



Regulatory Impact Statement: Targeted reform of emissions-related torts

Decision sought	<i>Cabinet policy approvals for the development of a statutory bar on emissions-related tort claims.</i>
Agency responsible	<i>Ministry of Justice</i>
Proposing Ministers	<i>Minister of Justice</i>
Date finalised	<i>21 April 2026</i>

Summary: Problem definition and options

What is the policy problem?

The Government is concerned about the impact of the ongoing litigation in *Smith v Fonterra* on business and investor confidence. This litigation, which is set down for a substantive hearing from April 2027, has introduced uncertainty about the role of tort law in addressing greenhouse gas (GHG) emissions in New Zealand. There is a possibility that novel forms of liability could exist giving rise to obligations on emitters that are in addition to, and may be in tension with the government's approach to regulating GHG emissions. The length of time before the legal position may be settled following court proceedings and any subsequent appeals also contributes to this concern.

What are the policy objectives?

There are two policy objectives. First, give businesses and investors legal clarity and confidence by ensuring companies operating in New Zealand understand their GHG obligations. Second, seek to protect the stability of New Zealand's constitutional institutions and core legal principles, including public and individual rights, which support public trust and economic activity.

These objectives can be in tension with each other at times. Steps to increase commercial certainty, such as simplifying regulation or making retrospective legal changes, may undermine public confidence in the rule of law. For example, retrospective legislation that favours business certainty can compromise fairness or established legal expectations.

What policy options have been considered, including any alternatives to regulation?

- Option 1: Status quo – no regulatory intervention at this time
- Option 2: Immediate legislative change to impose a statutory bar on emissions-related tort claims

What consultation has been undertaken?

Targeted consultation was undertaken with legal experts in tort, environmental, and public law. Broader public consultation was not undertaken.

We also consulted relevant central agencies including the Ministry for the Environment, Ministry of Business Innovation and Employment, Ministry for Primary Industries, Ministry of Foreign Affairs and Trade, the Treasury, the Crown Law Office, and with the Department of the Prime Minister and Cabinet informed.

s9(2)(h)

Is the preferred option in the Cabinet paper the same as preferred option in the RIS?

No, the Ministry of Justice's (the Ministry) preferred option is option 1: no regulatory intervention at this time.

Summary: Minister's preferred option in the Cabinet paper – a statutory bar on emissions-related tort claims

Costs (Core information)

The Minister's preferred option may have non monetised costs:

Mr Smith and other potential litigants

- A statutory bar would preclude Mr Smith and other potential litigants from the possibility of success in tortious claims for harm caused by GHG emissions. This would restrict the ability of individuals and organisations to seek certain types of remedies for climate-related harm.

Defendant Companies¹ and other GHG Emitters (including individuals and businesses)

- A statutory bar may adversely impact these businesses' reputations if the law was seen as shielding them from what would otherwise be actionable behaviour.

The Minister's preferred option may have monetised costs:

Ministry of Justice and the courts

- Litigants are likely to test the scope of a statutory bar resulting in increased court time and associated costs.

All government agencies/the Crown

- s9(2)(h)

GHG Emitters (including individuals and businesses)

- A highly contested statutory bar may create doubts about its longevity across future governments. If the legal framework regarding tortious liability for GHG shifts over time, this would have the effect of making the law less clear for businesses and the general public.
- s6(a)

Benefits (Core information)

The Minister's preferred option may have monetised benefits:

¹ Mr Smith is seeking that the court require respondents Fonterra Co-operative Group Limited, Genesis Energy Limited, Dairy Holdings Ltd, New Zealand Steel Ltd, Z Energy Ltd and BT Mining Ltd to reduce their emissions to reach net zero emissions by 2025, or alternatively to immediately cease emitting or contributing to net emissions.

Defendant Companies and other GHG Emitters (including individuals and businesses)

- A statutory bar would protect emitting businesses from tort liability, providing greater legal certainty to GHG emitters. This would reduce legal-risk planning costs and minimise expenses associated with defending litigation or compliance with potential court orders.
- If the bar endures across changes of government, it could signal a stable regulatory environment for certain industries, where all obligations are clearly set out in legislation, potentially increasing business confidence which could attract international investment.

Balance of benefits and costs (Core information)

Does the RIS indicate that the benefits of the Minister’s preferred option are likely to outweigh the costs?

The Ministry of Justice considers that benefits of the Minister’s preferred option for a retrospective statutory bar will likely not outweigh the costs of intervening in active litigation and the resulting impact on confidence in regulatory stability.

Implementation

How will the proposal be implemented, who will implement it, and what are the risks?

The Minister’s preferred option of a statutory bar requires legislation.

Limitations and Constraints on Analysis

The analysis has been limited to legislative options as the only available avenue for the Government to clarify the common law. Non-legislative options were not considered beyond the status quo.

Consultation was very limited

Due to the ongoing litigation, consultation was limited to legal experts. Lack of consultation with businesses or potential overseas investors constrained officials’ ability to assess business confidence impacts. It also meant Māori perspectives on the options were not recorded. No consultation took place with other stakeholder groups.

The policy process has not involved engagement with Māori

The Crown has obligations under the Treaty of Waitangi of good governance, including to engage with Māori in good faith under Article One; and to respect Māori rights and interests to make decisions over resources and taonga under Article Two. Mr Smith’s claim relies in part on tikanga Māori and climate change is an area where Māori have consistently expressed significant concern given its effects on land, waterways, fisheries and other aspects of the natural environment. The Crown’s obligation to act in good faith requires it to be sufficiently informed when making decisions that affect Māori interests.² There has been no engagement with Māori during policy development, which may be criticised as potentially inconsistent with Treaty obligations.

