

**INTERIM NON-PUBLICATION CONFIDENTIALITY ORDERS IN TERMS  
OF CONFIDENTIALITY ORDERS SECTION IN THE JUDGMENT.**

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-000735  
[2023] NZHC 342**

UNDER	The Judicial Review Procedure Act 2016
IN THE MATTER OF	An application for judicial review of decisions under sections 19A and 19B of the Land Transport Management Act 2003
BETWEEN	MOVEMENT Applicant
AND	WAKA KOTAHI First Respondent
AND	MINISTER OF TRANSPORT Second Respondent
AND	AUCKLAND TRANSPORT Intervener

Hearing: 3-5 October 2022

Appearances: S R Gepp and L S B Acland for Applicant  
V L Heine KC, T D Smith and A J Wicks for First Respondent  
H T N Fong and N B de Lautour for Second Respondent  
P M S McNamara for Intervener

Judgment: 1 March 2023

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**JUDGMENT OF GRICE J**

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## Introduction

[1] The Courts are aware of the significant concerns that many New Zealanders have about climate change and the steps being taken to address the problem. Judicial review allows the Court to ensure that public bodies act within the limits of their legal powers in accordance with the relevant procedures and legal principles governing the exercise of their decision-making function.<sup>1</sup> That function has been emphasised in a number of cases challenging decision-making in the context of climate change.

[2] The Court however is not in a position to make political, social and economic choices. Those decisions are entrusted to Ministers and other public bodies.<sup>2</sup> There will be choices as to the approach taken by public bodies made legitimately within the statutory and policy framework.

[3] Movement is a charitable trust that advocates for safe, accessible and sustainable transport. It says that it brings this proceeding in the public interest, having regard to the urgency and severity of the climate crisis and the contribution of land transport emissions to New Zealand's carbon emissions. Movement says the first respondent (Waka Kotahi) failed to take into account various issues in relation to climate change, particularly the reduction of greenhouse gas (GHG) emissions, when it prepared and adopted its national land transport programme (NLTP) for 2021–2024 (NLTP 2021–2024).<sup>3</sup>

[4] The first respondent, Waka Kotahi NZ Transport Agency (Waka Kotahi), is a statutory body which is required to, among other things, contribute to an effective, efficient and safe land transport system in the public interest and manage the State Highway system, oversee the planning operation, implementation and delivery of public transport and manage the funding of the land transport system.<sup>4</sup> The second respondent, the Minister of Transport (the Minister), is the responsible Minister.

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<sup>1</sup> *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 at [22], citing *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073, [2021] PTSR 553 at [6].

<sup>2</sup> At [22].

<sup>3</sup> Waka Kotahi NZ Transport Agency *Ngā Kaupapa Huarahi o Aotearoa | National Land Transport Programme* (August 2021) [NLTP 2021–2024].

<sup>4</sup> Land Transport Management Act 2003, ss 93 and 95.

[5] Waka Kotahi must determine whether particular activities should be included in a national land transport programme (NLTP), approve activities or a combination of activities as qualifying for payments from the national land transport fund (NLTF) and approve procurement procedures.<sup>5</sup> The Minister may not give directions to Waka Kotahi in relation to performing these functions.<sup>6</sup> Waka Kotahi must prepare and adopt an NLTP every three financial years for the following three financial years.<sup>7</sup> NLTP 2021–2024, at issue in these proceedings, is the most recent NLTP.

[6] The Minister must issue a Government Policy Statement on land transport (GPS).<sup>8</sup> The most recent GPS (GPS 2021) covers the period 2021/2022–2030/2031.<sup>9</sup> The NLTP issued by Waka Kotahi must give effect to the GPS.<sup>10</sup>

[7] The intervener, Auckland Transport (AT), is a statutory entity established under the Local Government (Auckland Council) Act 2009.<sup>11</sup> It is wholly owned by the Auckland Council. Its statutory purpose is to “contribute to an effective, efficient and safe Auckland land transport system in the public interest”.<sup>12</sup> It is responsible for preparing the Auckland Regional Land Transport Plan (RLTP). The most recent is the 2021–2031 plan (2021 RLTP).<sup>13</sup> The 2021 RLTP is a significant input into NLTP 2021–2024. Approximately a third of all forecasted investment in the NLTP is in Auckland.<sup>14</sup>

[8] The issues in this proceeding relate to the decision by the Waka Kotahi Board to approve NLTP 2021–2024. In essence the applicant says that NLTP 2021–2024 did not comply with the purposes and provisions of the Land Transport Management Act 2003 (LTMA) or the GPS 2021 as it was required to. It does not seek to set aside the decision to adopt NLTP 2021–2024 but seeks directions for the consideration of the

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<sup>5</sup> Section 95(2).

<sup>6</sup> Section 95(3)(b).

<sup>7</sup> Section 19A(1).

<sup>8</sup> Section 66(1).

<sup>9</sup> Te Kāwanatanga o Aotearoa | New Zealand Government *Government Policy Statement on Land Transport: 2021/22–2030/31* (September 2020) [GPS 2021].

<sup>10</sup> Land Transport Management Act, s 19B(a)(iii).

<sup>11</sup> Local Government (Auckland Council) Act 2009, s 38.

<sup>12</sup> Section 39.

<sup>13</sup> Auckland Transport *Auckland Regional Land Transport Plan: 2021–2031* (June 2021).

<sup>14</sup> \$7.3 billion out of \$24.3 billion: affidavit of Ms Jenny Chetwynd, Executive General Manager Planning & Investment at Auckland Transport, 8 July 2022, at [7.3].

NLTP in accordance with this Court’s findings, which will inform the preparation of future NLTPs.

### **The background**

[9] The fact of climate change and its effects are not in dispute. Ms Gepp for Movement referred to comments in a recent High Court decision confirming there was no doubt that climate change gave rise to “vitaly important environmental, economic, social, cultural and political issues”.<sup>15</sup>

[10] New Zealand is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>16</sup> Article 4 of the UNFCCC requires New Zealand as an Annex 1 country to take the lead to reverse the long-term trends in anthropogenic emissions. New Zealand has also ratified the Paris Agreement, which is an international agreement under the UNFCCC.<sup>17</sup>

[11] New Zealand has enacted domestic legislation to meet its international obligations. Particularly relevant here is the Climate Change Amendment Act 2019 (Zero Carbon Act), which came into force on 13 November 2019. The Zero Carbon Act amended the Climate Change Response Act 2002 and set a target for New Zealand to reduce net emissions of all greenhouse gasses (excluding biogenic methane) to zero by 2050.

[12] On 2 December 2020, Parliament passed a motion to declare a climate emergency. The Climate Change Commission (CCC) published its advice to the government on 9 June 2021.<sup>18</sup> It recommended emissions budgets that would reduce net emissions by 2030 (against a 2019 baseline) by 38 per cent in respect of long-lived greenhouse gases and by 47 per cent in respect of carbon dioxide.<sup>19</sup>

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<sup>15</sup> *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [50].

<sup>16</sup> New Zealand ratified the United Nations Framework Convention on Climate Change on 16 September 1993.

<sup>17</sup> Paris Agreement (signed 22 April 2016, entered into force 4 November 2016). New Zealand signed the Paris Agreement on 22 April 2016 and ratified it on 4 October 2016.

<sup>18</sup> He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa – Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022 – 2025* (9 June 2021).

<sup>19</sup> At 77 and 102.

[13] Movement pleaded that nearly 20 per cent of New Zealand’s domestic GHG emissions come from transport, with 90 per cent of those from road transport. Road transport has been New Zealand’s fastest growing source of carbon dioxide emissions. Road transport GHG emissions made up 42.6 per cent of all carbon dioxide emissions in 2018 and have increased two per cent from 2017 to 2018 and 101.6 per cent from 1990 to 2018.

[14] Waka Kotahi published the second issue of its sustainable monitoring report, *Tiakina te Taiao*, in October 2021.<sup>20</sup> The report states that transport generates 47 percent of carbon emissions in Aotearoa with 90 per cent of this coming from road transport. It noted that sustainability was not just about reducing carbon emissions. To that end Waka Kotahi had adopted a new strategic direction, Te Kāpehu, which reflected “the importance of an environmentally sustainable land transport system.”<sup>21</sup> That meant protecting the natural and built environment, improving public health and making towns and cities safe and accessible for everyone.<sup>22</sup>

### **Judicial review**

[15] This Court has indicated on a number of occasions that in relation to climate change it will intervene by way of judicial review in appropriate circumstances. The fact that climate change involves difficult and multivalent issues, often described as “polycentric” or “socio-economic” issues, does not detract from the Court’s role.<sup>23</sup>

[16] Ms Gepp for Movement referred to the comments of Palmer J in *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* that, depending on the context, decisions about climate change deserve heightened scrutiny.<sup>24</sup>

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<sup>20</sup> Waka Kotahi NZ Transport Agency *Tiakina te Taiao — Our Sustainability Monitoring Report* (October 2021).

<sup>21</sup> At 5.

<sup>22</sup> At 5. Carbon is often used as a shorthand reference to CO<sub>2</sub> which is one of the GHGs.

<sup>23</sup> *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [134]; and see *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [26].

<sup>24</sup> *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council*, above n 15, at [51].

[17] In *Hauraki Coromandel Climate Action Inc*, the relevant decision was one made by the Mayor. The offending decision was to not refer consideration of the adoption of a declaration endorsed by a number of other local authorities concerning climate change to her Council.<sup>25</sup> The process did not comply with the requirements of the Local Government Act 2002 nor with the Council’s Significance and Engagement Policy.

[18] In *All Aboard Aotearoa Inc v Auckland Transport*, Venning J noted, however, that the application of the heightened scrutiny approach was not “subscribed to by all.”<sup>26</sup> The “obvious” difficulty that Venning J saw for applying a higher standard of review to decisions involving climate change in general was that it would require every case which may have an impact on climate change (even if peripheral), to be subject to a different standard of review.<sup>27</sup> In that case the Court was considering the interpretation of the LTMA and its application to the preparation of the Auckland Regional Transport plan.

[19] Ms Gepp said externalities were also important to statutory interpretation. For instance, the impact on freshwater quality would be taken into account when granting consent to a dairy farm operation. She accepted there was a different statutory framework in that case, being the Resource Management Act 1991 (RMA), but that it was generally analogous. Given the different nature of the application and of the statutory context, I do not consider the analogy assists in the interpretation of the particular provisions before the Court in this case. Nevertheless, climate change is a significant issue for transport planning. However as Venning J noted and I accept, the focus is on whether the decision-maker has acted in accordance with the power in issue and with any other legal requirements.<sup>28</sup>

[20] Waka Kotahi referred to the comments of Kós J in *Chorus Ltd v Commerce Commission* in relation to economic regulation as being apt in the context of the land

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<sup>25</sup> At [40].

<sup>26</sup> *All Aboard Aotearoa Inc v Auckland Transport* [2022] NZHC 1620 at [87].

<sup>27</sup> At [88].

<sup>28</sup> At [87], citing *Patterson v District Court, Hutt Valley* [2020] NZHC 259; and *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456.

transport decisions under the LTMA.<sup>29</sup> Both contexts involve complex decisions involving polycentric considerations. As Kós J said:<sup>30</sup>

... Economic regulation ... is notoriously difficult to prescribe, given the extraordinary variety of business practices, markets and circumstances that fall to be addressed. The reality of economic regulation is that statutes present a chart of medium scale at best. The exact route to be taken is left to the judgment of the navigator, the decision-maker ...

[21] The approach to statutory interpretation is uncontroversial. Interpretation commences with the text, informed by the purpose and the context, including the statutory scheme of the relevant legislation.<sup>31</sup> It is the application to the particular case that may pose difficulty.

[22] I now turn to the legislation.

### **Statutory framework**

[23] Section 3 of the LTMA provides:

#### **3 Purpose**

The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.

[24] Every three financial years, Waka Kotahi must prepare and adopt an NLTP for the ensuing three financial years.<sup>32</sup> The relevant core requirements are set out at s 19B as follows:

#### **19B Core requirements for national land transport programme**

The Agency must, in preparing a national land transport programme,—

(a) ensure that the national land transport programme—

(i) contributes to the purpose of this Act; and

...

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<sup>29</sup> *Chorus Ltd v Commerce Commission* [2014] NZHC 690.

<sup>30</sup> At [15].

<sup>31</sup> Legislation Act 2019, s 10(1); and see *Commerce Commission v Fonterra Co-operative Dairy Group Ltd* [2007] NZSC 36, [2007] 1 NZLR 767 at [22] and [24]; and *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [6].

<sup>32</sup> Land Transport Management Act, s 19A.



- (iii) gives effect to the GPS on land transport; and
- (b) take into account any—
  - ...
  - (iii) regional land transport plans; and
  - (iv) national energy efficiency and conservation strategy; and
  - (v) relevant national policy statement and any relevant regional policy statements or plans that are for the time being in force under the Resource Management Act 1991; and
  - ...

[25] The required content of the NLTP is set out at s 19C as follows:

**19C Content of national land transport programme**

A national land transport programme must include the following matters:

- (a) an indication of any significant forthcoming national land transport issues known to the Agency; and
- (b) an assessment as to how the programme complies with section 19B; and
- (c) a list of the activity classes identified in the GPS on land transport to be funded from the national land transport fund, and their proposed level of funding; and
- (d) approved activities and combinations of activities; and
- (e) any Police activities or combinations of Police activities approved under section 18L to be delivered by the Commissioner; and
- (ea) a list of rail activities or combinations of rail activities included in the current rail network investment programme; and
- (eb) a list of rail activities or combinations of rail activities approved under section 22F; and
- (f) activities and combinations of activities that the Agency anticipates being funded from the national land transport fund if they are—
  - (i) included in a regional land transport plan; or
  - (ii) activities or combinations of activities (other than those relating to State highways) for which the

Agency is responsible for delivery or managing delivery; and

- (g) an indication of any nationally or regionally significant activities that are likely to be considered for funding in the 3 financial years that follow the 3 financial years covered by the national land transport programme; and

...

[26] The Minister must issue a GPS on land transport for a period that covers six financial years.<sup>33</sup> The preparation and content requirements of the GPS are set out in the LTMA:

#### **67 Preparation or review of GPS on land transport**

- (1) When preparing or reviewing a GPS on land transport, the Minister must—
  - (a) be satisfied that the GPS on land transport contributes to the purpose of this Act; and
  - (b) take into account—
    - (i) any national energy efficiency and conservation strategy; and
    - (ii) any relevant national policy statement that is in force under the Resource Management Act 1991; and
  - (c) have regard to the views of Local Government New Zealand and representative groups of land transport users and providers.
- (2) For the purposes of subsection (1), the Minister must, at least once in every period of 3 financial years, review the Crown's land transport investment strategy required under section 68(1)(b).
- (3) To avoid doubt, nothing in subsection (2) limits section 90(1).
- (4) Before issuing a GPS on land transport, the Minister must consult the Agency about the proposed GPS on land transport.

#### **68 Content of GPS on land transport**

- (1) The GPS on land transport must include—
  - (a) the results that the Crown wishes to achieve from the allocation of funding from the national land transport fund over a period of at least 10 consecutive financial years; and

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<sup>33</sup> Section 66.

- (b) the Crown's land transport investment strategy; and
  - (c) the Crown's policy on borrowing for the purpose of managing the national land transport programme.
- (2) The Crown's land transport investment strategy—
- (a) must link the amount of revenue raised from road users with the planned levels of expenditure from the national land transport fund; and
  - (b) must, for the first 6 financial years of the GPS on land transport and any subsequent years that the Minister considers relevant, address the following matters:
    - (i) the short-term to medium-term results that the Crown wishes to achieve through the allocation of funding from the national land transport fund:
    - (ii) the activity classes to be funded from the national land transport fund:
    - (iii) likely revenue, including changes to the duties, fees, and charges paid into the national land transport fund:
    - (iv) the identification of an expenditure target for the national land transport programme for each year:
    - (v) a maximum and a minimum level of expenditure for the national land transport programme for each year (subject to the ability to carry forward funds from the closing balance of the national land transport fund for a financial year to a future financial year):
    - (vi) an allowable variation between expenses and capital expenditure incurred under the national land transport programme and the inflows received by the national land transport fund:
    - (vii) funding ranges for each activity class:
    - (viii) the allowable reasons for varying the expenditure target identified under subparagraph (iv) when making funding allocation decisions:
    - (ix) a statement of the Minister's expectations of how the Agency gives effect to the GPS on land transport; and
  - (c) must specify the forecast funding ranges for each activity class for the period of 4 financial years following the first 6 financial years of the GPS on land transport; and
  - (d) must state the overall investment likely to be made in the land transport sector over a period of 10 financial years and the likely or proposed funding sources.

- (3) The GPS on land transport—
- (a) may set out national land transport objectives, policies, and measures for a period of at least 10 financial years beginning on the date that the GPS on land transport is issued; and
  - (b) must, subject to the Public Finance Act 1989, specify any additional expected funding for land transport activities, including (but not limited to) any money that Parliament may appropriate for the purpose.

### **The GPS 2021**

[27] Part 3 of the LTMA provides for the Minister to issue a GPS on land transport covering a period of six financial years. The GPS 2021 published on 17 September 2020 came into effect on 1 July 2021.

[28] Waka Kotahi must give effect to the GPS when performing its functions including in the preparation and adoption of the national land transport programme, but there is no statutory obligation on the agency to approve or decline funding for a particular activity or combination of activities included in the national land transport programme.<sup>34</sup>

[29] The GPS must, among other things, define the classes of activity for investment and prescribe the funding bands for each class. It is then for Waka Kotahi, through the NLTP, to translate those investments into specific projects.

[30] Mr Bryn Gandy, the Deputy Chief Executive of Te Manatū Waka | the Ministry of Transport (the Ministry), says it is to the policy intent of the GPS that the Ministers bring their values and priorities to influence decisions on projects but the choices between individual projects are made by Waka Kotahi.<sup>35</sup>

[31] In the Foreword to the GPS 2021 the Minister noted that the transport system accounts for nearly 20 per cent of the country's GHG emissions.<sup>36</sup> He also noted that an important part of meeting the target of net zero carbon by 2050 is the electrification

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<sup>34</sup> Sections 20 and 70(2).

<sup>35</sup> Affidavit of Mr Bryn Gandy, Deputy Chief Executive of the Ministry of Transport, 28 June 2022 at [14].

<sup>36</sup> GPS 2021, above n 9, at 4.

of the light vehicle fleet. The Minister noted that the GPS is a “roadmap for how the Government develops and maintains a transport network that keeps pace with future social and economic changes”.<sup>37</sup> To this end, the GPS set four “big challenges”: preventing deaths and serious injuries; decarbonisation; better transport choices for New Zealanders; and improving freight connections.<sup>38</sup>

[32] Those four big challenges were said to guide the four strategic priorities set out in the GPS, being: safety; better travel options; improving freight connections; and climate change.<sup>39</sup>

[33] The “big challenge” in cities is to move more people with fewer vehicles.<sup>40</sup> Efficient transport networks were required, with investment in the land transport system, including rail and freight. Safety under the “Road to Zero” tagline was emphasised, with the upgrading of roads and road policing important in that regard.

