



NSWCCL SUBMISSION

SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

INQUIRY INTO THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (CLIMATE TRIGGER) BILL 2022 [NO. 2]

13 October 2022

NSWCCL

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (**NSWCCL**) is grateful for the opportunity to make a submission to the Committee's Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No.2] (**Bill**).

Introduction

1. NSWCCL supports laws that strengthen Australia's mitigation efforts as a crucial step towards protecting human rights from the impacts of climate change.
2. We believe the Bill fills an important gap in Australia's climate change framework which currently leaves the Commonwealth unable to properly manage the development of emissions intensive activities. By giving the Minister the power to ensure further development of such activities occurs in line with a carbon budget, the Bill provides a way towards ensuring Australia's newly legislated emissions target is achievable.
3. While we welcome the Bill as an improvement on the current state of affairs, this submission contains suggested improvements which we believe will further its aims.

Climate Change and Human Rights

4. The impacts of climate change present a range of threats to human rights, including the right to life, health, food, water, housing and culture. This was highlighted in the recent decision of the UN Human Rights Committee which found Australia had failed to protect from climate impacts the rights of Torres Strait Islander communities to culture, and freedom from arbitrary interferences with private life, family and home.¹ The decision also recognised that the impacts of climate change may expose individuals to violations of their right to life in the future.²
5. International human rights treaty bodies have made clear that in order to avoid the worst impacts of climate change upon human rights, developed countries also have obligations to intensify their mitigation efforts.³ Currently, Australia's climate policies are not consistent with limiting warming to 1.5°C,⁴ a level of warming that may limit the worst impacts of climate change on human rights.
6. As such, Australia has obligations to intensify its mitigation efforts, not only under the *Paris Agreement*, but also under international human rights law.
7. To be clear, we consider climate change to be the single greatest threat to the long-term advancement and enjoyment of human rights for humanity today. Any delay to such intensification of mitigation efforts is not only a breach of human rights obligations today, but contributing to a future where the enjoyment of all human rights is in jeopardy.

Why the Bill is necessary

8. The Bill provides a much needed mechanism to ensure future development of emitting projects occurs in a way that is consistent with Australia's emission reduction target.

¹ Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [8.12].

² *Ibid* [8.7].

³ See for example: Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Norway*, 30th sess, UN Doc E/C.12/NOR/CO/6 (6 March 2020) [11]; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, 30th sess, UN Doc E/C.12/BEL/CO/5 (6 March 2020); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Switzerland*, 2562nd sess, UN DOC CRC/C/CHE/CO/5-6 (24 September 2021) [37].

⁴ Climate Action Tracker, 'Australia' (2 August 2022)

<<https://climateactiontracker.org/countries/australia/targets/>>

9. The current legislative framework for greenhouse gas mitigation lacks a coordinating mechanism to ensure that decisions of the Australian Government (including development approvals) are made consistent with Australia's newly legislated climate target. We note that if approved, emissions from planned fossil fuel projects have the capacity to negate the reductions achieved by current climate policies and make achieving the target impossible.⁵
10. This is because there is currently no requirement under the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)* for the Minister to consider climate impacts, or for large emitting projects to be referred for Commonwealth approval unless they happen to impact on another matter of national environmental significance.
11. The Bill goes part of the way towards introducing a mechanism to ensure Australian government decisions are made consistent with the target insofar as it will require, for the first time at the Commonwealth level, the emissions of development proposals. We consider setting a carbon budget is key to this as it provides the Minister with a framework within which to analyse how individual projects will impact the attainment of the target.

Recommendation 1: That the Government set a carbon budget to provide the Minister with a framework within which to analyse how individual projects will impact the attainment of the target.

Approvals

12. However, we note that the requirement to consider the national carbon budget and Australia's greenhouse gas reduction targets provided by proposed section 141 does not require the Minister to make decisions consistent with the carbon budget or target (except in the case of actions with prohibited impacts as addressed below).
13. We note this is largely consistent with the existing structure of the EPBC Act which allows the Minister to weigh environmental impacts against economic and social considerations, allowing the Minister to approve the action notwithstanding adverse impacts on the matters protected by the EPBC Act.⁶ Where climate impacts have been considered by the Minister, there is a trend of trading off climate impacts for short term economic gains.⁷
14. As mentioned previously, climate change threatens human rights. Rights such as the right to life are absolute and cannot continue to be traded off against competing economic interests.
15. For this reason, we are concerned that the discretion given to the Minister to approve projects gives scope to preference short term economic gains over attainment of the target.