Our analysis of whether the Minister’s preferred option is consistent with Treaty of Waitangi obligations has also been constrained due to lack of consultation with Māori.

Other constraints

The absence of international precedents for climate-related torts, or for a statutory bar on climate-related torts also limited comparative evidence.

The analysis presented here is therefore subject to significant constraints. Limited stakeholder engagement and inability to predict how statutory interpretation or common law may evolve over time limit the extent to which we can assess the impact of options on the stability of the legal framework. These limitations could be addressed to some degree through additional engagement and data

² Cabinet Office Circular CO (19) 5, para 39.

collection. A Select Committee process may also give interested people, including emitters, Māori, and other stakeholders an opportunity to provide feedback on a legislative response.

Summary: Ministry's preferred option - status quo/no legislative intervention at this time

Costs (Core information)
<p>The Ministry's preferred option may have non monetised costs:</p> <p>GHG emitters (including companies and individuals)</p> <ul style="list-style-type: none">As above, businesses may continue to face legal uncertainty until the case is resolved and it becomes clear whether there may be corporate liability in tort for GHG emissions.
<p>The Ministry's preferred option may have monetised costs:</p> <p>Defendant Companies and other GHG Emitters (including individuals and businesses)</p> <ul style="list-style-type: none">Businesses will continue to incur legal costs in assessing and managing potential liability, defending litigation and, as well as reputational impacts and diversion of resources from core operations. If their defence is unsuccessful and there is no future legislative intervention, there could also be costs associated with complying with court orders.
Benefits (Core information)
<p>The Ministry's preferred option may have non monetised benefits:</p> <p>Defendant Companies and other GHG Emitters (including individuals and businesses)</p> <ul style="list-style-type: none">Judicial clarification could strengthen long-term business confidence, particularly if the outcome is that no liability in tort is found and businesses' obligations in relation to GHG emissions remain only those under the existing legislative framework. <p>Potential litigants</p> <ul style="list-style-type: none">Preserves full access to the courts and the ability to establish their legal rights and seek potential redress for harm to those rights. <p>The Courts and Government</p> <ul style="list-style-type: none">Supports constitutional arrangements by not intervening during ongoing litigation and maintains stability of the rule of law. <p>There are no monetised benefits for the Ministry's preferred option.</p>
Balance of benefits and costs (Core information)
<p>The Ministry of Justice considers that the benefits of the Ministry's preferred option are likely to outweigh the costs because:</p> <ul style="list-style-type: none">in the absence of consultation with stakeholders, officials have not been able to identify clear evidence that the current litigation has affected business confidence;while defendant companies may face costs if the court finds in favour of Mr Smith and imposes additional obligations to reduce emissions, the Ministry considers there is broader public value in upholding the rule of law by allowing litigation underway to conclude before considering whether to change the law; andthe status quo maintains access to justice for people seeking remedies relating to environmental harm to property and otherwise supports New Zealand's constitutional arrangements.

Implementation

The Ministry's preferred option of no statutory intervention at this time has no implementation implications.

Quality Assurance Statement

Reviewing Agency:

QA rating: Does not meet

Panel Comment:

The Ministry of Justice RIS Panel has reviewed the Regulatory Impact Statement (RIS) "Targeted reform of emissions-related torts" and considers that it does not meet the Quality Assurance criteria.

The RIS clearly acknowledges that there has been "very limited engagement with legal experts and no engagement with business" (due to ongoing litigation), and there has been no consultation with Māori.. The lack of consultation places significant constraints on the quality of the analysis presented.

The problem definition rests on an assumption that the ongoing Smith v Fonterra court case has a negative impact on business confidence. While acknowledging that some consultation has occurred with legal experts, the panel considers that a lack of any business perspective means that the underlying question of the impact on business confidence has not been adequately tested. This makes it difficult for decision makers to make an informed decision about the necessity of legislative intervention. The panel notes the RIS's conclusion that "We have not identified any evidence that the ongoing court proceedings have had a measurable impact on business confidence".

In the absence of broader consultation and clearer evidence of the policy problem, the panel considers that the analysis cannot be adequately relied on by Cabinet to support decision making.

The Ministry of Justice has expressed a preference for the status quo, allowing the substantive case to proceed before assessing the need for any regulatory intervention. This would allow for wider consultation with interested stakeholder groups

I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

Responsible Manager(s) signature:

s9(2)(a)

Caroline Greaney

Deputy Secretary Policy

21 April 2026

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Government is concerned that the ongoing litigation in Smith v Fonterra³ has raised questions about the role of tort law in regulating greenhouse gas emissions

1. The litigation raises questions about whether the courts could find duties exist outside of the existing statutory framework under the Climate Change Response Act 2002, and what this may mean for regulatory coherence, business certainty, and constitutional norms.
2. In 2020, the plaintiff, Mr Smith (Ngāpuhi, Ngāti Kahu), filed tort claims, including public nuisance and a novel climate system damage tort, against six companies for their emissions. The claim is based on physical damage to property that Mr Smith has customary and tikanga-based interests in, including a specified block of Māori freehold land. Mr Smith is not seeking damages so a successful claim would not result in financial compensation. He is seeking:
 - a. a declaration that the defendants have (individually or collectively) unlawfully caused or contributed to a public nuisance through their emitting activities, and
 - b. an injunction requiring each of the defendants to reach net zero emissions by 2050 (and a particular reductions trajectory between now and then) or otherwise cease their emissions activities.
3. In October 2021, the Court of Appeal granted an application to strikeout all of Mr Smith's claims, preventing them from proceeding to trial. The Court considered that tort law was a poor vehicle to resolve climate harms which require a sophisticated regulatory response at a national level, supported by international co-ordination. The decision was appealed to the Supreme Court.
4. In February 2024, the Supreme Court unanimously determined not to strike out Mr Smith's claims, meaning that the case can proceed to trial. The Supreme Court's decision mostly focussed on the claim of public nuisance. The Court held that Mr Smith did have standing to bring the claim, in part because the pleaded damage was to specific Māori freehold land that he and those he represents have a distinct legal interest in. The Court observed that allowing the claim to proceed to trial was not indicative of whether or not it may ultimately succeed.⁴
5. The High Court hearing is scheduled to begin in April 2027. The case will be focused on whether the defendants' contributions to climate change give rise to liability and whether a duty exists to cease materially contributing to climate harm.

