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POWERING A BETTER NEW ZEALAND TOGETHER

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Justice Select Committee
Parliament Buildings
WELLINGTON

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Submission: Climate Change Response (Tort Liability) Amendment Bill

Introduction

1. Energy Resources Aotearoa welcomes the opportunity to submit on the Climate Change Response (Tort Liability) Amendment Bill (the '**Bill**').

2. Energy Resources Aotearoa is New Zealand's peak energy sector advocacy organisation. We represent participants from across the energy system, providing a strategic sector perspective on energy issues and their adjacent portfolios, such as sound regulatory and operational frameworks. We enable constructive collaboration to bring coherence across the energy sector through and beyond New Zealand's journey to net-zero carbon emissions by 2050.

3. This submission focuses on the impact of the Bill on the energy and resources sectors. Energy Resources Aotearoa wishes to be heard on this submission.

Key Messages

4. Energy Resources Aotearoa supports the Bill's proposed changes to the Climate Change Response Act (the 'CCRA').

5. Responding to climate change involves many complex policy choices and trade-offs and as such, is a question that should be considered and settled in a political context and determined by Parliament. Parliament has done that through the CCRA – and will continue to adapt to those policy challenges through legislative mechanisms over time. This approach provides certainty to communities and businesses about how climate impacts will be regulated over time.

6. By contrast, the potential for novel tort liability risks undercutting that certainty and ability for businesses and communities to plan for climate action. We are concerned about *Smith v Fonterra* ('*Smith*'), which is currently still before the court, and the risk it poses of a court-determined duty of care being inserted into New Zealand's climate regulatory framework. In our view, there is no need for a common law duty of care in this instance: Parliament's decision on the policy direction for climate change, found in the CCRA, addresses these issues.

7. We consider that reducing uncertainty about tort liability for climate change is essential to maintaining New Zealand's reputation as a stable, rules-based destination for international investment, particularly in the energy sector which involves long-lived assets and requires commensurate policy durability and predictability. These features are critical to maintaining New Zealand's energy security and affordability.

8. We agree that the proposed statutory bar against private tort liability will provide the legal certainty that domestic and international investors need. These reforms strengthen the existing regulatory scheme in the CCRA and reinforce New Zealand's commitment to "clear and stable climate change policies".[1]

9. However, the Bill does not fully address the risk of climate-related litigation uncertainty for public decision-makers, especially when making statutory decisions relating to businesses that are otherwise acting under the CCRA. The Supreme Court's decision in *Climate Clinic Aotearoa Inc v Minister* of *Energy and Resources* [2025] NZSC 197 ('*Climate Clinic*') demonstrates that judicial review remains a live pathway through which additional climate change considerations could be imposed on Crown decision-making outside the CCRA framework. In our view, the CCRA is the appropriate vehicle for the government's response to climate change. The gap created by *Climate Clinic* needs to be closed.

10. To address that gap, we recommend one targeted amendment: that the Bill also amend the purpose provision of the CCRA to confirm that the CCRA provides the complete regulatory scheme for all climate change matters in New Zealand. This amendment would make clear that there is no additional requirement, outside the CCRA framework, where Ministers must consider additional climate change obligations, unless Parliament expressly directs statutory decision-makers to do so. That change would give full effect to the policy behind the Bill.

Submission

Why Energy Resources Aotearoa is concerned about *Smith v Fonterra*

11. *Smith* involves several claims, including public nuisance, negligence and a proposed novel climate system damage tort, all directed at seven large New

1 See Climate Change Response Act 2002, s 3(1)(aa).

Zealand companies. At its heart, the claims seek to hold these New Zealand companies accountable for contributions to global emissions and the associated harm. However, that harm and the level of global emissions is a cumulative product resulting from emitters contributions across the world over a number of decades.

12. Any attempt to hold a company personally liable for tortious liability naturally creates an exceptionally complex question of causation. No individual emitter's contribution is traceable to a particular climate outcome in the way that a discrete tortious act can be connected to a discrete injury. This is what the respondents in *Smith* argued: it is not possible to link specific emissions to harm suffered by any individual plaintiff.

