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Environment and Communications Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING THE ENVIRONMENT
PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (CLIMATE
TRIGGER) BILL 2020

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Environment and Communications Legislation Committee Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020.

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The enclosed submissions reflect the opinions of the contributors, with the UNSW Law Society Inc. proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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I OBJECTIVES AND CONTENT

A Objectives of the Bill

The proposed purpose of the new Subdivision FC of the Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (Cth) ('the *Climate Trigger Bill*'),¹ is to 'fulfil Australia's obligations under the Climate Change Conventions'.² The Bill is consistent with the objects of the *Environmental Protection and Biodiversity Conservation Act* ('*EPBC Act*'), which includes 'to assist in the co-operative implementation of Australia's international environmental responsibilities'.³

The amending objective of the Bill is to institute emissions considerations as the tenth 'matter of national environmental significance'⁴ under the *EPBC Act*.

B Australia's International Agreements

This submission argues that the *Climate Trigger Bill* furthers governmental obligations under international climate change agreements to which Australia is a signatory. These include but are not limited to the *United Nations Framework Convention on Climate Change* (UNFCCC), *Kyoto Protocol* and the *Paris Agreement*.⁵ In ratifying these agreements, Australia has made a commitment to address climate change and reduce greenhouse gas emissions. This submission notes that the *Climate Trigger Bill* adheres to this commitment by endeavouring to mitigate potentially serious environmental harms.

The landmark *Paris Agreement* treaty has the central aim of ensuring global temperatures are kept two degrees Celsius below pre-industrial levels.⁶ In its most recent NDC submission under the *Paris*

¹ *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020* (Cth) ('*Climate Trigger Bill*').

² See the *United Nations Framework Convention on Climate Change* (UNFCCC), *Kyoto Protocol* and the *Paris Agreement*.

³ *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e) ('*EPBC Act*').

⁴ *EPBC Act* pt III div 1.

⁵ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005); *Paris Agreement Under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016)..

⁶ *Paris Agreement Under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016).

Agreement, Australia pledged to reduce its carbon emissions by 26-28% by 2030.⁷ For Australia to fulfil its obligations under this Agreement tangible steps must be taken towards reducing Australia's own emissions. This submission proposes that the *Climate Trigger Bill* represents such a step, by formally acknowledging emissions-producing actions as matters of national environmental significance.⁸

C *Australia's Climate Emission Contributions*

According to the Organisation for Economic Cooperation and Development (OECD), Australia's greenhouse gas emissions have increased steadily since the commencement of the *EPBC Act* in 1999 until 2019 and Australia remains one of the top OECD emitters.⁹ Many of Australia's coal projects have been detrimental to the domestic and global environment. For example, the Adani Carmichael mine project has attracted wide criticism for the level of environmental harm it would cause; one medical journal deemed the project a 'public health disaster'.¹⁰ A report by the Climate Council claims that the Galilee Basin coal project could emit 705 million tonnes of carbon dioxide per year, which it estimates to be 1.3 times Australia's current annual emissions.¹¹

The direct impacts of climate change felt by Australia have been in national discussion following the unprecedented 2019-2020 bushfire season.¹² This is underpinned by predictions that 'risks to urban, catchment and biodiversity values are likely to increase under the scenarios of 2050 climate change within the range of feasible prescribed burning options'.¹³ The CSIRO has echoed similar remarks, stating in their 2006 report that, 'extreme events are on the rise as a result of anthropogenic perturbation of the climate system, and climate models indicate the potential for increases in extremes of temperature, precipitation, droughts, storms, and floods'.¹⁴

As the largest exporter of coal and natural gas in the world, emissions from Australia's exported fossil

⁷ Government of Australia, 'Australia's Intended Nationally Determined Contribution to a New Climate Change Agreement', Communication to the *United Nations Framework Convention on Climate Change*, August 2015.

⁸ *EPBC Act*.

⁹ Organisation for Economic Cooperation and Development, *Greenhouse gas emissions* (Statistics, December 2019); *EPBC Act*.

¹⁰ Chris McCall, 'Australia's New Coalmine Plan: a Public Health Disaster' 389 (10069) *The Lancet* 588.

¹¹ Climate Council, *Galilee Basin- Unburnable Coal* (Report, 2015)

<<https://www.climatecouncil.org.au/uploads/af9ceab751ba2d3986ee39e1ef04fd.pdf>>.

¹² 'This is Not Normal': Climate change and escalating bushfire risk' (Briefing Paper, Climate Council, 12 November 2019) 1.1

¹³ Ross Bradstock, Ian Davies, Owen Price, and Geoff Cary, 'Effects of climate change on bushfire threats to biodiversity, ecosystem processes and people in the Sydney region: Final report to the New South Wales department of environment and climate change: climate change impacts and adaptation research project.' (Report, 2008) 65.

