliament deliberately decided to make climate change a permitted but not a mandatory consideration.<sup>14</sup> However, it is equally clear that Parliament intended that agencies such as the Commission would give due consideration to the application of s 5ZN. While the s 5ZN considerations are permissive, that is not the same as saying they are optional. For example, the Departmental Report also noted that:

17.1 the drafting of s 5ZN ensured there are "no limitations" on the ability of the emissions budgets and targets to be considered across broader Government decision-making; and<sup>15</sup>

17.2 section 5ZN was intended to "provide confidence to decision-makers that the 2050 target and an emissions budget can be properly considered alongside the requirements of their own statutes".<sup>16</sup>

18 The reason not to establish the s 5ZN considerations as mandatory considerations was that, in some circumstances, the target or budgets would not be relevant to the decision at issue, or would be inconsistent with the specific statutory requirements that applied to the decision.<sup>17</sup> However, the Departmental Report equally advised against removing s 5ZN altogether because "if the targets and budgets are not expressly established as permissive considerations, decision makers could avoid considering them if there is a risk that their decisions could be challenged on the basis that the target or budgets are not relevant considerations".<sup>18</sup>

19 That indicates that Parliament intended to empower decision-makers to take the s 5ZN considerations into account in circumstances where: (i) the s 5ZN considerations are relevant to the matter at hand, and (ii) taking account of those considerations would not be inconsistent with the relevant statutory requirements for the decision.

20 There are other indications in the legislative history that support the view that, while the s 5ZN considerations are permissive rather than mandatory, Parliament expected that decision-makers would have due regard to the s 5ZN considerations where they are relevant. For example:

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<sup>13</sup> [2022] NZHC 2116 at [77].

<sup>14</sup> Ministry for the Environment, *Departmental Report on the Climate Change (Zero Carbon) Amendment Bill 2019* (September 2019) at page 109.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid at page 110.

<sup>18</sup> Ibid.



- 20.1 the explanatory note to the Bill stated that the purpose of s 5ZN is to allow those considerations to “influence broader Government decision making where they are relevant”; and<sup>19</sup>
- 20.2 the Select Committee, on advice from the Ministry for the Environment, removed a provision that would have expressly provided that a *failure* to take into account the s 5ZN considerations would not invalidate anything done by that person. Parliament therefore deliberately chose *not* to insulate decision-makers from challenge in circumstances where they decline to take into account the s 5ZN considerations.
- 21 In light of that intent, the Commission would err if it simply disregarded s 5ZN on the basis that it is permissive rather than mandatory.<sup>20</sup> That would not achieve Parliament’s intent. Rather, the Commission, when making a decision, should consider whether the s 5ZN considerations are relevant to that decision. If the Commission determines not to take into account the s 5ZN considerations it should have a rational basis for doing so. In certain circumstances the s 5ZN considerations will be so obviously relevant to a decision that it would be untenable for the Commission not to take them into account.
- 22 An interpretation that gives proper weight to s 5ZN and the need for climate change response is also consistent with New Zealand’s international obligations and should therefore be preferred. As the Court observed in *Thomson v Minister for Climate Change Issues*,<sup>21</sup> a statutory discretionary power is to be interpreted consistently with New Zealand’s international obligations where that interpretation is available.<sup>22</sup> The Court held that the CCRA should be interpreted consistently with New Zealand’s obligations under the Convention and the Paris Agreement. Section 5ZN is intended to facilitate the all of government response required to meet New Zealand’s obligations. It should therefore be applied in a manner consistent with achieving that intent.
- 23 Finally, where the Commission determines that climate change response is relevant to the decision at hand, the factors it must then take into account are those set out in s 5ZN. In other words, s 5ZN requires that the Commission, when it is considering climate change response in the context of its functions, take account of the Government’s emissions target, budgets and emissions reductions plans. The Commission would err if it determined that climate change response is a relevant consideration in a matter before it, but then failed to have regard to those factors to which Parliament has directed its attention in s 5ZN.

**The Commission may take account of the s 5ZN considerations only where doing so is consistent with promoting the s 52A purpose of Part 4**

- 24 In its Framework Paper, the Commission has said that it may only take into account the s 5ZN considerations “where doing so is consistent with promoting the section

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<sup>19</sup> Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 11.

<sup>20</sup> To be clear, we don’t read the Framework Paper as expressing a view that the Commission can simply disregard s 5ZN. The Commission has indicated it will consider the application of s 5ZN.

<sup>21</sup> [2017] NZHC 733.

<sup>22</sup> At [88].