[34] The GPS noted that together the four strategic priorities and the investment strategy in the GPS would “contribute to all five key outcomes” of the Transport Outcomes Framework, namely:<sup>41</sup>

- (a) inclusive access;
- (b) economic prosperity;
- (c) resilience and security;
- (d) healthy and safe people; and
- (e) environmental sustainability, which would include “[t]ransitioning to net zero carbon emissions, and maintaining or improving biodiversity, water quality, and air quality”.

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<sup>37</sup> At 4.

<sup>38</sup> At 4.

<sup>39</sup> At 6.

<sup>40</sup> At 4.

<sup>41</sup> At 5 and 14, referring to Te Manatū Waka | Ministry of Transport *A framework for shaping our transport system: Transport outcomes and mode neutrality* (June 2018) [Transport Outcomes Framework].

[35] The GPS provides a “roadmap” for how the Government develops and maintains the transport network by putting forward strategic priorities and investment principles that are “informed by urban spatial economics to ensure our land transport system is economically and environmentally sustainable”.<sup>42</sup> The GPS noted that the maintenance of the transport system requires coordination and investment by a number of different government agencies, including:<sup>43</sup>

- (a) the Minister;
- (b) the Ministry;
- (c) Waka Kotahi;
- (d) local government;
- (e) KiwiRail;
- (f) the Ministry of Housing and Urban Development;
- (g) Kāinga Ora Homes and Communities;
- (h) the Ministry for the Environment; and
- (i) the Climate Change Commission.

[36] Waka Kotahi collaborates with local government and other agencies to develop integrated plans for transport and land use. It draws on RLTPs to create the NLTP that gives effect to the GPS priorities.

[37] Of the four strategic priorities set out in the GPS 2021, climate change was mentioned as a particular challenge that the Government was working to tackle.<sup>44</sup> It said the GPS reflects the importance of making investment decisions in the transport

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<sup>42</sup> At 4.

<sup>43</sup> At 5.

<sup>44</sup> At 14.

sector that will help New Zealand towards its climate change goals and transforming to net zero carbon emissions.<sup>45</sup> References are made to prioritising a reduction in greenhouse gases emitted by transport to achieve the Government’s emissions reduction targets and protect public health.<sup>46</sup>

[38] Section 2.5 of the GPS 2021 is headed “Strategic Priority: Climate Change”. Under this section, the “primary outcome” is recorded as follows:

67. 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.<sup>47</sup>

[39] In the more detailed description of the climate change priority the following points are made:

68. Nearly 20% of New Zealand’s domestic greenhouse gas emissions currently come from transport, with 90% of those emissions from road transport. New Zealand has committed to reduce greenhouse gas emissions to 30% below 2005 levels by 2030 ... The Government has set a target for New Zealand to be net zero carbon by 2050. Transport emissions are growing, so intervention is required to reduce them.

69. Achieving net carbon zero ultimately requires a transition to a low carbon transport system. In such a system, measures are in place to manage travel demand, and infrastructure is interconnected to encourage walking, cycling and the use of public transport ...

70. The transition will require combined approaches, with government, businesses, and communities all playing a part. The Government should lead because it has a range of tools available to reduce land transport emissions from regulations and standards to direct investment, urban planning requirements and incentive schemes.

71. New Zealand’s cities need to be places where people can safely and enjoyably travel by low emissions transport modes such as walking, cycling, and emissions-free public transport. Businesses also need to look for lower emissions ways to move freight. These choices are influenced by Government investment decisions, such as investing more in rail and coastal shipping; the GPS has a part to play in supporting this transition.

72. The outcomes for the Climate Change strategic priority in GPS 2021 reflect the Government’s move towards setting emissions budgets to make

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<sup>45</sup> At 14.

<sup>46</sup> At 13.

<sup>47</sup> No emissions reduction “target” was in fact recommended by the Climate Change Commission (CCC) to Cabinet. I deal with this in more detail below, at [50].

sure New Zealand achieves its emissions reduction goals. The independent Climate Change Commission (the CCC) is developing emissions budgets, which will set a cap for emissions in five year periods (2022–2025, 2026–2030 and 2031–2035). The CCC will provide advice on the direction of policy required for an emissions reduction plan for the first budget, by February 2021. The Government will respond with its plan to achieve the first budget by 31 December 2021. All investment decisions will need to be consistent with the transport component of that plan, which will be informed by the Transport Emissions Action Plan.

[40] The GPS went on to note that we are already experiencing the impacts of climate change on the national transport system, such as more frequent severe storm events, flooding and coastal inundation.<sup>48</sup> The National Climate Change Risk Assessment provides a national picture of the risks New Zealand faces from climate change, including the risks to land transport infrastructure. The GPS stated the Government will use the Assessment to prioritise reduction of risks, which may include investment choices made through the NLTF. Responding to those risks requires the coordination and collaboration of many agencies.<sup>49</sup>

[41] Referring to *what* would be delivered by 2031 (short to medium term results), the GPS 2021 listed:<sup>50</sup>

- (a) reduced GHG emissions;
- (b) reduced air and noise pollution; and
- (c) improved resilience of the transport system.

[42] Under *how* these outcomes would be delivered, the GPS identified the following:<sup>51</sup>

- a) Waka Kotahi would implement its Sustainability Strategy and Action Plan;

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<sup>48</sup> At 23.

<sup>49</sup> At 23.

<sup>50</sup> At 23.

<sup>51</sup> At 23.



- b) investment decision-making that supports national commitments on emissions reduction;
- c) Waka Kotahi would undertake relevant actions identified in the National Adaptation Plan; and
- d) land use, urban form and street design would be shaped in a way that reduces car dependency, and walking, wheeling, cycling and micro-mobility safe and attractive travel choices would be put in place.<sup>52</sup>

[43] Monitoring is also provided for in relation to *how* progress is to be measured. The GPS noted the Ministry for the Environment would lead monitoring the transport sector's contribution to reducing greenhouse gases, and GPS reporting would continue to include relevant indicators.<sup>53</sup> The relevant indicators for measuring progress in achieving the strategic priorities of GPS 2021 are set in Section 2.6 of the GPS.<sup>54</sup>

[44] Section 3.4 of the GPS sets out the “activity class framework” in a table showing the mandatory minimum and maximum allocation of funding for each of 11 activity classes, including the classes for which the Government had indicated investment priority should be given.

#### *Ministerial expectations*

[45] Section 3.7 of the GPS sets out the statement of ministerial expectations, which is intended to “highlight important behaviours or action required from Waka Kotahi to give effect to GPS 2021.”<sup>55</sup>

[46] The ministerial expectations include Waka Kotahi:<sup>56</sup>

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<sup>52</sup> The GPS noted this would also contribute to the strategic priorities of Safety and Better Travel Options.

<sup>53</sup> At 23.

<sup>54</sup> At 24. It noted that the indicators may be reviewed and updated as new data sources become available.

<sup>55</sup> At 41.

<sup>56</sup> At 41.

- (a) playing a more proactive role in accelerating mode shift across New Zealand;
- (b) having a greater role in long-term, integrated planning for the sector, including working collaboratively with local government, improving transport choices which support the reduction of GHG emissions and supporting the Ministry;
- (c) working closely with the Ministry and local government in developing the NLTP to give effect to the GPS;
- (d) helping to meet the specific programmes under the Government commitments;
- (e) working with KiwiRail, the Ministry, AT, Auckland Council and Greater Wellington Regional Council to develop the Rail Network Investment Programme (RNIP) and implement the new planning and funding framework for rail;
- (f) developing its ability to manage delivery across projects, packages and programmes that comprise its wider portfolio;
- (g) being innovative within its own business, and working collaboratively with others to deliver transport innovation for the land transport system;
- (h) taking a robust approach to getting value for money from the NLTF;
- (i) working with the Ministry to continuously improve the GPS monitoring and reporting system to inform decisions throughout the life of the GPS;
- (j) making land transport data available to others, and promoting the use of common data standards; and
- (k) aligning investment decisions with its 2018 Resilience Framework.

## Preparation of the GPS 2021

[47] The GPS is intended to contribute to the wider goals of the whole transport system, which are contained in the Ministry's Transport Outcomes Framework.<sup>57</sup> According to the Ministry, the majority of the Government's investments in the transport system are in the land transport sector, which is funded by the NLTF.<sup>58</sup> The GPS explains how the transport system will contribute to the five system-wide stipulated outcomes: inclusive access; economic prosperity; resilience and security; healthier and safe people; and environmental sustainability.<sup>59</sup>

[48] The Government may prioritise some outcomes over others, depending on social, economic and environmental circumstances and the Government of the day.<sup>60</sup> There will often be tensions at a project level when transport agencies need to decide how to meet the outcomes, and they may need to make trade-offs between different outcomes.<sup>61</sup>

[49] Mr Bryn Gandy, the Deputy Chief Executive of the Ministry, says the GPS sets out the strategic (or policy) priorities of the Government, among other things, including by defining the classes of activity for investment and prescribing the funding bands for each class.<sup>62</sup> It is then for Waka Kotahi, through the NLTP, to translate those priorities into investment decisions in specific projects.<sup>63</sup>

[50] Mr Gandy says that following cross-party consultation and inter-departmental consultation on the draft GPS, there were various amendments made to what became the "primary outcome" for the climate change strategic priority. He said it incorrectly refers to an emissions reduction *target* recommended by the CCC, whereas the CCC has not in fact recommended targets for any particular sectors. It had, however, provided a transport sector *demonstration path* as a model illustration of how emissions reduction might be met.<sup>64</sup>

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<sup>57</sup> Transport Outcomes Framework, above n 41.

<sup>58</sup> Affidavit of Mr Gandy at [8].

<sup>59</sup> At [15].

<sup>60</sup> Transport Outcomes Framework, above n 41, at 3.

<sup>61</sup> At 3.

<sup>62</sup> Affidavit of Mr Gandy at [13].

<sup>63</sup> At [13].

<sup>64</sup> At [90].

[51] In the Cabinet paper seeking approval to release the finalised GPS 2021, the Minister commented that GPS 2021 would make significant progress in achieving environmental and climate change objectives, including greater funding in the first three years of GPS 2021 compared to GPS 2018 for both public transport (around 17 per cent more) and walking and cycling (26 per cent more).<sup>65</sup> The Minister said he did not consider it appropriate to propose increases to funding for the climate change priority as it would mean “reducing ambition elsewhere or raising additional revenue from land transport”.<sup>66</sup> The Minister went on to explain:<sup>67</sup>

The GPS requests that those who implement it consider the Government’s ambition to reduce greenhouse gas emissions when selecting investments to give effect to the strategic objectives. The GPS cannot decide specific projects, rather, it sets a direction for investments by Waka Kotahi and local government. It is at this project level that I would expect Climate Impact Assessments to be completed.

[52] Mr Gandy went on to say that work was ongoing in relation to the preparation of GPS 2024 and the Ministry would “look to take a more expansive assurance role through the implementation of the NLTP to make sure that the GPS is being given effect to”.<sup>68</sup>

[53] Mr Gandy also said that the progress monitoring indicators set out in the GPS 2021 had largely been taken from the GPS 2018.<sup>69</sup> These would be used according to the Cabinet paper to complete a “holistic, high level report” against GPS 2021.<sup>70</sup>

[54] Mr Gandy commented on the difficulty to attribute outcomes to produce specific reductions as they are affected by external factors and it would take a long time to observe notable changes.<sup>71</sup> The changes would be cumulative. At the stage the GPS 2021 was prepared, the primary purpose of the reporting measures, or

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<sup>65</sup> Cabinet Paper “Release of the Government Policy Statement on land transport 2021” (5 August 2020) at [25].

<sup>66</sup> At [25].

<sup>67</sup> At [38].

<sup>68</sup> Affidavit of Mr Gandy at [118], referring to Cabinet Briefing “Reporting Framework for the GPS on Land Transport” (7 August 2019) Briefing OC190486 at [34].

<sup>69</sup> At [112].

<sup>70</sup> At [113].

<sup>71</sup> At [115].

indicators, was “transparency”.<sup>72</sup> That would lay the groundwork for shifting the transport system to one that was based on evidence-based decision-making.<sup>73</sup>

[55] Mr Gandy said the first couple of years would predominantly focus on monitoring, rather than analysis, in order to build the foundation for baseline data.<sup>74</sup>

[56] Mr Gandy pointed to the Ministry’s annual reports and noted that the year two report on the GPS 2018 explained that the measures were not intended to be a “scorecard” of investment in the transport sector and that all the measures were influenced by a wide range of factors.<sup>75</sup> The next annual review of the GPS 2018 is scheduled to be released shortly. The first annual review of GPS 2021 had not been released at the time of the hearing.

### **Relationship between GPS 2021 and Emissions Reduction Plan**

[57] I now turn to the Government’s Emissions Reduction Plan (ERP).<sup>76</sup>

[58] Mr Gandy noted that the GPS was developed through a coalition between the Labour Party and the New Zealand First Party and a confidence and supply agreement between the Labour Party and the Green Party.<sup>77</sup> Cross-party engagement was required in the process of developing the GPS. The Ministry worked closely with Waka Kotahi to publish the draft GPS.

[59] Wider communications were undertaken with a group of stakeholders with transport interests, including representative groups of land transport users and providers such as local authorities and other interested groups.<sup>78</sup> Mr Gandy described how the pressures on the NLTF were discussed in a number of Cabinet papers and that to meet the emissions reductions targets, coordinated actions outside the GPS would

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<sup>72</sup> At [115], referring to Briefing OC190486, above n 68, at [19].

<sup>73</sup> At [115], referring to Briefing OC190486, above n 68, at [20].

<sup>74</sup> At [115].

<sup>75</sup> At [119], referring to Te Manatū Waka | Ministry of Transport *Government Policy Statement on Land Transport 2018: Annual Report (Year 2)* at 3.

<sup>76</sup> Manatū Mō Te Taiao | Ministry for the Environment *Te hau mārohi ki anamata: Towards a productive, sustainable and inclusive economy – Aotearoa New Zealand’s first emissions reduction plan* (May 2022) [ERP].

<sup>77</sup> Affidavit of Mr Gandy at [20].

<sup>78</sup> At [21].

be needed, beyond the investment the NLTF could offer.<sup>79</sup> Mr Gandy noted that most of the key reductions in emissions in transport would be through actions beyond the GPS, such as encouraging people to buy more electric vehicles, incentivising uptake of low carbon liquid fuels, and supporting the decarbonisation of the freight system. Mr Gandy also noted there would be a focus on changing the way infrastructure is used in cities, including by reshaping streets to support transport and enabling congestion charging and investigating other pricing and demand tools to reduce transport emissions.<sup>80</sup> Therefore, regulatory intervention would also be required. All of these interventions would be required to achieve the Government's emission targets in the Emissions Reduction Budget for the transport sector. The targets amount to an approximately 41 per cent reduction in transport emissions by 2035 from 2019 levels.<sup>81</sup>

[60] The transport section of the ERP notes the key actions for the sector as:<sup>82</sup>

- (a) reducing reliance on cars and supporting people to walk, cycle and use public transport by better and more affordable public transport, improved infrastructure for walking and cycling, safer streets and well-planned urban areas;
- (b) rapidly adopting low emissions vehicles, including by incentivising the uptake of such vehicles, increasing access to such vehicles for low-income households and improving EV charging structure; and
- (c) decarbonisation of the heavy transport industry and freight, including by funding to support the freight structure to purchase zero- and low-emission trucks, requiring zero-emissions public transport buses to be purchased and supporting the uptake of low-carbon liquid fuels by implementing a sustainable aviation fuel mandate and sustainable biofuels obligations.

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<sup>79</sup> At [23], referring to the Cabinet Paper "Government Policy Statement on Land Transport 2021 – release of draft for public engagement" (16 March 2020) at [44].

<sup>80</sup> At [24].

<sup>81</sup> At [24], referring to the ERP, above n 76, at 172.

<sup>82</sup> ERP, above n 76, at 178–190.

[61] The ERP states that transport is one of the largest sources of GHG emissions responsible for approximately 17 per cent of gross domestic emissions and 39 per cent of total domestic CO<sub>2</sub> emissions.<sup>83</sup> The Government has committed in the ERP to a 41 per cent reduction in transport emissions by 2035 from 2019 levels. There are four transport targets:<sup>84</sup>

- (a) Target 1 – reduce total kilometres travelled by the light fleet by 20 per cent by 2035 through improved urban form and providing better travel options, particularly in the largest cities;
- (b) Target 2 – increase zero-emission vehicles to 30 per cent of the light fleet by 2035;
- (c) Target 3 – reduce emissions from freight transport by 35 per cent by 2035; and
- (d) Target 4 – reduce the emissions intensity of transport fuel by 10 per cent by 2035.

[62] The ERP recognised the Government must work with key partners to take the initial actions over the first emissions budget period (2022–2025).<sup>85</sup>

[63] The transport route map to 2035 states that for 2022 the following actions would be taken:

- (a) clean vehicle discount continued;
- (b) public transport operating model review completed;
- (c) national cycling or walking plans published;

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<sup>83</sup> At 171.

<sup>84</sup> At 172.

<sup>85</sup> At 173.

- (d) public transport made more affordable, particularly for low income New Zealanders;
- (e) initial investments made to improve safety and access to public transport and active mode;
- (f) sustainable aviation fuel mandate design proposed to government;
- (g) national EV-charging infrastructure strategy published;
- (h) Government decision made on whether to progress legislative changes to enable congestion charging; and
- (i) funding provided to support the freight sector to purchase zero- and low-emission trucks.

[64] The ERP recorded that the Government was confident it would achieve the first emissions budget based on the analysis in the ERP and that further actions and refinements would be needed in the second and third emissions budget, depending on how matters were tracking.<sup>86</sup> The ERP also noted the need to build climate change adaptation into the planning and design of future infrastructure and to have plans in place to respond to emergency events.<sup>87</sup>

[65] Mr Gandy explained that, in his view and as reflected in Cabinet papers, the GPS had a particularly important role to play “to encourage the land transport sector to play its part and make it easy for people to transition to low carbon transport”.<sup>88</sup> Mr Gandy also noted that bringing heavy rail and coastal shipping into the land transport planning system, alongside the first New Zealand rail plan, made it more straightforward for these to be planned and funded within a more integrated transport system.<sup>89</sup>

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<sup>86</sup> At 193.

<sup>87</sup> At 197.

<sup>88</sup> Affidavit of Mr Gandy at [25], referring to the March 2020 Cabinet Paper, above n 79, at [40].

