

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND IN THE MATTER OF A claim by **Cletus Maanu Paul, David Potter and Andre Paterson** on behalf of the **Mataatua District Māori Council** that the Crown is acting in breach of Treaty of Waitangi obligations towards Maori as a result of the New Zealand Government failing to implement adequate policies to address the threats posed by global climate change.

AFFIDAVIT OF IVO GEOFFREY BERTRAM

Dated 7 November **2019**

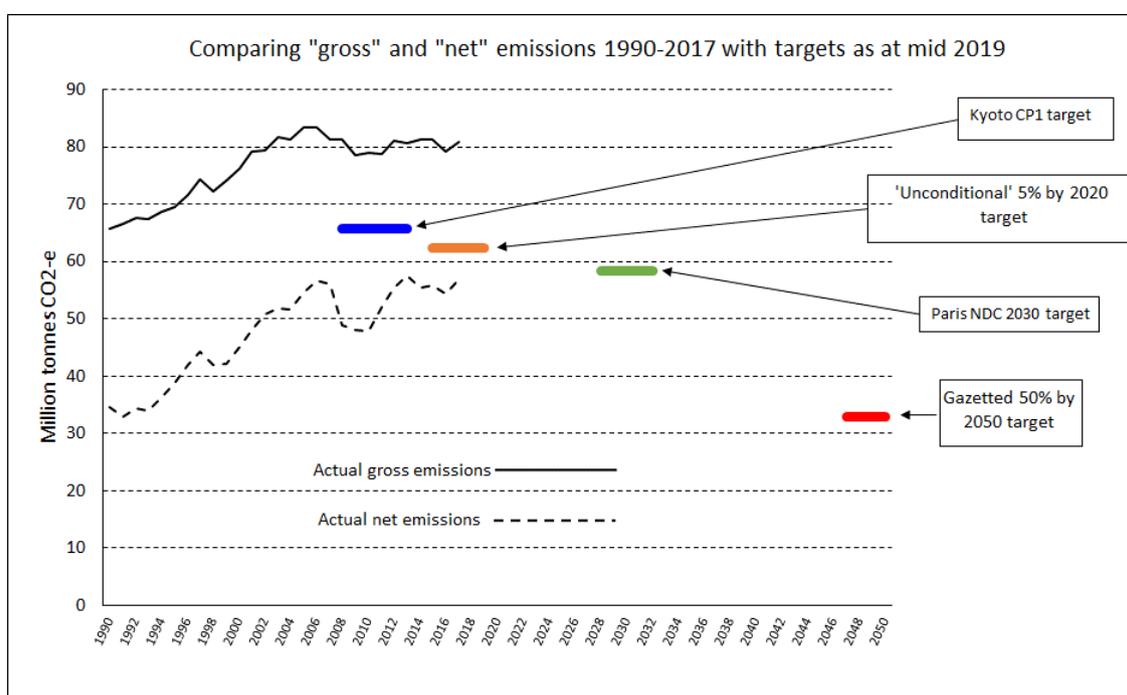
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“emissions reductions”, with no mention of the vital gross-net calculation on which they rest²⁵.

7.3. This is especially discreditable in the case of the Nationally Determined Contribution (NDC) target which should have been clearly specified as “net emissions in 2030 to be 30% below gross emissions in 2005”. Reference to the chart in paragraph 7.4 below shows that the chosen base year of 2005 was the peak year for gross emissions, a choice that cynically maximised the apparent ambition of the target.

7.4. Again using the latest available data from the website of the United Nations Framework Convention on Climate Change²⁶, the chart below shows the four listed targets compared with officially-reported actual gross and net emissions up to 2017:



7.5. Taking first the First Commitment Period of the Kyoto Protocol, it is clear that even without the massive impact on emissions of the Global Financial Crisis of 2008-2010, New Zealand could have easily met that target without any change

²⁵ The Cabinet Paper on the Nationally Determined Contribution at <https://www.mfe.govt.nz/more/cabinet-papers-and-related-material-search/cabinet-papers/new-zealands-intended-contribution> (accessed 1 November 2019) similarly provided Cabinet ministers with no mention of the gross-net distinction, using simply the unqualified expression “emission reductions”.