¹⁴ CSIRO, *Climate Change Impacts on Australia and the Benefits of Early Action to Reduce Global Greenhouse Gas Emissions* (Report, February 2006) 29.

fuel currently contribute to approximately 3.6% of global emissions.¹⁵ According to Parra et al, even if total carbon emissions decreased to the IPCC's projected rate under the Paris Agreement – of a 45% reduction below 2010 levels by 2030 – the country's current goals and projections for fossil fuel export means that Australia would still be contributing 13% of all worldwide emissions that have been determined to be compatible with the Paris Agreement in 2030.¹⁶ This would result in severe disproportionality of Australian emissions in the context of global emissions. Therefore, if Australia's current emissions output from 'emissions-intensive actions' continue, there is a risk of conflict with not only its own obligations under the Paris Agreement, but also the global effort under the Climate Conventions. This submission argues that Australia should endeavour to offset not only its own emissions, but the emissions from the products that Australia extracts and exports.

D *Ineffectiveness of Current Legislation*

There has been an absence of an express statutory requirement to consider climate change impacts in the exercise of planning powers. Although the *EPBC Act* identifies nine matters of national environmental significance ('MNES'),¹⁷ it does not address concerns about climate change or greenhouse gas emissions.¹⁸ Furthermore, despite existing environmental reporting¹⁹ and product disclosure²⁰ requirements imposed, the *Corporations Act 2001* (Cth) has little protection for the environment through express legislative mandate.²¹ Thus, this submission notes that current *EPBC Act*²² and other legislation fails to recognise 'climate and emissions impact...[as] a matter of national environmental significance'.²³

¹⁵ Paola Yanguas Parra et al, Climate Analytics, *Evaluating the Significance of Australia's Global Fossil Fuel Carbon Footprint* (Report, July 2019) 2.

¹⁶ United Nations, *Status of Treaties: Paris Agreement* (online), <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

¹⁷ *EPBC Act* ch 2 pt 3 div 1.

¹⁸ This anomaly has been identified since the implementation of the *EPBCA*: see, eg, Victoria McGinness and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37 *Environmental and Planning Law Journal* 87; Department of the Environment, Water, Heritage and the Arts, Parliament of Australia, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, 30 October 2009) 143 [6.15].

¹⁹ *Corporations Act 2001* (Cth) s 299(1)(f).

²⁰ *Ibid* s 1013DA.

²¹ Helen Anderson and Wayne Gumley, 'Corporate social responsibility: legislative options for protecting employees and the environment' (2009) 29(1) *Adelaide Law Review* 29, 30.

²² *EPBC Act*.

²³ Commonwealth, *Parliamentary Debates*, Senate, 13 February 2020, 965 (Sarah Hanson-Young); Lisa Ogle, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?' (2000) 17(5) *Environmental and Planning Law Journal* 468.

As a result, climate change is not effectively regulated in the *EPBC Act*, even when there are identifiable and major sources of greenhouse gas emissions.²⁴ Thus, an anomaly exists where the Act aims to protect MNES, but does not regulate the ‘greatest threat to those matters – climate change’.²⁵

This submission argues that the introduction of the *Climate Trigger Bill* would allow ‘the *EPBC Act* to assess major developments and the emissions and climate change impact of industrial activity’²⁶ and therefore better fulfil the object of the *EPBC Act* in fulfilling Australia’s international environmental responsibilities.

At a state level, there has been an observable trend of judgments featuring climate change as a planning consideration. In *Gloucester Resources Ltd v Minister for Planning*,²⁷ a coal mine application was refused because, among other reasons, its contribution to climate change in the form of carbon emissions made the project not of ‘sustainable use’. This submission recognises that carbon emissions can be, and have been, used to determine environmental impact.

Thus, this submission argues that the *Climate Trigger Bill* addresses a significant gap in the national regulatory and legislative framework for environmental assessment. This submission notes that the inclusion of a climate trigger in the *EPBC Act* complements other initiatives and commitments under international law by the Australian Government.²⁸

II CONSTRUCTION OF THE BILL

A Ministerial Discretions

This submission argues that the *Climate Trigger Bill*’s ability to effect practical climate action could be significantly hampered by the *EPBC Act* giving overwhelming capacity and discretion to the Minister for the Environment. Under the unamended *EPBC Act*, for an environmentally harmful

²⁴ See, eg, *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510 (‘Wildlife Whitsunday’); *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784 (‘Anvil Hill’). Cf. *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

²⁵ Chris McGrath, ‘Regulating Greenhouse Gas Emissions from Australian Coal Mines’ (2008) 25 *Environmental and Planning Law Journal* 240, 259.

²⁶ Commonwealth, Parliamentary Debates, Senate, 13 February 2020, 965 (Sarah Hanson-Young).

²⁷ *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

²⁸ See Department of Industry, Science, Energy and Resources, ‘Australia’s 2030 Climate Change Target’ *Department of Industry* (Fact Sheet, 2015) <<https://publications.industry.gov.au/publications/climate-change/climate-change/publications/factsheet-australias-2030-climate-change-target.html>>; *United Nations Framework Convention on Climate Change*, opened for signature 3 June 1992, 1077 UNTS 107 (entered into force 21 March 1994).

action to be taken, it must go through an approval process outlined in Part 9.²⁹ This includes a general provision stipulating that the Minister ‘must take into account the principles of ecologically sustainable development’ in making their decisions.³⁰

Part 4, Div 2-3 of the *EPBC Act* outlines the process that the Minister must follow when making a declaration that an action can escape the Part 9 approval process. This submission notes that a Minister, under Part 7, may approve an action if it can be taken in a ‘certain manner’³¹ that the Minister views as not harmful to the relevant element of the environment (i.e. the relevant MNES). Sections 24G(2) and 24H(2) of the *Climate Trigger Bill* defer to the same unaltered provisions under Parts 7 and 9 of the *EPBC Act* that provide extensive discretion to decision makers.