<sup>89</sup> At [25].



[66] The ERP also provided that one of the actions required to deliver on the ERP was to “[e]nsure the next Government Policy Statement on Land Transport guides investment that is consistent with the emissions reduction plan.”<sup>90</sup>

[67] The briefings to the Minister by the Ministry indicate that the GPS 2021 was unlikely in the short term (2021–2024) to make significant progress towards the CCC’s proposed mode shifts, as its focus was on maintaining the existing work and implementing other programmes the Government had committed to deliver.<sup>91</sup> References in the briefing paper suggest the focus of the mode shift activities would be through the local government-based programmes such as the Auckland Transport Alignment Project (ATAP) and Let’s Get Wellington Moving (LGWM).

[68] Also relevant is the Ministry’s May 2021 discussion paper on transport emissions, which is not Government policy but issued by the Minister with a foreword by the Minister.<sup>92</sup> It again identifies opportunities to reduce emission across the three themes:<sup>93</sup>

- (a) changing the way we travel;
- (b) improving our passenger vehicles; and
- (c) supporting a more efficient freight system.

[69] It notes:<sup>94</sup>

A key purpose of the National Land Transport Fund (NLTF) is that it was designed and intended to fund and maintain the essentials for Aotearoa’s transport system, e.g. provision of roading where needed, maintenance of the system etc. Emissions reductions is a significant step change in investments for the NLTF, which will always be far beyond what the NLTF could do or

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<sup>90</sup> ERP, above n 76, at 191.

<sup>91</sup> Cabinet Briefing “Delivering Mode Shift Through Investment and Regulatory Levers” (21 April 2021) Briefing OC210166 at [22].

<sup>92</sup> Te Manatū Waka | Ministry of Transport *Hikina te Kohupara – Kia mauri ora ai te iwi: Transport Emissions: Pathways to Net Zero by 2050* (May 2021) notes that it identifies what Aotearoa could do to shift the transport system onto a zero emissions pathway and sets out a system-wide approach for reducing transport emissions: at 1.

<sup>93</sup> At 1–2.

<sup>94</sup> At 24–25.

was ever intended to do. There is no doubt that some big investments in public transport, for example, may have to be funded by the Crown.

[70] The next GPS will be the first prepared since the release of the ERP and is scheduled for 2024. The ERP for reducing emissions in the transport sector would be implemented in different ways, one of which was through the GPS. Mr Gandy also referred to the Climate Emergency Response Fund (CERF), which has allocated \$375 million in funding to deliver mode shift and reduce emissions from transportation, \$41 million in funding to support decarbonisation of public transport and \$20 million in funding to support innovations in the decarbonisation of freight.<sup>95</sup> Mr Gandy noted there were other critical and effective levers to reduce transport emissions, such as encouraging the uptake of electric vehicles and regulatory steps such as congestion charges as well as large-scale public transport projects were funded outside of the NLTF.<sup>96</sup>

### **National Land Transport Programme**

[71] The investment in the land transport system for the three-year period (2021–2024) amounted to about \$24.3 billion from the NLTF, Crown funding and forecast investment from local councils. The funding for the NLTF is forecast to be \$13.6 billion for 2021–2024.<sup>97</sup>

[72] The Foreword to NLTP 2021–2024 noted that there were significant funding pressures in developing NLTP 2021–2024. \$12.9 billion of the forecast \$13.6 billion revenue was needed to achieve the lower limits across the 11 activity classes within the GPS. 90 per cent of this forecast revenue was committed for already approved projects under contract or construction or otherwise for continuous programmes to maintain levels of service on the roads and public transport networks.<sup>98</sup> The Foreword notes that further increases in the level of funding or financing would be required in future NLTPs “to transition to a low carbon future and meet emerging transport emissions reduction targets.”<sup>99</sup>

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<sup>95</sup> At [26], referring to Te Kāwanatanga o Aotearoa | New Zealand Government *Climate Emergency Response Fund* (16 May 2022) at 8.

<sup>96</sup> Affidavit of Mr Gandy at [26].

<sup>97</sup> NLTP 2021–2024, above n 3, at 9.

<sup>98</sup> At 8.

<sup>99</sup> At 8.

[73] The NLTP sets out the Government’s wider objectives for:<sup>100</sup>

- (a) making cities and towns, in particular growth areas, great places to live;
- (b) addressing pressure on housing availability and affordability; and
- (c) supporting sustainable economic recovery from COVID-19.

[74] It sets out how projects are assessed and priorities established using the investment prioritisation method (IPM).<sup>101</sup> The funding is prioritised using a tiered investment method approach as follows:<sup>102</sup>

- (a) activities that have previously been approved and are continuing to be delivered in 2021–2024;
- (b) continuous programmes, such as maintenance, public transport services and road safety promotions, and indicative funding for regional transport plans;
- (c) the three-year RNIP as approved by the Minister of Transport; and
- (d) improvement activities, including low-cost low-risk activities prioritised for funding based on the GPS priorities and government commitments.

[75] The NLTP indicates that the minimum spend levels for each activity class must be met.<sup>103</sup> The NLTP activities implemented will change through the three-year period. Therefore, there was a degree of “over-programming”.<sup>104</sup>

[76] The “baseline” activities which are required to be delivered accounted for 90 per cent of the forecast funding.<sup>105</sup> These include:

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<sup>100</sup> At 18–19.

<sup>101</sup> At 21.

<sup>102</sup> At 21.

<sup>103</sup> At 21.

<sup>104</sup> At 21.

<sup>105</sup> At 27.

- (a) financial commitments for projects that had already been approved for funding in previous NLTPs;
- (b) schedule payments under public/private partnerships;
- (c) funding for the RNIP;
- (d) funding to maintain existing public transport services;
- (e) funding to help maintain the roading network at essential levels of service for safety, resilience and access; and
- (f) funding for road policing and road safety promotion.

[77] Separately, detailed regional and activity tables were produced which show the hundreds of activities by region and organisation or activity class and organisation and the approved and potential NLTF investment.<sup>106</sup> The tables showed in line-by-line items whether the funding is committed and the activities that must be included in the NLTP under s 19C(d) of the LTMA. There was a narrow exception for activities that had not been progressed and identified in the IPM and could be taken out. However, indications are that these would not be significant, and, any event, the statutory requirement is to include the approved programme. These amount to \$4.7 billion of the NLTF.

[78] Improvement activities which are to enhance the land transport system include new roading, walking and cycling infrastructure, or public transport infrastructure.<sup>107</sup> These activities are assigned a priority based on a combination of ratings against “GPS alignment”, “scheduling” and “efficiency” factors.<sup>108</sup> Further, an additional and separate statutory process under s 20 provides for funding approval assessed on the basis of a business case for each relevant phase of the activity, usually following the adoption of the NLTP.

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<sup>106</sup> Waka Kotahi NZ Transport Agency “Regional and activity tables” <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

<sup>107</sup> Affidavit of Mr Gareth Hughes, 28 June 2022, at [44.1] and [45].

<sup>108</sup> Waka Kotahi NZ Transport Agency *Investment Prioritisation Method for the 2021–24 National Land Transport Programme* (December 2020) [IPM] at 5–7.

[79] The funding activities under the heading “continuous programmes” relate to investments to operate and maintain the land transport system. This includes, for instance, existing public transport services, road maintenance and road safety programmes.<sup>109</sup> These are given a generic rating under the IPM as a “starting point” which recognises the importance of maintaining ongoing levels of service. The priority order might be adjusted to prioritise filling gaps that align with and contribute to GPS priorities.<sup>110</sup>

[80] Sir Brian Roche, the Chairman of the Waka Kotahi Board, explained that continuous programmes for the entirety of the NLTP period were approved under s 20 at the time of the adoption of the NLTP.<sup>111</sup> Approval is based on business cases for the continuous programmes.<sup>112</sup>

[81] Another category of project called “low cost/low risk” (LCLR) carries a budget of \$857 million.<sup>113</sup> These are proven activities with a value of up to \$2 million. These are assessed as programmes within the activity programme business cases. Information on GPS alignment is provided on each activity and the generic rating may be adjusted following assessment. Funding is allocated first to high GPS-aligned activities. In addition, each region receives at least 50 per cent of the funds claimed for its LCLR programme.<sup>114</sup> This approach was adopted because the application of unadjusted alignment with the GPS favoured work in the cities, leaving the regional requirements underfunded. Therefore, an adjustment was needed to ensure the provincial LCLR activities were funded. Section 20 approval was given at the same time as the NLTP adoption based on business cases provided such as the local councils’ activity management plans.<sup>115</sup>

[82] The NLTP then summarises how it deals with the Climate Change strategic priority. I deal with those contents in more detail below under the analysis.

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<sup>109</sup> At 8.

<sup>110</sup> At 10.

<sup>111</sup> Affidavit of Sir Brian Roche, 23 June 2022, at [94]; IPM, above n 108, at 8; and Waka Kotahi NZ Transport Agency “Board Paper: NLTP final adoption” (30 August 2021) [30 August 2021 Board Paper].

<sup>112</sup> Affidavit of Mr Hughes at [92.2].

<sup>113</sup> 30 August 2021 Board Paper, above n 111, at 1–2.

<sup>114</sup> Affidavit of Mr Hughes at [124].

<sup>115</sup> At [92.2], referring to the 30 August 2021 Board Paper, above n 111.

[83] The evidence of Sir Brian Roche and Mr Gareth Hughes, the National Land Transport Programme Manager at Waka Kotahi, dealt with the more detailed decision-making processes and tools used by Waka Kotahi in preparation and approval of NLTP 2021–2024.

### **Waka Kotahi Board decision-making process**

[84] In order to consider the detailed allegations concerning the lack of efficacy of the investment prioritisation method (IPM) and the climate assessment tool for investment (CATI) to aid the Waka Kotahi decision making concerning climate change issues, it is necessary to go into some detail on the decision-making and activity approval processes of Waka Kotahi, both at the technical/executive level and the board level.

[85] The Chairman of the Waka Kotahi Board, described the decision-making process undertaken by the Board leading to the adoption of NLTP 2021–2024 and how the Board concluded it gave effect to GPS 2021.<sup>116</sup> He noted that Waka Kotahi had specific statutory functions under the LTMA which encompass a broad range of activity related to the transport system but it is not solely responsible for the entirety of the land transport system.<sup>117</sup> Its functions are generally focused on “operational” aspects of the transport system, rather than on policy settings for the system as a whole.<sup>118</sup>

[86] That means that Waka Kotahi generally implements existing government policy relating to transport rather than making major changes to the system that require significant policy work (and often legislation). Sir Brian noted that it is a Crown agent under the Crown Entities Act 2004 and its functions rest with the Board of Waka Kotahi.<sup>119</sup> As a Crown agent, Waka Kotahi must give effect to government policy if directed to by the responsible Minister.<sup>120</sup> It is subject to more general ministerial guidance in its investment decisions through the GPS.

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<sup>116</sup> Affidavit of Sir Brian.

<sup>117</sup> At [33].

<sup>118</sup> At [34].

<sup>119</sup> At [39].

<sup>120</sup> Crown Entities Act 2004, s 7(1)(a).

[87] Sir Brian noted that the Board of Waka Kotahi was required to exercise judgment over how best to perform its functions and contribute to an effective, efficient and safe land transport system in the public interest.<sup>121</sup> The adoption of the NLTP, being a decision of major significance, is reserved for the Board.<sup>122</sup> Sir Brian noted the Board was comprised of individuals with extensive governance and public sector experience, as well as transport and infrastructure experience and expertise.<sup>123</sup>

[88] Sir Brian noted that the NLTF and borrowings fund the NLTP. The NLTF may only be used to pay for specified types of “activities” identified in the LTMA and related expenses.<sup>124</sup> An activity is broadly defined in the LTMA as a “land transport output project”.<sup>125</sup> The range of activities is wide. Sir Brian indicated that to assess new activities for inclusion in the NLTP, Waka Kotahi assesses each new activity on the basis of available information in accordance with the IPM.<sup>126</sup> The application of the IPM is subject to a moderation exercise to ensure that the list of activities recommended for inclusion in the NLTP best gives effect to the relevant statutory criteria. The Board also has a discretion to depart from the results of the IPM.<sup>127</sup>

[89] Once an activity is included in the NLTP, it is eligible for funding from the NLTF, subject to the satisfaction of the criteria under s 20. These activities may be in fact different phases of a project. Generally, the first phase is the business case phase. Development of the business case is guided by the Business Case Approach, which is a key element of the Investment Decision Making Framework (IDMF) adopted by Waka Kotahi. As Sir Brian explained, the Business Case Approach is a robust evidence-based approach for developing business cases based on the Treasury’s Better Business Cases Approach.<sup>128</sup> Sir Brian indicated there is flexibility in the approach to cater to the nature and complexity of a project for which funding is sought.<sup>129</sup> Complex projects may require a sequence of business cases of increasing detail to be developed before they can be implemented. However, the ultimate purpose of any

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<sup>121</sup> Affidavit of Sir Brian at [44].

<sup>122</sup> At [45].

<sup>123</sup> At [46].

<sup>124</sup> At [54].

<sup>125</sup> Land Transport Management Act, s 5(1) definition of “activity”.

<sup>126</sup> Affidavit of Sir Brian at [91].

<sup>127</sup> At [91].

<sup>128</sup> At [92].

<sup>129</sup> At [93].

business case is to seek to justify, in accordance with the relevant statutory criteria under s 20, a decision to fund further phases of the project.<sup>130</sup>

[90] The business case must identify the transport problem that is to be addressed and demonstrate that the proposed solution is the optimal means of addressing it. A business case does this by providing evidence of likely outcomes of the solution, on the basis of specialist transport planning, economic, environmental and other analysis.<sup>131</sup>

[91] Sir Brian indicated that business cases for improvement projects commonly took around a year to prepare and, for more complex projects, the business case phase can take more than a year, especially if the activity is significant.<sup>132</sup> For a complex rapid transit project Waka Kotahi would typically first prepare a “programme” business case that identifies at a network level, the problem and that some form of rapid transport may be an appropriate solution. There would then be a “detailed” business case to identify the particular form of mass rapid transport that is the best solution for the programme. Both the programme and the detailed business case would be supported by expert analysis on transport and other relevant impacts of the project. These are frequently obtained by commissioning external consultants to prepare the work. A project may have separately funded phases for detailed design, property purchase and construction.

[92] Further information is available at subsequent phases when further decisions on approval of projects or activities are made under s 20 of the LTMA. For subsequent phases, Waka Kotahi again applies the IPM to confirm the priority of the activity in accordance with the IPM based on updated information about the activity. There is likely to be far more information available about the impacts of a project to inform the application of the IPM during subsequent phases, which will be assessed before funding approval is given.

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<sup>130</sup> At [93].

<sup>131</sup> At [93].

<sup>132</sup> At [94].



[93] Activities seeking funding approval also undergo an investment quality assurance process.<sup>133</sup> Various other investment checks are made, including an assessment of the robustness of the business case and its alignment with the relevant statutory criteria.

[94] Funding approval is ultimately determined by the relevant decision-maker in Waka Kotahi with authority to approve funding under s 20. For projects with a value over \$50 million, the Board must give approval. For lower levels, various officers of the organisation have delegated authority to approve funding. A Business Case and Funding Decisions Committee consider the information before recommendations to the approving officer or the Board.<sup>134</sup>

[95] Sir Brian said that Waka Kotahi had undertaken significant work in recent years to respond to climate change, including to contribute to the reduction of emissions from land transport.<sup>135</sup> These actions include investment decision-making to promote emissions reduction, including, in particular, increasing the emphasis in the NLTP on activities that contribute to reducing emissions, such as public transport, walking and cycling, and reducing the emphasis on public highway improvements that may increase emissions. At the same time, Waka Kotahi made changes to its Investment Decision Making Framework of IDMF to promote mode-neutrality and allow better assessment of the costs of emissions and benefits of emissions.<sup>136</sup>

[96] Sir Brian noted that the GPSs issued before 2018 referred to climate change and emissions reduction but they had a significantly different focus to the GPS 2018 and the GPS 2021. The earlier GPSs were focused on economic growth and productivity, value for money and road safety.<sup>137</sup>

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<sup>133</sup> At [97].

<sup>134</sup> At [99].

<sup>135</sup> At [101].

<sup>136</sup> The Ministry of Transport defines “mode neutrality” in the Transport Outcomes Framework, above n 41, at 7 in the following way:

Mode neutrality means considering all transport modes when planning, regulating and funding transport, and basing decisions on delivering positive social, economic, and environmental outcomes. Mode neutrality involves two important aspects:

1. Making sure all modes and options are considered and evaluated to find the best system solution.
2. Making users and decision-makers more aware of the benefits and costs of transport choices, to incentivise robust decision-making and smart travel choices.

<sup>137</sup> Affidavit of Sir Brian at [106].

[97] The Transport Outcomes Framework published by the Ministry in 2018 signalled a significant change in focus.<sup>138</sup> The new framework was intended to provide long-term and broad direction to the transport system.<sup>139</sup> It adopted mode neutrality as a guiding principle and included as an outcome “Environmental Sustainability: transitioning to net zero carbon emissions and maintaining or improving biodiversity, water quality, and air quality”.<sup>140</sup>

[98] As Sir Brian explained, Waka Kotahi responded to the shift in focus in the GPS through the development of the NLTP 2018–2021, which reflected the shift in focus on the GPS towards mode-neutrality and investments in public transport, walking and cycling.<sup>141</sup> Sir Brian produced a graph showing the proposed investment levels for NLTP 2018–2021, and actual spend in NLTP 2015–2018. This shows substantial increases in anticipated spending on public transport activity, walking and cycling activity classes, compared to the actual spend in 2018 and the addition of the new “transitional rail” activity class and the rapid transit activity class, together with anticipated reductions in state highway improvements.

*Investment Decision Making Framework (IDMF)*

[99] In 2018, Waka Kotahi also carried out a review of the IDMF it uses, which sought to ensure that investment decision-making, among other things, encourages and supports a mode-neutral approach to identifying and assessing land transport solutions and the delivery of the social, economic and environmental objectives.<sup>142</sup> This resulted in changes to the IDMF, including:<sup>143</sup>

- (a) transitioning to a new benefits framework that aligned with the Ministry of Transport’s Transport Outcomes Framework and was mode-neutral;

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<sup>138</sup> At [107].

<sup>139</sup> At [108].

<sup>140</sup> At [108], referring to the Transport Outcomes Framework, above n 41, at 5.

<sup>141</sup> At [114]–[115].

<sup>142</sup> At [117].

<sup>143</sup> At [118].