²⁶ https://di.unfccc.int/ghg_profiles/annexOne/NZL/NZL_ghg_profile.xlsx downloaded 31 October 2019.

to its pre-existing emissions growth trajectory. Under the gross-net accounting procedure, New Zealand was credited with 123.7 million “surplus units” which it is currently claiming as credit to cover its ongoing emissions growth over the period 2013-2020²⁷.

7.6. Turning next to the “unconditional” 2020 target of net emissions 5% below 1990 gross emissions, this target never represented any sort of serious constraint on business-as-usual emissions growth.

7.7. Similarly, the NDC target for 2030 leaves room for net emissions to increase, albeit at a reduced rate. The very low level of ambition in this target is concealed by the gross-net accounting procedure.

7.8. In addition it must be noted that the 2030 target is not necessarily to be met by actually changing projected emission levels at all, relative to “business as usual”. According to the Ministry for the Environment, “New Zealand will meet its emissions budget for the period 2021–2030 through a combination of:

- domestic emission reductions
- removal of carbon dioxide by forests
- participation in international carbon markets.”²⁸

7.9. The use of a gross 1990 baseline for the 2030 target is not, it should be noted, explicitly acknowledged in the *Third Biennial Report*. It is necessary to turn to the UNFCCC website to secure an explicit statement: “New Zealand’s existing activity start year of 1990 will continue to apply, ensuring continuity of action with previous commitments”.²⁹ To the casual reader this obscure wording could easily be mistakenly mis-read as implying a net-net commitment, and the public-relations work of the Government in presenting this Commitment to the wider public has done nothing to dispel such an impression.

²⁷ See “Latest update on New Zealand’s 2020 net position” at <https://www.mfe.govt.nz/climate-change/climate-change-and-government/emissions-reduction-targets/reporting-our-targets-0> accessed 1 November 2019.

²⁸ *Third Biennial Report* p.20.

²⁹ *New Zealand Submission under the Paris Agreement: New Zealand’s Nationally Determined Contribution*, at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/New%20Zealand%20First/New%20Zealand%20first%20NDC.pdf>, p.2 under “Methodologies”.

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- 7.10. That leaves the 2050 target, which lies so far into the future - relative to the New Zealand electoral cycle and policy process - that its value is no more than symbolic, as a burden kicked down the road for future governments to bear. Announced in the *NZ Gazette* in March 2011, this target was again set in gross-net terms: “The 1990 level is based on New Zealand’s gross greenhouse gas emissions as per the agreed accounting rules of the Kyoto Protocol under the UNFCCC. The 2050 target is based on New Zealand’s net greenhouse gas emissions and will take into account any removals or emissions arising from afforestation or deforestation since 1990 consistent with the Kyoto Protocol under the United Nations Convention Framework on Climate Change.”³⁰
- 7.11. The emissions targets set prior to 2019 by the New Zealand Government have thus been so weak as to be meaningless, in addition to which they are non-binding under the Paris Agreement. New Zealand’s withdrawal from Commitment Period Two of the Kyoto Protocol signalled to the rest of the world New Zealand’s lack of serious commitment to joint action, while releasing New Zealand from the prospect of being subject to legally binding obligations under the Protocol.

8. The Zero Carbon Bill

- 8.1. On 8 May 2019 the Climate Change Response (Zero Carbon) Amendment Bill was introduced to Parliament.
- 8.2. The Bill contains a number of symbolically-important steps:
- It adopts a two-basket approach to greenhouse gases, separating biogenic methane from the other gases, and setting separate targets: net emissions of GHGs other than methane to be zero by 2050, and gross emissions of methane to be reduced 10% by 2030 and 24-47% by 2050.
 - It requires the Minister to set emissions budgets for three periods into the future, and makes him or her politically accountable for achieving them.

³⁰ “Climate Change Response (2050 emissions target) Notice 2011”, *New Zealand Gazette* 31 March 2011, p.987, online at [https://www.dia.govt.nz//Pubforms.nsf/NZGZT/NZGazette41Mar11.pdf/\\$file/NZGazette41Mar11.pdf#page=28](https://www.dia.govt.nz//Pubforms.nsf/NZGZT/NZGazette41Mar11.pdf/$file/NZGazette41Mar11.pdf#page=28) (accessed 27 March 2019).

- It establishes a Climate Change Commission to conduct research, review and monitor the emissions budgets, advise the Minister, and recommend required changes.
- It requires the Government to prepare risk assessments and a national adaptation plan.