Furthermore, the *Climate Trigger Bill* introduces various discretionary powers alongside these provisions. These include:

- a) Declaring what does and does not fall within the parameters of each of the delineated matters of national significance;
- b) Deciding whether to take protective actions like listing a species threatened with extinction, or whether an activity will have a ‘significant’ impact on a species;³²
- c) Whether a proposed action is a ‘controlled action’ within the meaning of section 67, and therefore requires approval: s 75;
- d) Which process should be used to assess the relevant impacts of a controlled action: s 87;
- e) Whether a proposed action can be exempted from environmental provisions under Part 3 or Chapter 4, by reason of the ‘national interest’. The Minister is not limited in the matters they may consider under this provision: s 158.

This submission is concerned with the broad nature of these ministerial discretions, which may result in a lack of transparency. Under the amended *EPBC Act*, a minister’s assessment runs the risk of amounting to mere ‘formalities to which decision-makers rarely refer’.³³ Reducing this assessment to a mere formality may also raise the issue of stringency, exacerbated by the lack of transparency. This concern is reflected in a 2009 review which found a ‘lack of trust in the quality of decisions made

²⁹ See *EPBC Act* which outlines what environmental matters are specifically protected.

³⁰ *EPBC Act* 37B(2).

³¹ *EPBC Act* s77A.

³² Australian Senate Environment and Communications References Committee, ‘Australia’s faunal extinction crisis’ (Interim report, April 2019) 47.

³³ Jie Zhang, Lone Kornov and Per Christensen, ‘Critical Factors for EIA Implementation: Literature Review and Research Options’ (2013) 114 *Journal of Environmental Management* 148, 148.; Maya Suzuki, ‘Muddled waters: Revealing methodological confusion in Australia’s environmental impact assessment process.’ (2020) 37(2) *Environmental and Planning Law Journal* 267-281, 278.

under the [EPBC] Act'.³⁴ As these discretions continue to apply to the *Climate Trigger Bill*,³⁵ this submission argues that it is unclear how the amendment improves the approval process for potentially environmentally damaging actions. Furthermore, this submission notes that judicial review is not readily available to scrutinise the exercise of discretion throughout the approval process.³⁶

This submission recommends that the exemptions and discretionary measures of the *EPBC Act* be reviewed, and that the *EPBC Act* be reformed to focus more on defined environmental outcomes rather than prescribing a ministerial assessment procedure.

B The Meaning of 'Significant Impact'

At section 24G(1), the *Climate Trigger Bill* reads:

*'A person must not take an emissions-intensive action if the action has, will have or is likely to have a **significant impact** on the environment.'*³⁷

This submission argues that the *Climate Trigger Bill* would benefit from a clearer definition of what constitutes a 'significant impact'. Australia does not have a national climate law, consequently there is no legislative guidance available to decision makers on the threshold to apply when deciding whether 'actions have a *significant impact* on the environment'.³⁸ While it is possible that courts could look to landmark cases such as *Gloucester Resources Limited v Minister for Planning* and international case law, this submission proposes that the *EPBC Act* should place greater focus on outcomes; such as specifically quantified emissions restrictions or other scientifically endorsed markers.³⁹

This submission argues that the phrasing of 'significant impact' also makes the *Climate Trigger Bill* vulnerable to the argument that Australia contributes so little as to be a 'drop in the bucket' of global emissions, and therefore cannot make a difference to the world climate.⁴⁰ Australia's domestic

³⁴ Department of the Environment, Water, Heritage and the Arts, Parliament of Australia, *Report of the Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999* (Final Report, 30 October 2009) 155.

³⁵ See *EPBC Act* ss 12(2), 15B(8), 16(2), 22(4), where the exact same exceptions to the comparable offences in the current law apply.

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 24 February 2020, 5 (Jenny McAllister); Department of the Environment, Water, Heritage and the Arts, Parliament of Australia, *Report of the Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999* (Final Report, 30 October 2009) 143 [20.34].

³⁷ *Climate Trigger Bill* s 24G(1).

³⁸ Laura Schuijers, 'Climate Change in Court', *University of Melbourne* (Webpage, 3 March 2019) <<https://pursuit.unimelb.edu.au/articles/climate-change-in-court>> (emphasis added).

³⁹ *Gloucester Resources Limited v Minister for Planning* (n 27).

⁴⁰ Steve Bishop, 'Alan Jones' Climate Change 'Argument' *Independent Australia* (Online, 18 June 2019) <<https://independentaustralia.net/business/business-display/alan-jones-climate-change-argument,12816>>.

industry contributes 1.3% of the world's emissions,⁴¹ however in terms of emissions per capita, Australia is one of the world's highest emitters.⁴² Furthermore, this only considers emissions produced within Australia's domestic borders, not those resulting from Australian-mined fossil fuels being used overseas (Scope 3 emissions).⁴³ Greenhouse gases broadly refers to the class of gases which have the effect of trapping heat in the Earth's atmosphere.⁴⁴ The de facto standard for corporate greenhouse gas emissions differentiates between scopes:

- a. Scope 1: direct emissions from the activity.
- b. Scope 2: emissions from generation of electricity purchased for the activity.
- c. Scope 3: indirect upstream or downstream emissions.⁴⁵

Scope 3 emissions of corporate actions make up the vast majority of attributable emissions.⁴⁶ While the inclusion of scope 3 emissions in assessment reports would change the harm to be considered, this submission notes that this would involve a choice in characterisation (an emissions-intensive activity as cumulative rather than constrained to site development) unlikely to be taken voluntarily when determining 'significant impact'.