- (b) the development of tools to develop with options appraisal and investment decision-making to ensure it could demonstrate effect was being given to the GPS 2021;
- (c) the development of an Appraisal Summary Table to support investment decisions, which required consideration of GHG emissions; and
- (d) the development of an IPM based on the GPS 2021; and
- (e) adjustments to the monetised benefits and costs manual to update the methodology for assessment of GHG emission to better assess the long-term impacts through adjustments to the discount rate and analysis periods.

[100] Sir Brian indicated that following the release of the ERP, Waka Kotahi is undertaking work to update its policies on s 20 funding approvals, in light of the specific policies of the ERP.<sup>144</sup>

*Toitū Te Taiao*

[101] The NLTP 2021–2024 refers to delivering reduction of transport carbon emissions through its investment decisions and through implementing *Toitū Te Taiao*, *Waka Kotahi’s Sustainability Action Plan*.<sup>145</sup> That document sets out the steps Waka Kotahi will take to achieve objectives related to sustainability, including reducing transport GHG emissions.<sup>146</sup>

[102] *Toitū Te Taiao* records a vision for a “sustainable, multi-modal land transport system where public transport, active or shared modes are the first choice for most daily transport needs.”<sup>147</sup> It specifies the reshaping of towns and cities to reduce reliance on cars and support active, healthy and shared transport choices and provide

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<sup>144</sup> At [119].

<sup>145</sup> NLTP 2021–2024 at 35, referring to Waka Kotahi NZ Transport Agency *Toitū Te Taiao – Our Sustainability Action Plan* (April 2020).

<sup>146</sup> *Toitū Te Taiao*, above n 145, at 9.

<sup>147</sup> At 6.

for efficient freight movement.<sup>148</sup> The vision is said to respond to some of the greatest challenges Aotearoa and the world are facing, including an urgent need to reduce land transport emissions and limit global warming.<sup>149</sup> The focus is on a commitment to environmental sustainability and public health in the land transport sector. The document describes how Waka Kotahi will use the levers “within our control and influence” to deliver on this vision.<sup>150</sup> It refers to *Arataki – Our Plan for the Land Transport System 2021–2031*, which affirms Waka Kotahi’s focus on reducing transport GHG emissions to tackle climate change and support the transition to a low-emission economy and improving public health as part of transitioning to a safe and healthy land transport system.<sup>151</sup>

[103] *Toitū Te Taiao* records four challenges: reducing GHG emissions; improving public health; reducing environmental harm; and reducing corporate emissions.<sup>152</sup> Its long-term outcome to 2050 in relation to the GHG emissions challenge is net zero land transport GHG emissions.<sup>153</sup>

[104] *Toitū Te Taiao* sets out six workstreams, with headline actions and sub-actions listed under each.<sup>154</sup>

- (a) sustainable urban access, using planning and investment levers to reduce emissions and improve public health by reducing reliance on car travel and accelerating mode shift to low-carbon, shared and/or active modes;
- (b) safe, clean and efficient vehicles, using its regulatory levers to reduce emissions and improve health through interventions that improve vehicle fleet efficiency;
- (c) protect and enhance the natural and built environment;

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<sup>148</sup> At 6.

<sup>149</sup> At 6.

<sup>150</sup> At 6.

<sup>151</sup> At 6.

<sup>152</sup> At 9.

<sup>153</sup> At 9.

<sup>154</sup> At 13–22.

- (d) lead by example, by reducing business travel emissions and modelling sustainable behaviours;
- (e) invest for sustainable outcomes, by recalibrating Waka Kotahi's planning and investment settings for long-term sustainable outcomes; and
- (f) establishing foundations for enduring success, by establishing building blocks for enduring success and continuous improvement.

[105] The first two workstreams, sustainable urban access and safe, clean and efficient vehicles, directly support the GHG emissions challenge. Under the first workstream, actions include embedding a strategic approach for Waka Kotahi on urban form and transport planning for sustainable development that reduces emissions and improves access and liveability. The second summary action refers to sizing the mode shift contribution for net zero land transport emissions by 2050. Waka Kotahi will support lead government agencies and the CCC “to understand the urban form and mode shift contribution to achieving net zero land transport emissions, relative to improving the vehicle fleet so that achievable emission reduction interventions, objectives and targets can be set.”<sup>155</sup> The second workstream, safe, clean and efficient vehicles, includes in summary actions the gearing up and administering of the Government's proposed Clean Car Discount and Clean Car Standard when approved, supporting the feasibility study for social leasing to help low-income households into safe and clean vehicles, and partnering to provide individuals and fleet owners with the knowledge and confidence to purchase and use electric vehicles.

[106] Sir Brian said Waka Kotahi had made significant progress toward the goals in *Toitū Te Taiao*, including updating the IDMF and embedding the use of the Appraisal Summary Table in investment decisions, which summarises the impacts and whole of life costs for business case approvals of proposed transport investments.<sup>156</sup> GHG emissions are a mandatory consideration within the Appraisal Summary Table.<sup>157</sup>

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<sup>155</sup> At 13.

<sup>156</sup> Affidavit of Sir Brian at [132], noting this was outlined in Waka Kotahi's 2021 sustainability monitoring report, *Tiakina te Taiao*, above n 20.

<sup>157</sup> At [132].

[107] Other initiatives include supporting the development of the Government's Clean Car Programme, which includes administering the clean car rebate to encourage people to buy low-emissions vehicles, and commissioning research to determine baseline carbon footprints for construction, operations and maintenance emissions from land transport infrastructure, which would be used to benchmark road construction projects and help set targets for reducing emissions.<sup>158</sup>

#### *Board processes*

[108] Sir Brian then outlined the decision-making process of the Board.

[109] He noted that NLTP 2021–2024 is positioned at the start of what will be a significant change in transport over time as successive emission reduction budgets take effect.<sup>159</sup>

[110] The Chairman described the funding difficulties that the Board was required to grapple with before it could approve NLTP 2021–2024. The pressures on funding were such that the revenue Waka Kotahi received to fund NLTP 2021–2024 was only sufficient to fund the minimum investment in the activity class ranges.<sup>160</sup> In some activity classes, the bottom of the activity class range was below expenditure required to maintain current services. Therefore, funding would not maintain levels of service in activities such as public transport and maintenance. The Board was faced with trade-offs, such as whether it would prioritise safety or climate change outcomes. The Board was due to meet to approve the NLTP on 19 August 2021. However, following further discussions with the Ministry and officials from Treasury, an additional debt funding of \$2 billion was forthcoming.<sup>161</sup> Sir Brian noted that the strategic priorities (safety, better travel options and improving freight connections) all required the maintenance of roads and infrastructure to support them.<sup>162</sup> In addition, improvement of the resilience of the transport system is one of the results associated with the climate change strategic priority.<sup>163</sup> Maintenance of service levels is consistent with the

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<sup>158</sup> At [132].

<sup>159</sup> At [152].

<sup>160</sup> At [181].

<sup>161</sup> At [211].

<sup>162</sup> At [145].

<sup>163</sup> At [146].

purpose of the LTMA and the objective of Waka Kotahi to contribute to a safe, effective and efficient land transport system.<sup>164</sup>

[111] The Board was then satisfied that NLTP 2021–2024 gave effect to the GPS 2021 and approved it.<sup>165</sup> Sir Brian says that the Board assessed the NLTP in context, in particular, that:<sup>166</sup>

- (a) investment in the transport network was one of several mechanisms for achieving transport outcomes (including climate-related outcomes, which are also impacted by, for example, planning and regulatory levers);
- (b) reducing emissions requires coordinated action between multiple actors in central and local government;
- (c) at the time the NLTP 2021–2024 was adopted, work to establish the ERP, which would provide a complete plan for emissions reduction covering the whole transport sector in accordance with the emissions budgets adopted by the Government, was ongoing;
- (d) Waka Kotahi had developed its own long-term strategic approach to emissions reduction that outlined for its purposes, and for the purposes of informing its partners, how emissions reduction could be achieved over the long-term through the full range of available interventions in the transport system;
- (e) the NLTP represents investment for three years of the 10-year timeframe of the GPS; and
- (f) there are significant funding restraints in those first three years.

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<sup>164</sup> At [148].

<sup>165</sup> At [243].

<sup>166</sup> At [244].

[112] The Board was satisfied that the climate change strategic priority in particular, had been appropriately dealt with, for a number of reasons:<sup>167</sup>

- (a) the additional funding for the GPS is significantly weighted towards activity classes with a mode-shift focus;
- (b) the only activity classes for improvement activities that the draft NLTP funds beyond the minimum of the GPS funding range are public transport infrastructure and walking and cycling;
- (c) no new (that is, non-committed) state highway improvement activities are contemplated by NLTP 2021–2024;
- (d) within the local road improvement class, a public transport project, the Eastern Busway has been prioritised by exception from its IPM ranking as “probable” for funding;
- (e) the “very limited” discretion funding available prior to the injection of the \$2 billion additional debt was directed to continuous programmes, including the maintenance of existing service levels for public transport;
- (f) the additional funding sought, and ultimately received, is closely aligned with GPS priorities and weighted toward activity classes with a mode shift focus;<sup>168</sup> and
- (g) more of the additional funding is allocated to public transport and walking and cycling activity classes than to road improvements.

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<sup>167</sup> At [245]–[246].

<sup>168</sup> As Sir Brian explained (at [246.3]), this included additional funding allocated to state highway improvements and funding to avoid the serious consequences of failing to maintain service levels as was consistent with the purpose of the LTMA to ensure an effective, safe and efficient land transport system. This had the co-benefit of encouraging mode shift on roads. Improving safety may also have a co-benefit of encouraging mode shift. The additional funding was primarily for ATAP projects, which was a Government commitment and where the Government considered GPS alignment to the strategic priorities to be the strongest.



[113] In addition, the NLTP 2021–2024 anticipates significant investment in activities which would give effect to the climate change strategic priority of GPS 2021, including:<sup>169</sup>

- (a) planning with co-investment partners to shape compact development, enable low carbon travel options for mode shift and health benefits in four main urban areas, and ensure resilient networks for people and freight;
- (b) supporting increased use of public transport, walking and cycling through improvement of existing and provision of new services, networks and infrastructure, as well as making shared spaces safe and more attractive to encourage mode shift; and
- (c) improving connections between shared and active modes to help people connect with and transfer between public transport, walking, cycling and “micro-mobility” networks.

[114] The key activities which would achieve that, Sir Brian said, are the investment of \$2.6 billion in public transport services and related co-investment funding from partners.<sup>170</sup> This includes maintenance of services but also additional investment amounting of over \$100 million for improvements in public transport services.

[115] In addition, there is significant investment in public transport infrastructure, including the Auckland initiatives, LGWM, the National Ticketing Solution and new shared pathways, bike routes, walkways and pedestrian facilities across the country. These total well over \$2 billion.

[116] Sir Brian indicated that before funding for any activity is actually approved, the activity will again be tested for consistency with the LTMA and GPS 2021.<sup>171</sup> As the funding approved becomes more consequential, there is more information and

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<sup>169</sup> At [248].

<sup>170</sup> At [249].

<sup>171</sup> At [250].

therefore more detailed assessment undertaken to ensure the activities approved for funding were consistent with the GPS 2021.

[117] In addition, the Board was confident in the process that had been used to assess improvement activities for inclusion in NLTP 2021–2024. The process involved the application of the mode neutral IPM to assess GPS alignment of activities for inclusion in the NLTP as well as the effectiveness and efficiency of these activities. The results of the application of the IPM, were subject to moderation to ensure the NLTP overall was consistent with the statutory criteria.<sup>172</sup>

[118] The Board was of the view that the mix of improvement activities would deliver the greatest impact across the four strategic priorities.<sup>173</sup> Sir Brian indicated that he was further satisfied that the NLTP achieved an appropriate balance between the various aspects of GPS 2021 to give effect to it, including the climate change strategic priority. This was because 90 per cent of forecast funding from NLTF was directed toward “baseline” activity funding for committed activities which include maintenance of existing public transport services, maintenance of the road network at essential levels for safety, resilience and access, and funding for road policing and road safety promotions. All of those activities, he said, played a key role in delivering on the four strategic priorities in the GPS.<sup>174</sup>

[119] Sir Brian says that he does not think the Board would have been assisted by an attempt to quantitatively model the NLTP.<sup>175</sup> This is because trade-offs presented by the funding constraints were quite clear, especially before the additional funding was confirmed. Trade-offs were obvious, for example, increased maintenance spending to reduce deaths and serious injuries against spending more in improvement activities focused on mode shifts that might reduce emissions. Quantification of the precise level of emissions reduction in different variations on those fundamental trade-offs was unlikely to assist the Board in exercising its judgment. In addition, Sir Brian noted that the GPS contemplates the Ministry will work with agencies to carry out

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<sup>172</sup> At [247].

<sup>173</sup> At [247].

<sup>174</sup> At [248].

<sup>175</sup> At [252].

monitoring against the GPS priorities over the course of the GPS on the basis of available data resources.<sup>176</sup>

[120] Sir Brian said that the IPM was effective. The applicant had criticised it as prioritising activities according to the single highest GPS alignment factor. In response Sir Brian said that investment in activity classes ensures that there is a reasonable spread of anticipated investments across the four strategic priorities.<sup>177</sup>

[121] In addition, Sir Brian said judgement was applied to the results of the IPM to ensure it gave effect to the GPS 2021.<sup>178</sup> This included prioritising by exception projects that were highly aligned with GPS objectives, such as the Eastern Busway. Finally, he said that the IPM did in fact result in a significant weighting of the NLTP towards the activity class that promoted mode shift from private vehicles to public transport, walking and cycling, consistent with the climate change priority of GPS 2021.<sup>179</sup>

### **The challenges to the decision**

[122] In the first cause of action Movement says that in preparing and adopting NLTP 2021–2024, Waka Kotahi was required to ensure that the NLTP contributed to the purpose of the LTMA and gave effect to GPS 2021. Movement says Waka Kotahi failed to do that and did not properly assess whether NLTP would reduce emissions as it was required to do.

[123] The second cause of action alleges an error of law in relation to the preparation and adoption of the NLTP under s 19A of the LTMA in that Waka Kotahi failed to ensure that the NLTP contributed to the purpose of the LTMA and gave effect to the GPS 2021. In particular, it erred by assessing the priority of activities for investment in the NLTP using the IPM and by assessing the emissions impact of the NLTP using the CATI.

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<sup>176</sup> At [253].

<sup>177</sup> At [254.1].

<sup>178</sup> At [254.3].

<sup>179</sup> At [254.4].

[124] The third cause of action alleges an error of law by Waka Kotahi in preparing and adopting the NLTP by failing to ensure that the NLTP gives effect to GPS 2021. The allegation is that as a funding applicant, Waka Kotahi was required to show that it had considered alternatives, and how those alternatives compared in meeting the results set out in section 2.6 of the GPS 2021, and it failed to do so.

[125] The applicant had initially sought an order quashing the decision to adopt the NLTP 2021–2024 and a direction that Waka Kotahi reconsider the plan in accordance with the Court’s findings. However, given the time that has elapsed since the publication of the NLTP, it no longer seeks that the NLTP 2021–2024 adoption decision is quashed, but instead seeks directions for the consideration of the NLTP in accordance with this Court’s findings.

### **First and second causes of action**

#### *Quantitative measurement*

[126] A focus of argument in the first and second grounds of review is that Waka Kotahi should have undertaken quantitative measurements of emissions in the preparation of its NLTP. These were required initially as a baseline from which to measure the reductions to be achieved in line with the *emissions reduction target* recommended by the CCC.<sup>180</sup>

[127] The CCC had not published a separate budget for the land transport sector but had published a “transport sector demonstration path”. Movement responds by saying that while the CCC did not expressly recommend an “emissions reduction *target*”, what was required were reductions in line with the CCC’s recommended emissions budgets and the transport sector’s role in achieving those reductions should be informed by the transport demonstration path. Movement says that the CCC’s recommendations equate to a reduction in net CO<sub>2</sub> of 47 per cent by 2030 and 78 per cent by 2035, compared with 2019 baselines. The transport demonstration path for

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<sup>180</sup> The CCC in fact did not produce emission reduction targets but published emission reduction budgets which were recommended to Cabinet.

achieving the budget shows transport CO<sub>2</sub> emissions reducing from a 2019 baseline by 12.5 per cent by 2030 and 41 per cent by 2035.<sup>181</sup>

[128] Movement says Waka Kotahi did not prepare baseline projections for GHG emissions from land transport for the years to 2021 nor did it have quantitative measurement tools to measure the activities' predicted emissions going forward to 2031 or otherwise. It says that while Waka Kotahi, using its CATI tool, was able to predict that 78 per cent of the NLTP investments had the potential to either maintain or increase emissions it did not assess whether, collectively, activities set out in the NLTP will increase, maintain or reduce emissions, or whether the NLTP will give effect to the emissions reduction target the CCC recommended to Cabinet.

[129] Movement says that the GPS 2021 is concerned with quantitative outcomes. That means GHG emissions must be reduced in real terms, as opposed to a reduction in the rate of growth. The applicant submits that the requirement for quantitative measurements in the NLTP is borne out by the following:

- (a) The Climate Change Strategic Priority is a primary outcome that Waka Kotahi is required to give effect to.
- (b) The strategic priority of transition to a low carbon transport system must support emissions reductions that are aligned with national commitments at the same time as improving safety and inclusive access.<sup>182</sup> According to Professor Ralph Sims, an expert who provided an affidavit in support of Movement, such a transition is a “real world example of the just transition concept”.<sup>183</sup> This would require:<sup>184</sup>

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<sup>181</sup> Affidavit of Professor Ralph Sims, 28 April 2022, at [37].

<sup>182</sup> GPS 2021, above n 9, at 22.

<sup>183</sup> Reply affidavit of Professor Sims, 29 July 2022, at [27]. Hīkina Whakatututuki | Ministry of Business, Innovation and Employment defines a “just transition” on its website (Hīkina Whakatututuki | Ministry of Business, Innovation and Employment “Just Transition” <[www.mbie.govt.nz](http://www.mbie.govt.nz)>) in the following way:

In general terms, a ‘Just Transition’ in New Zealand is a strategy to move a region toward a low carbon future. It is about a region leading their own transition to ensure that the impacts and opportunities that may arise from the transition are more evenly distributed.

Transitions have traditionally disadvantaged some groups more than others. In a Just Transition, this is acknowledged and incorporated into planning to make the transition more fair, equitable and inclusive.

<sup>184</sup> Reply affidavit of Professor Sims at [27].

... a change in direction for activities such as state highway improvements that would otherwise continue on a trajectory of increasing emissions. Such a change in direction should be carried out in a way that does not jeopardise safety or inclusive access ...

- (c) The strategic priority primary outcome as it refers to investment decisions which contribute to a sector that reduces harmful emissions, requires more precision. This is reinforced by the changes in language made to that particular strategic priority reflecting public submissions supporting the inclusion of more tangible outcomes in deliverables. Therefore the language of the outcome was amended to refer to “giving effect to” the CCC emissions reduction target from the previous wording which was “taking account of”.