8.3. Substantively, however, the Bill does no more than set up a general framework for the next round of policy formation, without resolving any of the critical issues. It has several provisions that leave the future radically uncertain:

- Neither the long term targets nor the emissions budgets are legally binding - “no remedy or relief is available for failure” (5ZJ(i))
- Banking provisions allow unused credits to be carried forwards without restriction (5ZC) which means that lower emissions in one period translate to less binding budgets in later periods.
- Offshore emissions may be used to meet emission budgets to an extent that is to be at the discretion of future Ministers (5W and 5X), which places radical uncertainty over the future value of emission permits.
- The Commission must have particular regard to “economic circumstances and the likely impact ... on taxation, public spending, and public borrowing” (5Z(ix)), a provision which makes climate policy hostage to the economy rather than the other way round.

8.4. The effect of these provisions is to make the targeting and budgeting exercise a matter of political discretion rather than binding rules. There is a conspicuous contrast between the limited role and powers of the Commission (advisory only and with no enforcement powers) and, for example, the Reserve Bank of New Zealand (RBNZ) which exercises genuine authority over the setting of monetary policy.

8.5. The resulting uncertainty over how future policy will work out removes much of the incentive on business and households to act quickly to reduce emissions. The common economic response to uncertainty is to delay decisions on matters such as investment and R&D while individual economic actors wait to see how the Government exercises its discretion in setting budgets and designing actual policies to achieve them.

- 8.6. The Bill's failure to strong provisions to ensure its targets are met reflects the extreme difficulty of moving serious climate policy forward in a democratic system subject to vigorous vested-interest lobbying and political obstruction.
- 8.7. This implies that when it promised under the Paris Accord to contribute "to the maximum extent" and with "the highest ambition", the New Zealand Government was offering only what it perceived to be politically achievable within those constraints, as distinct from the maximum effort of which the New Zealand economy could be capable.. Rather than exercising its authority to push policy forward, the Government is settling for mere "nudges" to move the national community ahead. That process is inevitably a slow one, while the required response to the pending climate change emergency now needs to be rapid.

9. Climate Change Response (Emissions Trading Reform) Amendment Bill

- 9.1. Introduced on 24 October 2019, this Bill makes some changes to the NZETS but does not fully address the fundamental flaws noted in paragraph 1.5 above, and leaves in place the consequences of the scheme's past lack of integrity.
- 9.2. Certain privileged large corporate interests now treat as an established property right their access to continued free issues of NZUs, and their freedom to use banked units issued in past years which were retained by surrendering the cheap imported hot-air credits described in section 6 of this affidavit.
- 9.3. Agricultural interests, having repeatedly succeeded via intensive lobbying in holding at bay both carbon taxes and ETS discipline, have yet again secured exemption for agricultural greenhouse gases from the scheme for another five years with no credible sanctions for failing to reduce emissions.
- 9.4. The differential treatment of large industry versus small and medium enterprises in the issuing of free units remains intact, constituting a blatantly distortionary subsidy arrangement that will hinder any future attempt to bring New Zealand into trade agreements built around the carbon content of traded goods.

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- 9.5. The price cap of \$25 per tonne is to be replaced by a “cost containment reserve” which leaves the NZETS far removed from the economic concept of cap-and-trade, and renders it even more clearly a de-facto carbon tax imposed via obscure and complex procedures subject to undue influence from powerful vested interests.

10. Economics of maximum effort

- 10.1. At the time in the early 1990s when I and others advocated adoption of a carbon tax by New Zealand, it was reasonable to think that a tax of relatively modest proportions, rising gradually over time, could “nudge” the economy away from reliance on fossil fuels and towards a low- or zero-carbon production system. In my opinion that time has now passed. If climate change is to be halted, the coming decade will have to bring dramatic policy interventions that go well beyond the gentle introduction of easily-responded-to price signals. The outlook now is for both a dramatically increased price on carbon, and a range of non-price measures to force the pace of progress towards net-zero carbon. (The possibility of a ban on new-vehicle internal combustion engines in the transport sector, for example, is already entering into policy debates overseas.)
- 10.2. In 2018 the IPCC reviewed the economic literature on the level of a global carbon price that would be required to achieve the targets of holding temperature increase below 2 degrees or 1.5 degrees. The range of carbon prices estimated by various models was very wide, but lay well above the figures often mentioned in New Zealand policy debate. For example, estimates of the carbon price required by 2030 to put the world economy on track for 1.5 degrees ranged from a minimum of US\$135 per tonne to a maximum of \$5,500 per tonne³¹. The minimum figure converts to 200 New Zealand dollars per tonne. The price of units in the ETS remained capped at \$25 until replaced, under the new legislation, by a less transparent price cap embodied in a “cost containment reserve”, the details of which remain to be settled.

