

Submission

by

**THE
NEW ZEALAND
INITIATIVE**

to the

Justice Committee

on the

Climate Change Response (Tort Liability) Amendment Bill

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1. Introduction and Summary

- 1.1 This submission on the Climate Change Response (Tort Liability) Amendment Bill (**the Bill**) is made by The New Zealand Initiative (**the Initiative**), a Wellington-based think tank supported primarily by major New Zealand businesses. The Initiative undertakes research that contributes to the development of sound public policies in New Zealand, advocating for a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.
- 1.2 The views expressed in this submission are those of the author rather than the Initiative's members. Two disclosures should be made at the outset. First, the Initiative's membership includes some of the defendants in the proceedings in *Smith v Fonterra Co-operative Group Ltd*. Second, in August 2025 the Ministry of Justice consulted the author, in confidence, as part of its expert consultation on options for responding to emissions-related tort litigation. The Ministry has since released a note of that consultation.
- 1.3 The Initiative supports the Bill and recommends that it be enacted, for four reasons:
 - (a) The Bill restores the orthodox allocation of constitutional responsibility. Climate change policy involves precisely the social, economic and distributional trade-offs that our constitution assigns to Parliament, not to the courts.
 - (b) Parliament has already legislated comprehensively on greenhouse gas emissions through the Climate Change Response Act 2002 (**the Act**) and the Emissions Trading Scheme (**ETS**) it houses. Tort liability for emissions would not fill a gap in that framework. It would contradict the framework's design.
 - (c) The Bill's application to proceedings not finally determined is justified within the framework of the Legislation Guidelines themselves. No judgment on the merits exists in *Smith v Fonterra*. What the Bill forecloses is the opportunity to persuade a court to recognise a novel form of liability, not any vested right.
 - (d) The Bill's breadth is the minimum required for it to be effective, while its careful preservation of traditional tort claims makes it considerably narrower than its critics describe.
- 1.4 The Initiative's 2024 report, *Who Makes the Law? Reining in the Supreme Court*, examined the Supreme Court's expanding role in matters of policy and identified targeted legislation reversing particular decisions as Parliament's most direct remedy.¹ The Bill is an exercise of exactly that kind.

2. Who Makes Climate Change Law?

- 2.1 The Bill's explanatory note states its purpose plainly: to confirm "that the role of developing, setting, and implementing regulatory policy in respect of greenhouse gas emissions sits with the Executive and the Legislature". That is not a novel assertion of power. It restates the constitutional orthodoxy recorded in section 3(2) of the Senior Courts Act 2016: "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."
- 2.2 The Court of Appeal applied that orthodoxy when it unanimously struck out all three of Mr Smith's causes of action, observing that "the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through

¹ Roger Partridge [Who Makes the Law? Reining in the Supreme Court](#) (The New Zealand Initiative, Wellington, 2024).

the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.”²

- 2.3 The Supreme Court nevertheless reinstated the claims on a strike-out application.³ The consequence of that decision is that the boundaries of legal responsibility for emissions, a question touching every business and household in New Zealand, would be settled through years of litigation over a claim that includes a proposed tort of damage to the climate system recognised by no court anywhere in the common law world.
- 2.4 Mr Smith’s proceedings did not ask the courts to apply the established law of torts. They invited the courts to invent new law. Causation is the spine of tort: a defendant is not liable in nuisance or negligence unless the plaintiff’s harm is meaningfully traceable to the defendant’s conduct. New Zealand produces roughly 0.17 per cent of global emissions, and the contribution of any single defendant is a small fraction of that fraction. The Supreme Court accepted that ordinary domestic emitters, the motorist and the householder among them, would be unlikely to cross that causal threshold, yet held that the position of the six corporate defendants must await trial.
- 2.5 Whether and how to attach legal consequences to conduct of that kind is a policy choice. The explanatory note is right to say that such choices require “careful consideration of social, economic, and distributional implications”. Courts hearing adversarial argument between single parties are not equipped to make them. Parliament is.