This case opens the door to findings of common law duties in regard to damage caused by GHG emissions

6. If the substantive case of *Smith v Fonterra* is to proceed, common law duties in regard to climate damage could be found, in large part, through the application of public nuisance to GHG emissions.
7. Public nuisance is defined as an unreasonable interference with a right common to the public. It has long served as a flexible doctrinal tool to address harms that fall outside the reach of more specific torts. Over time, the doctrine has evolved to address complex

³ *Smith v Fonterra* [2024] NZSC 5; [2024] 1 NZLR 134.

⁴ *Ibid.*, at [2].

societal harms, including environmental degradation, where at times regulatory mechanisms have become ineffective.

8. The Attorney-General has standing to take action on behalf of a community to restrain a widespread public nuisance, rather than leaving private individuals to initiate proceedings. Individuals have standing if they can show that they have suffered a harm that is somehow sufficiently different from that of the wider public.
9. It is difficult to determine the exact number of public nuisance claims brought in New Zealand, as cases are not recorded by claim type, but the volume is likely to be very low. The Supreme Court noted that the most recent authority on public nuisance is over 75 years old and based on a United Kingdom precedent.⁵

Parliament already regulates emissions through the Climate Change Response Act 2002

10. The Climate Change Response Act 2002 (CCRA) is New Zealand's primary legislation for addressing GHG emissions. One of the purposes of the CCRA is to enable New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change,⁶ the Kyoto Protocol,⁷ and the Paris Agreement.⁸ A key component of the CCRA sets up a framework for reducing emissions over time. This includes setting a long term 2050 emissions reduction target. The Minister of Climate Change sets 5-yearly emissions budgets for the entire New Zealand economy, which act as stepping stones towards the long-term target.⁹ The Minister must ensure that the net accounting emissions do not exceed the emissions budget for the relevant budget period. The Minister also has responsibility for implementing policies to reduce net emissions across the economy as a whole, rather than targeting specific emitters.¹⁰
11. The CCRA also sets up the New Zealand Emissions Trading Scheme (ETS),¹¹ which is the government's main tool for reducing GHG emissions in sectors covered by that scheme. The scheme is designed to:
 - a. help New Zealand meet its international commitments under the Paris Agreement; and
 - b. support achievement of the country's 2050 target and emissions budgets.
12. All sectors of New Zealand's economy, other than agriculture, are covered by the ETS. The ETS generally requires that businesses must surrender one emissions unit to the Government for each one tonne of emissions they emit. Over time, the government reduces the number of emissions units supplied into the scheme to lower the total amount of emissions allowed to encourage businesses to reduce their emissions.

The interaction between the respective branches of government gives rise to several constitutional matters

13. These are:
 - a. the rule of law;
 - b. separation of powers between the legislative and judicial branches;

⁵ *Smith v Fonterra* [2024] NZSC 5, [2024] 1 NZLR 134 at [108].

⁶ [United Nations Framework Convention on Climate Change | UNFCCC](#)

⁷ [The Kyoto Protocol | UNFCCC](#)

⁸ [The Paris Agreement | UNFCCC](#)

⁹ See section 5X CCRA.

¹⁰ For example, the Minister for Climate Change has responsibility for preparing a plan setting out the policies and strategies for meeting the relevant emissions budget (section 5ZG(1) CCRA).

¹¹ [New Zealand Emissions Trading Scheme | Ministry for the Environment](#)

- c. the presumption against retrospectivity;
- d. respect for private property rights;
- e. the Treaty of Waitangi; and
- f. access to justice.

The rule of law fosters stability and confidence in how New Zealand operates

14. The rule of law is ingrained in New Zealand's constitution and sets out principles that ensure fairness before the law and promotes public trust in institutions. The Legislative Design Advisory Committee (LDAC) highlights that legislation should uphold the rule of law by ensuring that everyone is equal before the law, that the law should be clear and easily understood, that disputes between individuals should be decided by the courts, and that legislation should not restrict access to the courts.¹²

The legislative and judicial branches have distinct constitutional roles

15. The core constitutional principle of the separation of powers requires mutual respect and restraint between the legislative and judicial branches. Parliament is the supreme law-making body of New Zealand.¹³ The LDAC guidelines state that legislation should not generally interfere with judicial decisions in specific cases.¹⁴ Parliament and the courts may, however, engage with the same subject matter without encroaching on each other's domain. For example, Parliament may legislate on an issue while the courts simultaneously hear cases on it, and vice versa.

LDAC guidelines are that legislation should only interfere in active litigation when it is in the public interest

16. Retrospectivity occurs when legislative changes are applied to conduct that occurred before the law was enacted. Retrospectivity is generally disfavoured under section 12 of the Legislation Act 2019, which affirms the fundamental rule-of-law principle that people should be able to rely on the law as it stands. Applying new rules to past actions can undermine settled expectations and public trust.
17. Parliament may legislate retrospectively, however, where there is a compelling public interest or a need to correct a significant legal anomaly. LDAC guidelines also recognise rare situations where retrospective changes may legitimately apply even to parties in ongoing or completed litigation, for example, where exempting those litigants would undermine the policy rationale of the change or lead to inconsistent or inequitable outcomes.¹⁵

¹² Legislation Guidelines 2021 edition, 4.1.