³¹ IPCC SR1.5, “Mitigation pathways consistent with 1.5°C in the context of sustainable development”, http://report.ipcc.ch/sr15/pdf/sr15_chapter2.pdf, page 2-78 and Figure 2.26 top panel, on page 2-80.



10.3. New Zealand Governments have moved reluctantly, late, and to only a minimal extent towards pricing carbon. The absence of any effective emissions-reducing policy measures, whether by pricing or by direct regulatory intervention, has been the hallmark of policy to date.

10.4. In a report prepared in 2018 for the New Zealand Productivity Commission, Vivid Economics³² outlined three scenarios of ways to reach net-zero emissions by 2050. All of these relied heavily on a switch to electric vehicles and expansion of forestry, with gross emissions falling by 28-43% over the three decades³³. A notable feature of the Vivid Economics report is its relatively low estimate of the carbon price required to move the economy along these scenario paths: “The initial findings suggest that New Zealand is likely to be able to decarbonise its economy at a cost comparable to that expected in the rest of the developed world. Under a 25 MtCO₂e target, the domestic emissions prices required to put New Zealand on track to a net zero emissions economy are below Paris consistent global emissions prices until well after 2035, and below or towards the lower bounds of anticipated Paris Agreement consistent emissions prices in 2050”³⁴. These results suggest that New Zealand is not less able than other developed economies to play a full role in the global effort outlined in the Paris Agreement

10.5. A subsequent study conducted by NZIER for the Ministry for the Environment reached more pessimistic conclusions regarding the carbon price, but estimated that zero carbon by 2050 could still be achieved alongside ongoing growth of GDP, albeit at a somewhat lower rate than could be sustained if the target were to be abandoned³⁵. As the authors note, “under all core scenarios and targets, the economy continues to expand”³⁶.

³² Vivid Economics, *Modelling the transition to a lower net emissions New Zealand: Interim Results*, April 2018, https://www.productivity.govt.nz/sites/default/files/Modelling%20the%20transition%20to%20a%20lower%20net%20emissions%20New%20Zealand_Interim%20Results_Concept%2C%20Motu%2C%20Vivid.pdf .

³³ Vivid Economics 2018 p.42.

³⁴ Vivid Economics 2018 p.39.

³⁵ NZIER, *Economic Impact Analysis of 2050 Emissions Targets*, June 2018, <https://www.mfe.govt.nz/sites/default/files/media/Climate%20Change/NZIER%20report%20-%20Economic%20impact%20analysis%20of%202050%20emissions%20targets%20-%20FINAL.pdf> , p.xi Figure 5 shows the carbon price paths and p.18 Figure 13 shows GDP growth rates.

³⁶ *Economic Impact Analysis of 2050 Emissions Targets* p.17.

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10.6. To achieve the goal of zero carbon by 2050 may require the New Zealand economy to forego some GDP growth, but neither study finds an unsustainable burden of cost. Both, however, point to the need for early action that would have the effect of raising the carbon price quite sharply above its current level. “Maximum effort” will require policy settings under the new legislation to incorporate a far higher level of ambition than New Zealand Governments have exhibited to date.

11. Non-applicability of the Resource Management Act

- 11.1. The Resource Management Act 1991 (RMA) devolved to local authorities the task of issuing consents for new activities, with provision made for central Government to provide guidance on matters of national, as distinct from local, importance, by the issuing of National Policy Statements, as provided for in sections 45 and 45A of the Act. Those statements were conceived of as being critical components for the delivery of a sound resource management regime. In 1996, the OECD review of New Zealand’s environmental performance stated plainly that local government implementation of the RMA was lagging in part due to “the absence of more detailed policy guidance from the central Government” and strongly recommended greater central government support.³⁷
- 11.2. One other process for enabling national concerns to be brought to bear on planning decisions was provided for in the RMA. The Minister for the Environment was given a reserve power to “call-in” projects which raised national issues, and this power was exercised in 1994 when the Electricity Corporation of New Zealand (ECNZ) applied for consent to build the Taranaki Combined Cycle (TCC) plant at Stratford³⁸. Following an inquiry, the Minister granted consent on condition that the plant’s 1.5 million tonnes of CO₂ emissions be mitigated by tree planting or other means. Far from setting a precedent for implementation of the Government’s international obligations

³⁷ OECD (1996) *OECD Environmental Performance Reviews: New Zealand*.

