

20 May 2020

Committee Secretary
Standing Environment and Communications Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Sir/Madam

**ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT
(CLIMATE TRIGGER) BILL 2020**

1. The Australian Environment and Planning Law Group (the **AEPLG**)¹ of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to the Senate Environment and Communications Legislation Committee inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (the Bill)*.
2. The Bill seeks to amend parts of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* to define certain 'emissions intensive' actions as a matter of national environmental significance to be regulated by the EPBC Act and provide penalties for an individual or body corporate undertaking such actions without the appropriate authority under the Act.
3. As a preliminary comment, the AEPLG notes that the EPBC Act is currently under review and the issue of how the EPBC Act should be engaged in the regulation of greenhouse gas emissions and the impact of climate change on Australia's environment will no doubt be considered in detail by the Reviewer, Professor Graeme Samuel AC. The AEPLG recommends that this Committee have regard to any analysis and recommendations made by the Reviewer in relation to climate change matters prior to the finalisation of the Committee's inquiry into the Bill.
4. This submission comments on the provisions in the Bill in turn:

Item 1 SECTION 24F - Purpose of this Subdivision

5. The AEPLG notes the proposed wording of the Bill's purpose implies that the Bill is intended to satisfy Australia's obligations in full under certain Climate Change Conventions (as defined by reference to the *Product Emissions Standards Act 2017 (Cth)*). Clearly, this is not the case as Australia's emissions reduction

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

obligations can only be satisfied through a comprehensive economy-wide legislative and policy framework. The AEPLG recommends the wording be revised to clearly stipulate that the proposed Bill will go *some way* to fulfilling Australia's international emissions reduction obligations.

6. There is a need for a clear national policy approach to the regulation of greenhouse gas emissions to ensure that Australia can meet its international commitments to greenhouse gas reductions under the United Nations Framework Convention on Climate Change² and related agreements, including the Paris Agreement.³ It is also important that State and Territory governments demonstrate a commitment to the reduction of greenhouse gas emissions using the legislative and policy tools at their disposal as part of their contribution to Australia's national targets.

Item 1 Section 24G - Requirement for approval of emissions-intensive actions

7. While the approach to the drafting of this section and section 24H adopt the same formulation as the equivalent provisions for other matters of national environmental significance in the EPBC Act, it is not possible to assess the impact of this new trigger without a clear understanding of how a 'significant impact on the environment' as a result of an emissions-intensive action is to be defined and the test for determining how to measure what will, or is likely to, have such an impact. This issue is compounded by the inadequate definition of 'emissions-intensive action' in section 24J (see further comments below).
8. The 2009 statutory review of the EPBC Act conducted by Dr Allan Hawke recommended that the EPBC Act be amended to define the emission of more than 500,000 tonnes of CO₂-e of greenhouse gases as a matter of national environmental significance as a short term measure until a carbon price was in place.⁴ While this amendment was not implemented, it was at least clear what actions would potentially be caught by this form of 'climate trigger'.
9. While the issue of a 'significant impact' on other matters of national environmental significance has been left to guidelines, the AEPLG believes that such an approach is not appropriate in relation to the regulation of greenhouse gas emissions due to the complexity of demonstrating the link between emissions and impacts on the Australian environment. Courts and regulators around Australia have adopted different approaches to assessing this impact which has created both confusion and uncertainty for proponents⁵. If this proposed trigger is to work efficiently and effectively, there must be a discussion now about how a 'significant impact' is to be determined.

² United Nations Framework Convention on Climate, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

³ Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016).

⁴ Australian Government, Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair) (2009).

⁵ For example, the Western Australian Environment Protection Authority had to withdraw its greenhouse gas assessment guidelines due to an outcry from the business sector. They were redrafted and re-released nearly a year later. The approach to the assessment of greenhouse gas emissions by the New South Wales Land and Environment Court and the Independent Planning Commission has also attract controversy in recent years.

Item 1 Section 24J - What is an emissions intensive action?

10. The AEPLG is deeply concerned by the lack of clarity this clause provides, despite its critical role in the operation of the Bill.
11. It is unclear why there is a focus on emissions from three particular types of actions, if the intention of the Bill is to reduce Australia's overall emissions profile. Rather, the trigger should focus on the volume of emissions from any action, rather than where or how they are generated (and not consider the volume being emitted).
12. If the intention is to focus on emissions from the three listed types of actions, then much greater clarity is required on what those actions encompass. For example:
 - (a) what individual activities constitute 'mining operations'? Mining activity is generally defined in State and Territory mining laws and can include everything from hand prospecting to major extractive industry;
 - (b) what constitutes 'drilling exploration'? Is this intended to cover exploration drilling as a precursor to hard rock mining extraction or is it intended to cover drilling for oil and gas deposits or both? In the context of oil and gas exploration, does it cover both on and offshore activities? Exploratory drilling is also undertaken for reasons unrelated to resource extraction; for example, to search for water resources – is this type of 'drilling exploration' also intended to be covered?; and
 - (c) what extent of land clearing is required to constitute an 'emissions-intensive' action? And how would the regulation of land clearing at the EPBC Act level, based on 'emission intensity' overlap and interact with the regulation of the same activity at the State and Territory level?

Item 10 – After Paragraph 305(2)(ea)

13. The AEPLG raises a concern as to the wording of the proposed insertion, in that the double negative of any proposed agreement being '*not inconsistent with Australia's obligations under any Climate Change Conventions*' is vague and ambiguous and, in AEPLG's opinion, invites agreements that, contrary to the purpose of this item, do not contribute to fulfilling Australia's obligations. This provision would serve a stronger purpose if it were reworded such that any agreement be '*consistent with Australia's obligations*'.
14. The AEPLG would welcome the opportunity to discuss this submission with the Committee. In the first instance, please contact AEPLG Chair, Robyn Glindemann on

Yours sincerely

Margery Nicoll
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