

THE LAW SOCIETY OF NEW SOUTH WALES
youngLAWYERS

Environment and Planning Law Committee

Submission on the Senate Inquiry into Australia's Environment

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About Us

NSW Young Lawyers is a division of the Law Society of NSW and is made up of legal practitioners who are under the age of 36 or in their first 5 years of practice, and law students. It is the largest body of newly practising lawyers and law students in Australia, with a membership comprising of some 15,000 members. NSW Young Lawyers supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice.

The Environment and Planning Law Committee brings together a network of the State's young practitioners to discuss a shared interest in our environment. It focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law, and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

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Introduction

This is a submission by members of the Environment and Planning Law Committee ("Committee"). The comments are the views of individuals and not of the workplaces by which members are employed.

The Committee is grateful for the opportunity to make a submission to the Senate Inquiry into Australia's Environment ('Inquiry'). This submission focuses on three of the terms of reference for the Inquiry being:

- Attacks on carbon pricing, the Clean Energy Finance Corporation, the Australian Renewable Energy Agency and the renewable energy target, the Climate Change Authority and the Climate Commission;
- Attacks on Federal environmental protection through handing approval powers over to State governments, which have poor track records and recent environment staff cuts; and
- Undermining Australia's compliance with the World Heritage Convention, the Convention on Biological Diversity, and the Ramsar Convention, in particular by attacking the Great Barrier Reef and the Tasmanian Wilderness World Heritage Areas.

The Committee makes a number of recommendations in relation to ensuring that Australia meets its international environmental obligations, ensuring that public participation is a key feature of decision-making processes, and maintaining open and transparent decision-making processes.

List of Recommendations

1. The Government should activate its commitment to increase the reduction target to 15-25 percent of the year 2000 levels. In order to meet this target it should refrain from following through with the repeal of green energy investment agencies and consider seriously the advice provided by bodies such as the Climate Change Authority.
2. Given the inability of Direct Action to meet our emission reduction targets in a sustainable manner, Australia should return to more effective market-based instruments such as a carbon price or an emissions-trading scheme.
3. In order to achieve the Government's claims that environmental outcomes can be maintained or improved under the One-Stop Shop policy, safeguard measures must be put in place, and the consistent and proper implementation of bilateral agreements must be fully supported through the provision of additional financial resources, extensive training, and a forum for State decision-makers.
4. The Government should provide additional funding for the environmental assessment and approval processes at the State level to ensure that sufficient resources are available for proper assessment.
5. Meaningful public participation should be a feature of assessment and decision-making processes.
6. Developments that pose a conflict of interest for States, such as where a State entity or government-owned corporation is the proponent or where the State has a significant financial interest, should be excluded from assessment agreements and be approved by the Australian Government Minister for the Environment.
7. The Government should observe its international obligations and strive to maintain or improve the integrity of sites identified as being of national and international importance.

Attacks on carbon pricing, the Clean Energy Finance Corporation, the Australian Renewable Energy Agency and the renewable energy target, the Climate Change Authority and the Climate Commission

Meeting Australia's International Climate Change Obligations

The Committee is concerned that current efforts by the Government to repeal and abolish the existing array of climate mitigation laws and agencies will impair Australia's ability to meet our international climate obligations in full.

As a signatory to the *United Nations Framework Convention on Climate Change* (UNFCCC) Australia made a non-binding agreement to stabilise greenhouse gas emissions (GHG) at 1990s levels. Upon our ratification of the Kyoto Protocol in 2008 however this agreement became legally binding and Australia committed itself to reducing emissions by an unconditional 5 percent compared with 2000 levels. Furthermore in the 2010 Cancun Agreements Australia stated that it would increase any reductions to between 15-25 percent of 2000 depending on the strength of future global action on climate change.

It is the Committee's view that we are beginning to see a concerted effort among Australia's major trading partners to curb emissions and this effort should activate our 2010 pledge to reduce emissions by 15-25 percent of 2000 levels. The current 5 percent target is far less ambitious than most comparable countries.

On 24 October 2014 the European Union agreed to a binding 40 percent domestic reduction in GHG by 2030 compared to 1990 levels.¹ Furthermore the EU set itself a target of sourcing at least 27 percent of energy from renewables by 2030. These are the most ambitious mitigation targets set to date.