52A purpose of Part 4". The Commission has not elaborated on what it means by "consistent with promoting the section 52A purpose". The Commission could be interpreted as saying:

24.1 it may take into account the s 5ZN considerations where they are *not inconsistent* with the 52A purpose, even if taking into account those considerations would not itself promote the 52A purpose; or

24.2 it may take into account the s 5ZN considerations *only* where to do so would *promote* the 52A purpose.

25 In our view, the former is an appropriate interpretation of the intent of s 5ZN, whereas the latter is not. In the exercise of its functions under Part 4, there will typically be a range of decisions open to the Commission that would promote the s 52A purpose. Within the range of options consistent with s 52A, the Commission may *in addition* take into account the s 5ZN considerations in making its decision. But taking into account the s 5ZN considerations need not, of itself, further the s 52A purpose. It is sufficient that taking into account the s 5ZN considerations would not detract from the s 52A purpose.<sup>23</sup> The Departmental Report referred to by the Commission in its Framework paper confirms that the intent was that decision-makers would consider the s 5ZN considerations "alongside" the requirements of their own statutes.<sup>24</sup>

26 Section 5ZN was expressly intended to expand the range of considerations a decision-maker could have regard to when making its decisions. An interpretation that renders s 5ZN applicable only to the limited extent that those considerations promote the outcomes in s 52A(1)(a)-(d) would:

26.1 be contrary to the plain meaning of s 5ZN and would deprive s 5ZN of any meaningful effect; and

26.2 not achieve the legislative intent of allowing those considerations to influence broader Government decision making where they are relevant.<sup>25</sup>

27 The Commission, in its Framework Paper, refers to the Supreme Court's decision in *Unison*, in which the Court held that:<sup>26</sup>

27.1 a power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power; and

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<sup>23</sup> This approach is consistent with the Court's decision in *Students for Climate Solutions Incorporated*, supra n 13. In that case the Court held the s 5ZN considerations were impermissible considerations because they stood in direct conflict with the statutory purpose of the Crown Minerals Act, which was to promote exploitation of fossil resources.

<sup>24</sup> Departmental Report, supra n 14 at page 109.

<sup>25</sup> Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 11

<sup>26</sup> *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [53].



27.2 there will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.

28 The Commission's implication appears to be that taking into account the s 5ZN considerations would amount to pursuing a purpose other than the statutory purpose. However, the Commission is expressly empowered by the CCRA to take into account the s 5ZN considerations. As noted in the Departmental Report, s 5ZN was intended to provide confidence to decision-makers that the 2050 target and an emissions budget can be properly considered "alongside the requirements of their own statutes".<sup>27</sup> Taking into account the s 5ZN considerations therefore does not constitute pursuit of a collateral purpose in the manner cautioned against by the Court in *Unison*.

**A matter for the Commission's expert judgement in the context of a particular decision, based on the available evidence**

29 We agree.

**Emissions target, budgets and reductions plans are part of the factual matrix and may be a relevant consideration**

30 We agree that the emissions target, emissions budgets and emissions reductions plans are part of the factual matrix when the Commission is exercising its functions, and may therefore be relevant considerations. The Commission's decision in the Gas DPP3 reset is an example of this. In addition, where climate change legislation imposes obligations on regulated suppliers, the Commission should take this into account in exercising its functions.

31 However, s 5ZN's relevance is not limited to circumstances in which the emissions target, budgets or reduction plans are part of the factual matrix when the Commission is applying s 52A. If that were the case, s 5ZN would be redundant. Section 5ZN is intended to *expand* the range of considerations that the Commission is able to take into account when exercising its functions.

32 Section 5ZN additionally allows the Commission to "take into account" the emissions target, budgets or reduction plans when making its decisions. In our view, as discussed above, this means the Commission may take account of the s 5ZN considerations *in addition to* any considerations that would ordinarily be relevant under the s 52A purpose statement, provided taking into account those considerations would not be inconsistent with achieving the s 52A purpose.

**Not of equal weight to the 52A(1)(a)-(d) outcomes**

33 The Commission has said in its Framework Paper that the s 5ZN considerations are not of equal weight to the outcomes in section 52A(1)(a)-(d) because the former are permissive considerations whereas the latter are mandatory considerations.

34 The Commission has not elaborated on what it means by "not of equal weight". But in our view:

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<sup>27</sup> Departmental Report, supra n 14 at page 109.





- 34.1 the fact that the s 5ZN considerations are permissive does not mean those considerations are not of “equal weight” to the outcomes set out in paragraphs (a) to (d) of s 52A;
- 34.2 paragraphs (a)-(d) are not exhaustive of the outcomes that are produced in competitive markets. In workably competitive markets, suppliers would take into account the Government’s emissions target, emissions budgets and emissions reductions plans; and
- 34.3 even if the Commission’s view is that paragraphs (a)-(d) are exhaustive of the outcomes produced in competitive markets, actions taken by suppliers in response to the Government’s emissions target, budgets and reduction plans can properly be considered under s 52A(1)(b) because they are an aspect of the “quality” of the regulated service.

