ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (CLIMATE TRIGGER) BILL 2022: Submission to the Senate Standing Committees on Environment and Communications

13th October 2022

Introduction

The ***Beyond Gas Networ***k is a network of volunteer citizen based climate action networks with links across Australia. We are committed to publicising the scale and impact of fossil gas on emissions both domestic and exported, on people and on country. On the precipice of a climate calamity, we advocate the rapid replacement of a fossil fuel based economy with a renewably based future.

We thank the Committee for the opportunity to make a submission on this critically important Bill and inquiry.

Why the EPBC Act should include a Climate Trigger

The EPBC Act is more than 20 years old and is in need of extensive reform. It has been well established, broadly acknowledged and underlined by the Samuel Review findings[1] that the Act is complex, inefficient, and most importantly, not meeting its aim of protecting the environment and conserving biodiversity.

Weaknesses of the Act

The Act fails to address some of the most significant environmental challenges facing Australia, including climate change, land clearing and cumulative impacts. Its implementation has been undermined by resourcing issues, the interaction between Federal and State responsibilities, and the employment of overlapping responsibilities to leverage the resource advantages of the fossil fuel lobby.

A climate trigger has been proposed in previous reviews of the EPBC Act

This is not a novel proposal: a national trigger to oversee high greenhouse gas (GHG) emitting projects has long been considered a major gap in the national environmental law.

[1] https://epbcactreview.environment.gov.au/

Previous ministers and several reviews, most recently in 2020, have considered or recommended a greenhouse trigger under the EPBC Act[2].

The key policy gap in the Act

A key failure of the existing EPBC Act is the inability of the Environment Minister to employ it to address the impact of climate change on the Australian environment and especially on the environment and survival of threatened species and of areas requiring special protection including those declared as being of national and international environmental importance - such as the Great Barrier Reef. The current Bill's explanatory memorandum puts it well *"There are nine matters of national environmental significance under the EPBC Act, including, but not limited to, world heritage properties, national heritage places, Commonwealth marine areas, and water resources in relation to coal seam gas development and large coal mining development. <u>There is a clear policy gap in that emissions-intensive activities are currently not considered a matter of national environmental significance under the EPBC Act.</u>"*

Minister impotent to deal with the biggest threat to world heritage values

The Australian World Heritage Advisory Committee (AWHAC), in its submission to the 2020 Senate inquiry on this issue, advised that climate change is the biggest threat to the integrity of World Heritage values and that carbon intensive activities now pose the greatest threat to Outstanding Universal Value (OUV), through driving climate change-related impacts. It submitted that not considering these impacts puts the application of the Act out of step with its objects (as well as the articulated principles of inter-generational equity (s3A(c)). Significant impacts that may affect the Outstanding Universal Value (OUV) - and the attributes that form the listing of these properties - are prevented under the Act. Yet the Minister is currently unable to consider the impact of the GHG emissions of projects on these properties.

Australia's international climate and environmental commitments not followed through in Australian law

Section 3 (1) sets out the Objects of the Act, and includes *"(e) to assist in the cooperative implementation of Australia's international environmental responsibilities."* Both the World Heritage Convention and The Paris Agreement are relevant international agreements and, as we are a signatory, considered by the international community as part of Australia's international environmental responsibilities. Yet despite this, our national environmental laws do not explicitly require decision-makers to consider climate change impacts in environmental decision-making. At present, under the EPBC Act, assessment and conditions related to climate change can only be incidental to protecting listed matters of national environmental significance. The Environment Minister cannot review or reject a proposal on

[2] When Environment Minister Robert Hill introduced the EPBC Bill in 1998, he noted his government's commitment to negotiate a greenhouse trigger once the Act was passed: Senate Hansard, Environment Protection and Biodiversity Conservation Bill 1998 [1999], Second Reading Speech, 22 June 1999, at 5990. The Hawke Review proposed an interim greenhouse trigger until an economy-wide carbon price was in place, and a requirement for strategic-level mitigation (recommendation 10)

the grounds that its GHG emissions are excessive and present an unacceptable risk, even to threatened species or areas of international environmental significance. This is clearly a major legislative failure. The Bill remedies this, as stated "*The purpose of this Subdivision is to contribute to meeting Australia's obligations under the Climate Change Conventions*".

The EPBC in the current context the best vehicle to give the minister necessary authority

We acknowledge that the EPBC Act as currently constructed is perhaps not the ideal vehicle for the inclusion of a mechanism which enables the Environment Minister to consider the impacts of the GHG emissions of a project on the climate and thus on the Australian environment generally. However, the Climate Change Act, which could be the alternative vehicle, does not encompass the discretion of a Minister to reject a project which may damage the environment via an increase in GHG emissions; and there is now overwhelming evidence that:

- this is happening on a global scale;
- is particularly affecting the Australian environment broadly, with Australia the developed nation most currently affected at 1.4 degrees Centigrade above pre-industrial levels;
- Is drastically affecting international and national areas of particular environmental significance; and
- Is accelerating the extinction crisis.