13. Allocating responsibility for climate harm among large companies in New Zealand raises profound policy choices that the courts are not equipped to, and should not be required to, resolve. Determining a defendant's proportionate share of global emissions and allocated associated liability is not a problem for the common law to deal with. These are squarely choices about how society manages its productivity and relationship with the climate.

14. Parliament has done so through the implementation of the CCRA and the Emissions Trading Scheme (the 'ETS', provided for within the CCRA). These represent careful policy responses to climate change as a result of extensive consultation, cross-party deliberation and consideration of New Zealand's international obligations under the Paris Agreement. The CCRA and the ETS are the vehicles through which Parliament determined to govern climate related effects. To allow the courts to impose parallel unknown obligations through tort would usurp those democratically chosen vehicles.

Certainty for investment in New Zealand

15. We have experienced first-hand that New Zealand's attractiveness as a destination for long-term international investment depends on the long-term predictability of its regulatory framework. This is especially true in the energy sector, where capital commitments are large, assets are long-lived, and investors require confidence that the rules governing their obligations will not shift easily, quickly or in capricious ways. Our sector has previously experienced the investment impact of 'regulation shock', where the direction of government policy has abruptly changed in an unexpected and dramatic way. In 2018, the Labour-led government banned new exploration permits from all areas outside of onshore Taranaki. Investment was subsequently and massively chilled.[2]

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2 To demonstrate that these impacts are not trivial, at the time of the petroleum permit ban, NZIER forecast that it would cumulatively reduce real GDP by $28 billion in the medium scenario, with low and high scenarios of $15 billion and $38 billion, respectively (see https://www.energyresources.org.nz/news/nzier-report-shows-28b-blow-to-economy-from-oil-and-gas-ban/).

16. Here we risk 'litigation shock'. When climate-related liability can be determined by judges applying common law tests rather than through a clear statutory scheme, that predictability is lost. It has a chilling effect on investment and business confidence. All investors in the energy sector, regardless of investment type place a high value on regulatory certainty. Climate change litigation is increasingly being treated as a material investment risk globally for this sector. Where there is uncertainty, businesses face greater difficulty planning, capital allocation becomes more expensive, and the case for investing weakens relative to jurisdictions with more settled frameworks.

17. The Bill addresses this directly. By establishing a statutory bar on tortious claims for climate change harm, it removes a significant source of legal uncertainty. The Bill signals to global investors and trading partners that New Zealand is committed to managing its climate obligations through a coherent regulatory framework rather than through unpredictable, case-by-case litigation.

18. For companies investing in long-lived assets, particularly in the energy sector, this clarity is significant. It enables more confident capital commitment, supports employment, and reinforces New Zealand's position as stable economy. It also underpins the delivery of secure, affordable energy at the very time New Zealand faces the real risk of energy shortages in dry years.

Fossil fuels will remain a critical part of our energy mix beyond the 2050 target

The critical role of natural gas

19. New Zealand's electricity system is one of the most renewable in the world, with up to 90% plus of our generation needs met by renewable energy sources depending on seasonal weather and rainfall. In 2025, natural gas provided roughly 8.7% of New Zealand's total electricity generation, while coal contributed about 6.6% (up from 2% in 2023). The renewable component of our world-class electricity system is only set to increase as we develop our abundant renewable energy resources.

20. The recent declines in natural gas production, which dropped by 22% between 2023 and 2024 and by a further 8.6% in 2025 reinforces the importance of natural gas production. This had a dramatic impact on both the gas and electricity markets, especially in 2024 resulting in Methanex and the smelter shuttering production and other industrial sites closing with a loss of investment and jobs in regional New Zealand.

21. While our reliance on fossil fuels, including natural gas, will diminish over time, as it stands, natural gas continues to play a vital role in the security of our electricity system, providing crucial 'peaking' and 'firming' to back up other less reliable intermittent energy sources, such as wind and solar. With New Zealand

looking to nearly double its electricity generation capacity over the next 30 years, natural gas will enable us to electrify our economy safely, securely and affordably. [3]

The importance of natural gas in achieving our long-term climate goals

22. In light of the above, we do not consider the utilisation of natural gas to be inconsistent with attaining our long-term climate goals. Indeed, extreme commercial uncertainty and regulatory ambiguity resulting in a loss of investment and employment can hinder the attainment of our climate goals by:

    a encouraging a greater reliance on, and the higher use of, coal to generate electricity;

    b stifling the development of renewables by failing to support their development with the presence of sufficient thermal-fired firming power 'backing'; and

    c hindering the electrification of the transport fleet by leading to electricity prices being higher than they would otherwise have been.