[130] With that in mind, Movement suggests that for Waka Kotahi to ensure that NLTP 2021–2024 gives effect to GPS 2021, it is necessary to:

- (a) determine the baseline quantum and trajectory of transport emissions;
- (b) understand how the different components of the land transport system would contribute to the reduction of emissions contemplated by the CCC recommended emissions budgets and demonstration path for transport and the 2031 “reduce emissions” results;
- (c) make an ambitious assessment as to which reductions are required under the NLTP as a proportion of the reductions from the wider transport system to achieve those outcomes;<sup>185</sup>
- (d) assess the carbon emissions of activities in NLTP 2021–2024 given it influences land transport emissions over a longer period; and
- (e) ensure that the contribution to emissions reduction achieved by NLTP 2021–2024 is consistent, as part of the reductions required from the

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<sup>185</sup> Referring to the report of the CCC, above n 18, at 262, referring to ambitious targets and the requirement for the government to encourage a wider set of actions than what is simply necessary to achieve the budgets.

wider land transport system, with the magnitude of emissions reductions contemplated by the CCC.

[131] In response, Waka Kotahi and the respondents say:

- (a) GPS 2021 specifies funding ranges for activity classes;<sup>186</sup>
- (b) the Transport Outcomes Framework contains a statement that the outcomes need to be met “as a whole”;<sup>187</sup>
- (c) not all aspects of the land transport system’s effects on emissions are within the scope of the GPS and NLTP; and
- (d) Waka Kotahi is not in a position to measure in a quantifiable manner all emissions from the sector activities within the NLTP, both because the tools are not available to do so but remain under development and, secondly, because of the enormity of the task.

### *Experts*

[132] Movement provided affidavits from two experts. Professor Sims is an emeritus professor in sustainable energy and climate mitigation.<sup>188</sup> Mr Roger Boulter is an urban transport planning consultant.<sup>189</sup> Both experts provided an analysis and critique of Waka Kotahi’s approach and the tools it used. In general, the criticisms go to the fact that Waka Kotahi had no quantitative tools for measuring the effect on emissions, first to provide a baseline for the NLTP and then to analyse predicted reductions in emissions by implementation, in line with the budgets adopted by the Government.

[133] Waka Kotahi personnel, the Chair and experts provided affidavits in response.

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<sup>186</sup> Waka Kotahi must fund at least up to the lower end of the investment range for each activity.

<sup>187</sup> Affidavit of Mr Gandy at [15]–[16].

<sup>188</sup> Further qualifications and experience were set out in Professor Sim’s affidavit.

<sup>189</sup> Affidavit of Mr Roger Boulter, 2 May 2022, and reply affidavit, 1 August 2022. Mr Boulter’s qualifications and experience are set out in more detail in his affidavit.

[134] Mr Robert Hannaby is the lead advisor in the environment and sustainability team at Waka Kotahi.<sup>190</sup> He had led a range of activities and initiatives, including the development of emissions assessment tools that Waka Kotahi uses in relation to planning and investment decision-making.<sup>191</sup>

[135] In addition, affidavits were provided by Mr Adolf Stroombergen, a chief economist at Infometrics with specific specialist expertise in the fields of climate change and transport modelling,<sup>192</sup> and Mr Mark Lusic, a consultant with Arup, a professional services firm which has undertaken a range of work for Waka Kotahi.<sup>193</sup> Mr Lusic was part of the team that investigated opportunities to assess GHG emissions across regional land transport activities in the NLTP.<sup>194</sup> He also co-created the GHG emission reduction framework, which was used to develop the present CATI tool used by Waka Kotahi.<sup>195</sup>

[136] Mr Gareth Hughes, the National Land Transport Development Manager at Waka Kotahi, led the NLTP development team and also filed an affidavit.<sup>196</sup> Other affidavits were filed in opposition, including on behalf of regional transport committees concerning the RLTP process. It is not necessary to refer to those in any detail.

[137] Professor Sims for Movement outlined a range of models which he said could be developed or used in combination as tools to provide the quantitative analysis required. Mr Boulter approached the issue from the point of view of transport planning and the need to monitor quantitative results.

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<sup>190</sup> Affidavit of Mr Robert Hannaby, 27 June 2022. Mr Hannaby's qualifications and experience are set out in his affidavit.

<sup>191</sup> At [2].

<sup>192</sup> Affidavit of Mr Adolf Stroombergen, June 2022. Mr Stroombergen's qualifications and experience are set out in his affidavit. Infometrics is a Wellington-based company specialising in delivery of economic information, research, analysis and forecasts to assist businesses and other organisations to make their policy, planning and strategic decisions.

<sup>193</sup> Affidavit of Mr Mark Lusic, 1 July 2022. Mr Lusic's qualifications and experience are set out in his affidavit.

<sup>194</sup> At [9.1].

<sup>195</sup> At [9.1].

<sup>196</sup> Mr Hughes' qualifications and experience are set out in his affidavit.



[138] Criticisms were also made of the tools or models used by Waka Kotahi. In relation to the CATI tool, Professor Sims noted in particular that it does not assess:<sup>197</sup>

- (a) annual tonnes of GHG emissions/carbon dioxide (up or down);
- (b) monetised costs and benefits of GHG emissions;
- (c) implications of broader system policy settings, such as implementation of vehicle emission standards, local government parking policies and spatial planning commitments; or
- (d) construction, operation and end-of-life GHG emissions.

[139] Mr Boulter also criticises the use of other Waka Kotahi models and their application. He notes that *Toitū Te Taiao, Waka Kotahi's Sustainability Action Plan*, aligns well with the desired outcomes in the four strategic priorities in the GPS 2021. However, he says due to Waka Kotahi's internal processes, the approach outlined in *Toitū Te Taiao* to reducing emissions is compromised, most notably by:

- (a) the low weight attached to emissions in Waka Kotahi's monetised analysis of benefits and costs;
- (b) the failure to compare alternatives across different forms of transport; and
- (c) the assessment of GPS alignment according to a single GPS criterion (as defined by the IPM), rather than to what extent does the investment achieve the results required by GPS 2021.

[140] In general terms in response, Mr Hannaby for Waka Kotahi says it is not possible to develop a quantitative emissions tool given:<sup>198</sup>

- (a) data availability and quality;

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<sup>197</sup> Affidavit of Professor Sims at [84].

<sup>198</sup> Affidavit of Mr Hannaby at [44]–[47].

- (b) complexity, with over 5,000 different projects involved and consideration of a range of interdependencies, particularly since many functions, such as urban form and elective vehicle uptake, are outside Waka Kotahi’s control;<sup>199</sup> and
- (c) the lack of a model that robustly accounts for mode shift impacts on the transport system.

[141] Mr Hannaby says, in particular, the difficulties with data required to form any reliable assessment and the complexities mean that any qualitative assessment would not be sufficiently robust at this stage to be of any potential use to a decision-maker.<sup>200</sup> The end product would be highly uncertain and potentially produce erroneous results.<sup>201</sup>

[142] That position is confirmed by Mr Stroombergen, an economist, who says that while the CCC provided advice to the New Zealand government concerning net emissions budgets for all gases for the periods 2026-2030 and 2031-35, as well as proposing broad measures to achieve those budgets which are tested by a modelling a transport “demonstration path” for the emission reductions that would result from those measures, it is economically inefficient and very costly to expect all sectors to reduce emissions by the same proportional amount.<sup>202</sup> He also says the ERP adopted by the New Zealand government does not take the approach suggested by Professor Sims.

[143] The concept of a “just transition” to a low emissions economy describes the recognition by the CCC and New Zealand Government that the transition to low or zero emissions economy should be just, fair and inclusive for all New Zealanders. A functioning transport system has numerous objectives, including efficiency, safety, accessibility and reducing emissions. This is reflected in the Ministry of Transport Outcomes Framework.<sup>203</sup> Mr Stroombergen says this is reflected in GPS 2021 which

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<sup>199</sup> For example, increasing the price of road transport might well have an implication for the use of cycleways and predictions of what other activities in the system would be required: at [46.2].

<sup>200</sup> At [48].

<sup>201</sup> At [48].

<sup>202</sup> Affidavit of Mr Stroombergen at [18]–[19].

<sup>203</sup> At [21]–[22].

expressly refers to the transport outcomes framework in the climate change strategic priority in the GPS. A balance between objectives is implied when the climate change priority refers to the low carbon transport system supporting emissions reductions aligned with “national commitments while improving safety and inclusive access”.<sup>204</sup>

[144] Mr Stroombergen also comments that the modelling by the CCC for the “Path to 2035” is based on projections that emissions from domestic road transport will peak in 2023–2024.<sup>205</sup> He goes on to say that the Government’s ERP notes that the emissions budget for the first period (2022–2025) is likely to be met through existing planning initiatives and, in particular, the shift of the vehicle fleet to cleaner forms of energy.<sup>206</sup>

[145] Mr Stroombergen says that he knows of no practical methodology available to produce a robust quantitative analysis of the emissions impacts of a national programme comprising the land transport investments in New Zealand. He points to the lack of data and wider aspects of the economy that might impact emissions.

[146] Mr Stroombergen notes that there are many significant factors outside the ambit of Waka Kotahi that may confound any project-by-project summation of the emissions. The foremost of these is the penetration of electric vehicles but others include oil prices, carbon prices, the rise in working from home, the price of public transport and imminent changes to regulations about urban form.<sup>207</sup>

[147] Mr Lusic said there was no streamlined method of measurement.<sup>208</sup> He noted that emerging digital technologies are currently being investigated in some jurisdictions to develop comprehensive models of quantitative emission impacts but they were not yet readily available.<sup>209</sup>

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<sup>204</sup> At [23], referring to the GPS 2021 at 22.

<sup>205</sup> At [26].

<sup>206</sup> At [26], referring to the ERP, above n 76, at 193.

<sup>207</sup> At [27]–[30].

<sup>208</sup> Affidavit of Mr Lusic at [23]. Mr Lusic is an Associate Principal with Arup, the consultancy engaged by Waka Kotahi to assist in the development of a model that could be used to assess the GHG emissions reduction potential impact of transport interventions at a programme level.

<sup>209</sup> Affidavit of Mr Lusic at [24].

[148] Mr Lusic also comments that Professor Sims has “materially overstated the usefulness of these documents to the creation of an operational model to quantitatively assess the GHG implications of a programme with transport investment.” The only document directly relevant<sup>210</sup> had been taken into account by Arup (Mr Lusic’s consulting firm) in developing the CATI tool or model.

[149] Mr Lusic refers to the development of that model and says that the focus of the work was on “how investments in infrastructure and services influence emission outcomes arising from the use of the transport system”. It was not a requirement of the methodology to provide for a consideration of GHG emissions associated with specific project design construction, maintenance or operation of infrastructure. Those considerations were better assessed when projects were further developed.<sup>211</sup>

*Minister of Transport*

[150] Mr Fong, for the Minister, supported Waka Kotahi’s submissions, that a quantitative assessment of the carbon emissions was not required in order for Waka Kotahi to fulfil its duty to give effect to GPS 2021.

[151] Mr Fong argued that Waka Kotahi’s responsibility was to the Minister so only a flagrant disregard of the policies could vitiate the decision to adopt the NLTP. Mr Fong also pointed to s 68 (content of GPS on land transport) as being non-prescriptive and including references to the Minister’s “wishes” and “expectations”.

[152] Mr Fong submitted that the climate change priority did not impose hard-edged outcomes and Waka Kotahi was not obliged to ensure the NLTP delivered a specific level of emissions reduction. He noted this was consistent with the GPS’s description of itself as providing a “road map”, “direction and guidance” and “influence”.<sup>212</sup>

[153] Mr Fong submitted that the GPS was concerned with strategic priorities or directions which are objectives rather than “bottom lines”. He referred to the decision of the English Court of Appeal in *R (Thornby Farms Ltd) v Daventry District Council*,

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<sup>210</sup> Affidavit of Professor Sims at [27].

<sup>211</sup> Affidavit of Mr Lusic at [32].

<sup>212</sup> GPS 2021, above n 9, at 4 and 21.

which indicated that “[a]n objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations.”<sup>213</sup> A “flagrant disregard” for the objective would be a breach of an obligation, but as long as the objective was kept in mind decisions giving weight to the other considerations might mean little or no progress is made on one objective.<sup>214</sup>

[154] Mr Fong said that Waka Kotahi’s obligation is to keep all four strategic priorities in mind when preparing the NLTP and some decisions may mean “little or no progress” is made on all of the four strategic priorities. He referred to the Transport Outcomes Framework to which the priorities are linked,<sup>215</sup> noting that at a project level, agencies “will often face tensions when deciding how to meet these outcomes, and may need to make trade-offs between different outcomes”.<sup>216</sup> Mr Fong also referred to ministerial briefings which referred to “competing priorities” and “trade-offs” in support of that argument.

[155] Mr Fong said that Waka Kotahi, as a Crown agent, is primarily accountable to the Minister (and, through him, to Parliament) for the extent to which it had successfully given effect to the GPS, and this was demonstrated by the accountability mechanisms available under the LTMA. For instance, Waka Kotahi had to publish an annual report on the NLTF which included financial information, a statement of commitments and a statement of performance for the Minister, who then presents it to the House of Representatives.<sup>217</sup> In addition, it must make its reasons for decisions under s 20 to approve or decline funding publicly available.<sup>218</sup> In addition, the Minister requires Waka Kotahi to include various matters in its statement of intent under the Crown Entities Act, including the basis upon which it will prepare the NLTP and how that programme would give effect to the GPS.<sup>219</sup> The purpose of the statement of intent is to promote public accountability. Finally, Mr Fong pointed to s 101 of the LTMA, which allows the Secretary of Transport to monitor and review

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<sup>213</sup> *R (Thornby Farms Ltd) v Daventry District Council* [2002] EWCA Civ 31, [2003] QB 503 at [53].

<sup>214</sup> At [53].

<sup>215</sup> Briefing OC210166, above n 91, Appendix 1 at [4].

<sup>216</sup> Transport Outcomes Framework, above n 41, at at 3.

<sup>217</sup> Crown Entities Act, s 11.

<sup>218</sup> Section 20E.

<sup>219</sup> Section 100.

Waka Kotahi's activities, including its evaluation procedures, for the purpose of performance of the land transport funding and planning system.

[156] Mr Fong said that while these features do not exclude judicial review, they are relevant for considering what amounts to a failure to give effect to the GPS. This is reinforced by the fact the Minister is authorised to provide a statement setting out his expectations of how Waka Kotahi gives effect to the GPS supplemented by annual letters of expectations.

[157] Mr Fong also pointed to case law from England and Wales, based on the *Tameside* duty on a decision-maker not only to ask the right question but also to "take reasonable steps to acquaint himself of the relevant information to enable him to answer it correctly".<sup>220</sup> Mr Fong reviewed a number of authorities in support of his submission that what was reasonable would depend on the circumstances prevailing at the time, including time available, resource to hand, existing knowledge and expertise and reliability or apparent reliability of sources which could all have a bearing.<sup>221</sup> Mr Fong submitted that these authorities indicated the Court should not intervene merely because it considers that further enquiries would have been sensible or desirable, but only if no reasonable authority could have been satisfied on the basis of enquiries made and it possessed information necessary for its decision.<sup>222</sup> In addition, the relevant information "must be of such importance or centrality, that its absence renders the decision irrational".<sup>223</sup>

[158] Mr Fong, in summary, said the quantitative assessment at programme level here was not required because:

- (a) There was no express stipulation in either s 19B or GPS 2021 that a quantitative assessment must be carried out.

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<sup>220</sup> *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) at 1065. *Tameside* has been applied in New Zealand in, for instance, *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 197.

<sup>221</sup> *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000 at [60], affirmed on appeal in *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA).

<sup>222</sup> *R (Friends of the Earth) v Secretary of State for International Trade* [2022] EWHC 568 at [98].

<sup>223</sup> At [99].

- (b) The climate change priority does not require NLTP 2021–2024 as a programme to deliver on the short-term results of “reduced greenhouse emissions”. The Minister accepts proper consideration of emissions reduction may require some form of quantitative assessment, but in respect of GPS 2021 the stage at which this assessment occurs may, if appropriate, take place when approving funding for specific activities under s 20, not when preparing or adopting an NLTP under s 19A and s 19B.
- (c) There is an “absence of an agreed metric” for assessing the emissions impacts of NLTP 2021–2024. The technical difficulties are set out in the affidavits of Mr Hannaby and Mr Lusi. The opportunity for emissions assessment was at the s 20 approval stage where the merits would be considered in detail through the business case process leading to a decision to approve funding under s 20 of the LTMA.<sup>224</sup> In addition, he pointed to Mr Hughes’ evidence<sup>225</sup> that Waka Kotahi envisages undertaking further work “in relation to assessment of emissions when making decisions to approve funding under s 20 of the LTMA” to reflect the recently published ERP.

[159] Movement responded to these arguments in a submission handed up in the course of argument. Ms Gepp analysed each of the cases referred to by Mr Fong and submitted that, on a correct interpretation, the authorities support the proposition that whether a quantitative assessment is required depends on the language of the statute or policy being applied and that a substantially qualitative assessment may be implied from the statute or policy. In addition, she submitted that the findings of the cases should not be treated as statements of general principle in a different statutory or policy context. Ms Gepp also submitted that where the statute requires that an obligation to be satisfied that an emissions budget will be achieved, requires a “numerical prediction” or a substantially quantitative assessment. She said that the language of the climate change strategic priority and the primary outcome in 2031 result inferred the need for a quantitative assessment of whether NLTP 2021–2024 would increase or

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<sup>224</sup> Affidavit of Mr Hughes at [60].

<sup>225</sup> At [65].

reduce emissions and by what magnitude in order for Waka Kotahi to be satisfied NLTP 2021–2024 would give effect to the GPS.

[160] Movement also contested the submission that there was an “absence of an agreed metric” for assessing the emissions impacts of NLTP 2021–2024. Ms Gepp pointed to the expert evidence of Professor Sims in that regard. In addition, she agreed, in response to a submission by the Minister that it was inappropriate for the Court to adjudicate on “scientific differences of opinion” in judicial proceedings,<sup>226</sup> but submitted that the starting point was what was required by GPS 2021 and the expert evidence adduced for Movement indicated that an assessment could have been undertaken. That was a matter the Court should consider.

[161] Ms Gepp also responded to the argument that the inclusion of an activity in the NLTP funding usually allowed a further opportunity for emissions assessment at the s 20 approval stage. Ms Gepp said that the obligation under s 20 to be consistent with the GPS applied in addition to the obligation under s 19B to give effect to the GPS. In addition, funding decisions under s 20 assess individual programmes and cannot assess the cumulative net effect of the NLTP programme overall.