³⁸ *Annual Report of the Ministry for the Environment for the Year Ended 30 June 1994* p.5, and *Annual Report of the Ministry for the Environment for the Year Ended 30 June 1995* p.5.



under the FCCC, however, this has been the only greenhouse-gas-related call-in to date.

11.3. In 2004 the RMA was amended to explicitly prevent local authorities from having regard to climate-change-related issues, which were to be dealt with under separate legislation. The new section 104E reads: “When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either (a) in absolute terms; or (b) relative to the use and development of non-renewable energy.

11.4. A series of court challenges tested whether this left space for an electricity generating plant or a coal mine to be refused consent on the grounds that the activity involved the discharge into the atmosphere of greenhouse gases. In *Greenpeace New Zealand Ltd v Genesis Power Ltd* [2008] NZSC112, and in *West Coast ENT Inc v Buller Coal* [2013] NZSC87 the Supreme Court affirmed that the RMA rules out consideration of end-use emissions as part of the planning consent process. Consents have therefore been granted for projects with high potential to increase New Zealand’s aggregate carbon emissions because local authorities have had no grounds to withhold consent on this basis.

12. Affidavits of Joanne Deirdre Tyndall and Roger Scott Lincoln

12.1. Ms Tyndall’s affidavit accurately summarises the factual content of international negotiations over the past decade, without offering any judgment as to the adequacy or effectiveness of New Zealand’s response. She notes at paragraph 8 the non-binding character of UNFCCC commitments, describes in paragraph 9 the legally binding commitments imposed by the Kyoto Protocol, and notes in paragraph 11 the global decision to shift the focus of negotiations from Kyoto obligations to voluntary Intended Nationally Determined Contributions.



- 12.2. Conspicuously absent from her account of events is New Zealand's withdrawal from the Second Commitment Period of the Kyoto Protocol, which would have involved legally binding commitments. Participation in Kyoto II would not have been in conflict with adherence to the Paris Agreement. New Zealand's refusal to accept a second set of legally binding commitments provided, in my opinion, a clear signal to our negotiating partners of this country's unwillingness to take any leadership role in tackling carbon emissions. It would have been helpful for Ms Tyndall to lay out for the Tribunal the reasons for New Zealand's defection from the Kyoto Second Commitment Period.
- 12.3. As Ms Tyndall notes in her paragraph 13, under the Paris Agreement, "countries' INDCs reflected their ambition for reducing emissions consistent with their national circumstances." The absence of serious ambition in New Zealand's INDC serves simply to reinforce the message conveyed by withdrawal from Kyoto Protocol obligations – that this country is not yet prepared to take any major initiatives, or incur any serious sacrifices, in pursuit of decarbonisation.
- 12.4. In her paragraph 18 Ms Tyndall emphasises that "there is no expectation or requirement that Parties adopt a target that, if adopted by all Parties, would achieve [the 2°C] goal". Simple logic dictates that if no Party adopts such a target, the goal will not be achievable. A heavy burden therefore falls on the hope for "continuous improvement" and increasing ambition over time under the Paris Agreement, as outlined by Ms Tyndall in paragraphs 19-20.
- 12.5. In paragraph 40 Ms Tyndall advances the proposition that "the Fifth [IPCC] Assessment Report provided the scientific basis for the development of New Zealand's current NDC". I am not aware of any clear evidence that this was the case. The weakness and lack of ambition in New Zealand's NDC, and the admitted fact that it does not amount to "a target that, if adopted by all Parties, would achieve [the 2°C] goal", suggests to me that the current NDC is in fact not consistent with the science set out in the Fifth Assessment Report, and would have to be massively strengthened to be so consistent.