23. Natural gas also supports New Zealand livelihoods, and increased prosperity and related social benefits. Benefits include:

    a avoiding the export of emissions and therefore reducing total global emissions as various energy intensive production activities would remain in New Zealand with more stringent climate rules;

    b retaining the option of the development and uptake of renewable gases such as the scaling up of biomethane and other low carbon technologies such as carbon capture and storage; and

    c leveraging off New Zealand's increased energy sovereignty to bring reliability and resilience for households and businesses in the face of increasing climate impacts while also creating a strong enabling environment for the development of energy relevant research, science and technology in New Zealand.

24. Therefore, we believe that natural gas will play a positive role in achieving New Zealand's climate goals. On the contrary, continuing with or worsening the climate regulatory framework will likely result in a worsening of our environmental and climate action performance and overall economic prosperity.

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3 See:https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-statistics-and-modelling/energy-modelling/electricity-demand-and-generation-scenarios.

Validity for the current regulatory scheme

25. The issues raised in *Smith* are matters for Parliament to address rather than the courts. Climate liability requires consideration of long-term economic impact and the need for energy affordability and security against the pace of emissions reductions and the interests of communities (both economic and otherwise). That consideration is outside of the ambit of the court and instead requires the attention of New Zealand's democratic process to ensure legitimacy and certainty.

26. This consideration of climate change is a complex issue requiring Parliament to balance competing economic, social, and environmental considerations. Parliament has the democratic mandate, the resources, and the breadth of perspective to do so effectively. The Bill gives effect to that mandate by confirming that the regulatory framework for climate change sits with Parliament, not with the courts.

27. Beyond investment certainty, the Bill serves to provide validity in the current CCRA regulatory scheme. It prevents the risk of judges developing a parallel liability regime that would undermine the coherence of New Zealand's climate change response. Such a parallel scheme is not required and is actively risky, given the uncertainty of where it might apply and in what form.

28. The operation of the CCRA has fundamental business implications and decisions are being taken daily on the basis that the CCRA provides the complete regulatory framework for emissions management. For example, the economically pervasive price incentives arising from the operation of the ETS to both invest and divest accordingly, the need to comply with its myriad obligations, as well as the relative signals it implies as to the geographic location of investments (domestically or globally).

29. Disturbing this in an unpredictable way would create mistrust and could undermine the regulatory scheme in the CCRA, resulting in a loss of investment in the ETS in particular.

Further legal certainty is needed

30. We support the Bill but consider that it needs to go further to provide legal certainty to businesses and those investing in New Zealand.

31. One of the purposes of the CCRA is to:

> " ..... provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global

> average temperature increase to 1.5° Celsius above pre-industrial levels and allow New Zealand to prepare for, and adapt to, the effects of climate change".[4]

32. Despite that explicit purpose, in *Climate Clinic,*[5] the Supreme Court held that the Minister of Energy and Resources was required to consider climate change implications when deciding whether to invite block tenders under section 24 of the Crown Minerals Act 1991 (the '**CMA**').[6] The Court reasoned that where a matter such as climate change is not fully dealt with in other regulatory frameworks, including the CCRA, the Minister may be required to address it as part of the tender decision.[7]

33. The Supreme Court further held that there was no:

> " … comprehensive regime that created a framework for addressing the climate change implications of ongoing petroleum exploration and mining".[8]

34. This conclusion presupposes that CCRA does not fully deal with climate change. The Court then considered that the Minister of Resources must go further and climate change must therefore be a mandatory consideration under section 24 of the CMA.

35. We disagree. The CCRA is Parliament's response to climate change, embodying all the policy decisions and considerations required to get to that point. The Minister of Resources (or other Ministers in other contexts) should not have to go further, unless expressly directed to consider climate change by the statute. The CMA does not contain such a direction.