3. Parliament Has Already Occupied the Field

- 3.1 Parliament made its choice more than two decades ago. The Act sets the 2050 target, establishes emissions budgets and the Climate Change Commission, and requires a National Adaptation Plan. The ETS it houses places a price on emissions through a capped system of units that emitters must surrender.
- 3.2 Opponents of the Bill answer that these settings are incomplete. Lawyers for Climate Action, for example, submits that the current settings “provide no mechanism by which emitters can be held accountable for climate-related harm” and that the common law “has the capacity to fill these gaps in the legislative framework”.⁴
- 3.3 The premise fails. The features of the statutory scheme that its critics call gaps, including free allocation for trade-exposed activities and the treatment of particular sectors, are deliberate policy choices made and remade by successive Parliaments. A court supplying tort liability in those spaces would not be filling gaps. It would be reversing decisions the elected branch has taken.
- 3.4 Nor would judicially imposed liability reduce emissions. For emissions within the scheme’s cap, a court order forcing one emitter to abate simply frees units for use by other emitters. Net emissions from the capped sectors are set by the cap, not by the conduct of any defendant. And where emissions sit outside the cap, as biogenic agricultural emissions do, that is because successive Parliaments have deliberately decided they should. Tort litigation against selected

² [Smith v Fonterra Co-operative Group Ltd \[2021\] NZCA 552](#) at [16], quoted in *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [8].

³ [Smith v Fonterra Co-operative Group Ltd \[2024\] NZSC 5](#), [2024] 1 NZLR 134.

⁴ Lawyers for Climate Action NZ [“Submission on the Climate Change Response \(Tort Liability\) Amendment Bill”](#) (6 July 2026) at [4].

emitters would redistribute the burden of abatement without reducing it, while adding a second, judge-made pricing mechanism on top of the one Parliament designed.

- 3.5 Whether the ETS is too loose or too strict is a legitimate and important question. It is a question for political contest, and voters will have their say at the general election in November. That is where disagreement with Parliament’s climate settings belongs.

4. The Application of the Bar to Proceedings on Foot

- 4.1 The most substantial objection to the Bill is that it applies to proceedings already before the courts, including *Smith v Fonterra* itself. The New Zealand Bar Association has urged reconsideration on this ground.⁵
- 4.2 The starting point is the Legislation Guidelines: “Legislation should have prospective, not retrospective effect.”⁶ That principle is a presumption, not a prohibition, and the Guidelines themselves define its limits. Chapter 12 acknowledges that “Parliament may wish to amend the law in light of a judgment given in court proceedings”, including “where a court has interpreted a provision in legislation in a way that departs from previous understandings”. The Guidelines also state the governing test: legislation affecting pending proceedings should be justified as being in the public interest, should impair the rights of litigants no more than is reasonably necessary to serve that interest and should apply to litigants in a pending case only where the policy reasons for altering the law would otherwise be undermined.⁷
- 4.3 The Bill satisfies that test. The public interest lies in a single, coherent, democratically determined framework for emissions. The impairment is confined: the Bill bars only tort liability for the climate change effects of emissions, leaves judicial review of government decisions untouched and does not disturb any proceeding finally determined. And confining the bar to future claims would defeat its purpose, since the very litigation that threatens to establish a parallel liability regime would continue to trial and appeal.
- 4.4 What the bar extinguishes is itself limited. No court has found any defendant liable. The Supreme Court decided only that Mr Smith’s claims were not so untenable as to be struck out before trial. What the Bill forecloses is the opportunity to persuade a court to recognise a novel liability, not a judgment obtained or a right accrued. Interference with accrued rights is at its shallowest where, as here, the right asserted has never been held to exist.
- 4.5 Parliament has acted in this way before, under governments of both stripes. After the Supreme Court’s decision in *D v Police*, Parliament passed legislation under urgency restoring the child sex offender register to the scope Parliament had originally intended.⁸ In 2004, the Foreshore and Seabed Act replaced the customary title claims opened by the Court of Appeal’s decision in *Ngāti Apa* with a statutory regime, superseding applications then on foot. And for more than half a century, the accident compensation legislation has barred proceedings for damages for personal

⁵ [“NZ Bar Association calls for government to reconsider changing climate law to prevent lawsuits”](#) RNZ (May 2026).

⁶ Legislation Design and Advisory Committee [Legislation Guidelines \(2021 edition\)](#), ch 12.

⁷ Legislation Guidelines, ch 12.2, as applied in the Minister of Justice’s “Policy decisions on targeted reform of emissions-related torts” (Cabinet paper, proactively released by the Ministry of Justice, 2026) at [31]–[33].

