

21 January 2021

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Climate Change Response (Auction Price) Amendment Bill**

### **Purpose**

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1. We have considered whether the Climate Change Response (Auction Price) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. This advice has been prepared in relation to a draft version of the Bill (PCO 23349/4.5). We will provide you with further advice if we receive another version of the Bill that includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

### **The Bill**

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4. The New Zealand Emissions Trading Scheme (NZ ETS) is one of New Zealand's main tools for reducing greenhouse gas emissions and will help New Zealand meet its climate change targets. Most of the trading in New Zealand units<sup>1</sup> takes place on the secondary market that is open for trading daily; it is the operation of the secondary market that sets the process for New Zealand units. Auctions, conducted on behalf of the Government, occur infrequently and are designed to allow the Government to sell New Zealand units into the secondary market without disrupting the secondary market's operation.
5. The Bill amends the Climate Change Response Act 2002 (the Act) to empower the Minister of Climate Change (the Minister), in consultation with the Minister of Finance, to make regulations to set a methodology to calculate a minimum price for New Zealand units in auctions.
6. The Bill consequentially amends the Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020 (the Regulations) to specify the operation of the confidential reserve price in auctions by an auction operator. An auction operator is the Minister, or an agent appointed by the Minister under s 6(a) of the Act to conduct the sale of New Zealand units by auction.<sup>2</sup> An auction operator is appointed on the terms and conditions that the Minister thinks fit.<sup>3</sup>
7. The purpose of the confidential reserve price is to prevent the sale of New Zealand units significantly below prevailing secondary market prices and thereby ensure the auction

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<sup>1</sup> One emission unit, the New Zealand unit represents one metric tonne of carbon dioxide or carbon dioxide equivalent (i.e., the amount of another greenhouse gas that does as much damage as one tonne of carbon dioxide).

<sup>2</sup> Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020, reg 3(1).

<sup>3</sup> Climate Change Response Act 2002, s 6A(b).

does not unduly influence the secondary market. Without a confidential reserve price for New Zealand units sold at auction, there is a risk that auction participants will strategically bid to undercut secondary market prices. This would undermine the integrity of the NZ ETS.

## **Consistency with the Bill of Rights Act**

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### **Section 14 - Freedom of Expression**

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>4</sup>
9. The Bill amends s 30GA of the Act by inserting a provision which empowers the Minister, when recommending that regulations be made to set a methodology to calculate a minimum price, to recommend that the auction operator be required to provide anonymised auction information to the chief executive [of the Department responsible for the Act]. As a consequence, the Bill inserts regulation 36A to request the auction operator provide that data to the chief executive. The chief executive requires this information in order to understand how the methodology and the confidential reserve price are operating in practice and effectively manage auctions under the NZ ETS.
10. The Bill amends regulation 16 of the Regulations, which requires that the auction operator make auction notices publicly available, so that the notice includes a statement about a confidential reserve price for the auction. It also amends regulation 36, which requires that the auction operator make auction results publicly available, and to indicate if no bids were successful because the final clearing price was less than the confidential reserve price. Making this information available to the public ensures that the auction process is open and transparent, it ensures that the public are informed that there might be a confidential reserve price and where the reserve price was not met.
11. The Bill inserts regulation 15C to require the auction operator or any other person to keep the methodology and the calculated reserve price confidential so that they are not disclosed to any potential buyers who participate in an auction. This ensures that auction participants do not strategically bid to undercut secondary market prices. We note, however, that there are no offence provisions linked to this obligation of confidentiality for auction operators (or “any other person”) in the Act.
12. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.<sup>5</sup>
13. To the extent that the provisions of the Bill engage the right in s 14 (as to whether such information is truly ‘expressive’ in nature), we consider that the requirements are rationally connected to the objective of the Bill – ensuring that the integrity of the NZ ETS

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<sup>4</sup> See, for example, *Slaight Communications Inc v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>5</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

is not undermined. The requirements are, in our view, proportionate and limit the right to freedom of expression no more than is reasonably necessary.

14. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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15. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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