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SUBMISSION TO THE EPBC AMENDMENT (CLIMATE TRIGGER) BILL 2020

The Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

20 May 2020

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

Dear Committee Secretary,

RE: Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020

The Australian National University GreenLaw Law Reform and Social Justice Project (GreenLaw) welcomes the opportunity to provide this submission to the Senate Standing Committee on Environment and Communications concerning the Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020 (the Bill).

The ANU Law Reform and Social Justice (LRSJ) is a program at the ANU College of Law that supports the integration of law reform and principles of social justice into teaching, research and study across the College. LRSJ provides opportunities for students to explore and interrogate the complex role of law in society, and the part that law and lawyers play in promoting both change and stability.

GreenLaw is a student research and policy reform group formed within the LRSJ program with the academic supervisory support of Associate Professor Vivien Holmes.

This submission reflects the views of GreenLaw researchers and is not intended to be institutional submission by of the Australian National University nor is it intended to represent the views of our respective employers.

If further information is required, please contact GreenLaw at green_law@outlook.com.

Introduction

This submission focuses on assessing whether the Bill is consistent with Australia's international obligations, and the impact the Bill would have on Australian projects. In doing so, the submission draws heavily on the research GreenLaw conducted earlier this year in relation to claims made concerning the impact of green lawfare in Australia, this research was submitted to the ongoing EPBC Review and is pending publication in the Environmental and Planning Law Journal This submission also makes a number of minor recommendations concerning the scope of the definitional and criminal offence sections of the Bill. We believe these recommendations would strengthen the Bill and reduce the risk of potential unintended effects for stakeholders.

Summary of Recommendations

Recommendation 1

> *In light of GreenLaw's empirical submission to the EPBC Act Review, that the committee recognise there is no empirical evidence of lawfare-style litigation occurring under the EPBC Act or that expanding the Act's jurisdiction will result in vexatious litigation.*

Recommendation 2

> *That the committee support this Bill, notwithstanding the ongoing EPBC Review, as the proposed amendments are appropriately tailored. The addition of a climate trigger to the Act is consistent with Australia's international obligations and would better signal to industry that environmentally sustainable projects should be pursued.*

Recommendation 3

> *That the committee consider drafting the climate trigger to focus on substantial emissions impact, rather than a holistic environmental assessment (as the Bill is currently drafted), as a holistic assessment may not adequately fulfil Australia's international obligations.*

Recommendation 4

> *That the committee considers whether thresholds concerning the size of the project ought to be adopted in the definitions contained in the proposed s 24J.*

Recommendation 5

> *That the penalty provision contained in s 24H explicitly states the level of knowledge required by an individual to commit an offence.*

Recommendation 1 - Green Lawfare

Recent comments by government and industry lobby groups concerning the *EPBC Act* have focused on the supposed impact of 'green lawfare' on business development in Australia.[1] Given the economic impact of COVID-19 it is critical such allegations are assessed on an evidential basis, to ensure the interests of the public and business are met.[2] Broadly put, the allegations are that environmental NGOs are engaging in targeted litigation to disrupt and delay development projects in Australia.[3] In making these claims, commentators argue that NGOs are using s 487 of the *EPBC Act* to pursue unwinnable cases and seeking injunctions to block projects from taking place. This narrative could be used to justify recommending the Climate Trigger Bill not be passed. However, based on our empirical analysis of *EPBC Act* cases from 2009 – 2019,[4] there is no evidence that lawfare, even targeted lawfare, is being used to shut down development projects. On the contrary, very few environmental decisions are challenged (only 32 suits over a decade), injunctions are rarely sought, and NGOs are winning cases at a rate comparable to general judicial review cases. These conclusions mirror those found in peer reviewed journal articles, which should form the starting point for discussion in this space.[5]

Our research concluded that:

> public interest litigants are not abusing court processes to disrupt and delay proponents. The study demonstrated that major projects subject to public interest litigation were generally economically viable after litigation. There was no direct link between the cost or delay or litigation and a proponent deciding to not commence a project.[6]

We urge the committee to not accept any submissions claiming that including a climate trigger would increase the occurrence of green lawfare in Australia and harm local development projects. Any proposed amendments to the Bill based on such assertions should be rejected absent clear, empirical, peer reviewed evidence that green lawfare is occurring. Instead the committee should focus on whether the proposed climate trigger accords with Australia's international obligations.

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[1] See, eg, Lisa Cox, ''Cashed-up activists' should not be able to hold up developments, Australia's resources minister says', *The Guardian* (online, 30 April 2020); Cian Hussey, 'The Growth and Complexity of Environmental Regulation (IPA Report) 10 <https://ipa.org.au/wp-content/uploads/2020/04/IPA-Report-EPBC-Paper-1.pdf>.

[2] Kurt Wallace, 'A Simple Stimulus Step That Won't Cost a Cent', *Institute of Public Affairs* (online, 20 March 2020) <https://ipa.org.au/publications-ipa/a-simple-stimulus-step-that-wont-cost-a-cent-stop-green-lawfare>; Kurt Wallace, *Section 487: How Activists Use Red Tape to Stop Development and Jobs (2020 Update)* (Report, Institute of Public Affairs, March 2020) 2.

[3] John Hepburn, Bob Burton and Sam Hardy, *Stopping the Australian Coal Export Boom: Funding proposal for the Australian anti-coal movement* (Report, November 2011) 6; Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment).