China and the United States have also introduced ambitious measures this year. The USA's Clean Power Plan will cut carbon pollution from the power sector by 30 percent from 2005 levels, a sector that accounts for roughly one-third of all domestic GHG emissions.² Already dealing with severe pollution, China is getting ready to implement a national carbon market that will regulate 3-4 billion tonnes of CO₂, twice the size of the current EU market. Additionally China has pledged to reduce emissions intensity to between 40 and 45 percent below 2005 levels by 2020.³

Modelling, measuring climate ambition, commissioned by World Wide Fund for Nature Australia shows that as it stands by 2020 Australia would underperform against the majority of its key trading partners in the criteria of proportionate emission reductions and emissions intensity levels.⁴ Alarming, Australia would underperform against all six of the key trading partner studied in terms of per person emissions levels. Further, indication of Australia's poor position can be found in the recently released Global Green Economy Index, a report that measures national environmental performance, which placed Australia 57th out of 60 countries in climate change performance.⁵

In light of these developments Australia needs to do more to honour its international commitments and contribute to this global effort. As the analysis below indicates, the

¹ United Nations Framework Convention of Climate Change, 'EU Agrees 40% Greenhouse Gas Cut by 2030' (October 2014) <http://newsroom.unfccc.int/unfccc-newsroom/eu-agrees-40-greenhouse-gas-cut-by-2030/>

² Environmental Protection Agency, *EPA Fact Sheet: Clean Power Plan* (June, 2014)

³ Sydney Morning Herald, *China aims high for carbon market by 2020*:

<http://www.smh.com.au/environment/climate-change/china-aims-high-for-carbon-market-by-2020-20140912-10ftdp.html>

⁴ Australian Financial Review, *China set to announce new emissions target*:

http://www.afr.com/p/special_reports/opportunityasia/china_set_to_announce_new_emissions_INT2IKACXYoiVT2jsCQFJI

⁵ Bruck, Marten and Bals, *The Climate Change Performance Index 2014* (Global Green Economy Index, October 2014).

repeal of the carbon price has already damaged our capacity to achieve cost-effective emissions reductions and recommendations to limit the scope of the renewable energy target (RET) will have the same effect.

In order to stimulate the transition to a greener economy, Australia must maintain the necessary infrastructure to attract green investment and provide expert advice. The abolishment of the Climate Commission and the proposed abolishment of the Clean Energy Finance Corporation, the Australian Renewable Energy Agency and the Climate Change Authority have severely limited the capacity of Australia's policy to stimulate public and private response to climate mitigation. It is telling that in the above mentioned Global Green Economy Index Australia was placed almost at the top of every assessment area two years ago, before any of the current repeals were proposed.⁶

If the current slate of laws are allowed to pass then Australia's only tools for emission reduction will be Direct Action and an eroded RET. As is demonstrated below, the ability of each of these instruments to meet the level of Australia's international commitments under the 2010 Cancun Agreements is dubious.

Recommendation: The Government should activate its commitment to increase the reduction target to 15-25 percent of 2000 levels. In order to meet this target it should refrain from following through with the repeal of green energy investment agencies and consider seriously the advice provided by bodies such as the Climate Change Authority.

The Cost-Effectiveness of Direct Action

Climate mitigation policies cannot be measured by their ability to reduce emissions alone. Growing sovereign debt among developed nations (Australia included) has resulted in the limited availability of funds for mitigation initiatives and the fragile nature of post-crisis economies have made governments cautious of enacting regulations that may impede recovery.⁷ Any policy must be examined in light of this economic reality, as the economic and political appetite for climate action will be determined in part by the cost-effectiveness of combative measures.

The Government has repeatedly stated that the ERF will be able to reduce Australia's emissions at low cost and without a negative impact on the economy.⁸ Yet if introduced as it stands the policy will effectively cost over A\$15 billion, A\$2.55 billion for the ERF itself and the rest from the loss of carbon pricing revenue.⁹ This substantial price tag only accounts for what the Government believes is necessary to achieve the 2020 target however a number of models suggest that the ERF will require significantly more funds to meet this goal. Indeed a study commissioned by the Climate Institute found that even with the absolute baselines now confirmed in the White Paper, current funding arrangements for the ERF would see emissions rise by 9 percent above 2000 levels in 2020.¹⁰ For the ERF to hit the 5 per cent target an extra A\$4.08 billion would be needed. Modelling commissioned by WWF-Australian is even more unfavourable. It found that even with the setting of absolute baselines funding upwards of A\$20 billion, or A\$3.3 billion per year, would be needed to achieve the target.¹¹ Such findings compliment Australia's previous experiences with competitive grant schemes that demonstrated projected costs are consistently lower than the actual costs of abatement.¹²

The Climate Institute notes that with unlimited funds, the ERF could ostensibly achieve a reduction of 5 to 25 per cent by 2020, yet in the current political environment this is extremely unlikely to happen.¹³ The fund's cost-effectiveness is undermined by its lack of impact on emission intensive activities, reducing the incentive to adopt low-emission

⁶ Dual Citizen, *The Global Green Economy Index* (2012).