***Not of equal weight***

- 35 Section 5ZN provides that the Commission may “if it thinks fit” take into account the s 5ZN considerations. As we have discussed above, “permissive” does not mean “optional”. The Commission must have a rational basis to disregard the s 5ZN considerations in circumstances where they are relevant to the decision at hand. In certain circumstances, the s 5ZN considerations will be so obviously relevant that it will be untenable not to take them into account.
- 36 The Commission’s discussion suggests that, even when it takes the s 5ZN considerations into account, they will be afforded lesser weight in its analysis. While the permissive framing of the s 5ZN considerations means the Commission need not always take them into account, it does not follow that, where the Commission does take them into account, they are of lesser weight than the mandatory considerations in s 52A.
- 37 Mandatory considerations must be taken into account, whereas permissive considerations may properly be taken into account.<sup>28</sup> But that distinction does not go to the weight afforded to those considerations. There is no basis in the statutory scheme for the assertion that the s 5ZN considerations are invariably less weighty than the outcomes described in s 52A. If the s 5ZN considerations are relevant, and the Commission determines it is appropriate to take them into account, those considerations may be afforded the same weight as the outcomes in paragraphs (a) to (d) of s 52A. The weight afforded to the s 5ZN considerations in any given decision will be a matter for the Commission to determine.<sup>29</sup>
- 38 More generally, as the Commission has noted, the overall purpose of Part 4 is the promotion of the long-term benefit of consumers. That purpose can only be achieved in the context of a habitable planet and a society governed by the rule of law. Both are threatened by what the New Zealand Parliament has acknowledged is a climate emergency.<sup>30</sup> Addressing the climate emergency is critical to the long-term interests of consumers, the promotion of outcomes consistent with those in

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<sup>28</sup> *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 182

<sup>29</sup> *Students for Climate Solutions Incorporated*, supra n 6 at [59].

<sup>30</sup> (2 December 2020) 749 NZPD 237.



competitive markets, and indeed the existence of markets at all. Courts in a number of jurisdictions have recognised that a failure to take climate considerations seriously may lead to economic and societal collapse.<sup>31</sup> Accordingly, while the weight afforded to the s 52N considerations will vary depending on circumstance and the matter at issue, they will not invariably be of lesser weight than the s 52A(a)-(d) considerations.

**Paragraphs (a) to (d) are not exhaustive of the outcomes produced in competitive markets**

- 39 The Commission’s discussion in the Framework paper suggests its view is the outcomes in paragraphs (a) to (d) are exhaustive of the outcomes that would be produced in competitive markets. The implication appears to be that there is no room to consider climate change response as outcomes of a workably competitive market, alongside the outcomes in paragraphs (a)-(d).<sup>32</sup> That position is inconsistent with the case law and the Commission’s prior statements.
- 40 Prior to the current Part 4, electricity lines businesses were regulated pursuant to Part 4A of the Act, which provided for targeted control. The predecessor to s 52A in Part 4A was s 57E, which provided:

**57E Purpose**

*The purpose of this subpart is to promote the efficient operation of markets directly related to electricity distribution and transmission services through targeted control for the long-term benefit of consumers by ensuring that suppliers—*

- (a) *are limited in their ability to extract excessive profits; and*
- (b) *face strong incentives to improve efficiency and provide services at a quality that reflects consumer demands; and*
- (c) *share the benefits of efficiency gains with consumers, including through lower prices.*

- 41 In *Unison v Commerce Commission*,<sup>33</sup> the High Court held that the factors referred to in s57E(a) to (c) are “identified by Parliament as central aspects of the long-term interests of consumers and are central, *though not exclusive*, goals for the Commission in the performance of its duties...” [emphasis added].
- 42 In its December 2008 discussion paper on the new regulatory provisions of Part 4, the Commission noted the similarity between s 57E and s 52A of the new Part 4, referred to the High Court’s observation that the paragraph (a)-(c) outcomes are

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<sup>31</sup> See, for example: *Ministry for the Environment v Sharma* [2022] FCAFC 35 at [1] to [2].

<sup>32</sup> In its Process and Issues Paper on the gas DPP3 reset, the Commission stated explicitly that its ability to consider climate change response was limited because section 52A of the Act does not reference decarbonisation or mitigating climate change as outcomes to be promoted to achieve the purpose of Part 4.