36. We consider this decision is at odds with both the purpose of the CCRA and the policy of this Bill, to provide certainty in the regulatory framework provided in the CCRA.

37. Given these synergies, we invite the Select Committee to recommend that the purpose of the CCRA is strengthened, to underscore its place as New Zealand's regulatory response to climate change. Otherwise, the effect of *Climate Clinic* is to

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4 Climate Change Response Act 2002, s 3(1)(aa).

5 [2025] NZSC 197.

6 *Climate Clinic,* which was decided 22 months after *Smith v Fonterra*, [2024] NZSC 5. represented a significant departure from the approach of both the High Court and the Court of Appeal, both of which had held that climate change was an irrelevant consideration under the CMA. The High Court went so far as to find that substantive consideration of climate change by the decision-maker would have been unlawful.

7 *Climate Clinic Aotearoa Inc v Minister* of *Energy and Resources* [2025] NZSC 197, at [85].

8 At [87].

open a new avenue for the consideration of climate change outside Parliament's prescribed regulatory scheme of the CCRA.

38. That is precisely the outcome the Bill is designed to prevent and we encourage the Select Committee to clarify the law in both private and public contexts.

Proposed Amendments to the Bill

39. To address the gap identified in *Climate Clinic* and reinforce that the CCRA **is** the appropriate regulatory framework for these matters (including as they intersect with the CMA), we invite the Select Committee to recommend that the Bill amend section 3(1) of the CCRA, as noted below. This amendment would make clear that there is no additional requirement, outside the CCRA framework, where Ministers must consider additional climate change obligations, unless Parliament expressly directs statutory decision-makers to do so.

40. We propose the following drafting for the Select Committee's consideration:

> In section 3, before paragraph (a), insert:
>
> (ab) provides the regulatory scheme that fully and completely addresses matters relating to climate change for New Zealand, including, regulating activities, and related activities, that cause or contribute to emissions or climate change effects.

41. The above proposed amendment has the intended effect of confining, as Parliament intended, the consideration of climate change to the regulatory scheme set out in the CCRA unless Parliament expressly does so elsewhere (like the provisions regarding climate change in the current RMA). The proposed amendment is only relevant to legislative schemes that *do not have* mandatory requirements to consider climate change. Incorporating such a provision will deter the courts from creating mandatory requirements to consider climate change in public decision-making in the absence of express provisions to do so.

Further consideration of amendments following *Climate Clinic*

42. Further, we note that there will continue to be significant regulatory ambiguity for the CMA in relation to definition of the "benefit for New Zealand" from *Climate Clinic*.

43. The Supreme Court decided that, when deciding under section 24 of the CMA whether to offer exploration or mining permits for public tender, the Minister is also required to address whether such an offer is for the "benefit of New Zealand". This finding has extended the previous understanding of the scope of the assessment required and has additionally introduced significant regulatory ambiguity.

44. Parliament should consider further amendments to the CMA to define the scope of the "benefit of New Zealand" and limit it to economic considerations. It is also necessary to address the risks associated with *Climate Clinic* that extend beyond the CMA to decisions taken on other activities that have implications for the "benefit of New Zealand".

Concluding remarks

45. The Bill is a welcome and necessary step. It will restore legal certainty for businesses operating in New Zealand's energy sector and reinforce New Zealand's reputation as a jurisdiction with clear, stable climate change policy. That reputation is central to attracting the international investment that the energy transition requires.

46. However, without the amendment we propose, the Bill will not fully achieve its objectives. The *Climate Clinic* decision will remain on foot, and the uncertainty of the potential scope of Ministerial decision making beyond the guidance of the CCRA will remain. This will damage the attainment of New Zealand's energy security and affordability at the very time this is at its most vulnerable.

47. We encourage the Select Committee to adopt our proposed amendment to section 3(1) of the CCRA to address this gap.

48. Together, the Bill as amended would confirm that New Zealand has a coherent, complete, and Parliament-led framework for managing climate change obligations. That is the foundation on which domestic and international investors, particularly in the energy sector, can plan, commit capital, and contribute to New Zealand's energy security and affordability with confidence, as well as its lower emissions future.