Recommendation 2: That the Bill contain a prohibition on any action that would cause the carbon budget to be exceeded. This would essentially force the Minister to ensure approval decisions were consistent with achieving the carbon budget and target.

Prohibition on emissions over 100KT

16. We recognise the Bill attempts to place some hard limits on emissions through proposed section 141A which prohibits the approval of actions that will produce over 100 Kilotonnes (KT) of CO₂ emissions.

⁵ The Australia Institute, 'Undermining Climate Action the Australian Way' (Discussion Paper, November 2021) <<https://australiainstitute.org.au/wp-content/uploads/2021/11/P1163-Undermining-climate-action-the-Australian-way-WEB.pdf>>.

⁶ *Minister for the Environment v Sharma* [2022] FCAFC 35 [87] (ALLSOP CJ).

⁷ See for example: Statement of Reasons for Approval under the Environment Protection and Biodiversity Conservation Act 1999 extension of the existing Vickery Coal Project (EPBC 2016/7649), [282].

17. Given the EPBC Act fails to account for the cumulative impacts of multiple developments,⁸ this would allow a series of actions each below 100KT to produce cumulative emissions of well above 100KT. As pointed out in the *Rocky Hill Case*, climate change is a problem caused by the cumulative impacts of a series of small sources meaning that all emissions sources are important regardless of their size.⁹
18. As such, we do not consider prohibiting impacts over 100KT is a practical way to prohibit exceedance of the carbon budget. This is especially true as the remaining capacity in the carbon budget will vary across time.

Recommendation 3: A prohibition on the development of activities that would exceed the carbon budget is a more flexible prohibition that will better work towards ensuring the carbon budget is met than a somewhat arbitrary limit.

Measuring Emissions

19. We note that proposed section 527F(2) gives discretion to the Minister to develop methods to measure emissions for the purpose of the EPBC Act.
20. With regards to scope 1 and 2 emissions (those emissions emitted directly by an activity or indirectly through the consumption of electricity) we note that the *National Greenhouse and Energy Reporting Act 2007 (NGER Act)* already establishes a national framework for scope 1 and 2 emissions reporting including methods to measure emissions under the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*. To establish additional methods under the EPBC Act gives rise to unnecessary duplication.
21. For this reason, we recommend that proposed section 527F(2) refers to the measurement of emissions in accordance with the NGER Act.
22. This said, we also believe that a fulsome consideration of a development approval would also include consideration of scope 3 emissions (those emissions generated in the wider economy as a result of the development, for example the burning of coal by a mine's customer). Given the NGER Act does not deal with scope 3 emissions, we consider guidance will be required to measure scope 3 emissions for the purposes of the EPBC Act.
23. Further, we believe the Bill should be amended to make clear that scope 3 emissions are required to be considered. While the EPBC Act defines environmental impact to include the indirect consequences of a development,¹⁰ we consider the fact that the Bill is silent as to what classes of emissions should be considered creates unhelpful ambiguity as to what classes of emissions are covered. We recommend that to remove doubt, this be clarified by expressly referring to the classes (scope 1-3) of emissions to be considered.

Recommendation 4: That proposed section 527F(2) refer to the measurement of emissions in accordance with the *National Greenhouse and Energy Reporting Act 2007 (NGER Act)*.

Recommendation 5: Provide guidance to measure scope 3 emissions for the purposes of the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.

Recommendation 6: That the Bill be amended to make clear that scope 3 emissions are required to be considered. This will be achieved by expressly referring to the classes (scope 1-3) of emissions to be considered.

⁸ *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254, 268 [39]-[42] (Jessup J, Kenny J agreeing at 256 [1], Middleton J agreeing at 278 [70]).

⁹ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [515].

¹⁰ EPBC Act s 257E.

This submission was prepared by Jay Gillieatt on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance and would be pleased to assist further if required.

Yours sincerely,



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