[162] The parties in a joint memorandum brought to the Court’s attention the recent decision of the English Court of Appeal in *R (Friends of the Earth) v Secretary for State for International Trade*.<sup>227</sup> However, no further submissions were made on the case. The decision concerned among other things the extent to which the Paris Agreement (an international treaty) imposed obligations on the UK government when approving overseas investments to assess the potential GHG emissions as part of a scoping in relation to a proposal. The decision is of limited relevance to the issue before the court here. However, the Court of Appeal did note that in the context of the UK decision a consideration of climate change and GHG emissions did not require assessment of the risks “mathematically”.<sup>228</sup> The Court noted that any estimate was “by its nature uncertain” and the failure to make such an estimate as part of a

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<sup>226</sup> Citing *CRA3 Industry Association Inc v Minister of Fisheries*, above n 221, at [60]; *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 3009 at [196]; and *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75 at [47].

<sup>227</sup> *R (Friends of the Earth) v Secretary for State for International Trade* [2023] EWCA Civ 14.

<sup>228</sup> At [60].



“multifaceted decision-making process” did not by itself render the decision irrational.<sup>229</sup>

*Interpretation of the LTMA and the GPS*

[163] The applicant’s first cause of action is based on a claim that the LTMA and GPS 2021 require Waka Kotahi to ensure that the NLTP will reduce emissions and it fails to do so.

[164] Ms Gepp submitted changes in society over time are relevant to interpretation of a legislative provision. Given the harm from climate change and New Zealand’s recognition of that, climate change is relevant to the interpretation of what constitutes a safe land transport system in the public interest. Ms Gepp submitted that the purpose of the legislation was “to contribute to an effective, efficient, and safe land transport system in the public interest.” New Zealand’s environmental wellbeing must be a matter which is included in the reference to the *public interest*. In addition, what constitutes a safe land transport system in the public interest must take into account climate legislation. Therefore, contributing to environmental sustainability or climate change is to be included in the purpose of the legislation.

[165] Movement says that the GPS 2021 contained specific and directive obligations expressed as short to medium results including to reduce GHG emissions. Waka Kotahi was required to plan for “a reduction in greenhouse gas emissions ... through action across all priorities, programmes and activity classes”. Further, the NLTP should ensure that Waka Kotahi’s investment decisions *support* the rapid transition to a low carbon transport system and *give effect* to the emissions reduction target that the CCC recommended to Cabinet until the emissions budgets are released in 2021.

[166] Movement says that further support for its interpretation of the s 3 purpose is to be found in s 19B, that Waka Kotahi, in preparing the NLTP, must *ensure* that it both, under s 19B(a)(i), *contributes* to the purposes of the LTMA, and, under s 19B(a)(iii), *gives effect* to the GPS. It must also, under s 19B(b), “take into account”

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<sup>229</sup> At [63].

any RLTPs, national energy efficiency and conservation strategy, and relevant national and regional policy statements or plans under the RMA.

[167] The applicant, while accepting that government policy statements are subordinate to the LTMA and cannot be determinative of the interpretation of that Act, submits that they could provide relevant context for the Act's interpretation. To that end, the applicant pointed to the GPS 2021, which states that the purpose of a land transport system is:<sup>230</sup>

- (a) effective when it moves people and freight where they need to go in a timely manner;
- (b) efficient when it delivers the right infrastructure and services to the right level at the best cost;
- (c) safe when it reduces harm from land transport; and
- (d) in the public interest where it supports economic, cultural and environmental wellbeing.

[168] The applicant says that the same text appeared in earlier GPSs<sup>231</sup> and the framing is consistent with the ordinary meaning of the text of s 3 and with the legislative history. This reinforces that “environmental wellbeing” is part of the purpose of the LTMA insofar as s 3 refers to “in the public interest”. In addition, a safe system must take account of environmental factors.

[169] The purpose of the LTMA has evolved since its enactment in 2002. The applicant noted the original 2002 purpose was 160 words long. At that time the primary purpose was to contribute to an “integrated, safe, responsive, and sustainable” land transport system. Additionally this was supported by a list of seven features of the Act that would contribute to the purpose, including that the LTMA “improves social and environmental responsibility”.<sup>232</sup> In 2013 the amendments removed

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<sup>230</sup> GPS 2021, above n 9, at 47.

<sup>231</sup> Namely GPS 2015 and GPS 2018.

<sup>232</sup> Section 3(2)(a) of the Land Transport Management Act as enacted.

references to improving social and environmental responsibility as well as references to public health and environmental sustainability.

[170] The applicant submits the amendments were made and the relevant words removed only because the references to “wellbeing” had proved controversial and the Government was moving away from that term in the local government context.<sup>233</sup> The officials favoured a purpose which would cover off both economic “efficiency” and the “enabling” nature of land transport, referring to “well established legal terms”, in this case the term “public interest”. This was on the basis that public interest has a similar meaning to wellbeing for the purposes of the LTMA in that it related to society as a whole.<sup>234</sup>

### *Purpose of the LTMA*

[171] As Venning J pointed out in *All Aboard Aotearoa Inc*, the statutory purpose identified in s 3 of the LTMA makes no specific reference to environmental sustainability.<sup>235</sup> His Honour noted the amendments made in 2013 to the statutory purpose of the LTMA had removed the reference to “improving social and environmental responsibility”.<sup>236</sup> At the time, an explanatory note to the amendment bill referred to the funding framework being refined to “focus on the effectiveness and efficiency of public expenditure”.<sup>237</sup> The explanatory note went on to say this would “be reflected in a new purpose and streamlined decision-making criteria that will emphasise effectiveness, efficiency and safety.”<sup>238</sup> His Honour said that the decision to remove those references to public health and environmental sustainability was part of a “deliberate refocusing” of the LTMA.<sup>239</sup>

[172] His Honour rejected an argument that if climate change or environmental sustainability was not part of the purpose, because it had been removed by the

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<sup>233</sup> Referring to the Regulatory Impact Statement on the Land Transport Management Amendment Bill 2012: Te Tai Ohanga | The Treasury *Land Transport Management Act Review: Revised purpose and provision for tolling privacy* (13 September 2012) [RIS].

<sup>234</sup> Referring to the RIS, above n 233, at [24].

<sup>235</sup> *All Aboard Aotearoa Inc*, above n 26, at [92].

<sup>236</sup> At [92].

<sup>237</sup> At [93], citing the explanatory note to the Land Transport Management Amendment Bill (46–1).

<sup>238</sup> At [93].

<sup>239</sup> At [93].

amendment, then GPS 2021 would be ultra vires to the extent that it identified climate change as a priority.<sup>240</sup> He said this overlooked that under s 68(1)(a) of the LTMA, the GPS is required to include:

... the results that the Crown wishes to achieve from the allocation of funding from the national land transport fund over a period of at least 10 consecutive financial years ...

[173] That wording, his Honour noted, supported the inclusion of a number of objectives, including climate change as one of the priority strategies as a result that the Crown wished to achieve.<sup>241</sup>

[174] Venning J noted that s 14 required the Regional Transport Committee to be satisfied the RLTP was *consistent with* the GPS overall.<sup>242</sup> However, under s 19B of the LTMA, Waka Kotahi *must ensure* that the NLTP *gives effect* to the GPS.<sup>243</sup> Venning J did not comment further on the difference in wording as it affected Waka Kotahi's obligations under s 19B.<sup>244</sup>

[175] His Honour accepted that consistency could not mean *absolute consistency* at a sentence-by-sentence level because even within the strategic priorities, there were inconsistencies and considerations which pulled in separate ways.<sup>245</sup>

[176] Ms Heine said that the difference in wording between s 19B that Waka Kotahi *must ensure* that NLTP *gives effect* to the GPS and the s 14 obligations that require satisfaction as to consistency with the GPS was because of the regional focus of the RLTP. Supported by Mr McNamara in this submission, Ms Heine said that a relatively limited regional application compared to the national focus and effect of the NLTP required the different wording. An RLTP was merely one ingredient in the preparation of the NLTP and so could not *give effect* to the GPS. The RLTP is largely superseded by the NLTP.

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<sup>240</sup> At [95].

<sup>241</sup> At [95].

<sup>242</sup> At [123].

<sup>243</sup> At [125].

<sup>244</sup> The respondent accepted that submissions had been made to the Judge in *All Aboard Aotearoa Inc* concerning s 19B of the LTMA. By consent, the applicant produced the relevant synopsis of submissions on behalf of Auckland Transport, the Regional Transport Committee for Auckland and Auckland Council on those points.

<sup>245</sup> At [124].

[177] The applicant also says that the words used in s 19B that Waka Kotahi *must ensure* that the NLTP contributes *to the purpose* of the LTMA and *gives effect* to the GPS are highly directive and therefore it is Waka Kotahi’s responsibility to ensure that the strategic priorities in the GPS are carried out. It points in particular to the Supreme Court’s interpretation of the phrase “give effect to” in the context of the RMA in the *King Salmon* decision.<sup>246</sup> In that case, the phrase “give effect to” was held to mean “implement” and indicated a “strong directive, creating a firm obligation on the part of those subject to it”.<sup>247</sup>

[178] As Venning J noted in *All Aboard Aotearoa Inc*, in the *King Salmon* decision the Supreme Court was dealing with a hierarchy of requirements under the RMA, whereas the GPS 2021 has four strategic priorities of equal standing.<sup>248</sup>

[179] In *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* the Supreme Court considered the Treaty clause at s 4 of the Conservation Act 1987 requiring the Act be interpreted and administered as *to give effect to* the principles of te Tiriti o Waitangi | the Treaty of Waitangi.<sup>249</sup> Echoing its earlier terminology from the *King Salmon* decision, the Supreme Court said the requirement to “give effect to” the principles was “also a strong directive, creating a firm obligation on the part of those subject to it”.<sup>250</sup> It was regarded as a “powerful” Treaty clause which could not be trumped by other considerations, nor should it be part of an exercise balancing it against other relevant considerations.<sup>251</sup> However, as the Supreme Court recognised, context is everything. A “powerful” Treaty clause requiring a decision-maker to “give effect to the principles of the Treaty” recognises the important constitutional place of the Treaty in New Zealand. There were no competing considerations to balance against the Treaty clause.

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<sup>246</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

<sup>247</sup> At [77].

<sup>248</sup> *All Aboard Aotearoa Inc*, above n 26, at [124].

<sup>249</sup> *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [33].

<sup>250</sup> At [48].

<sup>251</sup> At [52] and [54].

[180] In contrast, the direction in this case to “give effect to” in the GPS 2021 requires consideration of four different strategic priorities, none of which is paramount. This calls for the decision-maker to apply considerable discretion in order to give effect to the priorities and balancing them across activity classes.

[181] The purpose of the LTMA is “to contribute to an effective, efficient, and safe land transport system in the public interest”.<sup>252</sup> For the following reasons, I do not accept the applicant’s submission that a statutory purpose relating to “environmental benefits” or “climate change” issues should be implied or read into s 3:

- (a) Reasonably recently Parliament has removed references to “economic and social benefits” from the purpose in s 3.<sup>253</sup> This tightening would suggest that climate change benefits should not be elevated to form part of the purpose through the reference to “in the public interest” or safety.
- (b) The purpose of the LTMA is also reflected in the statutory objectives and functions of Waka Kotahi. Its statutory objective is restricted to the following, namely “to undertake its function in a way that contribute to an effective, efficient and safe land transport system in the public interest”.<sup>254</sup>
- (c) The detailed statutory functions of Waka Kotahi and its overarching objectives are listed in s 95(1) and were amended in 2022. The amendment added to its functions the administration of the clean vehicle discount scheme.<sup>255</sup> This is to provide for the transition of New Zealand’s light vehicle fleet to zero and low-emission vehicles and reduce the vehicle carbon dioxide emissions. That Parliament has recently seen fit to amend the statute to accommodate a specific environmental initiative but not to insert any other directives concerning climate change is relevant.

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<sup>252</sup> Land Transport Management Act, s 3.

<sup>253</sup> Effected by the Land Transport Management Amendment Act 2013.

<sup>254</sup> Land Transport Management Act, s 94.

<sup>255</sup> Section 95(1)(ma).

- (d) The design of the LTMA leaves the more detailed considerations to be provided by way of Crown policy, including through the GPS process.

*Giving effect to the GPS*

[182] I now turn to the provisions of the GPS 2021 and consider whether Waka Kotahi has failed to give effect to it.

[183] The LTMA requires Waka Kotahi to prepare and adopt the NLTP. In that task it must ensure that the programme contributes to the purpose of the Act and gives effect to the GPS on land transport.<sup>256</sup> It must also take into account any RLTPs, national energy efficiency and conservation strategy and national and regional policy statements in force for the time being under the RMA. It must also include an assessment, among other things, “as to how the programme complies with section 19B”.<sup>257</sup>

[184] The GPS is not a legislative document. It is a policy document which sets out the results that the Minister seeks to achieve. It is written in general terms covering a wide range of activities. It must be read as a whole. As Venning J commented in relation to the Auckland RLTP there are inconsistencies and considerations which pull in separate ways even within the strategic priorities.<sup>258</sup>

[185] The wording of the GPS is not prescriptive. The document itself refers to the GPS being a “roadmap” for how the Government “develops and maintains a transport network that keeps pace with future social and economic changes.”<sup>259</sup> It:<sup>260</sup>

... provides direction and guidance to those who are planning, assessing and making decisions on investment ... [and] outlines the responsibilities of relevant parties with respect to land transport investment.

[186] In relation to the climate change priority, the guidance refers to *transforming* to a low carbon transport system that *supports* emissions reductions, while improving

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<sup>256</sup> Section 19B.

<sup>257</sup> Section 19C(b).

<sup>258</sup> *All Aboard Aotearoa Inc*, above n 26, at [124].

<sup>259</sup> GPS 2021, above n 9, at 4.

<sup>260</sup> At 5.

safety and inclusive access.<sup>261</sup> The primary outcome is to *support* that transition and *contribute* to a *resilient* transport sector that reduces harmful emissions. This will give effect to the emissions reduction commitments by the Government. Therefore, the short to medium results (by 2031) will include reduced GHG emissions, pollution and resilience of the transport system.

[187] The retrospective monitoring of the reductions is a task for the Ministry using the indicators set out in the GPS 2021. Waka Kotahi is required to provide information to the Ministry as set out in the statement of ministerial expectations. It is required to work with the Ministry to continuously improve the GPS monitoring and reporting system and is required to “collect, maintain and publish accurate, reliable and relevant, open (land transport) data.”<sup>262</sup>

[188] To achieve the transition to a low carbon transport system requires measures in place to “manage travel demand, and infrastructure ... to encourage walking, cycling and the use of public transport.”<sup>263</sup> This calls for a combined approach with Government, businesses and communities. The transition will look to use all the tools that the Government has, including direct investment, urban planning requirements and incentive schemes.<sup>264</sup> The climate change priority provisions refer to New Zealand cities being places where people can travel by low emissions transport modes such as “walking, cycling and emissions-free public transport.” That includes better ways to move freight, and investment in more rail and coastal shipping. Investments need to be consistent with the transport component of the ERP, which will be informed by the Transport Emissions Action Plan.<sup>265</sup> In addition, New Zealand’s transport network must respond to the impacts of climate change such as severe storm events flooding and coastal inundation.

[189] Under s 19C of the LTMA, the NLTP is required to contain certain content, including an assessment as to how the programme complies with s 19B. That in turn requires Waka Kotahi in preparing the NLTP to ensure that the programme contributes

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<sup>261</sup> At 22.

<sup>262</sup> At 43.

<sup>263</sup> At 23.

<sup>264</sup> At 23.

<sup>265</sup> At 23.



to the purpose of the LTMA and “gives effect to” the GPS. Other content which must be in the NLTP pursuant to s 19C includes: a list of activities identified in the GPS and the proposed level of funding of each activity; a list of rail activities included in the RNIP; activities in the RLTPs; an indication of any significant forthcoming national land transport issues; and any police activities approved under the Act to be delivered by the Commissioner. All of these have been included in NLTP 2021–2024.

[190] In NLTP 2021–2024, under the heading “How the 2021–24 NLTP will give effect to the GPS 2021”, reference is made to each of the strategic priorities. First, in relation to *Safety*, the Road to Zero 2030 target is to be achieved through a combination of initiatives. Secondly, to effect *Better travel options*, funding includes initiatives such as for public transport, rail, public transport infrastructure, new walking and cycling facilities as well as street changes which include such things as wider footpaths and cycle lanes. Thirdly, the NLTP outlines the initiatives for *Improving freight connections*, including by sea, by rail and by road. It notes investing in rail supports the climate change objectives of the GPS as well as improving road safety and the wear-and-tear on roads by reducing road traffic freight. The road improvements include improving the safety and resilience of key freight routes and more efficient movement of freight between ports and distribution centres.

[191] As to the fourth priority, *Climate change*, NLTP 2021–2024 notes the climate change priority in the GPS 2021 is focused on “transforming to a low carbon transport system that supports emissions reduction aligned to national commitments while improving safety and access.”<sup>266</sup> It also refers to the climate change adaptation response being based primarily on maintaining and improving the resilience of the land transport system to climate-related weather disruption. Under the heading “reducing harm to people and the environment”, specified activities include reducing the need to travel by car and increasing the uptake of public transport, walking and cycling. It also will deliver a range of public health benefits, including cleaner air and safer streets.

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<sup>266</sup> NLTP 2021–2024, above n 3, at 35.

[192] The NLTP notes that it expects to deliver on these outcomes by implementing *Toitū Te Taiao*.<sup>267</sup> The NLTP states:<sup>268</sup>

... At this point in time we have certainty about the broad areas of focus for reducing transport emissions, but detailed policies and plans are not yet in place.

[193] The broad areas of focus for reducing transport carbon emissions are listed as:<sup>269</sup>

- (a) supporting reduced need to travel by car and increased use of public transport, walking and cycling;
- (b) supporting increased uptake of electric vehicles; and
- (c) supporting more efficient freight movements and freight vehicles.

[194] NLTP 2021–2024 goes on to say:<sup>270</sup>

Within this NLTP, preference has been given to activities that support safety and access outcomes in ways that also make a strong contribution to reducing the need to travel by car; increasing the use of public transport, walking and cycling; and supporting more efficient freight movement. These activities will contribute to the short-to-medium results of reducing transport sector emissions by 2031 and provide a platform for the significant new investment that will be needed to enable delivery of the government's Emissions Reduction Plan from 2022.

[195] The NLTP notes environmental responsibility requires active consideration of maintenance and improvements, taking care of indigenous biodiversity and water quality.<sup>271</sup> To that end it was finalising *Te Hiringa O Te Taiao – Our Resource Efficient Strategy*, which focused on sustainable sourcing and use of resources, waste minimisation and reducing carbon emissions.<sup>272</sup>

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<sup>267</sup> At 35.