- 12.6. The affidavit of Roger Scott Lincoln is largely a recital of policy developments over the past decade and the extent of consultation with Maori, an issue which lies outside my expertise.
- 12.7. In paragraph 36 Mr Lincoln estimates that by 2019 New Zealand will have spent \$100 million on research into emission-mitigating technologies for agriculture. At first sight this may seem a large number, but in the wider context of the New Zealand economy it is an indication rather of the lack of ambition encountered across the entire range of climate-change policy to date. A commitment equal to less than 0.05% of annual Gross Domestic Product, spread over a decade (hence significantly less on average than 0.01% of annual GDP) does not amount to any sort of major national effort comparable with the resources committed in, for example, wartime.

13. Final comments

- 13.1. New Zealand's diplomatic position in climate negotiations internationally has been focused almost exclusively on protecting what successive Governments have perceived to be New Zealand's own vital interest in minimising, rather than maximising, this country's commitments to the international community.
- 13.2. One area in which this has been apparent is the role of forestry planting in New Zealand's commitments. In the early days of the Kyoto Protocol negotiations New Zealand gave undertakings that it would not rely solely on forestry sequestration as a means of avoiding direct action to reduce gross carbon emissions. That undertaking quickly became a dead letter.
- 13.3. The other notable area in which New Zealand has failed to do its utmost on the international front is the provision of active and effective support for the voices of indigenous communities of the Pacific Islands, as expressed most importantly through the Alliance of Small Island States (AOSIS).
- 13.4. From the outset the NZETS has been ineffective as a means of driving decarbonisation. The central reason has been that the scheme was and is designed to fail in this task. The crucial design flaws have been evident throughout, and in my opinion have been deliberately included and retained

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through successive iterations because they cater to the interests and demands of powerful vested interests that believe they stand to lose from effective use of the market mechanism to drive decarbonisation.

- 13.5. Two speeches by Maori Party MPs in the debates on the original NZETS legislation accurately captured, in my opinion, the essential weakness of the scheme. Tariana Turia said³⁹:

Fundamentally, the emissions trading scheme is limited by being nothing more than an emissions trading scheme, when what we really require is an emissions reduction programme. ... Reducing our emissions is about honouring our commitment to those who have passed on that we will leave this planet in a better state than it is now for those who come after us. The Government acknowledges that this scheme will make almost no difference. ... To make the world a better place we need to live differently, and we all need to live differently....

One of the fundamental issues that has troubled us in the passage of this bill has been the issue of inequity. The inequity exists at several levels. We suggest that the emissions trading scheme is politically sustainable only if it seen to share the Kyoto burden fairly across all sectors at each stage, and all starting at the same time...

The Māori Party does not support the bill. We are of the view that what is needed is a radical rethink of the whole approach. We are opposed to the concept of paying the polluters, of rewarding the corporate lobbyists with huge exemptions, and of the very nature of trading, rather than reducing, emissions.

- 13.6. Te Ururoa Flavell said⁴⁰:

We accept that any emissions reduction programme will result in changes to land values and will enable the Government, business, and the public to account for environmental costs on business, including forestry. So that is not the reason why we oppose the bill. The primary reasons are that it is not effective in reducing emissions, it is not transparent, and the polluters do not pay—they receive massive subsidies in the form of corporate welfare. The whole point of economic incentives to cut emissions is defeated.

- 13.7. There is a longstanding distinction in the economics literature between “rules” versus “discretion” in policy. Rules mean that non-negotiable decisions are taken, to which all players in the economy simply have to adjust; an example is the Official Cash Rate (OCR) set by the RBNZ. Discretion means that policy detail is negotiable and subject to political decisions reflecting the pressures of the moment. Rules provide certainty whereas discretion potentially opens the way to opportunism and rent-seeking, and so tends to foster uncertainty. Both

³⁹ *Hansard* 28 August 2008, Vol.648 pp.18087-18089.

⁴⁰ *Hansard* 2 September 2008, Vol 649 p.18136.



policy approaches nevertheless have advantages and disadvantages. In the right hands and the right circumstances, discretionary policy is fully defensible. But in the case of emission reduction there is an especially strong argument for maximising certainty and minimising uncertainty. The NZETS, and the accompanying policy stance of the New Zealand Government, seem set to maximise uncertainty, and hence to withhold, rather than impose, effective incentives for New Zealand businesses and households rapidly to abate their emissions.

SWORN at Wellington this 7th day
of November 2019 before me:



Ivo Geoffrey Bertram



HELEN CORSEY.

~~A solicitor of the High Court of New Zealand~~

Deputy Registrar
of the High Court
of New Zealand