⁷ OECD, 'The Economics of Climate Change Mitigation: Policies and Options For Global Action Beyond 2012' (Report, OECD, 2009) 54.

⁸ Department of the Environment, above n 2, 6.

⁹ The Climate Institute, 'Fiscal impact of Emission Reduction Fund and carbon laws repeal' (policy brief, TCI, April 2014) 1.

¹⁰ The Climate Institute, above n 9, 23.

¹¹ The Guardian, *Coalition's climate policy would cost vastly more than budgeted, study finds:* <http://www.theguardian.com/world/2013/aug/29/coalition-climate-change-modelling-shortfall>

¹² The Australia Institute, above n 9, 5.

¹³ The Climate Institute, above n 9, 37.

technology or change polluting behaviour. Without a stronger penalty regime, more stringent baseline and greater funding opportunities for abatement projects, the ERF crediting incentive loses impact. Ultimately, while the negative effects of the ERF on consumers and businesses are minimal, the huge budgetary cost of achieving any target will be a substantial burden on the taxpayer.

In contrast, carbon taxes are intrinsically cost-effective from a fiscal position. As a revenue-raising instrument they shift the costs of abatement onto businesses and incentivise them to adjust their activities in order to minimise exposure to the tax. This incentive spurs the development of new emissions-reducing technologies, which are then diffused into the economy and increase emission reduction levels at no further cost to the Government. Furthermore the administration costs of a tax are relatively low and consist primarily of establishing a framework for monitoring and reporting emissions.

Taxes do, however, raise concerns about their broader impact on the economy. Politicians, businesses and community members may be alarmed at the potential of the tax to restrict economic activity and transfer costs from emitters to consumers. As Australia's experience with carbon pricing demonstrates, these concerns are not without some merit, with estimates indicating that the carbon price has increased household electricity prices by at least 10 per cent to date,¹⁴ largely in line with the Treasury's predictions.¹⁵ In terms of real Gross Domestic Product (GDP) loss modelling suggested Australia's real GDP was projected to decline by 0.68 per cent after the introduction of the tax.¹⁶ Although this seems like a relatively minor impact, given the fact that the bulk of costs associated with these taxation regimes are incurred over the medium to long term, the total economic cost of the tax to the year 2050 could be as large as 83 percent of current GDP.¹⁷

The burden of a carbon tax would not be so daunting if its revenue was spent prudently. Recycling the income gained to reducing existing deficits, lowering other taxes or providing industry assistance allows government to minimise economic impact.¹⁸ Given the right political climate, a tax on emissions could prove to be one of the most economical means of reducing emissions.

Emission-trading schemes also fare well from a cost-effectiveness perspective. They have the capacity to provide access to abatement opportunities at low cost both domestically and internationally and allow businesses to source the most efficient means of emission reduction. Furthermore dedicated caps on emission provide an environment of certainty and flexibility that allows businesses to focus on making profit within the new arrangements, a feature that is lacking in baseline and credit schemes.¹⁹

Recommendation: Given the inability of Direct Action to meet our emission reduction targets in a sustainable manner Australia should return to more effective market-based instruments such as a carbon price or an emissions-trading scheme.

¹⁴ Alex Robson, 'Australia's Carbon Tax: An Economic Evaluation' (2014) 34 *Economic Affairs* 35, 38.

¹⁵ Commonwealth of Australia, 'Strong Growth, Low Pollution: Modelling a Carbon Price' (economic modelling, Treasury, 2011) 11.

¹⁶ Ibid.

¹⁷ Robson, above n 14, 40.

¹⁸ Ian W.H. Parry, 'Reducing Carbon Emissions: Interactions with the Tax System Raise the Cost' (paper, Resources for the Future, 1997) 12.

¹⁹ Prime Ministerial Task Group on Emissions Trading, 'Report of the Task Group on Emissions' (policy brief, Australian Government, 2007) 48.