[4] GreenLaw, Submission to the *EPBC Act Review* 4 (not yet published by the committee). We would be happy to supply the Committee with a copy of the submission if requested.

[5] See, eg, Rachel Pepper and Rachael Chick, 'Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare" (2018) 35 *Environment and Planning Law Journal* 177; Nicola Pain and Rachel Pepper, 'Legal Costs Considerations in Public Interest Climate Change Litigation' (2019) 30(2) *King's Law Journal* 211; Chris McGrath, 'Myth drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33(1) *Environmental and Planning Law Journal* 324.

[6] GreenLaw (n 4) 10.

Recommendation 2 - Appropriateness of the Bill

We recommend that the committee should support this Bill notwithstanding the ongoing *EPBC Review*. The *EPBC Review* is a wide-ranging, scheduled inquiry into the *EPBC Act* as a whole, without a specific consideration of the climate trigger question. The published discussion paper refers to stakeholder proposals for a climate change trigger, but no further references are made.[7] The discussion paper also notes that 'it is not a review of environment policy – which is the job of government'.[8]

This Bill is tailored, specific legislation looking to give effect to Australia's international environmental obligations. As such, it is appropriate to pursue the implementation of a climate trigger separately from the overarching *EPBC Review*. This Bill generally accords with Australia's international obligations. However, the open-ended assessment contained in section 24G(1) and section 24H(1)(b) may not be the best approach 'to fulfil Australia's obligations under the Climate Change Conventions',[9] particularly the *Paris Agreement*.[10]

In particular, 'a significant impact on the environment' is a qualitative, holistic assessment, rather than a quantitative assessment of emission impact. The *Paris Agreement* has a significant focus on emissions reduction.[11] A more effective way for a climate trigger to give effect to this obligation could be for the offence to be defined by substantial emissions impact rather than a significant impact on the environment.

This wording would also align more closely to the approach taken of other triggers under the *EPBC Act*. For example, section 22 specifically outlines what acts constitute a nuclear action to inform the s 21 requirements for approval. The clear guidelines in s 22 are appropriate and adapted to give effect to Australia's international obligations and achieve positive environmental outcomes. Accordingly, wording the climate trigger to target emissions impact rather than broader environmental impact would be more tailored and appropriate for the harm it seeks to prevent.

Overall, this Bill generally accords with Australia's international obligations. In particular, this Bill would be a strong signal to industry in Australia that projects that are environmentally sustainable and minimise environmental impact are to be preferred. Such a step may help drive further renewable energy investment in Australia (noting that renewable energy projects are more profitable and cost efficient that fossil fuel energy sources).[12]

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[7] Graeme Samuel, 'Discussion Paper' (Independent Review of the EPBC Act, 21 November 2019) <https://epbcactreview.environment.gov.au/resources/discussion-paper>

[8] Ibid.

[9] *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020* (Cth) s 24F

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

[11] See, eg, *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016), art 6(4).

[12] See, eg, Adam Morton, 'Wind and solar plants will soon be cheaper than coal in all big markets around the world, analysis finds', *The Guardian* (online, 12 March 2020) <https://www.theguardian.com/environment/2020/mar/12/wind-and-solar-plants-will-soon-be-cheaper-than-coal-in-all-big-markets-around-world-analysis-finds>; Carbon Tracker, 'How to waste over half a trillion

Recommendation 3 – 5 Consequential Amendments

For completeness, GreenLaw compared the proposed Bill with related *EPBC Act* provisions and makes two recommendations concerning the proposed amendments. The first relates to the definition of emissions-intensive actions that may need to go through the process of seeking ministerial approval. The proposed s 24J defines an emissions-intensive action:

> An action is an emissions-intensive action if the action:
> (a) involves mining operations; or
> (b) involves drilling exploration; or
> (c) involves land clearing; or
> (d) is specified in the regulations for the purposes of this paragraph.

If an action is an emissions-intensive action, then under s 24G approval (or another similar exemption) must be sought to take the action if the action has or is likely to have a significant impact on the environment. While we agree that this approach generally accords with Australia's international obligations as outlined above, the lack of a threshold relating to the amount of mining operations, drilling exploration or land clearing required before a project is subject to s 24G is of concern. Given that environmental regulations ought to be tailored and appropriate to the harm they seek to prevent, we suggest the committee consider whether it may be more useful to include a minimum emissions intensity factor for a project to fall within the scope of the section. We make no comment regarding the best method to calculate such a factor. Similarly, given the current lack of a definition within the *EPBC Act* for "land clearing", "drilling operations" or "mining operations", we recommend that definitions of these terms be included in the Bill to increase certainty for regulators, courts, NGOs and developers as to the scope of the climate trigger provisions.

The second amendment we recommend the committee consider is to s 24H. Section 24H currently does not state the fault element required for a person to commit an offence. We note that the *Commonwealth Criminal Code* requires provisions to expressly state if they are a strict or absolute liability offence,[13] and that similar provisions in the *EPBC Act* contain elements that are strict liability elements.[14] Therefore, we recommend the committee consider whether the fact the action is an emissions-intensive action ought to be an element of strict liability or have a higher fault requirement.

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dollars: The economic implications of deflationary renewable energy for coal power investments' (Report, 12 March 2020) <https://carbontracker.org/reports/how-to-waste-over-half-a-trillion-dollars/>.

[13] *Commonwealth Criminal Code* divs 5–6.

[14] See, eg, *EPBC Act* s 18A.