The NSW Land and Environment Court (NSWLEC) has recognised the need to include Scope 3 emissions in environmental assessments.⁴⁷ Furthermore, the NSWLEC has also refuted the argument that Australia contributes little to global emissions. The Court has ruled that as emissions-intensive actions contribute to climate change, and climate change has a global impact, the inability to accurately measure the direct impacts of a particular action 'does not suggest that the link to causation of an environmental impact is insufficient'.⁴⁸

This submission argues that while the 'significant impact' threshold is suitable for other MNES, it is not an appropriate standard to be applied to an assessment of emissions intensive actions. Although the words 'has, will have or is likely' and 'significant impact' are recognised legal threshold markers, due to the legal difficulty of establishing links between emissions and a significant impact on the

⁴¹ Scott Morrison, 'National Statement to the United Nations General Assembly' (Speech, UNGA, 25 September 2019).

⁴² Parra et al (n 15).

⁴³ The GHG Protocol classifies GHG emissions into three 'scopes'. 'Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.' 'FAQ', *Greenhouse Gas Protocol* (online) <https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf>.

⁴⁴ Department of Agriculture, Water and the Environment, 'Greenhouse effect', (Webpage, 17 May 2020) <<https://www.environment.gov.au/climate-change/climate-science-data/climate-science/greenhouse-effect>>

⁴⁵ McGrath (n 25) 251.

⁴⁶ Ibid 252.

⁴⁷ *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720 ('Gray'), [126] and [130]; *Gloucester Resources Limited v Minister for Planning* (n 27).

⁴⁸ *Gray* [2006] NSWLEC 720, [98].

environment,⁴⁹ this may preclude actions from triggering the provision and as such, the ‘emissions-intensive action’ would proceed without requiring Ministerial approval. This may result in proposed ‘emissions-intensive actions’ not triggering the climate provision of the *Climate Trigger Bill*. This leaves the operation of the *Climate Trigger Bill* overly dependent on ministerial discretion and judicial review, which may be difficult to access due to standing and grounds of appeal requirements.⁵⁰

This submission proposes that a strategy adopted to impose carbon emission limits on emissions-intensive actions should be calculated based on an annual national emission ‘budget’ or similar quantifiable requirement, rather than a ‘significant impact’. This would satisfy the recommendation that the *Climate Trigger Bill* consider the emissions during the life of a project, and should also include Scope 3 emissions.⁵¹ This submission recommends that proponents should be given the opportunity to review proposals to incorporate emission mitigation and offset strategies that allow projects to meet emission limits. This submission also recommends that such quantifiable emission limits should be continuously reviewed as per Australia’s international obligations and national climate change mitigation strategies.

An example of an applied ‘emissions budget’ could involve the *Climate Trigger Bill* expressly identifying an action that ‘has, or will have, or is likely to have a significant impact’ as including ‘emission-producing actions’. Here, ‘emission-producing actions’ would encapsulate actions that emit, or are likely to emit, more than 500,000 tonnes of carbon dioxide (‘CO₂’), or other greenhouse gases (such as nitrous oxide ‘N₂O’ or methane ‘CH₄’), per year. Conversely, if an emission-producing activity falls below 500,000 tonnes of CO₂ emissions, it does not have, or will not have, or is not likely to have a significant impact on the environment.⁵² As noted earlier, these emission limits should be continuously reviewed as per Australia’s international obligations and national climate change mitigation strategies.

This submission notes that using a quantitative definition changes how the Minister decides whether an action that ‘has, will have or is likely to have a significant impact’ on certain aspects of the environment. This submission recommends that instead of speculating the link between emissions and a significant impact on the environment, the use of specifically quantified emissions restrictions is a more accurate reflection of the link’s existence as informed by scientific evaluation and research.

⁴⁹ See, eg, *Wildlife Whitsunday* (n 24); *Anvil Hill* (n 24); *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2016) 251 FCR 308 (‘ACF’).

⁵⁰ Jacqueline Peel and Lee Godden, ‘Australia Environmental Management: A ‘Dams’ Story’ (2005) 28(3) *UNSW Law Journal* 668.

⁵¹ Department of the Environment, Water, Heritage and the Arts, Parliament of Australia, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009) 113.

⁵² Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005 (Cth) cl 25AB.