In this context, rather than asking for a justification for including an authority for the Environment Minister to be able to reject a project due to its GHG emissions and consequent impact on the Australian environment with particular reference to the existing protections under the Act, the question should be: what justification could there be for not giving the Minister such authority in law?

The Bills' explanatory memorandum states "*There is a clear policy gap in that emissions-intensive activities are currently not considered a matter of national environmental significance under the EPBC Act."*

Courts should not have to be relied upon to do the work of government

As a nation, we cannot and should not rely on the courts to shoulder the responsibility for environmental protection. The Chief Judge of the New South Wales Land and Environment Court, Brian Preston, considered Australia's leading environmental jurist, made this final illustrative remark on the Gloucester coal mine case in NSW[3]. *"In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep*

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[3] http://envlaw.com.au/gloucester-resources-case/#:~:text=A%20groundbreaking%20decision,which%20cannot%20be%20satisfactorily%20mitigated.

decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused." The ability to refuse projects on the grounds of their climate impact should be within the powers of the responsible Minister.

The Ministers for Climate Change and Environment have joint responsibilities in this area

We submit that there should be no argument entertained that matters concerning climate change should be the sole province of the Minister for Climate Change and Energy. That Minister has no authority to approve or reject projects and there is no prospect that they will. In addition, the Minister for Climate Change and Energy and the Environment Minister must clearly work together, as implicitly acknowledged by the fact that they have joint responsibility for a single department.

The process of revising the EPBC Act should consider the Senate inquiry findings and submissions

Finally, in this section, we believe that, as the Senate inquiry is due to report by 28 February 2023, the review will be able to also consider the anticipated development of the revision of the EPBC Act, and request and submit that the process of the revision of the Act fully take into account the findings of this inquiry and consider the submissions to it.

Specific provisions of the Bill

We support the two thresholds approach, being:
Threshold 1*: Significant Impact on Emissions: For actions that would emit between 25,000 to 100,000 tonnes of carbon dioxide equivalent scope 1 emissions in any one year, including in pre-construction stage, the Minister must consider the project through Part 9 of the Act, as the Minister currently does with matters of national environmental significance; In deciding whether to approve the proposal, the Minister must consider whether the project will be consistent with the national carbon budget (see below) and achievement of emissions reduction targets*
Threshold 2*: Prohibited Impact on Emissions: For projects that would emit above 100,000 tonnes of carbon dioxide equivalent scope 1 emissions, these projects would be treated similarly to nuclear projects under the Act, where the Minister is forced to reject the project's approval.*

Consideration of scope 1 emissions too limiting

However, we consider it unfortunate that the thresholds in the Bill take into account only scope 1 emissions. We note that Scope 2 emissions are specified under the National Greenhouse and Energy Reporting Act 2007 (NGER Act) and must be reported, and of course sales within Australia also have a direct impact on our national GHG emissions. Consequently, we believe that there is a case for including scope 2 emissions in the thresholds.

The elephant in the room: exported emissions

While scope 1 emissions encompass so-called fugitive emissions from fossil gas extraction and emissions from LNG production, they do not encompass the emissions from the burning of fossil gas when sold, substantially to overseas buyers. We also note that scope 3

greenhouse gas emissions are not reported under the NGER Scheme (although they can be used in Australia's National Greenhouse Accounts[4]). Yet these scope 3 emissions affect the Australian environment, there being no impermeable atmospheric national boundaries.The argument that we are not responsible for the burning of our gas by others makes no moral or logical sense, and the argument that if we did not supply it others would and there would be no net reduction in emissions is not only morally culpable but also illogical; any reduction in world supply results in price increases as we have seen, and in the context of the fact that we are the world's second largest supplier of LNG and the presence of alternatives to fossil fuel consumption that are already cheaper, less LNG from Australia would result in a faster switch to renewables and thus a safer climate - to our benefit as a nation and to the planet. The same argument applies to thermal coal exports.

Clearly no new fossil fuel projects is the position of the United Nations and the call of leading governments and stakeholder institutions e.g. the International Energy Agency. A revised or amended EPBC Act should enable the Environment Minister to have the powers to act in keeping with the rapidly changing international order. In this order, the tendency is to continue to:

- curtail demand for fossil fuels through Nation State promotion of increasing supply of cheaper renewables
- attempt to increase cost of fossil fuels through backdoor carbon pricing via offset and sequestration costs
- ***add*** the simpler and less corruptible lever of direct regulation by governments of supply if that supply continues to contribute to climate breakdown.

Following the International call for countries to cut new supplies of fossil fuels to save our civilization, the Australian government should have the capacity in law to exercise commensurate regulative power. The EPBC Act is the only existing legislative framework which can provide a Minister with that power.