Attacks on Federal environmental protection through handing approval powers over to State governments, which have poor track records and recent environment staff cuts

The Government has stated that its One-Stop Shop policy for environmental approvals under State and Territory environmental legislation and the *Environment Protection and Biodiversity Conservation Act 2000* (Cth) (EPBC Act) will "slash red tape and increase jobs and investment, whilst maintaining environmental standards,"²⁰ and that the One-Stop Shop is "expected to strengthen environmental outcomes for Matters of National Environmental Significance."²¹ The Committee submits that, although the Government is now implementing the efficiencies envisaged when the EPBC Act was first enacted,²² the handing over of Commonwealth approval powers to the States and Territories will remove a vital and independent check on State powers. The loss of this Federal oversight function risks adverse environmental outcomes and lower environmental standards, and may leave Australia in breach of its international environmental obligations.

Recommendation: In order to achieve the maintenance or improvement of environmental outcomes under the One-Stop Shop policy, safeguard measures must be put in place, and the consistent and proper implementation of bilateral agreements must be fully supported by the Government through the provision of additional financial resources, extensive training, and a forum for State decision-makers.

Handing approval powers to State and Territory governments will remove independent Federal oversight

State and Territory governments are required to make decisions that properly balance development needs, environmental protection and the public interest.²³ However, development approvals inevitably involve discretionary judgments and weighing of competing interests. Consequently, there are risks that State and Territory decision-makers will be influenced by economically powerful proponents or the government of the day's political agenda. The EPBC Act assessment and approval process, usually capturing large-scale projects such as dams, roads, mines, and ports, provides an independent check on the powers of State and Territory governments and increases the likelihood that an appropriate balance will be struck between environmental protection and economic development, particularly for controversial projects.²⁴

Historically, Commonwealth oversight has been vital in preventing projects which had the support of their State or Territory government despite unacceptable environmental impacts. Key examples include the Gordon-below-Franklin Dam, the Tamar Valley Pulp Mill, and the Traveston Crossing Dam.

Under the proposed One-Stop Shop system, State and Territory governments would have to incorporate both State or Territory and Federal requirements into their decision-making, but the approval process inherently involves judgments of a subjective nature. Unless certain checks and balances are put in place to ensure that environmental standards are maintained and improved, there is a risk that the handing of approval powers to the States and Territories could result in the approval of projects likely to have significant impacts on the Australian environment which may otherwise not have been

²⁰ The Hon. Greg Hunt MP, Media Release: One-Stop Shop Approved by Government, <http://www.liberal.org.au/latest-news/2013/10/16/one-stop-shop-approved-government>.

²¹ Australian Government, Department of the Environment, Regulatory Cost Savings under the One-Stop Shop for Environmental Approvals, September 2014, <http://www.environment.gov.au/system/files/resources/c3954859-fca6-4728-a97b-c17f90f6142c/files/regulatory-cost-savings-oss.pdf>, at 2.

²² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 45. See also, Lisa Ogle, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?' (2000) 17 *Environmental and Planning Law Journal* 468, 473-475 (discussing the controversial nature of Part 5 of the EPBC Act when it was first introduced).

²³ For example, see *Environmental Planning and Assessment Act 1979* (NSW), s 79C.

²⁴ For a further discussion of these issues see, Chris McGrath, 'One stop shop for environmental approvals a messy backward step for Australia' (2014) 31 *Environmental and Planning Law Journal* 164, 176-183.

approved, or which may have otherwise had important conditions imposed by the Australian Minister for the Environment.

Environmental standards could only be maintained under a One-Stop Shop policy if certain checks and balances are implemented

The Government has outlined an "assurance framework" as part of its One-Stop Shop policy.²⁵ The Committee supports the following aspects of the Government's "assurance framework" in order to ensure that the One-Stop Shop policy maintains or improves existing environmental standards:

- imposition of national environmental standards that States and Territories are required to meet to be accredited;
- regular evaluations or audits against State and Territory commitments in the bilateral agreements;
- five-yearly reviews of the bilateral agreements;
- ongoing monitoring and continuous improvement; and
- the Australian Government Environment Minister retaining the power to "call-in" the assessment and/or approval of a project if States and Territories are not meeting national standards.

Recommendation: The Committee considers that the Government should also:

- Provide additional funding for the environmental assessment and approval processes at the State level in order to ensure that:
 - States have sufficient resources to take on this additional role of applying Federal environmental law;
 - the delegation of approval powers is not seen as an opportunity by the Government to cut funding for environmental protection by passing on its key responsibilities to the States when it is known that the States are under serious financial strain; and
 - Government sends a clear message to the Australian public that it still considers the EPBC Act an important piece of legislation for protecting and conserving Australia's unique environment and meeting its international obligations.
- Provide extensive training programs for staff of State environmental departments who will undertake the work delegated from the Government, across the full range of disciplines necessary to ensure that:
 - environmental assessments are carried out taking into account the relevant matters;
 - approvals are granted in an integrated and fully-informed manner; and
 - national environmental standards are properly and consistently applied.
- Establish a network or forum of State decision-makers to discuss the application of the EPBC Act, to ensure consistent application of national environmental standards.

