

# Discussion document: commerciality and climate ambition in drafting

## How contracts can help you tackle climate change

The Chancery Lane Project (TCLP) has published a number of contract clauses to align businesses' legal agreements with their net zero ambitions. How you amend, implement, negotiate and enforce these clauses determines the extent to which those ambitions are achieved. This article discusses how to use contracts to align your business operations with net zero targets, tools to increase the ambition of our clauses and practical tips on how you can implement TCLP clauses.

## Targets are only the start of the net zero transition

Everyone is at a different stage on the journey to net zero. Each industry and business faces its own unique obstacles, making a tailored approach essential. Getting from a net zero commitment to delivering **meaningful** greenhouse gas (GHG) reductions that are aligned with the Paris Agreement is challenging. Climate change is a huge, abstract and multi-dimensional issue, with complex, and often hidden, interdependencies. The Energy & Climate Intelligence Unit and Oxford Net Zero (University of Oxford) survey of more than 4,000 significant entities (such as states, regions, cities and companies in the Forbes Global 2,000 list), found that only 20% of net zero targets met basic robustness criteria and only 44% of corporates with a net zero target had also published a plan to achieve those targets.<sup>1</sup> This poses a simple but vital question... how do entities transition to net zero?

## Why the level of climate ambition matters

Some climate scientists and activists have criticised the concept of net zero as misleading or inadequately robust. In particular, reliance on offsetting and framing targets for delivery in 2050 can imply that this is a problem for tomorrow and allows business-as-usual to continue.

Although some have expressed concerns that achieving net zero by 2050 is too costly, the reverse is true: organisations, businesses and society as a whole have been paying for climate change for some time. For example, the increasing numbers of flood events can severely

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<sup>1</sup> The Energy & Climate Intelligence Unit and Oxford Net Zero, [Progress Tracking - Net Zero Climate](#) (March 2021); [TAKING STOCK: A global assessment of net zero targets](#)

disrupt local supply chains. If those events are excluded by force majeure clauses in insurance contracts taken out by the relevant businesses, the cost of that disruption is borne by the businesses, their customers and shareholders. They are costs sitting on today's balance sheets, not tomorrow's.

Notwithstanding the criticisms of net zero, it offers a route to action that points us in the right direction. Being able to show a sufficient level of ambition in net zero plans is important to help avoid accusations of greenwashing. Net zero is a tool just like many others, how we use it is what matters. Understanding the principles of ambitious net zero target setting and the nuances around the concept are how we ensure that we are taking effective action.<sup>2</sup>

## How do TCLP's clauses scale up climate ambition?

TCLP has created a [Net Zero Drafting Checklist](#), based on our [Net Zero Explainer](#) and [Net Zero: What is it? Video](#). These tools can be used to ensure that climate clauses you add to your agreements contain an appropriate level of ambition that is aligned with your net zero targets and that will help set the trajectory of your net zero transition. For some of our [climate clauses](#), we offer versions in different shades of green and with different levels of net zero ambition. The aim of the darker green clauses with higher levels of net zero ambition amendments is to avoid overreliance on offsetting, ensure net zero targets are backed by effective net zero actions and increase the transparency of the action being taken.<sup>3</sup>

Ambitious net zero drafting will:

- Make explicit reference to [Scope 1, 2 and 3 emissions](#).
- Align targets and emissions reduction requirements [with the Paris Agreement](#) and [science based](#) goals of limiting the global temperature increase to 1.5°C.
- Encourage continuous reduction of emissions at a pace that aligns with the aim of halving absolute emissions every decade (a 7% year-on-year reduction).<sup>4</sup>
- Encourage parties to join [Race to Zero](#) and/or have targets validated by the [Science Based Targets Initiative](#).
- Require short, medium and long term interim targets to achieve a 2050 net zero target and net negative emissions thereafter.
- Ensure that emissions are offset only after best efforts are made to reduce them, and then in accordance with [The Oxford Principles for Net Zero Aligned Carbon Offsetting](#).
- Require board-level engagement and decisions (made with appropriate climate advice or expertise).

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<sup>2</sup> See [Net Zero Principles - Net Zero Climate](#) for more information.

<sup>3</sup> University of Oxford: [Mapping of current practices around net zero targets](#) (May 2020); The Conversation, ['Net zero: despite the greenwash, it's vital for tackling climate change'](#); Carbon Intelligence, [Are your net zero targets credible or just greenwash? - Carbon Intelligence](#); The Conversation, ['Climate scientists: concept of net zero is a dangerous trap'](#)

<sup>4</sup> The ['Carbon Law'](#); and J. Rockström et al., [A roadmap for rapid decarbonisation](#), Science 355.6331, 1269-1271 (2017); [Summary Report: Race to Zero criteria consultations](#)

- Require transparency and accountability for climate action through robust disclosure and verification (for example, aligning disclosures with the recommendations of the Financial Stability Board's (FSB's) [Task Force on Climate-related Financial Disclosures](#) (TCFD)).
- Consider the need for global equity and a just transition.
- Require lobbying activities, trade association memberships and public policy positions, employee training and climate leadership to be aligned with the Paris Agreement goals.

## When is climate ambition at risk?

What should organisations consider when setting levels of ambition or shades of green in their legal agreements?

The ambition level of a clause can be diluted when:

- **Customising clauses:** Whether you are a private practice lawyer drafting a bespoke agreement for a client, an in-house lawyer or a procurement professional you will likely need to tailor the clauses to your specific circumstances.
- **Negotiating clauses:** Clauses may be accepted without question, or they may be the subject of negotiations.

Both of these situations can lead to a change in the net zero ambition of the clause and risks delivery of the parties' net zero targets.

Where a clause has ambitious climate goals or is dark green, it may be seen as uncommercial or raise questions about costs. Removing controversial or costly elements is likely to reduce the ambition of the clause. It is important to consider the parties' climate goals, when you are changing or negotiating clauses, so that you do not dilute the clauses so that they are no longer aligned with the strategy and needs of your organisation. Crucially, if you are amending the clause to reflect a company/client/other party's current stage of their 'net zero journey' (because the obligations or requirements are not achievable now), it is important to build in a review so that the net zero ambition of the contractual terms adjusts as those parties' net zero capabilities grow. Consider if the drafting can incorporate a review, or include a set of targets that build in ambition over time?

## How to negotiate climate clauses

We recommend having early conversations with commercial colleagues about the impact of these clauses, both in terms of climate change and also in terms of cost, risk and price. Going into a negotiation having pre-agreed the level of additional cost you can accept in return for keeping a high level of climate ambition will help to ensure that your contract stays aligned with your net zero target rather than being diluted. There will always be a reason why a

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particular negotiation should be an exception to your targets. This approach risks missing your goals because too many exceptions were made. Understanding how the clauses deliver net zero, where and how often you can afford to compromise will lead to greater success in delivering your net zero target.

You should also be mindful of the different stages your customer or supplier may be at in their climate change journey and how this compares to yours, the market and your competitors. Smaller SME suppliers may need open dialogue and support from a customer in terms of training and education in order to achieve the climate obligations in a contract. For them, clauses with incentives rather than penalties may build a strong foundation for achieving GHG targets which will grow over time.