¹³ Legislation Guidelines 2021 edition, 4.1.

¹⁴ Legislation Guidelines 2021 edition, 12.2.

¹⁵ Legislation Guidelines 2021 edition, chapter 12.2.

Legislation should respect property rights

18. Respect for property rights is one of the fundamental values of New Zealand law. Legislation in New Zealand actively protects property rights in several ways, including through criminalisation of theft and fraud, laws dealing with trespass and other property rights.¹⁶ In addition, the common law has long recognised a presumption of the protection of property rights and peaceful enjoyment of property.¹⁷

Legislative actions require consideration of the Crown's obligations under the Treaty of Waitangi

19. The Crown and Māori have obligations to act reasonably and in good faith with each other. Legislation may affect the rights and interests of Māori if it impacts on the relationship between the Government and Māori, the durability of treaty settlements, or the possession, use, or ownership of land, waterways, forests, fisheries, taonga, and other resources.¹⁸ Māori have consistently expressed a strong interest in matters relating to climate change.

Access to the courts can only be limited when this is justified

21. LDAC guidance is that legislation should not restrict the right of access to the courts. The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified and will generally be given a restrictive interpretation by the courts.¹⁹

What is the policy problem or opportunity?

22. The Government is concerned that the ongoing litigation in *Smith v Fonterra* has introduced uncertainty around the role of tort law in addressing GHG emissions in New Zealand. This case has raised concerns about potential negative impacts on business and investment confidence, particularly for high-emitting industries. These concerns stem from both the uncertainty of court outcomes and the potentially extended timeframe before a final determination.
23. Climate change is a complex, multi-dimensional issue. There is a question as to whether it is best addressed through parliamentary processes rather than through common law. There is a risk that the courts could find that common law rights and duties related to climate change exist in a way that is inconsistent with the current regulatory approach, where the CCRA places responsibility on the Minister of Climate Change to implement policies to reduce net emissions across the economy as a whole, rather than targeted to specific emitters.

We have limited evidence on business confidence

24. Business confidence as a concept is a widely used term to describe how optimistic or pessimistic business leaders are about their companies' performances and the broader economic future. Perceived risk of significant financial impact because of government or judicial decisions may decrease business confidence. It is a value that can be difficult to analyse quantitatively or qualitatively. Business confidence is generally assessed through opinion survey data.
25. We have undertaken very limited engagement with legal experts and no engagement with business. We have not identified any evidence that the ongoing court proceedings have

¹⁶ Legislation Guidelines 2021 edition, chapter 4.4.

¹⁷ For example, the tort of nuisance is one way in which the common law recognises and compensates for damage to the peaceful enjoyment of private property.

¹⁸ Legislation Guidelines 2021 edition, chapter 5.

¹⁹ Legislation Guidelines 2021 edition, 4.6.

had a measurable impact on business confidence. This may reflect the relatively early stage of the case and that we have not consulted with businesses. While the Supreme Court has allowed the case to proceed, it has not made any findings of legal duties or wrongdoing by the corporate defendants. As the case proceeds towards a more substantive hearing, awareness and concern amongst the wider business community may increase and negatively impact business confidence.

How the status quo may develop if no action is taken

26. If the Government does not intervene, the case will likely proceed to substantive trial where evidence will be presented by both sides. The case in *Smith v Fonterra* is still at a preliminary stage. While the claims have survived a strike-out application, this does not give any indication of the likelihood of one or more of the claims succeeding. The High Court decision will determine both whether there is liability for the defendant companies, as well as the existence (or not) of a climate-related tort.
27. Following a judgement, there will be the opportunity for appeals. This means that the ultimate extent of potential liability will not be confirmed for a number of years. In advance of a court decision, it is unclear if (or how) emitters might be affected.

Should the claims in Smith v Fonterra succeed, there could be widespread impacts to New Zealand

28. The government's economy-wide approach to reducing net emissions under the CCRA allows it to meet climate change obligations while managing the impact of emissions reductions.
29. There is potential that a court determination that finds against the six defendants could result in orders for emitters to change their activity. This could occur despite emitters acting in accordance with the legislation (i.e. the Climate Change Response Act 2002) and may impose additional obligations for some companies. This presents a risk of misalignment between government policy and the common law.
30. The defendant companies contribute substantially to New Zealand's economy and are active across a range of sectors. Should the claims in the *Smith v Fonterra* case succeed, and the injunction sought be granted, this would have a widespread impact at odds with the intention of the CCRA.
31. Duties found at common law may conflict with legislative and policy settings. It could also be administratively difficult to manage emissions reductions nationally through the CCRA, as well as alongside any separate obligations that may apply to individual emitters as found by the courts.
32. If the court finds that climate system damage tort exists, this may also increase the chances of further litigation from other parties against high-emitting entities in the future. There is also a risk of significant financial implications for GHG emitters if the courts find that common law rights and duties related to climate change exist.
33. A court decision would provide eventual clarity for businesses about the extent of their obligations but would leave short term uncertainty, particularly for businesses in high emission industries.

What objectives are sought in relation to the policy problem?

34. The objectives are to:
 - a. provide legal clarity and confidence for businesses and potential investors, by ensuring companies who are, or wish to, operate in New Zealand understand their responsibilities regarding GHG emissions; and

- b. safeguard the stability and predictability of New Zealand's constitutional institutions and foundational legal principles which underpin public trust and economic activity. These include the rule of law as well as public and individual rights.
35. These objectives can sometimes be in conflict. Measures designed to enhance business confidence, such as regulatory simplification or retrospective legal changes, may not always align with the protection of individual rights or broader public trust in the legal system. For example, retrospective legislation that benefits commercial certainty might compromise fairness or undermine legal expectations.