For cross-border projects, the assessment and approval process should be undertaken by a consultative committee involving staff from the relevant State Departments of all those States on which the project is proposed to be undertaken.

The Committee also considers that the national environmental standards that States are required to meet to be accredited should include meaningful public participation and consultation requirements, such as minimum submissions periods at key stages in the assessment and approvals process, and an appeals process available to all members of the public (similar to the open standing provision in section 123 of the *Environmental*

²⁵ Australian Government, Department of the Environment, Regulatory Cost Savings under the One-Stop Shop for Environmental Approvals, September 2014, <http://www.environment.gov.au/system/files/resources/c3954859-fca6-4728-a97b-c17f90f6142c/files/regulatory-cost-savings-oss.pdf>, at 6.

Planning and Assessment Act 1979 (NSW)) to ensure that decisions are made openly and transparently, and that decision-makers are able to be held accountable for their decisions. This will allow the public to play a key role in ensuring that national environmental standards are upheld.

Developments that pose a conflict of interest for States, such as where a State entity or government-owned corporation is the proponent or where the State has a significant financial interest, must be excluded from assessment agreements and be approved by the Australian Government Minister for the Environment.

Undermining Australia's compliance with the World Heritage Convention, the Convention on Biological Diversity, and the Ramsar Convention, in particular by attacking the Great Barrier Reef and the Tasmanian Wilderness World Heritage Areas

The Committee is concerned that the Government is failing to observe its international obligations, and indeed, putting Australia's reputation as a leader in environmental protection at risk.

The Committee is concerned that a decision to approve dredging at Abbot Point and dumping on wetlands of national importance, as part of a new coal terminal development in Queensland, fails to meet Australia's obligations under international law. The Great Barrier Reef was listed a World Heritage Area in 1981. Article 4 of the World Heritage Convention (WHC) imposes a duty on Australia, as a party to the Convention, to "ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated in its territory", and requires it to "do all it can to this end to the utmost of its own resources".

Dr Christopher Ward, president of the Australian branch of the International Law Association, argues the approvals are "likely inconsistent" with the World Heritage Convention, saying:²⁶

It is entirely possible that the development on Curtis Island of LNG processing plants would be inconsistent with Australia's obligations under Article Four of the World Heritage Convention.

There have been reports that the dumping will impact the Caley Wetlands. The Caley Wetlands have been recognised as being of national importance, and the Australian Department of the Environment has stated that, "the importance of the site is such that it meets criteria for identifying wetlands of international importance adopted by the Ramsar Convention (e.g. 1a, 1c, 2a, 2c)."²⁷

In May 2014, the Australian Senate's Standing Committee on Environment and Communications concluded that the "Government's proposal to remove 74,000 hectares from the extended Tasmanian Wilderness World Heritage Area is fundamentally flawed and will have an adverse impact on the values of the Tasmanian Wilderness World Heritage Area". The Committee is concerned that the Government is failing to observe its international obligations, and is, putting Australia's reputation as a leader in environmental protection at risk.

Recommendation: That the Government observe its international obligations and strive to maintain or improve the integrity of sites identified as being of national and international importance.

²⁶ Sunshine Coast Daily, *Reef dredging may breach World Heritage obligations*:

<http://www.sunshinecoastdaily.com.au/news/reef-dredging-breach-world-heritage/2172804/>

²⁷ Australian Department of the Environment, *Directory of Important Wetlands in Australia - Information sheet*: http://www.environment.gov.au/cgi-bin/wetlands/report.pl?smode=DOIW&doiw_refcodelist=QLD001

Conclusion

The Committee is concerned that the Government is at risk of failing to observe its international obligations, and indeed, putting Australia's reputation as a leader in environmental protection at risk. Meaningful public participation must be a feature of assessment and decision-making processes. Independent checks and balances should make up part of environmental assessment processes. Initiatives designed to protect the environment and encourage renewable energy should be retained.

The Committee thanks you for the opportunity to provide this submission. Further queries in relation to this submission, or any assistance we can provide, should be directed to the Chair of the Committee, Emily Ryan.

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