A similar quantitative approach can be found in a prior proposal in 2005 by current leader of the Australian Labor Party, Anthony Albanese. This *Climate Trigger Bill* required approval for the broadly-defined term ‘climate change actions’, not just constructions, and defined the relevant level of emissions, although arguably that level was too high.⁵³ It also, unlike the *Climate Trigger Bill*, included considerations of indirect emissions, capturing emissions from the use of coal both in Australia and overseas, thus giving consideration to Scope 3 emissions.⁵⁴

Therefore, this submission recommends that the *Climate Trigger Bill* should place greater focus on outcomes; such as specifically quantified emissions restrictions or other scientifically endorsed markers. This could take the form of an ‘emissions budget’, that would impose quantitative carbon emission limits and include Scope 3 emissions, and thus overcome the difficulty of establishing links between specific emission-intensive actions and a ‘significant impact’ on the environment.

C *The Meaning of ‘Emission-Intensive Actions’*

Emissions-intensive actions, as stated in section 24J, are key contributors to global warming and climate change.⁵⁵ This submission notes that this is particularly relevant to large supranational corporations who conduct these actions, as ‘climate change is not just an environmental issue, it’s a corporate issue’.⁵⁶ Corporations, more so than nation states and individuals, often engage in emission-intensive actions; for example mining giant BHP has produced 1,863 Megatons of carbon emissions since 2004 in Australia. Furthermore, the Carbon Majors Report 2017 states that 100 companies have been the source of more than 70% of the world’s emissions since 1998, supporting the link between emission-intensive actions and corporate bodies, as opposed to governments or individuals.⁵⁷ This submission notes that the *Climate Trigger Bill* recognises the link between corporate emissions and MNES under section 24G.⁵⁸

As stated earlier, this submission believes an anomaly exists where the *EPBC Act* aims to protect MNES, yet does not regulate climate change. To address this, the *Climate Trigger Bill* proposes a

⁵³ Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005 (Cth); Chris McGrath, Submission 017 to the Department of the Environment, Water, Heritage and the Arts, *Independent Review into the operation of the Environment Protection and Biodiversity Conservation Act 1999* (14 December 2008) 6 <<http://www.environment.gov.au/system/files/pages/dacbabf4-0bca-46ee-9271-2fa95ce1b6dc/files/017-chris-mcgrath.pdf>>.

⁵⁴ McGrath (n 52) 7.

⁵⁵ *Climate Trigger Bill* s 24J; Lukas Rüttinger and Vigya Sharma, *Climate Change and Mining* (Report, 2016) <<https://www.adelphi.de/en/publication/climate-change-and-mining>>.

⁵⁶ Renee Garner and David Hodgkinson, ‘First text on climate change — Global Climate Change: Australian Law and Policy’ (2008) 23(10) *Australian Environmental Review* 19.

⁵⁷ Tess Riley, ‘Just 100 Companies Responsible for 71% of Global Emissions, Study Says’, *The Guardian* (online, 2017) <<https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change>>

⁵⁸ *Climate Trigger Bill* s 24G.

‘climate trigger’ to ensure ‘emissions-intensive actions’ are considered as MNES.⁵⁹ This submission believes the inclusion of an activity-based definition of an ‘emissions intensive action’ provides for a clearer link to be established between an activity and its impact on the environment, compared to an emissions threshold (which may be more suitable for defining ‘significant impact’), which gives proponents an opportunity to argue that their proposal is a ‘drop in the ocean’ of greenhouse gas emissions.⁶⁰ However, this submission suggests that the *Climate Trigger Bill*’s definition of ‘emission-intensive actions’ under section 24J is too unclear to be effective in addressing the climate change anomaly and effectively regulating emission-producing actions.

First, this submission notes that the wording of ‘emissions-intensive action’ and the respective actions identified in section 24J do not set a threshold to avoid the situation of all mining, drilling or land clearing projects being identified as controlled actions.⁶¹ Section 24J describes an ‘emission-intensive action’ as mining and drilling operations and land clearing.⁶² Whilst this attempts to narrow the scope of what is recognised as an ‘emissions-intensive action’, it instead broadens it due to a failure to specify at what point these operations become ‘emissions-intensive’. This gives arise to a risk of overloading the assessment/approval procedure with potentially trivial projects.

Secondly, this submission notes that limiting the definition of an ‘emissions intensive action’⁶³ to actions involving mining operations, drilling exploration, or land clearing may not capture other actions that could contribute to greenhouse gas emissions. Other potentially emission-intensive actions not captured under this definition include energy production, transportation and agriculture, and Scope 3 emissions.⁶⁴

Thirdly, this submission proposes that by imposing a theoretical ‘blanket ban’,⁶⁵ the *Climate Trigger Bill* may unintentionally impact the mining of materials, such as zinc, that are utilised to construct potential sources of renewable energy. Renewable energy technologies in the infancy of their

⁵⁹ Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (Cth) 2.

⁶⁰ McGrath (n 52) 6.

⁶¹ *Climate Trigger Bill* s 24J.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ The GHG Protocol classifies GHG emissions into three ‘scopes’. ‘Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.’ ‘FAQ’, *Greenhouse Gas Protocol* (online) <https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf>.

