



PROACTIVE RELEASE COVERSHEET

Minister	Hon Simon Watts	Portfolio	Minister of Climate Change
Name of package	Smith v Fonterra	Date to be published	10 September 2026

List of documents that have been proactively released

Date	Title	Author
20 March 2024	BRF-4465 - Next steps in responding to Attorney- General request re: Smith v Fonterra	Ministry for the Environment
4 June 2024	BRF-4648 Options for responding to Smith v Fonterra Litigation	Ministry for the Environment

Information redacted **YES** **NO**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Summary of reasons for redaction

Some information has been withheld from *[Document title]* under Section [section] of the Official Information Act [reason].

Briefing: Next steps in responding to Attorney-General request re: Smith v Fonterra

Date submitted: 20 March 2024

Tracking number: BRF-4465

Security level: Classification

MfE priority: Non-Urgent

Actions sought from Ministers		
<i>Name and position</i>	<i>Action sought</i>	<i>Response by</i>
To Hon Simon WATTS Minister of Climate Change	Agree that the Ministry for the Environment is the appropriate agency to lead this work Direct officials to provide further advice on this	3 April 2024

Actions for Minister's office staff

Return the signed briefing to the Ministry for the Environment (ministerials@mfe.govt.nz).

Appendices and attachments

1. Draft letter responding to Attorney-General

Key contacts at Ministry for the Environment

Position	Name	Cell phone	First contact
Principal Author	Samira Landgraf		
Responsible Manager	Patricia Parre		
General Manager	Stephen Goodman		✓

Minister's comments

Next steps in responding to Attorney-General request re: Smith v Fonterra

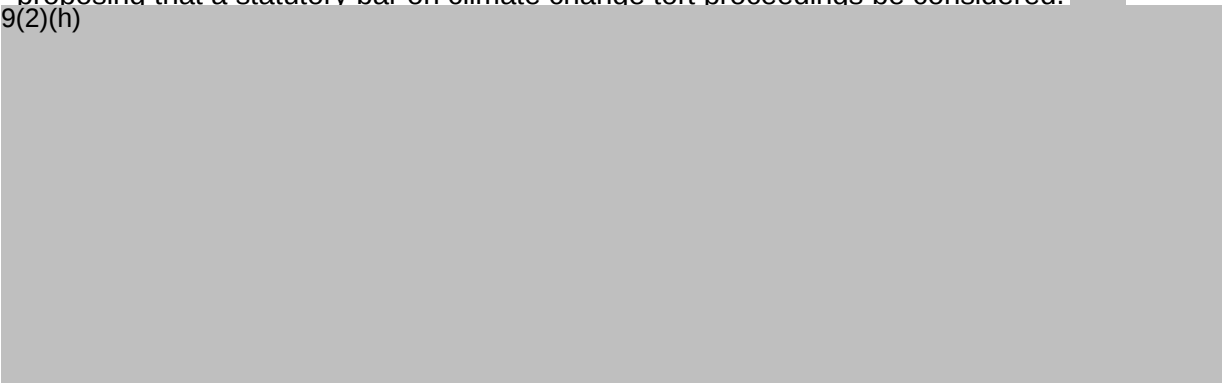
Purpose

1. The Attorney-General has proposed exploring a statutory bar on climate change tort proceedings. This briefing:
 - i responds to the Attorney-General's suggestion that the Ministry for the Environment (MfE) lead this work
 - ii sets out how this work could be progressed with the Minister of Climate Change being the responsible Minister, including a draft response letter for you to send to the Attorney-General agreeing to MfE being the appropriate lead agency (**Appendix A**).

Smith v Fonterra and the Attorney-General's proposal

2. In February, the Supreme Court overturned the Court of Appeal's strike out of a claim by Mr Smith¹ (an elder of Ngāpuhi and Ngāti Kahu) against seven of New Zealand's largest greenhouse gas emitters,² enabling it to proceed to full trial.³ The decision essentially opens the door for private law claims against greenhouse gas emitters, although does not in any way guarantee their success.
3. Mr Smith's claim is brought in tort law (specifically public nuisance, negligence, and a novel "climate system damage tort"). It argues that the defendants have materially contributed to the climate crisis and have damaged, and will continue to damage, land to which Mr Smith has an interest.
4. The Attorney-General has written to you, the Prime Minister and several other ministers proposing that a statutory bar on climate change tort proceedings be considered. 9(2)(h)

5.



