Dear Committee Members,

Re: Submission on Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020

This Bill departs from international best practice in clean energy lending. The Bill intends to open up the CEFC to lending to gas projects at a time when other major investment banks are aligning with the Paris Agreement, and introducing screening tests and unambiguous greenhouse gas emissions limits. For example the board of the European Investment Bank (EIB) agreed upon a new energy lending policy in November 2018, announcing that the “EIB Group will align all financing activities with the goals of the Paris Agreement from the end of 2020.” In addition, the UK’s energy minister stated in July 2020 that “we are now committed to net zero (emissions) over the next 30 years” and that this guide impending action for a second green investment bank in that country.

Examination of the Second Reading Speech for the original Bill for the Clean Energy Finance Corporation show us that the original intention for the CEFC was to create an independent statutory authority, that would operate at arms-length from Ministerial intervention, subject only to general directions, rather than specific instructions.

It is important to recall the immediate past context of 3 prior attempts to repeal the CEFC Act, and 7 increasingly specific revisions of the Investment Mandate of the CEFC to date, (plus another revision announced by the Minister for Energy in the Second Reading Speech for this Bill).

In that context, it is evident that this Bill represents an additional and unnecessary attempt to intervene in the independent exercise of discretion by the CEFC. Among the most concerning aspects of the Bill are:

- The failure to include provisions to align all financing activities of the CEFC with the emission reduction goals of the Paris Agreement, to which Australia is a Party. In particular, it does nothing to implement Article 4 of the Agreement, in which Parties committed to global peaking of greenhouse gas emissions (GHGs) as soon as possible, and climate neutrality by the second half of the century.
- That the Bill proposes an ambiguous and problematic redrafting of the definition of Low Emissions Technology (new s.60(4)) which is open-ended and is contemplated to facilitate gas fired generation (2nd Reading, plus Explanatory Memo, para 67-68)
- Watering down of the requirement associated with exercise of the Investment function, which presently requires “at least half of the funds invested at that time for the purposes
of its investment function are invested in renewable energy technologies”, by exempting any Grid Reliability fund investments from this requirement (new section 58(3A)).

- Contemplation and facilitation of loss making investments in non-clean electricity generation using the grid reliability fund via arrangements such as such as Revenue Floors “including activities that may not make an investment return.”(s.82 Regulations and Expl.Mo Para 12,13)

- Ongoing ambiguity in the Act and Mandates about the definition of clean energy are compounded by amendments to s.60, in new s.60(4)) and in particular an attempt to provide an opportunity for GRF projects to circumvent the Board’s Guidelines about what amounts to a low-emissions technology (s.60(4)(a)

- Ambiguity about the definition of grid reliability fund investments (s.58A(c) by means of delegation of the detail to a future Investment Mandate, rather than adequately incorporating sufficient detail in the Act.

- Constitutional Limits: The provisions in the Bill are arguably not supported by the external affairs power, as they do not give effect to the UN Climate Change Convention and related international agreements to which Australia is a party, as they do not involve “investing in clean energy technologies that could reasonably be expected to control, reduce or prevent anthropogenic emissions of greenhouse gases.” (s.10(b), CEFC Act)

Since 2014, there has been tendency to use increasingly specific Ministerial Directions, impinging upon the discretion of the statutory corporation in performing its investment functions. This tendency is further problematised by the use of non-disallowable legislative instruments for this purpose. The Senate Committee for the Scrutiny of Bills in its report of 2 September 2020 drew attention to inappropriately delegate legislative power of a kind that ought to be exercised by Parliament alone. Further, the Senate Standing Committee for the Scrutiny of Delegated Legislation also raised “significant concerns about the increasing exemption of delegated legislation from parliamentary oversight”.

Finally, although the amendments purport to be directed at grid reliability, the National Electricity Rules already provide the independent energy market operator AEMO with a host of powers and responsibilities to address reliability issues, and require AEMO to meet a 99.998% reliability standard.

I intend to make a more detailed written submission in the near future to supplement this brief submission. I am available to further elaborate upon these points, at any future hearing in Canberra or by video-link.

Yours sincerely

Dr James Prest
Senior Lecturer, ANU College of Law