What consultation has been undertaken?

Ongoing litigation limited consultation

36. Officials undertook targeted, in-confidence consultation focused on testing legal and constitutional design choices for a statutory bar. Due to the ongoing litigation, officials did not engage with the parties to the proceedings, companies in sectors with high GHG emissions, the wider business community, or Māori. The consultation, therefore, did not capture these perspectives.
37. Targeted consultation also did not allow the opportunity to gather data or evidence on the impact of *Smith v Fonterra* on broader business and investor confidence.
38. To mitigate this as far as possible, officials undertook a scan of the case, including legal and business journals, as the decision was widely reported on domestically and abroad. At this stage, we have not identified any publicly available material that suggests the decision has generated concerns that might disincentivise investment in New Zealand.
39. We spoke to:
- a. Legal experts in tort, environmental, and public law (including King's Counsel), commercial litigators, and academics.
 - b. Relevant central agencies and sector departments (Ministry for the Environment, Ministry for Business, Innovation & Employment, Ministry for Primary Industries, Ministry for Foreign Affairs and Trade, Treasury, the Crown Law Office, and the Department of the Prime Minister and Cabinet).

Experts had mixed views on the impact of this case on business confidence

40. Some experts thought that the decision might have impacted business confidence. Others noted that large (often multinational) corporate entities are used to operating in multiple jurisdictions and across differing regulatory regimes.
41. We heard from experts that:
- a. Statutory bars in other jurisdictions have been interpreted narrowly by the courts.
 - b. A statutory bar could have the unintended consequence of decreasing clarity for businesses, as the broad initial scope of a bar is applied more narrowly over time.
 - c. The extent to which a bar would boost business confidence or cut litigation costs is unknown.
 - d. Litigation will likely continue as people test the application and scope of the bar. Litigation is expected and planned for by businesses.

- e. Business certainty and confidence are more likely to be influenced by changes to the ETS, for example.

42. Public sector agencies that regularly speak with businesses about what is constraining growth also stated that the decision had not emerged as a concern.

Feedback from legal experts highlighted significant legal, constitutional, and policy implications from enacting a statutory bar on climate-related tort claims

43. While some commercial litigators saw potential benefits such as reduced litigation costs and increased business confidence, others warned these gains might be short-lived or illusory. Concerns were raised about a statutory bar's potential to undermine access to justice, especially in the absence of alternative remedies for emissions harm.

44. s6(a)

45. Designing a statutory bar was seen as legally complex and potentially counterproductive. Experts cautioned that broad bars often invite legal challenges and may be narrowed by courts over time, decreasing clarity. They recommended that if the Government proceeds with a bar, it should be a narrowly drafted bar that preserves traditional environmental torts while excluding climate-related claims .

46. From a constitutional perspective, some experts argued that climate issues are best addressed by Parliament, while others advocated for the courts' role in considering tort law when legislative action is lacking. Concerns were raised about Treaty of Waitangi obligations, human rights, and the erosion of judicial oversight, especially if legislation is enacted retrospectively or under urgency. Some suggested that the proposal should be assessed against the principles in the Regulatory Standards Act 2025 for possible inconsistency.²⁰

47. Many experts favoured a "wait and see" approach, suggesting the Government should observe the outcome of *Smith v Fonterra* before legislating. They believed this would reduce risk and support more informed policymaking. Alternative proposals included clarifying public nuisance thresholds, designing a government-led framework for emissions harm, and limiting available remedies rather than barring claims outright. These approaches were seen as more principled and less disruptive, offering legal clarity while preserving judicial oversight and public trust.

Ministry of Foreign Affairs and Trade comment

48. s9(2)(h)

49. s6(a)

²⁰ While not yet in force, the principles in Part 2 of the Act may be in force by the time legislation to give effect to the Minister's proposal is introduced. Relevant principles include consistency with the rule of law, the role of the courts and aspects of the principles of good law making such as the importance of consultation.

s6(a)

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options to the status quo?

Criteria	Description
Business responsibilities and obligations are clear	International and domestic businesses are confident of their legal obligations so they can assess legal risk of their commercial activities.
Supports individual and public rights	Individuals can bring claims to remedy private harms (e.g., access to the courts for recognised torts) and public rights (rights common to the public, as in public nuisance doctrine) ²¹ are protected through appropriate mechanisms (e.g., Attorney-General or other authorised proceedings).
Supports our constitutional arrangements	Respects our constitutional arrangements by upholding the legitimacy of the branches of government. This includes fundamental principles such as separation of powers, parliamentary sovereignty regarding law-making, access to justice and consistency with the rule of law as well as Treaty obligations.
International implications	The extent to which each option impacts New Zealand’s international legal or policy risk.

What scope will options be considered within?

50. Addressing the sorts of claims brought in *Smith v Fonterra* would require a legislative response. Apart from the status quo, non-legislative options were not considered.

What options are being considered?

Option One – Status Quo, no regulatory intervention at this time (Ministry’s preferred)

51. Under the status quo, no legislative action would be taken in response to the *Smith v Fonterra* proceedings at this time. The substantive case would proceed, and the courts would consider the substantive merits of the case. They would consider the common law of public nuisance and the potential recognition of a novel climate-related tort. As with all cases, it is not possible to determine the court’s decision in advance of arguments being made, evidence being heard, and the judgement being issued.

52. If the Government considers intervention is appropriate or necessary to ensure regulatory coherence following determination of the case, it could develop options at that time.

²¹ For example, public health, safety, convenience, and shared resources—protected at common law through the tort of public nuisance.