¹ *Smith v Fonterra & Ors* [2024] NZSC 5.

² Fonterra, Genesis Energy, Dairy Holdings, NZ Steel, Z Energy, Channel Infrastructure and BT Mining.

³ The Crown is not a party to the proceeding; however, Mr Smith has a concurrent claim against the Crown alleging breach of the NZ Bill of Rights Act 1990, the Treaty of Waitangi and a novel tort (*Smith v Attorney-General*). That case was heard in the Court of Appeal in November and a decision is pending.

6. 9(2)(h)

Advice

MfE is the appropriate agency to lead this work

7. As this relates to climate change it is appropriate for you as the Minister of Climate Change to be responsible for this work to ensure there are no unintended consequences that jeopardise the ability of New Zealand to meet our climate targets.
8. We recommend that MfE leads the work exploring the option for a statutory bar on climate change tort proceedings and you as the Minister of Climate Change are the responsible Minister.
9. We have provided a draft response to the Attorney-General for you to send, if you agree that this work lies with MfE (**Appendix A**). We recommend that you copy in the other Ministers who received the Attorney-General's letter to ensure they know the work is being progressed.

This work will require support from other agencies

10. Any further work would require engagement with other agencies; in particular, the Ministry of Justice (MoJ) and Ministry of Foreign Affairs and Trade (MFAT) on any potential Bill of Rights or international implications. 9(2)(h)
11. We recommend that the Climate Change Chief Executives Interdepartmental Board (IEB) be kept informed as appropriate, given its role working across the public sector to deliver the Government's climate change priorities.
12. As we progress this work, we will investigate whether responsibility for it sits firmly within your portfolio or whether it is shared with the Minister for the Environment.

Next steps

13. If you agree, the next step will be for you to direct officials to 9(2)(h)

If a legislative response progresses further

15. Subject to Cabinet legislative priorities, we can work toward Ministerial decisions on this matter in the second half of 2024. Depending on what Ministers decide, you could then introduce legislation by the end of 2024 (or at a later date).
16. An early announcement that this work is underway should provide some certainty to the business sector, if required. Note that the Attorney-General has advised to limit any comment on *Smith v Fonterra* to being along the lines that the Government is considering a legislative response.

Recommendations

We recommend that you:

- a. **note** that the Attorney-General suggests that the Ministry for the Environment is the appropriate agency to lead work exploring the option for a statutory bar on climate change tort proceedings
- b. **note** that Ministry for the Environment officials agree with the Attorney-General's suggestion
- c. **agree** that the Ministry for the Environment is the responsible agency for progressing this work, and that at this stage you as the Minister of Climate Change will be the responsible Minister for this work (noting that further advice will explore whether the Minister for the Environment should have joint oversight)

Yes | No

- d.

Yes | No

- e. **agree** to send the drafted response to the Attorney-General to confirm the Ministry for the Environment's role in the work

Yes | No

- f. **forward** the letter to the Prime Minister, Minister of Justice, Minister for Regional Development and Minister for the Environment

Yes | No

Signatures

A handwritten signature in blue ink, appearing to read 'S Goodman', on a light grey background.

Stephen Goodman
General Manager – Climate Mitigation
**Climate Mitigation and Resource
Efficiency**

20 March 2024

Hon Simon WATTS
Minister of Climate Change

Date

Appendix A: Draft letter responding to Attorney-General

[Ministerial letterhead]

20 March 2024

Hon Judith Collins

Attorney General

Dear Minister Collins

RE: OPTIONS FOR LEGISLATIVE REFORM FOLLOWING SMITH V FONTERRA [2024] NZSC 5

On 6 March 2024 you wrote to a group of Ministers, including myself, to raise the option of a statutory bar on climate change tort proceedings. In that letter, you suggested that the Ministry for the Environment is the appropriate lead agency for this work.

I agree that the Ministry for the Environment is the most appropriate agency to lead this work, 9(2)(h) [REDACTED]

I propose that the next step, in collaboration with relevant agencies, will be to obtain advice to inform our decision on whether to progress this option. The Ministry for the Environment will lead the drafting of policy advice on this, 9(2)(h) [REDACTED] and other agencies as appropriate. Any further work resulting from this decision will also be led by the Ministry for the Environment.

