

Law Reform Submission: Independent Review of the Environment Protection & Biodiversity Conservation (EPBC) Act 1999 (Cth)

**Rose Foster, Lachlan Glaves, Angela Goggin
(Climate Justice Initiative)**

About the Authors

This submission was researched and authored by UQ law students **Rose Foster, Lachlan Glaves** and **Angela Goggin** under the academic supervision of **Dr Justine Bell-James**. The submission was prepared for and on behalf of the UQ Pro Bono Centre's **Climate Justice Initiative**. Student researchers and Dr Bell-James undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

About the Climate Justice Initiative

Under its 2018-2021 Strategic Plan, the UQ Pro Bono Centre is committed to environmental sustainability through legal work (Goal 5.3). Under this strategic goal, the Centre has established a student-led Climate Justice Initiative. The Climate Justice Initiative is a group of senior law students who have a demonstrated commitment to environmental law and climate justice, and who wish to undertake pro bono legal research on climate justice matters. This includes research to support law reform, pro bono legal work and internal capacity building for the legal assistance sector.



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1. Introduction

This submission responds to questions five and six of the Discussion Paper.

The incorporation of climate change considerations should be a priority for reform of the *Environment Protection and Biodiversity Act 1999* (Cth) (**the Act**). This would ensure the Act's continued effectiveness as Australia's major piece of federal environmental protection legislation.

This submission proposes the following:

1. It is essential that the threat of climate change to Australia's environment is acknowledged in the Act, and that measures are implemented to address this threat to ensure that the Act is effective in achieving its statutory objectives, namely 'to provide for the protection of the environment';¹
2. In line with the near-universal scientific consensus on protecting the environment from the threats it faces this century, the most effective amendment would be the imposition of a prohibition on certain emissions-intensive activities;
3. Additionally, a number of amendments should be made to address the threat of climate change in the Act, and to require Ministerial consideration of proposed projects' contribution to climate change and consequent impact on matters of national environmental significance in the assessment process.

2. Climate Change and the EPBC Act

2.1 Threat of Climate Change and Urgency of Action

There is clear scientific consensus concerning anthropogenic climate change caused by the release of greenhouse gasses, and the urgency of action required to combat the threat it poses to society, the economy and human livelihood generally.² Furthermore, the threat is no longer an abstract prediction: many of the 'worst-case scenario climate change predictions made over 30 years ago have now been realised'.³ The 2018 *State of the Climate Report* notes that Australia's climate system has so far warmed by just over 1°C.⁴ Eustatic sea levels have risen by 20cm since the 19th Century which, in Australia, poses a risk of exposure to over \$226 billion in residential and commercial development and infrastructure.⁵ Rainfall patterns have caused mass aridification and the severity of extreme fire weather is increasing,⁶ as demonstrated by Australia's recent devastating fire season.

¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1) ("EPBC Act").

² The Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)] (IPCC, Geneva, Switzerland) 2, 4.

³ Great Barrier Reef Marine Park Authority, *Great Barrier Reef Outlook Report 2019* (Australian Government, 2019) 161.

⁴ The Bureau of Meteorology and CSIRO, *State of the Climate Report* (2018), Commonwealth of Australia, 4.

⁵ Ibid 13; Department of Climate Change and Energy Efficiency (2011) *Climate Change Risks to Coastal Buildings and Infrastructure*, 3.

⁶ The Bureau of Meteorology and CSIRO (n 4), 2.

These observed changes are projected to worsen in the future,⁷ though the long-term severity of these impacts depends upon the extent of actions taken to reduce emissions.⁸ There are significant differences in the severity of impacts between 1.5°C and 2°C of warming,⁹ demonstrating the necessity to curb global emissions and to do so immediately. This requires a global, concerted effort on the part of governments and societies to shift away from fossil-fuel dependence.

2.2 Failures of EPBC Act to protect MNES

A key object of the EPBC Act is to protect ‘matters of national environmental significance’ (‘MNES’).¹⁰ Seven of the nine MNES to which the Act explicitly applies have been or are vulnerable to the effects of climate change.¹¹ Since the last review of the Act, the Great Barrier Reef has suffered from two mass coral bleaching events, which are ‘directly attribut[able] to warmer-than-average sea temperatures due to climate change’.¹² The 2019/2020 bushfires across Australia, the extent of which was aggravated by climate change,¹³ affected seven of Australia’s nineteen World Heritage listed properties.¹⁴ Climate change also poses dire risks to Australia’s Ramsar wetlands,¹⁵ threatened and migratory species, and the ecological communities which sustain Australia’s complex biodiversity.¹⁶ By failing to address climate change, the Act fails to provide for the protection of the matters of national environmental significance,¹⁷ and so fails to meet its own objectives.

⁷ Ibid 22.

⁸ Ibid.

⁹ See Intergovernmental Panel on Climate Change, ‘Summary for Policymakers’ in *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018).

¹⁰ EPBC Act (n 1) s 3(1).