Option Two – Immediate legislative action to impose a statutory bar on emissions-related tort claims (Minister’s preferred)

53. This option involves the introduction of a statutory bar that would restrict any finding on liability in tort for GHG emissions-related harm. A statutory bar would apply across all torts claims for emissions-related activity, including negligence and public nuisance and any novel climate-related torts. It would protect all emitters for any direct or indirect emissions-related activity, including the Crown.
54. The bar would apply retrospectively, which would effectively prevent the claims in *Smith v Fonterra* from being tested in the courts. Retrospectivity may be justified when the policy reasons for enacting retrospective legislation could be undermined by leaving intact the litigants’ potential for success.²² In this instance, the Government considers that the design and scope of the regulatory framework for GHG emissions should be determined solely by Parliament. It therefore considers retrospectivity is justified to preserve a coherent and uniform regulatory framework for GHG emissions, particularly where allowing the proceedings to continue could result in obligations in relation to emissions that conflict with Parliament’s intended approach. For clarity, this option does not propose that the government be immune from judicial review for decisions related to GHG emissions.

Other options considered but discounted

Reform of the elements of public nuisance

55. The Supreme Court determined that Mr Smith’s public nuisance claim was sufficiently arguable to warrant a full trial. Initial advice to the Minister of Justice was provided on an option to scope policy work to consider in more detail a reform of elements of public nuisance. This would have considered codifying in statute some or all the requirements for public nuisance claims at common law. Modifying tort through statute is an approach seen in other areas, for example, the Defamation Act 1992, which modified a common law tort.
56. This option would involve a detailed analysis of each element of public nuisance, including an assessment of how it is currently understood and applied. For each element, we would examine the relevant legal standards, precedents, and interpretations. We would provide advice on whether those common law standards should be retained or put into statute. We would also advise if the element should be amended to reflect modern needs or provide clarity where required.
57. Ultimately, this option was discounted for the purposes of this analysis and further work was not undertaken. While it would allow for a review of public nuisance standards, such as whether the tort should cover emissions-related harm, it would not address the novel claims relating to tortious liability for damage to the climate system advanced in *Smith v Fonterra*. Therefore, it would not respond fully to the Government’s concerns.

Reform of corporate liability

58. Some experts consulted suggested an option much broader in scope, to determine whether there should be corporate liability for emissions beyond the existing ETS. This option was not explored for the purpose of this analysis.

²² Legislation Guidelines, 2021 edition, 12.2.

How do the options compare to the status quo?

	Option One – Status Quo, no regulatory intervention at this time	Option Two – Immediate statutory bar on GHG emissions related tort claims
Business responsibilities and obligations are clear	<p>0</p> <p>Litigation can pose reputational risks and divert resources from core business activities.</p> <p>Judicial clarification could ultimately support both regulatory compliance and long-term business confidence.</p> <p>In the absence of intervention, existing concerns felt by businesses may persist until the court processes play out.</p>	<p>0</p> <p>Supports the view that the CCRA is the appropriate mechanism to regulate GHG emissions. Maintains clarity regarding the nature and scope of the regulatory regime for GHG emissions, as enacted by Parliament. Mitigates the immediate risk that current litigation will change businesses' legal obligations.</p> <p>With the caveat that consultation with business was not undertaken, officials have identified limited evidence that a statutory bar will improve business confidence. It is possible that business confidence might improve if businesses respond favourably to government intervention and that this will be a key factor in businesses' operational decision making. There is also a risk that, a statutory bar could be interpreted narrowly by the courts, decreasing clarity of the law as the broad initial scope of a bar is applied more narrowly over time. The extent to which a bar would cut litigation costs is unknown. Litigation may continue as people test the application and scope of the bar.</p>
Supports individual and public rights	<p>0</p> <p>Supports rights by preserving full access to the courts and the ability to test whether redress for harm caused by GHG emissions through tortious claims is available.</p> <p>Reflects public expectations that alleged wrongs can be independently reviewed by the Judiciary.</p> <p>Enables courts to consider tort law in response to climate challenges.</p>	<p>-</p> <p>Mr Smith's claims (and any others who may have similar claims) will not be able to result in a finding of tort liability.</p> <p>Could be a significant restriction on access to justice, especially if no alternative provided, though the Government considers this is justified to maintain a coherent regime for regulating GHG emissions.</p>
Supports our constitutional arrangements	<p>0</p> <p>Waiting for a court decision prior to legislating to respond to its effect on the law supports the separation of powers and mutual respect and restraint between branches of government.</p> <p>In line with LDAC guidelines that legislation should have prospective, not retrospective, effect. This will maintain established principles regarding the rule of law and the certainty and predictability of law.</p> <p>Aligns with New Zealand's common law tradition, where tort law has historically developed to respond to evolving societal conditions and new scientific knowledge. May allow potential short-term concerns about the possible extent of business obligations in high-emitting industries to persist, particularly as the courts consider novel legal arguments</p> <p>Maintains public confidence in both branches of government through avoiding possible judicial or public criticism for interference in active legal proceedings.</p>	<p>--</p> <p>Reflects that Parliament is sovereign. While it is more usual for Parliament to await the outcome of a court decision before legislating, thereby respecting separation of powers, it still has the freedom to legislate where it considers necessary. Retrospective application is required to achieve the policy objective. LDAC guidelines state that retrospectivity which affects current litigation may be justified when it is in the public interest and impairing the rights of litigants no more than is reasonably necessary.</p> <p>There are likely to be a range of views about whether the risk posed to the coherence of the regulatory framework by the current litigation is of sufficient public interest to justify retrospectivity, particularly in advance of knowing the outcome of the litigation. While the Government considers that retrospectivity is in the public interest to ensure regulatory coherence, others may consider that retrospectivity gives rise to perceptions that:</p> <ul style="list-style-type: none"> • certain actors are shielded from legal accountability. • individuals' private property rights are not being protected. • the application of law to existing cases will be determined by the policy preference of the Government of the day rather than the rights of the participants. • the government has a relatively low threshold to intervene in court proceedings that are underway. <p>These perceptions could undermine public confidence in the rule of law, i.e. that the law is stable, the legal system is fair, and that rights can be relied upon.</p> <p>Could also lead to a perception that the Government is curtailing the development of the common law.</p> <p>Introducing a statutory bar may also be perceived by some as not being consistent with Treaty obligations due to the impact on one avenue where Māori may seek to protect lands, waterways and natural resources.</p>
International implications	<p>0</p> <p>s6(a)</p> <p style="text-align: center;">s6(a); s9(2)(h)</p>	<p>-</p> <p>s6(a); s9(2)(h)</p> <p>s6(a)</p> <p style="text-align: right;">s9(2)(h)</p>
Overall assessment	0	--