Yours sincerely

Hon Simon Watts

Minister of Climate Change



Options for responding to *Smith v Fonterra* Litigation

Date submitted: 4 June 2024

Tracking number: BRF-4648

Security level: Legally Privileged

MfE priority: Not urgent

Actions sought from Ministers

Name and position	Action sought	Response by
To Hon Simon WATTS Minister of Climate Change	Indicate your decisions on: - Whether to proceed with a statutory bar, and - If so, the process you wish to follow. Forward this paper to interested Ministers.	10 June 2024

Actions for Minister's office staff

Forward this briefing to interested Ministers (listed in recommendations), 9(2)(h)

Return the signed briefing to the Ministry for the Environment (ministerials@mfe.govt.nz).

Appendices and attachments

- Letter from Attorney-General re: Options for Legislative Reform following *Smith v Fonterra* [2024] NZSC 5
- 9(2)(h)
- Letter from the Minister of Justice to the Attorney-General re: Options for legislative reform following *Smith v Fonterra* [2024] NZSC 5

Key contacts at Ministry for the Environment

Position	Name	Cell phone	First contact
Principal Authors	Patricia Parre and Juliette Derry		
Chief Advisor	Becky Prebble	021 231 3499	✓
General Manager	Hemi Smiler	022 087 1268	

Minister's comments

Options for responding to *Smith v Fonterra* Litigation

Key messages

Purpose, context, and key choice

1. *Smith v Fonterra & Ors* [2024] NZSC 5 (*Smith*) involves the claimant, Mike Smith, taking a tort action (public nuisance, negligence, and a novel 'climate system damage' tort) against several high emitting companies in New Zealand. We currently do not know if the courts will find that a tort action based on greenhouse gas emissions exists, or if so, what may be needed to establish liability.
2. This paper sets out our advice on options to respond to this litigation. It seeks your decisions on whether to proceed with a statutory bar and the overall process you wish to follow.
3. If Ministers do not view a tort action based on greenhouse gas emissions as a desirable part of our system, the key choice is whether to legislate a statutory bar now, or rather to wait and see what the final decision in *Smith* is and then decide whether any action is necessary. ^{9(2)(h)}

Policy issues a statutory bar could address, and associated risks

4. A finding that there is a cause of action in tort against individual emitters for emissions-related activity may be undesirable from a system coherence perspective. In developing an overall emissions reduction strategy, governments balance multiple factors and consider social and economic goals as well as environmental ones. The existence of private causes of action could create misalignment with Government strategies and objectives. It may also give rise to a perception of unfairness and/or loss of business confidence if emitters are unclear whether they may be liable for emissions actions despite having complied with relevant legislation. On the other hand, there are arguments that a private cause of action could fill gaps in existing frameworks and drive further emissions reductions.
5. A statutory bar may be drafted to cover all tort causes of action that are based on greenhouse gas emissions. ^{9(2)(h)}
6. ^{9(2)(h)}
New Zealand would be the first jurisdiction to legislate a bar of this nature.

Considerations associated with proceeding with a bar prior to a substantive decision

7. While some risks associated with a bar will arise regardless of timing, 9(2)(h)

[REDACTED]

8. 9(2)(h)

[REDACTED]

Design and process choices

9. If Ministers wish to proceed with a statutory bar, there are design choices, including:
- **Scope:** the scope that best fits the policy intent is a bar on all tort proceedings based on greenhouse gas emissions.
 - **Legislative vehicle:** Our initial view is that the Climate Change Response Act 2002 (CCRA) is the best legislative vehicle.

Proceeding with a statutory bar now

10. There are two broad process options for proceeding with a statutory bar now:
- **Introduce legislation as soon as possible:** The next step would be that we would provide you with a Cabinet paper seeking agreement to proceed to a statutory bar. The benefit of this approach is that it would achieve clarity about the government's intentions as soon as possible.
 - **Consultation process prior to introducing legislation:** Alternatively, you could publicly consult on the proposal to introduce a statutory bar, seeking feedback on the overall policy rationale and scope and design choices. This process would allow us to refine the policy rationale for a bar, and deepen policy analysis – for example, better understanding the impacts on different groups.
11. Under either option, we recommend undertaking targeted engagement, in particular with Māori and with large emitters that might be affected by the existence of a tort cause of action.

Recommendations

We recommend that you:

EITHER

- a. **discuss** with officials options for gathering evidence about the impact the interim *Smith* decision has had on business confidence prior to making a decision about whether to proceed, **or**

Yes | No

- b. **direct** officials to develop a Cabinet paper progressing work on a statutory bar now.