⁶⁵ Commonwealth, *Parliamentary Debates*, Senate, 24 February 2020, 8 (Stirling Griff).

development rely on exploratory drilling.⁶⁶ A narrow reading of the ‘emissions intensive action’ definition could unintentionally prohibit these actions, which are essential to Australia’s sustained economic development a commitment to a carbon-neutral future. In addition, targeting ‘mining and drilling operations’ would place a stringent ban on mining for everyday metals such as silver and iron that are used for household purposes. This submission argues that this may have a substantial impact on the economy, as mining provides a large field of employment and facilitates capita through exports, and consequently assists in globalisation.⁶⁷ The manufacturing sector is a key contributor to Australia’s Gross Domestic Product, and nearly all actions in the manufacturing sector rely on some form of mining for materials to be physically or chemically transformed into new products.⁶⁸

Finally, as the Standing Committee on the Scrutiny of Bills noted, the definition of the term ‘emissions-intensive action’, can be broadened through further regulations.⁶⁹ The Scrutiny Committee particularly noted that this grants executive power to broaden the meaning of ‘emission-intensive actions’ through delegated legislation, thus reducing the ability of Parliament to scrutinise this expanded definition.⁷⁰ This submission notes further that concerns about clarity are especially relevant, given that the *Climate Trigger Bill* makes offenders liable for up to 7 years imprisonment.⁷¹ The increased scale of punishment means that the Bill should be clear and upfront in its definitions of liability, which may be difficult if the definition of ‘emission-intensive actions’ is subject to change.

This submission recommends that section 24J remain in place, as the inclusion of an activity-based definition of an ‘emissions intensive action’ provides for a clearer link to be established between an activity and its impact on the environment, and recognises the importance of including emissions-intensive actions in the *EPBC Act*. However, this submission recommends that the Committee consider the possible harms of section 24J noted above, and take steps to mitigate them through legislation or policy.

This submission also proposes that, as well as identifying and requiring approval for ‘emission-intensive actions’, the *Climate Trigger Bill* should introduce approaches to ensure that there are plans

⁶⁶ Commonwealth, *Parliamentary Debates*, Senate, 24 February 2020, 8 (Stirling Griff); see also WSP, ‘Environmentally Sustainable development (ESD) Plan – Special Activation Precinct, Parkes’, *Department of Planning, Industry and Environment* (July 2019) 23 [6.1.3] <https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/A+Parks/Parkes+SAP+-+Environmentally+Sustainable+Development+Plan.pdf> for a description of geothermal and ground source heat pumps.

⁶⁷ Shirley Jackson, *At the Coalface: Work, Community and Climate Change* (Report, December 2019) 4 <<https://percapita.org.au/wp-content/uploads/2019/12/At-The-Coalface-December-2019-1.pdf>>

⁶⁸ Australian Bureau of Statistics, *Australian National Accounts: National Income, Expenditure and Product, Dec 2019* (Catalogue No 5206.0, 4 March 2020).

⁶⁹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 3 of 2020, 26 February 2020) 6 citing Climate Trigger Bill sch 1 item 1, proposed s 24J(d).

⁷⁰ Ibid.

⁷¹ Climate Trigger Bill s24H(1).

in place to abate emissions before ministerial approval is granted. This shall ensure that the precautionary principle is upheld and thus lead to operations causing a growth in emissions to be temporarily shut down until a solution to limit emissions can be put into place. Additionally, aside from the introduction of the *Climate Trigger Bill*, this submission argues a national plan that provides a framework towards the reduction of ‘climate triggers’ and a plan to push Australia towards a carbon-neutral future with ‘net zero emissions by 2050’⁷² is necessary to place Australia on track towards reducing greenhouse gases and intergenerational equity.

D *Human Rights*

Finally, this submission notes the importance of the *Climate Trigger Bill* in advancing human rights in Australian law. The *Climate Trigger Bill* is ‘compatible’ with the *Human Rights (Parliamentary Scrutiny) Act* (‘*Human Rights Act*’).⁷³ The *Climate Trigger Bill* advances human rights under the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’), to which Australia is a signatory.⁷⁴ The *Human Rights Act* aims to ‘ensure that Australia’s domestic laws comply with our international obligations—particularly those that protect fundamental rights and freedoms’ and ‘provide a protection against unwarranted, unjustified or arbitrary interference with the fundamental rights enjoyed by all people’.⁷⁵ Cited in the *Human Rights Act*, the ICESCR recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ that includes ‘the improvement of all aspects of environmental and industrial hygiene’.⁷⁶ The *Climate Trigger Bill* proposes to scrutinise emissions-intensive actions to reduce emissions and protect the environment that is shared by the Australian people and whose enjoyment benefits both physical and mental health.⁷⁷

This submission argues that in addressing climate change obligations, the *Climate Trigger Bill* enhances human rights. The international climate change regime ‘provides a number of entry points for the consideration of human rights’.⁷⁸ The Paris Agreement on climate change refers to human rights, specifically their inclusion in the ongoing implementation and evolution of the climate

⁷² ‘UN Climate Action Summit 2019, *United Nations* (Web Page, 23 September 2019) <<https://www.un.org/en/climatechange/un-climate-summit-2019.shtml>>.

⁷³ *Human Rights (Parliamentary Scrutiny) Act* (Cth) 2011; Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (Cth) 5.

⁷⁴ *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).

⁷⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 June 2010, 4900 (Robert McClelland, Attorney-General).

⁷⁶ ICESCR (n 73) art 12.

⁷⁷ *Climate Trigger Bill*; ICESCR art 12.