Key for qualitative judgements:	
++	Much better than the status quo
+	better than the status quo
0	about the same as the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

59. Officials consider Option 1 to be the most effective way to meet the policy objectives. On the limited evidence the Ministry has gathered, it is unclear whether there is a problem that requires a legislative response ahead of the High Court issuing its decision. We do not consider a retrospective statutory bar that would interfere with cases already underway is warranted at this time.
60. Option 1 would see the Government decline to legislate at this time. Rather, the Government would monitor the litigation and any market signals and revisit the need for reform after the High Court has issued its decision (noting a trial is scheduled from April 2027 and timelines could extend with appeals).
61. Option 2 may offer short-term certainty by removing a class of claims, but we consider there is insufficient evidence to justify immediate intervention. Our view is that the possibility of certainty provided by a bar is outweighed by the access to justice and other constitutional considerations, risks to New Zealand's image, and limited net benefits.
62. Option 2 may not reduce the potential legal costs incurred by the courts and companies, as claimants may proceed with claims in any event to test the scope of the bar. These legal costs may still be less than costs associated with any court-ordered direction to reduce emissions, or other orders that may be imposed on defendants (in this and any subsequent cases) if the case proceeds and liability under tort is recognised.²³

How do these options compare when assessed against the criteria?

63. *Business responsibilities and obligations:* Option 1 allows the courts to clarify whether common law duties exist. The Government could then consider whether law reform is needed. Officials believe this approach will likely produce more durable, long-term certainty about corporate responsibilities than a legislative bar that could be tested, narrowed, or repealed. Option 2 will likely reduce immediate exposure for high emitting firms, but it does not eliminate litigation risk (e.g., challenges to the scope of the bar and other causes of action).
64. *Rights and access to justice:* Option 1 preserves avenues for individuals and communities to seek recognition or redress if the common law supports it, including through declaratory or injunctive remedies. Option 2 would materially restrict access to the courts for climate related harms, closing a pathway the Supreme Court has said should be tested at trial.
65. *Constitutional arrangements:* While it is always open for Parliament to legislate, option 1 would avoid legislative interference while litigation is live and allows the courts to complete their constitutional role of developing the common law. It also preserves the ability for a legislative response later, if required. In contrast, option 2 could risk undermining the rule of law, particularly the principles of equality before the law and that rights or obligations should not be altered retrospectively.
66. A statutory bar of the kind proposed under Option 2 could engage several Treaty of Waitangi obligations and may give rise to claims of inconsistency, especially if enacted without consultation.

²³ There are no reliable international comparators to estimate the costs associated with complying with potential court-orders. That said, Mr Smith's request for orders to cease emitting suggests the consequences could be substantial.

67. By limiting the ability of people to bring, or have the courts consider, tortious claims relating to climate related harm, Option 2 limits one avenue for Māori participation in decisions that materially affect them. It would also restrict a legal avenue through which Māori might seek to protect taonga, whenua, waterways, forests, fisheries and other resources. For these reasons, Option 2 may be perceived as not being consistent with Treaty obligations.

68. s6(a)

s6(a); s9(2)(h)

.s6(a)

s9(2)(h)

Is the Minister’s preferred option in the Cabinet paper the same as the agency’s preferred option in the RIS?

69. No. The Minister prefers Option 2: Statutory bar on GHG emission related tort claims. The Ministry of Justice prefers the status quo and no legislative intervention at this time.

What are the marginal costs and benefits of the preferred option in the Cabinet paper? (Option 2)

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Mr Smith	<p>The statutory bar applied retrospectively will prevent the claims in <i>Smith v Fonterra</i> from being able to result in any potential liability.</p> <p>Mr Smith has likely incurred costs (regardless of funding arrangements for the case) for litigation. These costs would be lost.</p> <p>We have not consulted the claimant to confirm any costs.</p>	<p>High</p> <p>The cost of an opportunity to have his claim heard, reasoned and potentially resolved. Retrospective application would see Mr Smith lose the ability to have a substantive hearing claim tested by the court, regardless of outcome.</p>	High/medium
Defendant companies in <i>Smith v Fonterra</i>	<p>Cost to reputation if the law is seen as shielding these businesses from what may otherwise be actionable behaviour.</p> <p>We have not consulted the defendants to confirm any costs.</p>	Low	Low

Potential litigants	<p>Impact on individuals' ability to seek potential remedies for harm caused by GHG emissions.</p> <p>We are unable to estimate how many claims could be disallowed because of this option.</p>	<p>Medium</p> <p>No alternative statutory avenues for claimants to seek redress in tort against private actors for GHG emissions.</p>	Low
GHG emitters (including individuals and businesses)	<p>Statutory intervention in ongoing litigation could introduce its own uncertainty in the law.</p> <p>We have not consulted emitters or assessed the economic impact of early statutory intervention.</p>	Low	Low
Government agencies/the Crown	<p>s9(2)(h)</p> <p>s6(a)</p>	<p>Low</p> <p>s9(2)(h)</p>	Low
Ministry of Justice and the courts	<p>Litigants are likely to test the scope of a statutory bar resulting in increased court time and associated costs.</p> <p>We have been unable to assess the number of cases that may result from the introduction of the bar.</p>	<p>Low</p> <p>Unlikely to be a high level of increased litigation to consume court resources.</p>	Low
Total monetised costs		Low	Low
Non-monetised costs		<p>High/low</p> <p>The non-monetised cost is high for specific individuals, but we estimate will remain low when assessed against everyone.</p>	Low