Yes | No

- c. if you wish to progress work on a statutory bar now, **indicate** whether:

a. you would like to introduce legislation as soon as possible, **or**

b. carry out a public consultation process prior to introducing legislation.

- d. 9(2)(h)

- e. 9(2)(h)

- f. **refer** this briefing to the Prime Minister, the Minister of Justice, the Attorney-General, the Minister for the Environment, and the Minister for Regional Development.

- g. 9(2)(h)

, **forward** this briefing to the Associate Minister (noting that the briefing with 9(2)(h) withheld can be forwarded now if you wish).

Signatures



Hemi Smiler
General Manager – Climate Change Mitigation
Climate Mitigation
30 May 2024

Hon Simon Watts

Minister of Climate Change
Date:

Options for responding to *Smith v Fonterra* Litigation

Purpose

12. This advice covers the policy issues associated with the possibility of there being a private law cause of action based on greenhouse gas emissions, ^{9(2)(h)} [REDACTED]

13. It also covers the trade-offs between proceeding with a statutory bar now versus waiting until there is a final decision in *Smith* and provides an initial view on the scope of a bar, and process options should you wish to proceed with one. We seek your decisions on whether to proceed with a statutory bar now, and the overall process you wish to follow.

Background

The evolving climate litigation context

14. There are multiple pieces of 'climate litigation' currently before the courts. Most of these have been taken against the Crown. *Smith* is unique in the New Zealand context because it concerns the availability of private law claims and remedies to address greenhouse gas emissions. If Mr Smith's claim is successful, this would mean that individuals could take climate change related tort claims against private entities. While until recently most climate change litigation in New Zealand has been against the Crown, this is one case in a wave of domestic and international climate change litigation against private companies.
15. Recently the Supreme Court overturned the Court of Appeal's decision to strike out Mr Smith's claims. The decision opens the door to the possibility of tort claims against greenhouse gas emitters, although is not an indication of success. This is because the threshold to strike out an application is high and is only met if there is no reasonably arguable claim and it is so untenable that it cannot succeed. The Supreme Court's decision means that Mr Smith's case will now proceed to a substantive trial.

Details about the Smith v Fonterra case

16. Mr Smith, an elder of Ngāpuhi and Ngāti Kahu and a climate change spokesperson for the Iwi Chairs Forum, raised three causes of action against seven respondents who are involved in industries that contribute significantly to emissions of greenhouse gases (including Fonterra, New Zealand Steel and Z Energy).
17. Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural and spiritual significance to him and his whānau. He raised

three causes of action in tort:¹ public nuisance; negligence; and a proposed new tort involving a duty, effectively requiring the emitters to cease materially contributing to damage to the climate system. As the Supreme Court allowed the appeal, all three causes will be heard by the High Court at a trial.

18. The remedies Mr Smith seeks from the High Court include a declaration that the respondents have breached the duties owed to him and have caused or will cause loss to him through their activities, and/or injunctions to reduce their emissions eventually reaching net-zero greenhouse gas emissions by 2050.

Government consideration of the Smith case

19. The Attorney-General wrote to several Ministers (you, the Prime Minister, the Minister of Justice, the Minister for Regional Development and the Minister for the Environment) on 6 March about this case and whether a statutory bar on climate change proceedings should be considered. A copy of this letter is included at Appendix 1.
20. On 14 March, the Minister of Justice wrote to the Attorney-General and outlined some preliminary considerations that he viewed should be considered during or before policy development. A copy of the letter is included at Appendix 2.

Analysis and advice

What are the policy issues associated with the possibility of there being a private law cause of action based on greenhouse gas emissions?

21. The substantive judgment on *Smith* is yet to be delivered and will not be for some years yet; and will almost certainly be subject to appeal. However, if the final judgment were to find the respondents liable in tort, that position could be an undesirable policy outcome for several reasons.

- **The drivers and impacts of climate change operate at a national and international level.** The primary framework for responding to climate change sits with governments, operating both domestically and internationally. Under the Climate Change Response Act 2002 (CCRA), New Zealand has a framework to meet its domestic emissions reduction targets and it had not previously been anticipated that a private law cause of action based on greenhouse gas emissions would form part of that framework. The principal tools for responding to climate change are successive emissions budgets, emissions reduction plans and the New Zealand Emissions Trading Scheme.