<sup>268</sup> At 35.

<sup>269</sup> At 35.

<sup>270</sup> At 35.

<sup>271</sup> At 36.

<sup>272</sup> At 36.

[196] The NLTP goes on to note that Waka Kotahi had updated its policy on sustainability rating tools for use on improvement projects.<sup>273</sup> Improvement projects in excess of \$100 million must complete certification under the Infrastructure Sustainability Council of Australia for planning, design and construction.<sup>274</sup> The sustainability scheme assesses the environmental and social credentials of the activities. Improvement activities would at a minimum meet those credentials and apply the principles contained in *Toitū Te Taiao, Te Hiringa O Te Taiao* and the sustainability rating scheme specification. In addition, the Government’s own Carbon Neutral Government Plan applies to Waka Kotahi.<sup>275</sup>

[197] Activities in NLTP 2021–2024 that would deliver on the climate change strategic priority are listed as including:<sup>276</sup>

- (a) planning (with co-investment partners) to shape compact development, enable low carbon travel options for mode shift and health benefits in urban areas, and ensure resilient networks for people and freight;
- (b) supporting development of the National Charging Infrastructure Plan and the National Adaptation Plan;
- (c) supporting increased use of public transport, walking and cycling for improvement of existing and provision of new services, networks and infrastructure, and making shared spaces safer and more attractive to encourage mode shift;
- (d) reallocating road space for shared and active mode to support more efficient, reliable and low emission movement of people and freight;
- (e) improving connections between shared and active modes to help people connect, walking, cycling and “micro-mobility” networks;

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<sup>273</sup> At 36.

<sup>274</sup> At 36.

<sup>275</sup> At 36.

<sup>276</sup> At 37.

- (f) improving the safety and resilience of the rail network to support a shift from road to rail freight, and deliver inter-regional tourism benefits in some areas;
- (g) improving the efficiency of freight movement by improving connections between freight modes through inland hubs, and efficient transfer and storage, and investigating options for mode shift from road to coastal shipping;
- (h) supporting activities to increase the uptake of electric vehicles and electrify the public transport bus fleet; and
- (i) supporting public health, biodiversity and water quality through investment and active models, use of low noise services and noise walls; protection and enhancement of habitats for important species, weed and pest management and control; erosion and sediment control, management of contaminants, engineered wetlands and traditional stormwater treatment.

[198] These are all activities which will “support” emissions reduction aligned to national commitments while improving safety and access as required by the climate change strategic priority in the GPS 2021. They are also aligned with the expectations of the Minister for Waka Kotahi as set out in the statement of ministerial expectations in the GPS 2021. In particular, the expectations include Waka Kotahi accelerating mode shift and taking a greater role in integrated planning for the sector.

*Quantitative assessment*

[199] I now consider whether the climate change priority requires the quantification of GHG emissions, whether as a baseline or as projections.

[200] To support its submission that Waka Kotahi was required to undertake quantitative analyses of the GHG baseline and projections for activities in the NLTP collectively Movement referred to the text of the GPS 2021 requiring Waka Kotahi to

give effect to a land transport emissions *target* derived from the Government’s commitment to emission reductions.

[201] Waka Kotahi says the emission reduction effects of the programme and its effects cannot be measured quantitatively with any useful accuracy, first because of the lack of tools to do so, and secondly because of the difficulties in isolating the effects of the activities, given the significant externalities. In addition, it would be an enormous task. Waka Kotahi also says it is not required to undertake such quantitative measurements either by the LTMA or the GPS 2021. Waka Kotahi says its decision-making processes, including the tools or models it uses (in particular, the IPM and the CATI), give sufficient qualitative information to determine that it is meeting the requirements of the LTMA and the GPS.

[202] The Courts have cautioned against requiring decision-makers to carry out a quantitative analysis in the absence of express directions to do so.<sup>277</sup>

[203] Ms Heine KC, for the respondent, pointed to the comments of the Court of Appeal in *Godfrey Hirst NZ Ltd v Commerce Commission* rejecting an argument that the Commerce Commission was bound to use quantitative analysis.<sup>278</sup> The Court commented that elements should be quantified but that the Commission and the Courts could not be “compelled to perform a quantitative analysis of quantitative variables”.<sup>279</sup> The Court there quoted its earlier comments in *New Zealand Bus Ltd v Commerce Commission* that:<sup>280</sup>

... It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.

[204] The Court in *Godfrey Hirst NZ Ltd* went on to note that the Commission was “better equipped than the courts to apply ‘more systematic ways’ to inform its

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<sup>277</sup> *Manawa Energy Ltd v Electricity Authority* [2022] NZHC 1444 at [122]–[123]; and *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [67].

<sup>278</sup> *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560, [2017] 2 NZLR 729.

<sup>279</sup> At [36].

<sup>280</sup> At [36], quoting *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [104] per Hammond J.

evaluative judgment” but the dangers of “false scientism” survive.<sup>281</sup> In *Manawa Energy Ltd v Electricity Authority*, Palmer J noted that “false scientism” is always a risk of quantification.<sup>282</sup> Importantly, he noted the Act in question in that case did not explicitly require quantification at all, let alone quantification to a particular standard.<sup>283</sup> It was not for the court to dictate what data should be considered by the experts.

[205] Waka Kotahi described the IPM and the CATI tools or models which it applied to assess and prioritise activities for inclusion in the NLTP.

*IPM (Investment Prioritisation Method)*

[206] Mr Hughes described the IPM, which was published in December 2020 to help guide preparation and proposals for activities to be included in the NLTP.<sup>284</sup> It was used primarily to assist in the making of decisions about what activities to include in the NLTP, but an inclusion did not mean the activity is eligible for funding from the NLTF. Rather, inclusion is a prerequisite to funding being approved for an activity under s 20 of the LTMA.<sup>285</sup> Funding approval generally follows an investigation of the merits of the proposed activity through a business case process. This includes an assessment against the statutory criteria and GPS alignment on the basis of more detailed information available following the business case process.

[207] The IPM, Mr Hughes said, provides a method to sort activities proposed for inclusion in the NLTP into a priority order. The priority is determined against the statutory criteria, including giving effect to the GPS. Mr Hughes explained there is typically greater demand for funding for each activity class than there is available funding during the NLTP period. Prioritisation of activities is therefore assessed against available funding in each activity class to determine the “investment threshold”. A priority higher than the investment threshold will generally result in a recommendation for inclusion of the activity in the NLTP but this is subject to exceptions to ensure the NLTP overall gives effect to the GPS.

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<sup>281</sup> At [37].

<sup>282</sup> *Manawa Energy Ltd v Electricity Authority*, above n 277, at [121].

<sup>283</sup> At [122].

<sup>284</sup> Affidavit of Mr Hughes at [33].

<sup>285</sup> Except in the case of emergency works: at [34].

[208] Once the activities are assessed with the assistance of the IPM, Waka Kotahi looks at the balance of investment across the NLTP and assesses whether it gives effect to the GPS and complies with relevant statutory obligations. Examples of such prioritisation include parts of the LGWM programme and ATAP, which were identified in the GPS as having a high alignment with the strategic priorities in the GPS.<sup>286</sup> For committed activities where funding has been approved under s 20 prior to the adoption of the NLTP, the activity is not required to be reviewed under the IPM. However, activities which had not been progressed to delivery were assessed.<sup>287</sup>

[209] One of the factors applied by the IPM to generate the priority order is GPS alignment ratings. In simple terms, for each GPS priority a low, medium, high and very high alignment can be assigned. These are defined for the climate change strategic priority, for example, as follows:

- (a) low alignment: addressing a known climate change adaptation issue that is forecast to occur beyond 2090;
- (b) medium alignment: a three per cent reduction in private vehicle kilometres travelled, or an up to five per cent reduction in CO<sub>2</sub> emissions per kilometre per day by corridor, or addressing a known climate change adaptation issue that is forecast to occur between 2041 and 2090;
- (c) high alignment: a four to six per cent reduction in private vehicle kilometres travelled or a six to 10 per cent reduction in CO<sub>2</sub> emissions per kilometre per day by a corridor, or addressing a known climate change adaptation issue that is forecast to occur by 2040; and
- (d) very high alignment: an up to six per cent reduction in private vehicle kilometres travelled, or an up to 10 per cent reduction in CO<sub>2</sub> emissions per kilometre per day by corridor.

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<sup>286</sup> At [42], referring to the Waka Kotahi NZ Transport Agency “Board Paper: NLTP Adoption” (13 August 2021) [13 August 2021 Board Paper] at 6.

<sup>287</sup> At [43].

[210] The information to inform the assessment against these parameters is drawn from project level estimates that are available but commonly reflect an early stage of analysis.<sup>288</sup> Mr Hughes noted that in addition to the climate change strategic priority, prioritisation factors for the better travel options and improving freight strategic priorities were aligned with influencing mode choice away from private vehicles and therefore would also contribute to the GHG emission reduction.<sup>289</sup>

[211] Mr Hughes noted that the IPM adopted separate methodologies for three categories of activities in the NLTP. These are: improvement activities, which are rated for GPS alignment but are complicated by scheduling, criticality and interdependence factors; continuous programmes, which operate, maintain and operate the system, with funding decisions made for three years to provide funding certainty for the sector; and LCLR programmes, which are described above.

[212] Mr Hughes summarised the difference between prioritisation for the purpose of inclusion in the NLTP and the assessment taken following development of the business case by reference to the technical paper on which the business case assessment is based.<sup>290</sup> In summary, prioritisation for inclusion in the NLTP is based on available information about an activity *prior to* the investment decision on a business case. Prioritisation of activities involves a “coarse comparison” of activities in an activity class across New Zealand.

[213] Following the IPM assessments, there are a number of moderation workshops and Waka Kotahi staff prepare a preliminary prioritisation of activities for inclusion in the NLTP.

[214] Mr Hughes said that the criticism that Movement makes of the IPM is that where an activity contributes to more than one GPS strategic priority, the rating is assigned based on the highest expected contribution to a single GPS priority. He says that such criticism misunderstands the role of the IPM at the stage of determining

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<sup>288</sup> At [49]–[50].

<sup>289</sup> At [51].

<sup>290</sup> At [63], referring to Waka Kotahi NZ Transport Agency “Final Assessment Design Report: A technical paper prepared for the Investment Decision-Making Framework Review” (3 June 2020) at 3.



whether to include an activity in the NLTP. The emphasis on positive alignment with the GPS strategic priorities assists organisations to develop investment proposals that contribute to achieving the priorities. The costs of an activity, including whether an increase in GHG emissions will result from the investment, are assessed during the business case process and separately taken into account in that analysis, usually completed as part of the business case and after the activity is first included in the NLTP. The IDMF requires, among other things, a business case development which addresses the alignment of the proposed investment with the strategic priorities of the GPS and undertakes a cost-benefit analysis of options and alternatives.<sup>291</sup>

*CATI (Climate Assessment Tool for Investment)*

[215] A specific check on the potential of activities to reduce GHG emissions is made using the CATI tool. It was developed by Waka Kotahi and used in the development of the NLTP.<sup>292</sup> The CATI is used to assess “in a qualitative manner, the enabled greenhouse gas emissions reduction potential of programmes”.<sup>293</sup> The resulting information allows an overall assessment of carbon emission reduction potential of a programme. The assessment categories are as follows:<sup>294</sup>

- (a) potential to increase emissions;
- (b) potential to maintain emissions (which means to maintain the current trajectory of emissions); or
- (c) potential to reduce emissions.

[216] The CATI was applied to a three-year snapshot of relevant activities which captured phases for particular projects that would take place over the next three years but not for future phases. An assessment was carried out in July 2021, when there was

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<sup>291</sup> At [64].

<sup>292</sup> The affidavits of Mr Hannaby and Mr Lusic set out the details and the background to the development of the CATI. Mr Hannaby led the development of the emission assessment tools that Waka Kotahi uses in relation to planning and investment decision-making, including the CATI tool. Mr Lusic is a consultant with expertise in decarbonisation, climate resilience and sustainability aspects of projects and an employee of Arup, the consultancy advising Waka Kotahi.

<sup>293</sup> Affidavit of Mr Hughes at [140].

<sup>294</sup> At [142].

some reasonable certainty about the NLTP permitted activities and continuous programmes. A subsequent updated CATI assessment was carried out to look at the emissions profile of the improvement categories for inclusion in the NLTP in early August 2021. The resulting information was combined with the earlier assessments on committed and continuous activities and continuous programmes. As at 19 August 2021, the updated assessment (from 13 August 2021) indicated that of the NLTP activities:<sup>295</sup>

- (a) 24.3 per cent had the potential to reduce emissions;
- (b) 59.9 per cent had the potential to maintain emissions; and
- (c) 15.8 per cent had potential to increase emissions.

[217] The paper for the 19 August 2021 Board meeting on the NLTP adoption referred to 23 per cent of anticipated spending having the potential to decrease emissions.<sup>296</sup>

[218] When the extra \$2 billion in funding became available, the decision on the NLTP adoption was deferred by the Board from 19 August 2021 to 31 August 2021. An updated assessment provided to Mr Hughes on 30 August 2021 included the allocation of the further \$2 billion in funding provided in the updated draft NLTP and indicated that the categories for the activities were as follows:<sup>297</sup>

- (a) 22 per cent had the potential to reduce emissions;
- (b) 65 per cent had the potential to maintain emissions; and
- (c) 13 per cent had the potential to increase emissions.

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<sup>295</sup> At [150].

<sup>296</sup> At [151]. Mr Hughes notes that the figure of 23 per cent was included in error, as it was taken from the first CATI assessment from the end of July, while there was in fact the more up-to-date assessment from 13 August 2021 available. However, he does not consider the difference material: at [152].

<sup>297</sup> At [154].

[219] Mr Hughes said that looking at only the improvement activities produced the following results:<sup>298</sup>

- (a) 38 per cent had the potential to reduce emissions;
- (b) 54 per cent had the potential to maintain emissions; and
- (c) 8 per cent had the potential to increase emissions.

[220] This final assessment, Mr Hughes said, was not provided to the Board, as the results were considered sufficiently similar to the earlier results and illustrated that NLTP 2021–2024 would make a significant funding contribution to emission-reducing projects.<sup>299</sup> This was particularly so in relation to improvement projects which were where Waka Kotahi had the most discretion to direct funding toward activities that had the potential to reduce emissions.<sup>300</sup>

[221] At the Board meeting on 31 August 2021 at which NLTP 2021–2024 was finally adopted, the Board had before it a paper headed up “How the NLTP gives effect to the GPS”.<sup>301</sup> This paper noted the constraints on Waka Kotahi, including funding, the activity class framework included in the GPS government commitments and the statement of ministerial expectations. The paper noted that the minimum expenditure was the lower range of the activity classes in GPS 2021 and was set close to the forecast inflows into the NLTF, leaving limited funds to invest above those lower ranges across the entire programme. It also noted that there were substantial existing commitments for spending on activities approved prior to the NLTP which must be included in the NLTP.

[222] Within those constraints, the paper indicated that the NLTP gave effect to the GPS as follows:

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<sup>298</sup> At [155].

<sup>299</sup> At [156].

<sup>300</sup> At [156].

<sup>301</sup> 30 August 2021 Board Paper, above n 111.

- (a) spending the minimum in each activity expenditure range was consistent with achieving the priorities and results in the GPS because funding is divided into activity classes as a means of achieving the results identified in the GPS;<sup>302</sup>
- (b) activities had been prioritised for inclusion in accordance with the IPM, which includes as a factor alignment with GPS priority and the extent of contribution to a GPS priority; and
- (c) a moderation process was applied to the results of the IPM to ensure the mix of activities for new investment activities achieved the best balance between GPS results, taking into account government commitments as well as government targets for GHG emissions.

[223] The paper also noted that where choices had to be made either within activity classes or when investing above minimum activity class levels, Waka Kotahi had exercised its discretion to achieve what it considered was the most appropriate balance between different GPS priorities and results in the context of the purpose of the LTMA.

[224] The paper further indicated that the CATI had been applied and indicated that more activities and investment dollars were being prioritised for activities with the potential to decrease emissions than to activities with the potential to increase emissions.<sup>303</sup>

[225] The paper noted in relation to the contribution to emissions reduction:

- (a) the GPS result of reduced GHG emissions was a result required over a 10-year timeframe (by 2031);

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<sup>302</sup> The GPS 2021, above n 9, stated “[f]unding is divided into activity classes as a means of achieving the results specified in GPS 2021” and “[t]he activity class funding ranges take into account the forecast expenditure from the [NLTF] to deliver the Government’s priorities and to realise the strategic direction in GPS 2021”: at 32.

<sup>303</sup> 30 August 2021 Board Paper, above n 111, at [7] of Appendix 2.

- (b) the transport component of the Government’s ERP was still under development,<sup>304</sup> and achieving emissions reductions in the transport system over the medium- to long-term would require significantly increased funding in future NLTPs; and
- (c) a substantial portion of the NLTF must be spent on existing commitments in maintaining existing service levels. Waka Kotahi is also obliged to give effect to other GPS priorities.

[226] The Board paper went on to state that in view of those factors, NLTP 2021–2024 gave effect to the climate change priority within the context of the GPS as a whole through:

- (a) its investment in activities with the potential to decrease emissions;
- (b) its investment in activities classes that have climate co-benefits; and
- (c) its investment in the public transport services, infrastructure and walking and cycling improvements activity class. In the case of the latter, effective investment was above the maximum range in the GPS.<sup>305</sup>

*Analysis — CATI and IPM*

[227] The applicant says the IPM and the CATI employed by Waka Kotahi to assist it to prepare NLTP 2021–2024 were not fit for purpose in relation to the assessment and giving effect to the priority of climate change issues.

[228] In particular, Movement says the assessment in terms of the IPM did not ensure that the NLTP gave effect to the GPS 2021 because the IPM methodology: enables activities that are not consistent with the climate change strategic priority to be assessed as consistent with the GPS 2021; is inconsistent with the requirement in GPS 2021 to evaluate investment based on the extent to which they “achieve the priorities”

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<sup>304</sup> At the time of issue of NLTP 2021–2024.

<sup>305</sup> Through the use of the extra debt financing.

of the GPS; is inconsistent with the requirement for all investment decisions to support the rapid transition to a low carbon transport system and to contribute to a resilient transport sector that reduces harmful emissions; and is inconsistent with the commitments in Waka Kotahi's publication *Toitū te Taiao*, in which the respondent committed to optimise programmes and packages for delivery against priority outcomes. Movement says consistency with *Toitū te Taiao* was required because Waka Kotahi purported to achieve GPS 2021 by implementing *Toitū te Taiao*.