Additional benefits of the preferred option compared to taking no action			
Defendant companies in <i>Smith v Fonterra</i>	<p>These companies would no longer have to pay to defend GHG emissions-related claims in court.</p> <p>These companies would no longer be at risk of a court finding that they must reduce net emissions or cease emitting.</p> <p>We have not consulted the defendants to confirm benefits.</p>	<p>High</p> <p>For companies of this size, litigation costs are likely to be relatively minor amongst overall costs for their commercial operations.</p>	<p>Medium</p>
GHG emitters (including companies and individuals)	<p>A statutory bar would provide businesses with certainty that their GHG-emissions obligations are only those under the CCRA. This may lead to greater business confidence, encouraging innovation and economic growth.</p> <p>Companies/individuals of variable size and resources would be saved from potential costs of defending themselves in litigation.</p> <p>New Zealand may be seen as a preferable regulatory environment for international businesses and investment in high GHG emitting business sectors. Officials have not identified evidence to suggest that a statutory bar would influence international investment decisions for businesses to enter the New Zealand market.</p> <p>We have not assessed how much legal expenses could be saved by GHG emitting companies and individuals.</p> <p>Additional time in consultation would improve our evidential certainty.</p>	<p>Medium</p> <p>Litigation costs are generally minor amongst the overall costs of the commercial operations of large companies in GHG related industries. Litigation costs may be a larger part of smaller companies and individuals' business expenses proportionate to the revenue and size of the business/individual.</p> <p>The risk of litigation for GHG emissions is likely to be a single small factor in deciding what markets to enter.</p>	<p>Low</p>
Total monetised benefits		<p>Medium</p>	<p>Low</p>

Non-monetised benefits		Low	Low
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What are the marginal costs and benefits of the Ministry’s preferred option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the Ministry’s preferred option			
Defendant companies in <i>Smith v Fonterra</i>	<p>The defendant companies in <i>Smith v Fonterra</i> would continue to incur the legal costs of the proceedings brought against them.</p> <p>We have not consulted the defendants to confirm costs.</p>	<p>Low</p> <p>Litigation costs are generally minor amongst the overall costs of the commercial operations of large companies in GHG related industries.</p>	Medium
GHG emitters (including individuals and businesses)	<p>Businesses may incur costs relating to legal risk and planning in assessing their potential liability to being sued. This includes potential costs of defending litigation due to company resources being diverted from core business activities to legal proceedings and addressing related reputational harm.</p> <p>The true potential impact would be determined once the Court issues its decision and based on the reasoning of its findings.</p> <p>We have not consulted emitters or assessed the economic impact of the litigation.</p>	<p>Medium</p> <p>We expect the similar impact to larger companies as above. Litigation costs may be a larger part of smaller companies and individuals’ business expenses proportionate to the revenue and size of the business/individual.</p>	Low
Total monetised costs		Low	Low
Non-monetised costs		Low	Low
Additional benefits of the Ministry’s preferred option			
Mr Smith	Mr Smith could progress his claim and have the opportunity to for his	Medium	High

	substantive arguments tested by the courts.	The benefit of an opportunity to have his claim heard and decided.	
Potential litigants	No regulatory action at this time would retain access to the courts, including the ability to seek redress for harm arising from GHG emissions.	Medium The benefit of retaining the ability to seek redress through the courts.	
Defendant companies in <i>Smith v Fonterra</i> , GHG emitters (including companies and individuals)	Determination of Mr Smith's claim through court proceedings may provide greater long-term clarity for individuals and companies in high GHG emitting sectors on their obligations and responsibilities. We have not consulted the defendants or emitters to confirm any benefits.	Medium	Low
The Courts and Government	No regulatory action at this time supports constitutional arrangements including stability of the rule of law.	Medium Retains a reasonably high bar of justification for legislating during active litigation.	High
Total monetised benefits		None	None
Non-monetised benefits		Medium	Medium

Section 3: Delivering an option

How will the proposal be implemented?

70. The Minister's preferred option of a statutory bar requires legislation. A Bill would create a statutory bar to cover all tort causes of action related to GHG emissions and will be applied retrospectively. This means it would be applied to any relevant tort claims currently before the court. We are only aware of one, the active litigation in *Smith v Fonterra*, but this would also impact any additional claims filed before legislation can be passed.
71. Once legislation has been passed, the statutory bar would prevent emissions-related tort claims from succeeding.

How will the proposal be monitored, evaluated, and reviewed?

72. The Ministry of Justice has regulatory stewardship responsibility for tort law. The Ministry will continue to monitor tort law, including the statutory bar, as part of its regulatory stewardship responsibilities. If the bar is insufficient to prevent private climate related

claims (either through tort proceedings or other avenues) then additional action may be required to achieve the Government's desired policy intent.

73. Companies will continue to have reporting obligations under Emissions Trading Scheme which is monitored by the Environmental Protection Agency.
74. The Ministry for the Environment has regulatory stewardship responsibility for climate change, which includes climate change policy, as well as monitoring greenhouse gas emissions (with input from relevant ministries). If the statutory bar has a severe impact on GHG emissions, this impact will be identified as part of this regular monitoring and any response considered through policy levers.