In developing an overall emissions reduction strategy, governments balance multiple factors and take into account social and economic as well as environmental goals and undertake public consultation on substantive decisions. In contrast, courts do not have the ability to address social, economic and distributional trade-offs and do not

¹ Tort law covers claims of civil wrongs or injuries, typically related to seeking redress for harm to a person, their property or their reputation. It usually arises from the common law (judge-made law). Other types of private law claims include those arising from contractual or commercial disputes, including fair trading.

provide all affected stakeholders the opportunity to be heard and have their views taken into account.² Climate policy can have wider impacts however: for example, if Mr Smith's remedy of an injunction is granted, the impacts could be significant not just for the emitters themselves but also for the wider New Zealand economy.

- **Lack of certainty about the extent of climate change obligations may affect business confidence.** Depending on the details of a finding that the respondents are liable in tort, there may be uncertainty for individuals and organisations as to the bounds of activity that does and does not give rise to liability. This could potentially have a chilling effect on investment in high-emitting sectors in New Zealand.
- **The connection between one emitter's emissions and actual impacts is indirect and remote.** It is not possible to 'trace' one emitter's emissions to broader impacts because when emissions are created, they are released into the atmosphere and become part of the global 'pool' of emissions. That remoteness raises a causation question and/or a broader perception of unfairness about emitters still being liable for emitting actions despite having complied with existing legislation addressing climate change.

22. The existence of a private cause of action between individuals and organisations has the potential to create unintended consequences that are out of step with the above. The policy intent of a statutory bar would then be to maintain business confidence and ensure that the Government retains the key levers for responding to climate change, and in extension primary responsibility for New Zealand's climate response.

23. Prior to a final judgment being issued, there may also be uncertainty for the respondents and other New Zealand businesses while the case moves through the court process. In general, there will always be uncertainty for parties to litigation prior to a final judgment being received. However, the novelty and potential significance of this particular proceeding arguably reaches a threshold where the Government may wish to consider options to resolve it on a faster timetable than might be expected through the court system.

24. However, at this stage, we do not have evidence of wider industry uncertainty. We understand that the respondents are concerned that a protracted period prior to a final judgment being issued could cause investment uncertainty for them and would involve significant costs. We do not know, though, the extent to which the judgment may have caused uncertainty in the wider business community and/or may have affected business confidence.

25. We also note that a statutory bar would not necessarily resolve uncertainty for the following reasons:

- 9(2)(h) [REDACTED]
- A statutory bar can be repealed or amended by a future Parliament. In contrast, court judgments are bound by precedent of higher court decisions on similar legal issues.

² *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 at [26].

9(2)(h)

- Introducing a statutory bar overriding the court process could affect investors' confidence in New Zealand. Investors rely on strong and stable domestic processes to protect their investments. While this particular intervention would likely be viewed by investors as favourable (considering it would provide certainty and remove a potential source of civil liability for businesses), repeated interventions of this nature could create a perception that the Government is willing to intervene in court decisions and effectively overturn them. If this were to occur, it could risk damaging New Zealand's reputation as a safe investment destination.

26. While a private cause of action based on greenhouse gas emissions could be undesirable in terms of overall system coherence, the question is not open and shut and there will be other perspectives. Points that could be made in favour of a common law tort include:

- **The common law can supplement legislative and regulatory frameworks.** ^{9(2)(g)(i)}

[Redacted text block]

While not a direct analogy, the Resource Management Act 1991 expressly allows for private actions, such as environmental nuisance, outside the statutory framework, as well as the regulatory compliance and enforcement within it.

- **The development of common law has improved environmental outcomes in the past.** An example of this is the treatment of pollution and environmental harm. It can also play an important role in balancing competing legal rights between different groups (such as major emitters and the general public in the climate context), through presentation of evidence and legal argument. The common law could also influence how we manage greenhouse gas emissions.
- **Common law development and/or private action could drive further emissions reductions.** Tort law can regulate behaviour and can clarify the competing legal rights of different stakeholders. For example, liability in tort could help to internalise negative externalities into the strategic and operational decisions of corporate emitters. This could be additional to, and supportive of, the internalisation of environmental externalities through a price mechanism (such as the NZ ETS). Legal risks could incentivise corporate emitters to transition to low-emissions alternatives. A lack thereof could have the opposite effect.

Would a statutory bar be effective in addressing those policy issues, and what are the associated risks with a bar?

27. In this case, the activity that would be "barred" is bringing an action in tort in relation to climate change that is based on greenhouse gas emissions (further advice on scope and design choices is set out from paragraph 40 below).