<sup>33</sup> *Unison Networks Limited v Commerce Commission and Powerco Limited*, High Court, Wellington, CIV 2004-485-960 (28 November 2005) at paragraph [59].



central but not exclusive, and concluded that the High Court's approach to s 57E served as a useful guide to interpreting the new purpose statement in s 52A.<sup>34</sup>

- 43 Like s 57E, for purposes of construction s 52A can be broken down into three parts:<sup>35</sup>
- 43.1 a statement of purpose: to promote the long-term benefit of consumers;
  - 43.2 the means to achieve that purpose: by promoting outcomes that are consistent with outcomes produced in competitive markets; and
  - 43.3 the amplification of that means, in the form of ensuring that the outcomes set out in paragraphs (a) to (d) are achieved.
- 44 The High Court in *WIAL v Commission* explained the structure of s 52A in similar terms, holding that the "overall purpose" of Part 4 is the promotion of the long-term benefit of consumers, and the "way that purpose is to be achieved" is by the promotion of outcomes that are consistent with outcomes in workably competitive markets, such that the paragraph (a) to (d) outcomes are achieved.<sup>36</sup>
- 45 While the Commission is required to make decisions that produce the outcomes in paragraphs (a) to (d), it does not follow that paragraphs (a) to (d) are exhaustive of the outcomes that would be observed in a workably competitive market. The Commission can properly give effect to other outcomes that would be consistent with workable competition, in addition to the paragraphs (a) to (d) outcomes to which it *must* give effect.
- 46 In conditions of workable competition, suppliers would be expected to take actions in response to the Government's emissions target, budgets and reduction plans. Firms that operate in competitive markets may choose to invest in climate change response even in the absence of a legal obligation to do so, and even where that investment is not short-term profit-maximising. For example:
- 46.1 voluntarily reducing their carbon emissions or purchasing offsets;<sup>37</sup>
  - 46.2 innovating to mitigate the emissions impacts of their operations;<sup>38</sup>

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<sup>34</sup> Commerce Commission, *Regulatory Provisions of the Commerce Act 1986: Discussion Paper* (19 December 2008) at paragraph 155.

<sup>35</sup> *Unison* at [110] to [112].

<sup>36</sup> *Wellington International Airport Ltd & others v Commerce Commission* [2013] NZHC 3289 at [222].

<sup>37</sup> See, for example, members of Toitu Envirocare, which certifies carbon reduction efforts undertaken by member companies and organisations: <https://www.toitu.co.nz/our-members/members>.

<sup>38</sup> For example, Fonterra's partnership with Sea Forest to trial the use of *Asparagopsis* seaweed as a supplement feed for dairy cows to reduce emissions: <https://www.fonterra.com/nz/en/our-stories/articles/a-new-phase-begins-in-fonterra-seaweed-trial-aiming-to-reduce-on-farm-emissions.html>.



- 46.3 investing in new products and services to anticipate and enable consumer responses to climate change and climate policy;<sup>39</sup>
- 46.4 anticipating climate related risks and investing in adaptation and mitigation.<sup>40</sup>
- 47 There are a range of drivers in competitive markets that prompt this sort of voluntary or anticipatory action, including consumer preferences, investor concerns, social licence to operate, anticipation of future regulatory change, and mitigating medium and long-term operational and commercial risks.
- 48 Given that suppliers could be expected to respond to the Government's emissions target, budgets and reduction plans in conditions of workable competition, we see no interpretive difficulty in placing the s 5ZN considerations alongside the outcomes in paragraphs (a) to (d) of s 52A.
- Alternatively, climate change response is an aspect of the "quality" of the regulated service***
- 49 We think the better view is as described above: that suppliers in competitive markets would respond to the Government's emissions target, budgets and reduction plans, and therefore the Commission can take into account the s 5ZN considerations alongside the outcomes in paragraphs (a) to (d) of s 52A.
- 50 However, alternatively, climate change responses are within the scope of s 52A because consumers demand that suppliers take action to prevent, mitigate or adapt to climate change. Suppliers' stance on climate change is increasingly relevant to consumers and informs their choices in competitive markets. Accordingly, the extent to which a supplier is responsive to the climate change is therefore increasingly part of the "quality" of the service that consumers demand and can therefore be considered under that limb of s 52A.

Simon Peart  
Partner

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<sup>39</sup> See: Vector's trial of EV smart charges, involving 200 households, to understand and prepare for the impact that an increase in EV uptake will have on electricity networks:  
<https://www.vector.co.nz/articles/vector-creating-a-new-energy-future-with-decarbon>

<sup>40</sup> See, for example: Vector's decisions to construct new zone substations with increased floor height to mitigate flood risk, and to utilise fully insulated covered conductors in its 11kV network to mitigate outage risks associated with increasing incidences of high winds: Vector Limited Electricity Asset Management Plan 2021-2031, section 11.4.1.