⁸ Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021, reversing the effect of [D \(SC 31/2019\) v New Zealand Police \[2021\] NZSC 2](#) on the scope of the register established by the 2016 Act, discussed in *Who Makes the Law?*, op. cit., chapter 2.

injury, the most fundamental interest tort law protects, in favour of a comprehensive statutory scheme. As Professor Paul Rishworth KC told the Legislation Design and Advisory Committee, “[T]here is no legal impediment to enacting a law to validate an action held by a court to be invalid”.⁹ The same is true of the converse.

- 4.6 Lawyers for Climate Action seeks to distinguish the accident compensation precedent on the basis that the Woodhouse scheme offered a quid pro quo: no-fault compensation in exchange for the bar.¹⁰ But Parliament has made provision here too. The ETS prices the harm; the Natural Hazards Commission and the National Adaptation Plan address loss and adaptation, including for vulnerable communities and iwi. In any event, parliamentary sovereignty requires no quid pro quo. Where Parliament provides one, that reflects an ordinary democratic balancing of interests, not a constitutional precondition. The accident compensation bar establishes the constitutional proposition on which this Bill rests: access to tort is not sacrosanct where Parliament substitutes a comprehensive statutory response to a systemic risk.

5. The Scope of the Bar

- 5.1 The Bill has been criticised as extraordinarily wide. The criticism misreads the drafting. Each element of new section 271(3), covering indirect emissions, conduct and effects inside or outside New Zealand and contributions that are partial or potential, corresponds to a route by which the claims in *Smith v Fonterra* were pleaded or could readily be re-pleaded. The definition of tort liability extends to declarations and injunctions because those are the very remedies Mr Smith seeks. A bar confined to damages, or to direct emissions, would be an ineffective bar.
- 5.2 At the same time, the Bill leaves the ordinary law of torts intact. Liability for the non-climate effects of emissions, such as ash residue or odour from a factory, is expressly preserved, as is liability for breach of statutory duty and misfeasance in public office. Claims arising from negligent land or infrastructure management, of the kind associated with forestry slash or stormwater failures, are untouched, because the bar operates only on liability for the climate change effects of emissions. The Bill is narrower than its critics describe.
- 5.3 New section 272(2)(d) confirms that the bar applies to conceptions of harm, including tikanga Māori conceptions, that are neither physical nor economic. The provision is constitutionally orthodox. Since the Supreme Court’s decision in *Ellis v R*, the place of tikanga in the general law has been left for the courts to work out case by case, without a clear rule of recognition.¹¹ Whether and where tikanga conceptions of harm sound in tort is exactly the kind of question Parliament is best placed to settle, and section 272(2)(d) settles it for this defined field. The provision is also necessary for the bar’s effectiveness: a bar that could be circumvented by re-pleading the same loss through a different conception of harm would fail in its purpose.

6. The Advice of Officials

- 6.1 Opponents place weight on the Ministry of Justice’s preference for monitoring the litigation and revisiting reform after the High Court’s decision.¹² Officials advise, and elected governments

⁹ Paul Rishworth KC [“Legislation that overrides judgments or interferes in court proceedings: when is it justified?”](#) (presentation to the Legislation Design and Advisory Committee, 2019).

¹⁰ Lawyers for Climate Action submission, *op. cit.*, at [24(b)].

¹¹ [Ellis v R \(Continuance\) \[2022\] NZSC 114, \[2022\] 1 NZLR 239](#); *Who Makes the Law?* *op. cit.*, chapter 2.

¹² Ministry of Justice [regulatory impact statement on the statutory bar](#) (proactively released, 2026) at [59].

decide. Nor does the case for the Bill rest on measured effects on business confidence. It rests on the rule of law itself. Legal certainty is the rule of law's offer to everyone living under it: that people can read the statute book and plan their lives by it, and that the boundaries of legal duty are set by a Parliament that voters elect and can remove. Waiting for the trial and the appeals that would inevitably follow means years in which that offer is suspended for every substantial emitting activity in New Zealand, with the policy question resting in the meantime with the courts.

7. Conclusion

- 7.1 Hard cases make bad law. *Smith v Fonterra* bears the adage out, and the Bill corrects it in the most direct way our constitution provides: the sovereign lawmaker declining to ratify a course the courts had left open. The Initiative supports the Bill and recommends that it be enacted.