28. 9(2)(h) . For comparison, the removal of tort liability and replacement of common law with a statutory regime for accident compensation had the benefit of a long history of common law prior to the development of legislation. This history was able to inform both the scope of the statutory bar as well as the extent and coverage of the replacement legislated compensation regime. Even then, the scope of the bar was litigated.

29. 9(2)(h)

9(2)(h)

30. 9(2)(h)

31. 9(2)(h)

What are the considerations that affect the choice as to whether to proceed with a statutory bar now, versus wait until there is a final decision in Smith?

32. The key factor in favour of acting now is to address potential uncertainty about possible tort obligations early. It could take many years for the case to move through the courts, including for appeals to be resolved. In the meantime, potential gaps or inconsistencies in the law could have a chilling effect on business confidence and investment.

33. 9(2)(h)

Parliament acting to change the law after a judgment has been issued is not uncommon, 9(2)(h)

34. 9(2)(h)

9(2)(h)

35. 9(2)(h)

36. 9(2)(h)

37. To the extent that the potential business uncertainty is part of the policy rationale for acting now rather than waiting for a substantive decision, the current lack of evidence around existing business uncertainty (beyond the respondents) may pose an increased risk. One way of mitigating this risk would be to gather evidence on the impact the interim *Smith* decision is having prior to making a decision on whether to progress work on a statutory bar further. We have not heard any reports of businesses being concerned by the judgment beyond the affected respondents, but equally we have not actively sought out information, due to the sensitivity of the subject matter.

38. If you see value in us gathering more evidence about the impact the *Smith* decision has had, we recommend we discuss the overall approach with you prior to us doing so. An initial step could be to use existing engagement opportunities to test how various stakeholders perceive the judgment. Other agencies, in particular the Ministry of Primary Industries and the Ministry of Business, Innovation, and Employment, may also be able to test this point through their regular engagement. Ministers may also have existing engagements that could be used. 9(2)(h)

39. If action is going to be taken regardless, 9(2)(h)

. Whilst very difficult to quantify, the substantive hearing is likely to take at least two months, given the number of parties and the scope of the issues. It may also not be heard until 2026, due to preparatory matters such as discovery, pleadings and evidence, with a judgment delivered some months after that. The case would likely then be appealed through the Courts due to its novel and high-profile nature.

What are the scope and legislative vehicle choices for a statutory bar, should Ministers wish to proceed with one now?

40. In terms of scope (that is, exactly what actions should be barred, and against whom) in order to meet the policy intent, 9(2)(h)

41. In addition, to protect the Crown from tort claims, the prohibition would also need to expressly apply to the Crown as defendant.³ 9(2)(h)

42. There are choices for scope that are both narrower and broader than the scope above, but these are less likely to address the policy issues identified in this advice:

- 9(2)(h)
- A broader scope, for example barring all private law claims involving climate change/greenhouse gas emissions, is broader than what is required to meet the policy intent outlined in this advice.

43. 9(2)(h)

44. In terms of legislative vehicle (what legislation the bar goes in), the two choices are the CCRA and the RMA. Either would be a suitable vehicle, but our initial view is that the CCRA is preferable as that is the legislation that sets out New Zealand's climate change response. 9(2)(h)

What would the process for introducing a statutory bar be, should Ministers wish to proceed with a statutory bar now?

45. There are two broad process options for proceeding with a statutory bar:

- **Introduce legislation as soon as possible.** The next step would be that we would provide you with a Cabinet paper seeking agreement to proceed with a statutory bar. The benefit of this approach is that it would achieve clarity about the government's intentions as soon as possible.
- **Run public consultation prior to introducing legislation.** The next step under this option is that we would provide you with a Cabinet paper and consultation document, seeking agreement to consult. The benefit of this approach is that it would allow you to develop the proposal further and hear perspectives on the proposal prior to introducing it to Parliament, allowing you to adjust it if necessary. It would also allow for us to test more comprehensively whether there is existing industry uncertainty

³ To protect the Crown as an emitter (e.g. greenhouse gas emissions from coal-fired boilers in schools), in the same way as private emitters would be protected.

and more generally refine the policy rationale for intervention. We could also undertake further analysis on the policy impacts on different groups.

46. For either approach, we would recommend targeted engagement, in particular with Māori and with large emitters that might be affected by the existence of a tort cause of action.
47. Either option will have resourcing implications for the Ministry. If you proceed with a bar, we would like to discuss the overall prioritisation and sequencing of this work with you.