⁷⁸ Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2009) 183-206.

regime.⁷⁹ In narrowing the current gap between Australian legislation and international climate change obligations, the *Climate Trigger Bill* would be integral in the development of Australia's human rights compatibility framework.⁸⁰

This submission further argues that the *Climate Trigger Bill* advances human rights in a manner not dissimilar to the protections that were primarily conceived by the Act.⁸¹ Explanatory memoranda of the *Climate Trigger Bill* as introduced refer to notions of 'national environmental significance' with objectives to mitigate '[potential] losses to future generations' from misuse of environmental resources.⁸² These terms bestow a reverence or implied right to which future generations are owed stewardship from present conduct in relation to the environment, which reflect the terminology adopted amongst the international covenants. The *Climate Trigger Bill's* proposed assessment of emissions intensive actions addresses the growth of emissions and protects the national interest in line with the objectives at the conception of the Act.⁸³

III ENFORCEMENT OF THE BILL

A Penalties under ss 24G - 24H

This submission argues that the introduction of civil penalties for unapproved emission-intensive actions with significant impacts under ss 24G and 24H will act as a disincentive for emission-intensive actions,⁸⁴ and thus assist Australia in meeting international objectives for environmental agreements.

However, this submission is also concerned with whether stricter penalties alone are a significant disincentive. This submission notes that differing laws across Australian states and territories have inaugurated licensing systems in respect of pollution, and enforced these systems through various monetary penalties and criminal sanctions. For instance, under the *Environment Protection Act 1970*

⁷⁹ John H Knox, 'The Paris Agreement as a Human Rights Treaty' in Dapo Akande, Jaakko Kuosmanen, Helen McDermott, and Dominic Roser (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press, 2018); Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 *Climate Law* 109.

⁸⁰ Commonwealth, *Parliamentary Debates*, Senate, 13 February 2020, 964 (Sarah Hanson-Young, Senator for South Australia).

⁸¹ *Climate Trigger Bill*.

⁸² Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (Cth) 5.

⁸³ *Climate Trigger Bill*; *EPBC Act*.

⁸⁴ *Climate Trigger Bill* ss 24G, 24H.

(Vic),⁸⁵ a person who ‘intentionally, recklessly or negligently’ pollutes the environment or permits an environmental hazard will be subject to a fine of 2500 penalty units or seven years imprisonment (in the case of an individual), and 10 000 penalty units in the case of a corporation. A statutory defence is, nonetheless, available.⁸⁶

This submission notes that monetary penalties may not be an effective disincentive for companies that have significant levels of market capitalisation and profits.⁸⁷ For example, the Shell Oil Refinery at Corio Bay had breached environmental standards on hundreds of occasions over the years and was satisfied to pay modest fines as opposed to investing in sustainable practices.⁸⁸ While these penalties represent a deterrent for breaches, this submission suggests that stronger means for regulation and enforcement are required to separate the *Climate Trigger Bill* from previous legislation. These penalties should reflect the greater involvement of industry managers and community stakeholders in the decision-making processes of corporations.

B Judicial Review Issues

This submission notes that under ss 24G and 24H of the *Climate Trigger Bill*, individuals and groups are provided a form of remedy/redress through judicial review, which may encourage the courts to develop a jurisprudence around environmental law.⁸⁹ The inaccessibility of judicial review in the *EPBC Act* was recognised in a 2009 review which found a ‘lack of trust in the quality of decisions made under the [EPBC] Act’.⁹⁰ Further, as Senator McAllister expressed during the second-reading of the Bill,⁹¹ judicial reviews are not available to scrutinise the exercise of discretion throughout the approval process.

This submission believes that parties who are likely to make claims include those who are most exposed to the physical impacts of climate change, such as communities affected by rising sea levels or regional communities impacted by bushfires, in addition to environmental activist groups.⁹² This

⁸⁵ *Environment Protection Act 1970* (Vic) s 59E.

⁸⁶ *Environment Protection Act 1970* (Vic) s 66B(1A).

⁸⁷ Corrs Chambers Westgarth, ‘A New Era of Climate Change Litigation in Australia?’, *Insights* (Web Page, 08 April 2019) < <https://corrs.com.au/insights/a-new-era-of-climate-change-litigation-in-australia?fbclid=IwAR2VN79h-JAiWcCkL5QamemdHKpk5sBSfqKmpq3Z-G3SxjJj5sLg748kvu4> >.

⁸⁸ ‘The Shell Refinery: An Issue on the Nose’, *The Age* (Online, 11 November 2003) < <https://www.theage.com.au/opinion/the-shell-refinery-an-issue-on-the-nose-20031111-gdwpqy.html> >.

⁸⁹ Climate Trigger Bill ss 24G–24H; Kate Stanton, ‘Waging a Legal Battle on Climate Change’, *University of Melbourne* (Webpage) < <https://law.unimelb.edu.au/alumni/mls-news/issue-21-june-2019/waging-a-legal-battle-on-climate-change?fbclid=IwARlXOtTnw1TqEIKqIxxTa59NBeuC9kO0EiKZuist3-GSSaF8GVG1Y9BKdNU> >.

⁹⁰ Allan Hawke, *The Australian Environment Act – Report of the Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2009) 155.

⁹¹ Commonwealth, *Parliamentary Debates*, Senate, 24 February 2020, 5 (Jenny McAllister).