Including scope 3 emissions promotes our national interest

We acknowledge that if scope 3 emissions are included in the Bill there may be the perception of an issue of a misalignment of this provision with Australia's narrowly-defined responsibilities under international obligations[5]. However, we submit that not to include scope 3 emissions creates a misalignment with the objects of the Bill and those of the EPBC Act; furthermore, in the context of the dramatic expansion of the number and size of fossil gas extraction and exploration projects in onshore and in Australian water and the concern of Pacific nations and others that we are attempting to game the international scene by talking climate protection while supporting the export of fossil-fuelled climate damaging fossil fuels, a failure to include scope 3 emissions in our policing of climate impacts under this Bill is potentially damaging to our national interest.

[4] https://www.dcceew.gov.au/climate-change/emissions-reporting/tracking-reporting-emissions

[5] "The purpose of this Subdivision is to contribute to meeting 11 Australia's obligations under the Climate Change Conventions"

We support the Bill's provisions:

- that, in deciding whether to approve a proposal, the Minister must consider whether the project will be consistent with the national carbon budget and achievement of emissions reduction targets
- that the Climate Change Authority develop a national carbon budget to 2050 and assess the remaining budget annually
- that the Minister must assess projects against the national carbon budget taking these assessments of the remaining budget into account
- that these national carbon budget and emissions reduction target considerations to be taken into account by the Minister when considering, under the strategic assessment provisions in Part 10 of the EPBC Act, whether to allow actions involving a significant impact on emissions to be taken in accordance with an endorsed policy, plan or program rather than being assessed under Part 9.

In addition, we advocate that the Minister be empowered to consider the climate impact of fossil fuels exported from Australia and be empowered by the inclusion of scope 3 emissions in the Bill to regulate new export supply to contribute to a safe climate.

These provisions and powers would together create a complementarity and synergistic relationship between the EPBC Act and the Climate Change Act. They are currently absent and are sorely needed in order to provide a firm legislative base for bringing down our emissions and protecting our environment and biodiversity.

Ensure independent advice to the Minister on GHG measurement

We have a concern about Section 527F "*The Minister may determine, by legislative instrument, methods, or criteria for methods, by which the amounts of emissions of greenhouse gases are to be measured for the purposes of this Act …*" We acknowledge that the Minister must be ultimately responsible for decisions on projects, but submit that this section effectively leaves the determination of advice on the effect of their decisions in the broad to their Department (even in the case of legislative instrument if it is delegated legislation). It may be beneficial to ensure that the Minister also receives advice from one or more Statutory bodies, in particular the Climate Change Authority.

No exemption for any project with a significant emissions impact

We strongly support Item 9 14 of the Explanatory Memorandum. *(confirming that a conservation agreement cannot declare that an action that has, will have, or is likely to have, a significant impact on emissions does not need approval under Part 9*) and Items 10 and 11 15. (*that clarify that exemptions from approval requirements for forestry operations or actions taken in the Great Barrier Reef Marine Park do not apply to projects that have, will have or are likely to have a significant impact on emissions*). Our particular reference is the high emissions impact of the exemption of the regional forest agreements from the provisions of the EPBC Act, as indicated by, among other things, a finding by the Fenner School of Environment & Society at ANU that ending native logging in Australia would reduce total GHG emissions by 24%[6].

[6] https://press-files.anu.edu.au/downloads/press/p56611/pdf/book.pdf p 7.

In addition, logging and other clearing of native forests is a significant threat to Australia's environment and achievement of climate targets - forests are currently a depleting carbon sink. For example:

- Victoria's Mountain Ash ecosystem was listed as critically endangered in 2014[7] by the International Union for Conservation of Nature, yet it continues being logged in 2022 with a commitment to an end only in 2030.
- The 2021 NSW State of the Environment Report[8] states that the land use, land use change and forestry sector (LULUCF) is currently considered a carbon 'sink' as it stores more carbon than it emits and thus reduces the state's emissions by 3%, while noting "the sequestration by 'forest remaining forest' has halved" since 2005, with "a decline in the forest sink by around 14%" relative to 2005. It warns that without further action the land sink is estimated to peak in 2022 as the "forest land sink decreases" (EPA 2021). Such statements are indicative of the value of forests as carbon sinks, their fragility, and the necessity of accounting for them in an open and transparent manner in carbon accounts (Mackey et. al. 2022[9]).

[7] https://onlinelibrary.wiley.com/doi/abs/10.1111/aec.12200
[8] EPA (2021) NSW State of the Environment. https://www.soe.epa.nsw.gov.au/
[9] Mackey, B., Moomaw, W., Lindenmayer, D. and Keith, H. (2022) Net carbon accounting and reporting are a barrier to understanding the mitigation value of forest protection in developed countries. Environ. Res. Lett. 17 054028.