Te Tiriti analysis

48. The Crown has an obligation to act in good faith and in accordance with Treaty principles. Climate change is an area where Māori have expressed considerable interest and usual practice is to engage with Māori in relation to climate change policy changes, especially on an issue such as this one which may have significant implications. If Ministers decide to progress a statutory bar, we will work with Māori Crown Relations: Te Arawhiti to inform our approach. If Ministers proceed with a statutory bar we recommend targeted engagement with Māori in order to better understand potential Treaty implications.
49. While not Treaty risks, proceeding with a bar may raise relationship risks. Mr Smith is an iwi leader who frequently engages with the Crown on climate change policy and consequently there may be relationship implications associated with proceeding with a statutory bar. Specifically, Mr Smith holds key roles in critical relationships and workstreams relating to climate change. He acts as an advisor to Pou Take Āhuarangi, the climate Pou within National Iwi Chairs Forum, and is co-chair of the Oho Mauri Trust, the entity currently leading the delivery of the Māori Climate Platform. Mr Smith has held these roles across the duration of his litigation to date, including litigation against the Crown 9(2)(h) [REDACTED]) and conflict of interest concerns have been managed.

9(2)(h) [REDACTED]

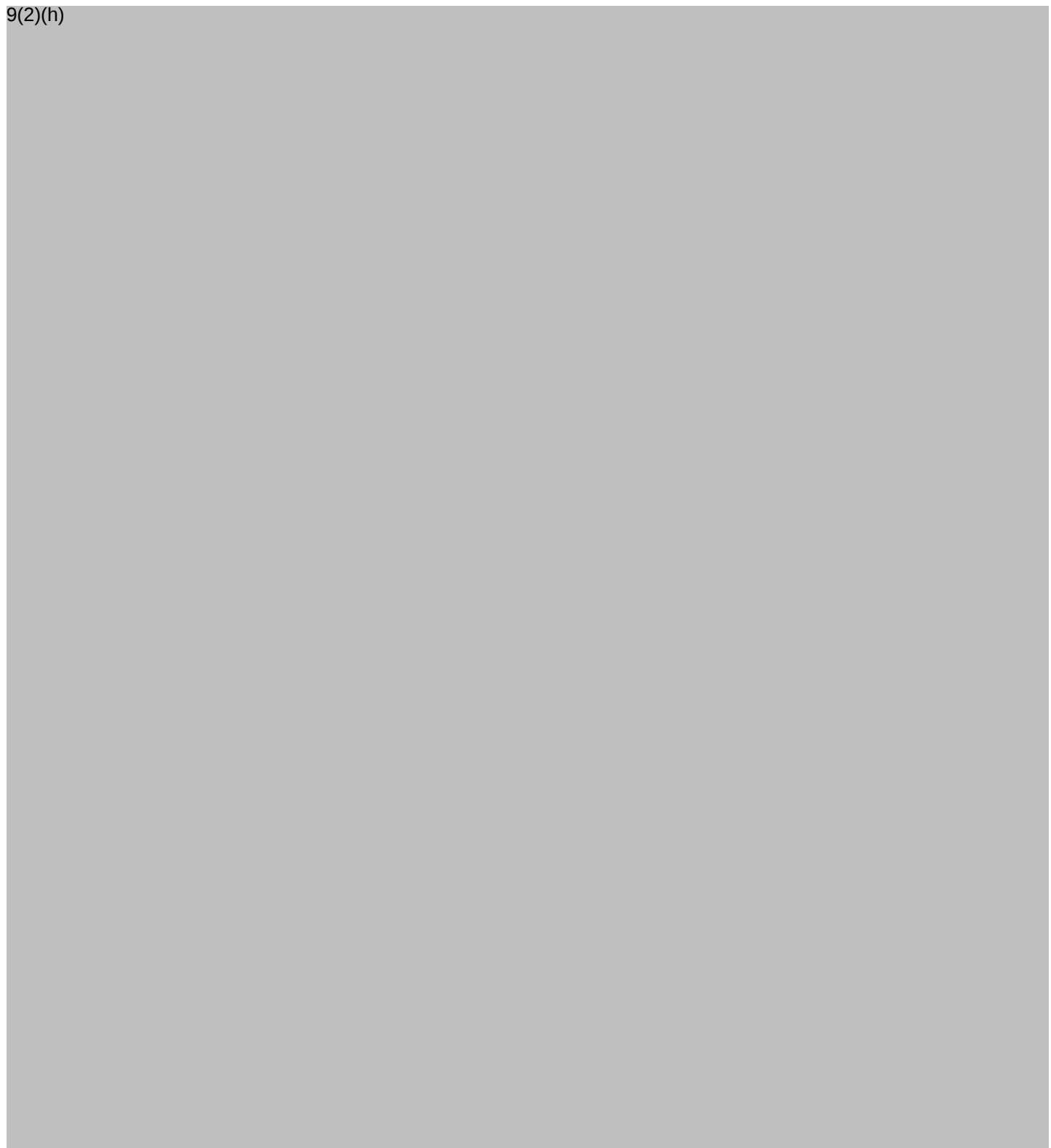
50. 9(2)(h) [REDACTED]
51. 9(2)(h) [REDACTED]
52. 9(2)(h) [REDACTED]