¹¹ The EPBC Act outlines nine areas of national environmental significance. The seven areas threatened by climate change are: World Heritage (s12); National Heritage (s15B); wetlands of international importance (s16); listed threatened species and communities (s18); listed migratory species (s20); the marine environment (s23); and the Great Barrier Reef Marine Park (s24B). The remaining two areas of national environmental significance are protection of the environment from nuclear actions (s21) and protection of water resources from coal seam gas development (s24D).

¹² Great Barrier Reef Marine Park Authority (n 3) 161.

¹³ Climate Council, ‘“This is Not Normal”: Climate Change and Escalating Bushfire Risk’ (Briefing Paper, 12 November 2019).

¹⁴ Department of Agriculture, Water and the Environment, ‘Wildlife and Threatened Species Bushfire Recovery Research and Resources’ (Impact of Bushfires on World Heritage Areas), Australian Government, available at: <http://environment.gov.au/biodiversity/bushfire-recovery/research-and-resources> (accessed 26 February 2020); Department of Agriculture, Water and the Environment, ‘Australia’s World Heritage List’, Australian Government, available at: <https://www.environment.gov.au/heritage/places/world-heritage-list> (accessed 26 February 2020).

¹⁵ Wetlands Section, Australian Government Department of the Environment and Energy, ‘Wetlands Australia 31: Assessing climate change risks to Australia’s international important wetlands’ (2019) <http://www.environment.gov.au/water/wetlands/publications/wetlands-australia/national-wetlands-update-february-2019/assessing-climate-change-risks>.

¹⁶ Lynda Chambers, L Hughes and Mike Weston, ‘Climate Change and its Impact on Australia’s Avifauna’ (2005) *Emu* 105, 1-20.

¹⁷ EPBC Act (n 1) s 3(1).

2.3 EPBC Act and Climate Change

The EPBC Act is the Federal Government's primary environmental legislation,¹⁸ and in its current form does not address climate change as a standalone issue. As one of the 'main pressures facing the Australian environment',¹⁹ climate change poses a more universal threat, beyond matters of national environmental significance. The EPBC Act is designed to ensure general environmental protection and uphold the principles of ecologically sustainable development.²⁰ As climate change will impact every aspect listed in the objects of the Act, the absence of provisions that address this threat is notable. Australia has committed to reduce emissions by 26% to 28% under the Paris Agreement by 2030.²¹ To ensure these obligations are met and the objects of the Act are fulfilled, Australia requires a regulatory scheme that translates Australia's national commitments into an effective climate change legislative framework.

3. Suggested Amendments – Energy Production

3.1 Prohibition

In acknowledgement of the urgency of the climate crisis, a possible amendment could be a blanket prohibition on certain greenhouse gas emissions-intensive activities. For example, a new section should be inserted into the EPBC Act providing that 'the Minister is prohibited from approving any and all projects involving the creation of a thermal coal mine or any activity involving the extraction and/or export of coal for use in energy generation'. This prospective provision replicates the approach taken with respect to nuclear installations in s 140A of the Act.

A similar provision could be included in relation to gas.

Why is such a prohibition required?

This course of action responds to the urgent requirement of undertaking 'rapid and far reaching transitions' in industry to limit global warming.²² The IPCC advises that this necessitates a reduction in coal use in electricity production globally from approximately 25% in 2020 to 5% by 2050.²³ In 2017, Australian coal contributed to a significant 3.5% of global emissions.²⁴ The imposition of a prohibition at the federal level would reflect a commitment on Australia's part to its international obligations under the Paris Agreement to dramatically reduce its emissions by 2030.²⁵

This prohibitive approach provides **consistency**, **certainty** and **clarity** to environmental approvals. It eliminates investment uncertainty in the energy sector, instead encouraging investment in

¹⁸ Department of Agriculture, Water and the Environment, 'Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)' <https://www.environment.gov.au/epbc>.

¹⁹ Department of Agriculture, Water and the Environment, *State of the Environment Report* (2016), Commonwealth of Australia.

²⁰ *EPBC Act* (n 1) s 3A.

²¹ Department of Agriculture, Water and the Environment, 'Paris Agreement' (2019) available at <https://www.environment.gov.au/climate-change/government/international/paris-agreement>.

²² Intergovernmental Panel on Climate Change (2018) (n 9) 15.

²³ *Ibid*, section 2.4.

²⁴ Paola Parra et al, Climate Analytics, Evaluating the significance of Australia's global fossil fuel carbon footprint (Report, 2019) 13.

²⁵ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [446] citing Expert Report of Will Steffen, 12 June 2018, [50]-[51].

technology that will facilitate a low carbon economy, including electrification, hydrogen, sustainable bio-based feedstocks, product substitution, and carbon capture, utilisation and storage.²⁶

Implementing a prohibition in the Act privileges protection of MNES, and removes the possibility of political pressure to approve new mines and electricity generation projects, even where such actions will have significant environmental impacts. It also removes the burden on environmental groups or other third parties to challenge approvals, and who are forced to rely on obscure sections of the Act to ensure proper scrutiny of the federal decision-making process.²⁷ A prohibition would reduce the circumstances in which approvals are subject to legal challenge on climate change grounds, thereby improving certainty and confidence in the assessment process. In implementing this prohibition, it is also necessary to support regional communities that are reliant on coal mining. A prohibition provides the government with an opportunity to implement a clear strategy to facilitate employment of these communities in different industries.