[229] Movement also says the assessment of the emissions impact of the NLTP using the CATI does not enable an assessment of whether the NLTP achieves GPS 2021 because: it does not enable a quantitative assessment; it assesses the impact of individual activities in terms of whether they are likely to increase, maintain or reduce emissions, and does not assess whether the land transport included in the NLTP will reduce emissions; and it does not assess whether the extent of any emissions reduction is consistent with the emissions reduction target the CCC recommended to Cabinet.

[230] Movement says the assessment using the IPM and/or the CATI also did not ensure that the NLTP achieves the purposes of the LTMA.

[231] A general criticism made by the applicant is that the CATI tool is simplistic and that according to it only 22 per cent of the proposed investment has the potential to reduce emissions.<sup>306</sup> The remainder will maintain or increase emissions. In addition, the cumulative impact of activities included in the NLTP on transport emissions is unknown.

[232] A further criticism made of the CATI is that it is qualitative, not quantitative, in terms of its individual categories measuring only the potential to increase or reduce emissions. There is no quantification of the potential to increase and/or reduce emissions individually or overall. Therefore, Movement says, it is not possible for Waka Kotahi to assess whether its investments are consistent with the obligation to reduce emissions. This criticism builds on the primary submission that Waka Kotahi does not have projections for GHG emissions for the years 2021–2031, and without

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<sup>306</sup> Affidavit of Professor Sims at [10].

projections based on current data and the impact from planned investments, it is unable to measure if it is achieving its obligation.<sup>307</sup>

[233] In response, Waka Kotahi says that the CATI tool is a cross-check and the other assessments undertaken throughout the various stages of investment assessment combine to ensure the decision-making is aligned with the GPS 2021 strategic priorities, including the climate change strategic priority. The CATI was developed as there was no simple method that could be applied quickly to comprehensively and robustly understand how investment programmes might positively or negatively impact on land transport emissions. The tool was designed to inform decision-makers about the potential for GHG emission reduction from different investment programmes.

[234] Movement says quantitative measurement tools were required. In support of that submission, it points to the indicators in the GPS referring to “Tonnes of greenhouse gas emitted per year from land transport” and “Tonnes of harmful emissions per year from land transport”,<sup>308</sup> as well as a reference in *Toitū Te Taiao* to the GPS outcome measure of GHG emissions per year from land transport.<sup>309</sup>

[235] I do not accept Movement’s submission that Waka Kotahi must undertake a quantitative assessment of emissions, whether as a baseline or on a predictive basis, to measure reductions in emissions either collectively or by activity. Waka Kotahi is not required by either the LTMA or the GPS 2021 to undertake quantitative measurements of land transport emissions.

[236] The climate change monitoring to be carried out by the Ministry using the indicators in the GPS 2021 is also referred to in *Toitū Te Taiao*. The proposed indicators are the emissions for the whole transport system intended to be gathered retrospectively. The GHG emission measurements refer to *annual* emissions, indicating that this information is to be gathered for the purposes of monitoring after

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<sup>307</sup> At [87].

<sup>308</sup> Indicators 26 and 27: GPS 2021, above n 9, at 25.

<sup>309</sup> *Toitū Te Taiao*, above n 145, at 28.

the fact rather than imposing a requirement for quantitative measurement for use on a predictive basis.

[237] Mr Gandy of the Ministry explains how the indicators are part of the long-term initiative to enable evidence-based evaluation of the impacts of investment on the land transport system. The primary purpose of the indicators at this stage is transparency and building a baseline of data.<sup>310</sup> The indicators are system-level indicators to allow monitoring of the transport system on the basis of real-world evidence gathered over time.

[238] As Waka Kotahi submits, the indicators generally in GPS 2021 are not suitable as criteria for a predictive assessment of the effects of individual activities. The indicators for the other strategic indicators are also retrospective measurements. These include “Deaths and serious injuries on the road and rail corridor”, “Hospitalisations from road crashes” “% of population with access to frequent public transport services” and “Availability of state highway network”, in addition to the “Tonnes of greenhouse gases emitted per year from land transport” indicator mentioned above.

[239] The Ministry says that its ex post facto monitoring analysis has not yet been able to confidently attribute changes to particular expenditure in the transport system.<sup>311</sup> The difficulties of attributing reductions in GHG emissions to any particular transport intervention are myriad. These are magnified in the case of a predictive assessment.

[240] I am satisfied that Waka Kotahi’s processes for decision-making and assessment of activities, including the application of the IPM and the CATI, meet its obligations related to the preparation of the NLTP. The relevant obligations are to ensure the NLTP contributes to the purpose of the LTMA and give effect to the GPS. To satisfy those obligations it was not required to undertake a quantitative analysis of emissions, nor predict quantitatively whether collectively activities in the NLTP would increase, maintain or reduce emissions. As I noted earlier, the courts have cautioned

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<sup>310</sup> Affidavit of Mr Gandy at [111]–[116].

<sup>311</sup> Briefing OC190486, above n 68.



against requiring decision-makers to carry out a quantitative analysis in the absence of express directions to do so.<sup>312</sup>

[241] Waka Kotahi undertook qualitative assessments as to how the activities in the NLTP as a whole gave effect to the GPS 2021. It was not required to ensure that all or any investment decisions supported a mathematical reduction in emissions, but rather it was required to consider the programme as a whole and balance the strategic priorities. It did so by undertaking three high-level processes which were designed to ensure that the NLTP gave effect to the GPS as a whole, including the climate change priority, as follows:<sup>313</sup>

- (a) a complex process in which the investment prioritisation model and expert judgement was used to prioritise individual activities for alignment with the GPS;
- (b) a cross-check of investment levels using the CATI tool; and
- (c) a qualitative assessment by the Board in relation to the climate change priority, in particular that the NLTP will contribute to emissions reduction to the extent possible within the relevant constraints.<sup>314</sup>

[242] As to the first process, the IPM and expert judgement were used to prioritise individual activities for best alignment with the GPS. Mr Hughes notes the significant scale of the development process of the NLTP. Approximately \$15.5 billion of expenditure will be made from the NLTF for the 2021–2024 period. That must take into account \$4.8 billion of funding from local government towards local authorities’ transport infrastructure and services which are co-funded by local government and Waka Kotahi. A substantial portion (\$4.7 billion) represents “committed activities” and many of the activities included in NLTP 2021–2024 are the result of decisions by decision-makers other than Waka Kotahi. This includes rail activities within the RNIP,

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<sup>312</sup> *Manawa Energy Ltd v Electricity Authority*, above n 277, at [122]–[123]; and *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy*, above n 277, at [67].

<sup>313</sup> Affidavit of Sir Brian at [143].

<sup>314</sup> 30 August 2021 Board Paper, above n 111, Attachment 2 at [8].

which are planned and approved by KiwiRail and the Minister, as well as police activities. These account for approximately \$1.6 billion of NLTP 2021–2024.

[243] Over 80 approved organisations are involved in the activities, in addition to the delivery of state highway and nationally delivered activities by Waka Kotahi. Improvement activities include proposed investment in walking and cycling infrastructure, public transport infrastructure, safety projects, local road improvements and state highway improvements. The investments include 14 RLTPs,<sup>315</sup> 500 improvement activities and 4,500 LCLR individual activities.

[244] Mr Hughes noted that Waka Kotahi had engaged with the Ministry during the preparation of the GPS.<sup>316</sup> The development of the RLTPs commenced before the GPS was finalised and continued until shortly before the NLTP was adopted.<sup>317</sup> The development of RLTPs alone is complex and time-consuming and was done locally, taking into account district and city councils' long-term plans and activity management plans required under the Local Government Act.

[245] Movement also criticised in detail various specific decisions made by Waka Kotahi in the course of preparing the NLTP. I do not propose dealing with all of those criticisms, as the detailed analysis of the activities and projects involves the application of technical expertise and experience which was within the discretion of Waka Kotahi and outside the scope of this judicial review.

[246] However, none of the detailed technical criticisms appear to give rise to an error of law. Decision-makers are generally entitled to place different weight on input variables, material and considerations in coming to their decisions, subject to working within the legal framework.<sup>318</sup> A wide margin of appreciation is generally allowed in the exercise of that discretion, particularly where projects involve multidimensional considerations for decision-makers and experts at both local and national levels.

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<sup>315</sup> In total, the 14 RLTPs run to approximately 1,400 pages: affidavit of Mr Hughes at [13].

<sup>316</sup> At [17].

<sup>317</sup> At [18].

<sup>318</sup> *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 967 at [121].

*Conclusion on first and second causes of action*

[247] The first cause of action alleges an error of law by Waka Kotahi in that it failed to ensure that in preparing the NLTP the requirements of s 19B of the LTMA were met. It said that the NLTP failed to contribute to the purpose of the LTMA and to give effect to the GPS 2021. The second cause of action also alleges an error of law, pleading the same failures as in the first cause of action and by reference to the assessment of the priority of activities for investment in the NLTP using the IPM and the emissions impact using the CATI. The failures alleged included a failure to use a quantitative assessment tool.

[248] Waka Kotahi designed its approach to the preparation of the NLTP using largely qualitative analysis, as it was entitled to do. I have gone into some detail in relation to the processes which went into the preparation of the programme to illustrate the complex considerations. I am satisfied that Waka Kotahi's overall qualitative assessment in its preparation of the programme leading to the decision to adopt the NLTP 2021–2024 met the relevant requirements of the Act and the GPS, including in relation to the climate change priority. To summarise, Waka Kotahi prepared the NLTP with reference to the climate change priority and supporting emissions reduction by, in general terms:

- (a) exercising choices concerning target funding levels for activity classes, with emphasis given to what activity classes would reduce emissions compared to those that have the potential to increase emissions;<sup>319</sup>
- (b) putting significant investment into activities that would support emissions reduction, including investment in public transport, walking and cycling, and investments in emissions reducing activities in the highway improvement class;

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<sup>319</sup> The example was given that walking and cycling was the only activity class that was funded to the top of its GPS range.

- (c) making new investment in roads only where it was strongly aligned with other strategic priorities, such as the Government's safety commitments as part of the Road to Zero campaign; and
- (d) requiring assessment for consistency with the GPS of most funding proposals when more detailed information was available through the business case process.<sup>320</sup>

[249] Waka Kotahi relied on expert advice in the preparation and assessment of the NLTP. The land transport system is a complex system which involves the participation of many organisations and government, as well as criticalities and interdependency of activities. It requires a high level of technical expertise and experience to ensure that the NLTP meets the requirements of the LTMA as well as the GPS.

[250] In the *Friends of the Earth* decision, Mr Justice Holgate noted that an enhanced margin of appreciation in judicial review should be afforded to decisions based on scientific, technical and predictive assessments.<sup>321</sup> The Court recognised that predictive assessments made many years into the future involve significant uncertainty.<sup>322</sup> As his Honour noted, even predictions expressed in quantitative terms involve subjective judgment, whether the analysis is quantitative or qualitative.<sup>323</sup> In addition, the Courts have cautioned against requiring decision-makers to carry out a quantitative analysis in the absence of express directions to do so.<sup>324</sup>

[251] No quantitative assessments of emissions reductions as suggested by the applicant were required in the preparation of the NLTP. I also find there were no errors as pleaded in Waka Kotahi's preparation and adoption of the NLTP. The first and second causes of action accordingly fail.

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<sup>320</sup> Affidavit of Sir Brian at [245]–[250].

<sup>321</sup> *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy*, above n 1, at [181].

<sup>322</sup> At [178].

<sup>323</sup> At [178] and [180].

<sup>324</sup> *Manawa Energy Ltd v Electricity Authority*, above n 277, at [122]–[123]; *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy*, above n 277, at [67].

### **Third cause of action**

[252] The third cause of action alleges an error of law by Waka Kotahi in preparing and adopting NLTP 2021–2024 and failing to ensure that the programme gives effect to the GPS 2021. The allegation is that as a funding applicant, Waka Kotahi is required to show that it has considered alternatives as well as how those alternatives compare in meeting the “results” set out in section 2.6 of the GPS 2021, and it has failed to do so.

[253] This cause of action cannot succeed. The GPS states that funding applicants “need to show” that they have considered alternatives and “how they compare” in meeting the results set out in section 2.6. This applies to decisions for funding of activities, which will generally involve the submission of a business case for assessment of the investment sought.

[254] The decision for funding approval for a particular activity is made under s 20. The decision that is the subject of this judicial review is the decision to adopt the NLTP made under s 19B of the LTMA.

[255] Section 3.2 requires funding applicants to show that they have considered alternatives, and “how they compare in meeting the results set out in Section 2.6”.<sup>325</sup> The results referred to are the qualitative transport outcomes such as healthy and safe people, inclusive access, economic prosperity, resilience and security and environmental sustainability.<sup>326</sup> Funding applicants must set out those matters in their applications, whether by way of a business case or otherwise. The requirement does not apply to Waka Kotahi in the preparation or adoption of the NLTP.

[256] The third cause of action therefore also fails.

### **Submissions by Auckland Transport (intervenor)**

[257] Mr McNamara outlined the AT approach to the preparation of the RLTP and supported the submissions of Waka Kotahi.

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<sup>325</sup> GPS 2021, above n 9, at 29.

<sup>326</sup> At 24.

[258] Mr McNamara, for AT, indicated that AT wished to be heard due to the concern that if the NLTP was set aside, the ramifications for AT would be significant as it had fed into the NLTP. It would disrupt the AT projects considerably and significantly slow down progress.

[259] Mr McNamara opposed Ms Gepp's suggestion that this Court should provide guidance and directions in relation to the preparation of the next NLTP.<sup>327</sup>

[260] Mr McNamara pointed out that one of the unintended consequences of such an approach might be that Waka Kotahi could not approve funding of activities under s 20 because in order to do so, such approval needed to be consistent with the NLTP. If this Court found that the NLTP was unlawful or defective in a public law sense, it may prove difficult for Waka Kotahi to grant the approval sought.

[261] I am not required to consider this issue because as is apparent the application for judicial review is not successful.

## **Conclusion**

[262] Climate change is an important issue for the land transport sector and Movement represents members of the public who are concerned that not enough is being done to address climate change, in particular to meet the zero carbon emission targets set for 2050.

[263] However, the Court's role in this judicial review is limited to ensuring that Waka Kotahi has exercised its decision making in the preparation and approval of the NLTP to ensure that it contributes to the purposes of the LTMA and gives effect to the GPS on land transport.<sup>328</sup>

[264] Climate change considerations are not a specified purpose under the LTMA. However, climate change is one of the four strategic priorities set out in the GPS, together with safety, better travel options and improving freight connections for

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<sup>327</sup> This was an approach taken by Gwyn J in *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 1427 at [217].

<sup>328</sup> Land Transport Management Act, s 19B.

economic development. None of those takes primacy over the others. The function of Waka Kotahi in the preparation of the NLTP requires the balancing of the strategic priorities. In addition, in order to give effect to the GPS, it was required to balance activities funded through the NLTF and commitments already made for funding.

[265] The preparation and assessment of the NLTP involves the participation of many agencies and businesses. It focuses on medium- and long-term planning and measures which will have the effect of reducing emissions. They reflect the key actions and Target 1 identified in the ERP.<sup>329</sup> These contribute to the wider objectives of: supporting reduced need to travel by car and increased use of public transport, walking and cycling; supporting increased uptake of electric vehicles; and supporting more efficient freight movement and freight vehicles. There are also co-benefits for safety, better travel options and improving freight connections. Other factors which are not part of the NLTP will significantly affect whether the emissions reductions in the transport sector are achieved. These include the electrification of the light vehicle sector, regulatory intervention and incentivising low emission fuels.<sup>330</sup> The NLTP activities have been assessed as contributing to the short- to medium-term results of reducing transport sector emissions by 2031 and providing a platform for the significant new investment that will be needed to enable delivery of the Government's ERP 2022. The preparation and adoption of the NLTP 2021–2024, including the qualitative assessments of the programme carried out by Waka Kotahi, met the legislative requirements and the requirements of the GPS 2021.

[266] Waka Kotahi had no legal or other obligation to put in place quantitative measures for emissions in the NLTP under either the LTMA or the GPS. The indicators in the GPS 2021 related to GHG emissions are for retrospective monitoring by the Ministry.

[267] The application for judicial review is dismissed.

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<sup>329</sup> ERP, above n 76, at 171 and 178–190. The key actions identified are: reducing reliance on cars and supporting people to walk, cycle and use public transport; rapidly adopting low-emissions vehicles; and beginning work now to decarbonise heavy transport and freight. Target 1 is to reduce total kilometres travelled by the light fleet by 20 per cent by 2035 through improved urban form and providing better travel options, particularly in our largest cities.

<sup>330</sup> At 173.

## Confidentiality orders

[268] The Minister sought interim confidentiality orders in relation to some information in Mr Gandy’s affidavit at [102] (in part) and [109] to [110] and in the ministerial briefing.<sup>331</sup> This was on the basis that that information has not yet been made public as it is only part of the briefing. The information is incomplete and once the Minister has made the information public the relevant confidentiality orders will be removed.

[269] All parties consented to those orders and they were granted on the basis that the disclosure of confidential information would likely have adverse consequences as it would pre-empt the Minister’s decisions (currently under deliberation) and create an inaccurate or incomplete expectation for the transport sector. In addition, it might inhibit “free flow of information” and free and frank expression of opinions by officials that are conducive to the conduct of affairs.

[270] The confidential material is not central to the resolution of issues in dispute and the interim orders are for a limited duration only, until the Minister had made a decision on the matters referred to.

[271] After the hearing the parties agreed on a variation to those interim orders. They were varied as set out in my minute of 5 January 2023 and interim orders were made as follows:

- (a) authorising the publication of the following documents filed by parties in the course of these proceedings:
  - (i) all parties’ legal submissions;
  - (ii) all parties’ affidavits, excluding exhibits except as set out in (iii); and

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<sup>331</sup> Cabinet Briefing “Amending GPS 21 to signal future embedding of emissions reduction” (12 May 2022) Briefing OC220047; and Cabinet Briefing “Further Focus on emissions reduction in the transport sector” (26 May 2022) Briefing OC220384.



- (iii) the exhibits to the applicant's affidavits;
- (b) excluding in all cases documents or parts of documents over which a confidentiality order applies, namely:
  - (i) paragraphs 102 (in part), 109 and 110 of Bryn Gandy's affidavit;
  - (ii) Ministerial Briefing OC220047; and
  - (iii) Ministerial Briefing OC220384; and
- (c) excluding in all cases the following parts of the affidavit of Mark Lusic:
  - (i) the identification of Mr Lusic's place of residence in paragraph 2;
  - (ii) paragraph 7, first sentence from after the comma until the final sentence;
  - (iii) sub-paragraphs 8.1–8.5; and
  - (iv) the final sentence of paragraph 24.

### **Costs**

[272] If the parties are unable to agree upon costs any application should be made within five days of the date of this judgment together with submissions. Any response is to be made within a further five days and any reply within a further three days.

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Grice J

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