⁹² Corrs Chambers Westgarth (n 86).

submission notes that judicial review under the *Climate Trigger Bill* would provide the ability for courts to enforce penalties, places pressure on governments, corporations and various industries to assess the environmental impact of projects before implementation, motivating them to make necessary changes that reduce emissions to avoid litigation and future consequences.⁹³

This submission also notes that climate change litigation is a growing trend, with many individuals and groups successfully challenging governments and fossil fuel companies that are directly accountable for climate change harms.⁹⁴ Within Australia, the landmark case of *Gloucester Resources Limited v Minister for Planning*⁹⁵ recently decided that the development of a coal mine should be blocked because of its potential impact on climate change.⁹⁶ This submission proposes that this decision, as well as international case law, provides guidance on how the ‘significant impact on the environment’ threshold can be fulfilled, by demonstrating the link between emission raising projects and environmental degradation through climate change.⁹⁷

Finally, this submission notes that under s 24G(2)⁹⁸ the Minister still has power to approve certain projects regardless of their environmental impacts.⁹⁹ The inaccessibility of judicial review under the *EPBC Act* means this ministerial discretion may lack transparency, and reduce the stringency of application of tests in the approval process.¹⁰⁰

IV RECOMMENDATIONS

1. This submission supports the implementation of the *Climate Trigger Bill* for addressing a significant gap in the regulatory framework for environmental assessment at a national level.

⁹³ Brian Preston, ‘The Evolving Role of Environmental Rights in Climate Change Litigation’ (2018) 2(1) *Chinese Journal of Environmental Law* 131, 150; Don Smith, ‘Landmark Climate Change-Related Judicial Decisions Handed Down in the Netherlands and Australia; A Preview of What’s to Come?’ (2019) 37(2) *Journal of Energy and Natural Resources Law* 145, 147.

⁹⁴ Brian Preston, *Ibid*; Don Smith, *Ibid*; Jacqueline Peel, ‘Can Legal Action Force Governments and Business to Respond to Climate Change?’, *ABC News* (Online, 14 February 2020) <<https://www.abc.net.au/news/2020-02-13/climate-change-legal-action-solve-global-warming/11943146>>.

⁹⁵ *Gloucester Resources Limited v Minister for Planning* (n 27).

⁹⁶ *Ibid* para 525 - 528.

⁹⁷ Corrs Chambers Westgarth, ‘NSW Land and Environment Court Refuses Development Approval for Rocky Hill Coal Mine Project on Climate Change Grounds’, *Insights* (Web Page, 13 February 2019) <<https://corrs.com.au/insights/nsw-land-and-environment-court-refuses-development-approval-for-rocky-hill-coal-mine-project-on-climate-change-grounds?fbclid=IwARlhc-ipkbDthUOciz3aS2gASO8WAKnHIOfcTII3xX2tfwcWcCFo74kyvtg>>; Don Smith, above n 10.

⁹⁸ *Climate Trigger Bill* ss 24(G)(2).

⁹⁹ See above, Section II Part A (*Ministerial Discretions*).

¹⁰⁰ Department of the Environment, Water, Heritage and the Arts, Parliament of Australia, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, 30 October 2009) 143 [20.34].

This submission holds that the inclusion of a climate trigger in the *EPBC Act* complements other initiatives and commitments under international law by the Australian Government.¹⁰¹

2. This submission recommends that the *Climate Trigger Bill* should review exemptions and discretionary measures of the *EPBC Act*, and that the *EPBC Act* be reformed to focus more on defined environmental outcomes and objective evidence-based assessment, rather than ministerial discretions.
3. This submission recommends that the *Climate Trigger Bill* elaborate on the meaning of ‘significant impact’ under section 24G(1), such as providing specifically quantified emissions outcomes or other scientifically endorsed markers to define ‘significant’. This could take the form of an ‘emissions budget’ that would impose quantitative carbon emission limits and include Scope 3 emissions, and thus overcome the difficulty of establishing links between specific emission-intensive actions and a ‘significant impact’ on the environment.
4. This submission recommends that section 24J remain in place, as the inclusion of an activity-based definition of an ‘emissions intensive action’ provides for a clearer link to be established between an activity and its impact on the environment, and recognises the importance of including emissions-intensive actions in the *EPBC Act*. However, this submission recommends that the Committee consider the possible harms of section 24J noted in Part II of this submission and take steps to mitigate them through legislation or policy.
5. This submission also proposes that, as well as identifying and requiring approval for ‘emission-intensive actions’, the *Climate Trigger Bill* should introduce approaches to ensure that there are plans in place to abate emissions before ministerial approval is granted.
6. This submission notes the importance of the *Climate Trigger Bill* in advancing human rights in Australian law.
7. While this submission supports the penalty scheme under section 24, this submission recommends stronger means for identification, regulation and enforcement of breaches.

¹⁰¹ See Department of Industry, Science, Energy and Resources, ‘Australia’s 2030 climate change target’ *Department of Industry* (Fact Sheet, 2015) <<https://publications.industry.gov.au/publications/climate-change/climate-change/publications/factsheet-australias-2030-climate-change-target.html>>; *United Nations Framework Convention on Climate Change*, opened for signature 3 June 1992, 1077 UNTS 107 (entered into force 21 March 1994).