3.2 Alternative Amendments

While prohibition is the most efficient and effective reform in relation to the scientific evidence, in addition it is proposed that the following amendments are implemented:

1. Amendment of the Act's objects (**s 3**), to include acknowledgement of the need to proactively limit its impacts on Australia's natural environment;
2. Amendment of the definition of 'impact' (**s 527E**), to explicitly include cumulative downstream emissions; and,
3. Amendment of the list of the Minister's mandatory considerations in deciding whether or not to approve an action (**s 136**), to include a project's cumulative contribution to global greenhouse gas emissions.

3.2.1 Amend the Objects

A new subsection should be inserted into **s 3** 'Objects' to include the following: 'to assist in the mitigation and prevention of impacts of climate change'. This provision remains consistent with the Commonwealth's powers under s 51(xxix) of the Constitution (the external affairs power), as it assists in implementing Australia's international obligations under the Paris Agreement. It would also advance the incorporation of both the precautionary principle and intergenerational equity into the Act.

This measure is necessary to ensure that climate change is recognised as the greatest threat to the environment in Australia's primary federal environmental legislation, and informs decision-making under the Act.

3.2.2 Amend the Definition of 'Impact'

The definition of 'impact' in **s527E** should include a new subsection that ensures greenhouse gas emissions fall within the scope of indirect impacts. It is essential that the Act requires proponents and decision makers to consider such 'scope 3' emissions (ie third party burning of coal mined, which may occur overseas). The Act should be amended with a new subsection s527E(2)(h) stating 'with the exception of greenhouse gas emissions, which fall within the scope of impact at

²⁶ Intergovernmental Panel on Climate Change (2018) (n 9).

²⁷ *Australian Conservation Foundation Inc v Minister for the Environment* [2017] FCAFC 134, [50].

s527E(1)(b)'. In practice, this would ensure that the cumulative impacts of the Australian coal industry are adequately considered in the decision-making process.

3.2.3 Amend the Mandatory Considerations

A new subsection should be inserted into **s 136** of the Act to include projects' contribution to climate change as one of the Minister's mandatory considerations in the approval process. This course of action is justified by the fact that given the pressure to allow new actions, Ministers are unlikely to consider factors they are not legislatively obliged to consider.

3.3 The Imposition of a Greenhouse Gas Trigger in the Assessment of 'Impact'

In the 2009 submission to the review of the EPBC, Dr Allan Hawke recommended the introduction of an 'interim greenhouse trigger', where above a prescribed amount of greenhouse gas (**GHG**) emissions a project would be considered a 'controlled action'.²⁸ However, the 2009 review was conducted at a time where the Carbon Pollution Reduction Scheme was to be the primary mechanism for regulation of Australia's carbon emissions.²⁹ In the absence of such a scheme presently, the EPBC Act must act as the primary mechanism for GHG prevention and reduction. A greenhouse gas trigger would merely serve to provide extra accountability for proposed activities with high CO₂ emissions, rather than preventing them from proceeding entirely. Currently, as the IPCC have warned of the *immediate* need to reduce GHG emissions to prevent global disaster by transitioning away from traditional industrial practices,³⁰ implementing a greenhouse gas trigger at this stage would be a case of 'too little, too late'.

4. Other high GHG emission activities

Whilst energy generation is a significant source of GHG emissions in Australia, there are other activities which generate high levels of GHG – for example, land clearing and transport.

We recommend that a GHG trigger be introduced, similar to the trigger proposed in the Hawke Review. This would capture all non-energy production activities where GHG emissions are projected to exceed a threshold amount. If this trigger is activated, the action would require assessment and approval under the Act.

5. Conclusion

Ultimately, climate change is the most pressing issue of our time. It necessitates strong leadership at a national level. The proposed amendments respond to the urgency of the threat and demonstrate Australia's commitment to a sustainable future.

²⁸ Dr Allan Hawke, 'Review of the EPBC Act' (2011) 1 *National Environmental Law Review* 35, 39.

²⁹ Independent Review into the EPBC Act, 'Fact Sheet 5' (2011).

³⁰ Intergovernmental Panel on Climate Change (2018) (n 9) 15.

We commend the students on their diligent research and we endorse this submission:

Law staff:

Associate Professor Francesca Bartlett
Associate Professor Francesca Bartlett

Professor Jennifer Corrin



Dr Xan Chacko



Dr Maria Itati Dolhare

Dr Maria Itati Dolhare

Hannah Fannin



Professor Graeme Orr

Professor Graeme Orr

Professor Andreas Schloenhardt
Professor Andreas Schloenhardt

Monica Taylor



Rebecca Wallis



Law students:

Elizabeth Aisi

Anna Kretowicz

Lachlan Hinchliff

Sophia Horrocks

Madeleine Pitman

Gabriela Roworth

Ella Veit-Prince



Contact details

UQ Pro Bono Centre

T +61 7 3365 8824

E probono@uq.edu.au

W uq.edu.au

CRICOS Provider Number 00025B