Consultation

53. This advice has been shared with the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Department of Prime Minister and Cabinet, and the Ministry of Business, Innovation, and Employment (Kanoa) and their feedback has been incorporated into this advice. 9(2)(h)



9(2)(h)





Financial, regulatory and legislative implications

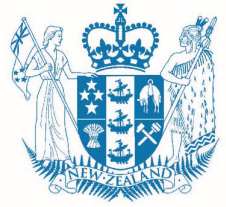
71. No financial implications are associated with the proposals in this briefing. There would be legislative implications if Ministers wish to proceed with a statutory bar.

Next steps

72. If you direct officials to undertake to gather evidence about business uncertainty we would like to discuss with you how best to approach that.
73. If you decide to proceed with a statutory bar now, we will provide you with further advice around process and any remaining design questions, and a draft Cabinet paper that reflects your direction.
74. If you wish to proceed with a bar, we recommend that we consult with the following stakeholders on the overall approach:
- Māori Crown Relations: Te Arawhiti
 - Legislation Design and Advisory Committee (LDAC)
75. We recommend that you consult with the Minister of Māori Crown Relations: Te Arawhiti.

Office of Hon Paul Goldsmith

Minister for Arts, Culture and Heritage
Minister of Justice
Minister for State Owned Enterprises
Minister for Treaty of Waitangi Negotiations



14 March 2024

Hon Judith Collins KC
Attorney-General
Parliament Buildings

Via email

Dear Judith

RE: Options for legislative reform following *Smith v Fonterra* [2024] NZSC 5

Thank you for your letter of 6 March 2024 outlining the proposal for a new statutory bar on climate change tort proceedings.

s9(2)(g)(i)

However, this matter raises important legal policy questions and my officials have indicated some preliminary areas that would need to be considered before proceeding, or during the policy development. They have advised that:

- The Supreme Court's decision not to strike out Mr Smith's claim does not give any indication of the likely ultimate outcome. The Courts have not heard substantive arguments and it could be premature to act before they do. No other jurisdiction has recognised a claim of this nature in public nuisance or developed a tort relating to climate damage. In addition, most negligence claims have been unsuccessful.
- The appearance of intervening so early to alter substantive legal rights in favour of one set of litigants over another could itself undermine certainty in the law. A full evaluation based on evidence and argument in court could be the best way to determine the correct balance between the competing interests. This would be in accordance with the normal development of tort law. Whether legal change or clarification is desirable could be assessed following a substantive hearing and decision.
- If the aim is to ensure that the current case is not heard, retrospective legislation would be needed. Guidelines from the Legislation Design and Advisory Committee recommend avoiding retrospective legislation except in narrowly defined circumstances. It would need to be clearly justified in the public interest and impair the rights of litigants no more than is reasonably necessary to serve that interest.
- A statutory bar raises significant policy questions about the rights of private citizens, and officials anticipate that the lead agency will need to engage with a range of stakeholders during the policy process to help determine what is fair.

I anticipate that, should work proceed on legislative change, officials from the Ministry for the Environment will work closely with my officials to resolve these issues. I am mindful that work in this area is likely to be complex and could take considerable time and resources. The

approach would need to be balanced against ensuring delivery of the government's current priorities.

Yours sincerely

A handwritten signature in black ink, reading "Paul Goldsmith". The signature is written in a cursive, flowing style with a large initial 'P' and a long, sweeping underline.

Hon Paul Goldsmith
Minister of Justice