



**Law Council**  
OF AUSTRALIA

# **Climate Change Bill 2022 and Climate Change (Consequential Amendments Bill) 2022**

**Senate Environment and Communications Legislation Committee**

**10 August 2022**

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
The Law Council's Climate Change Policy .....	5
Headline views about the bills .....	5
<b>Comments on individual clauses in the Climate Change Bill 2022</b> .....	<b>6</b>
Paragraph 3(b).....	6
Clause 10.....	7
Subclause 12(1).....	8
Paragraph 12(1)(c).....	9
Paragraph 12(1)(e).....	9
Subclause 12(3).....	9
Subclause 14(1).....	10
Subclause 14(3).....	10
Subclause 14(5).....	10
Subclause 14(6).....	10
Clause 15.....	11
Possible amendments - No express obligation to seek advice on an adjustment.....	11
Transparency and accountability should be strengthened.....	11
Subclause 15(1A).....	11
Subclause 15(5).....	12
Subclause 15(6).....	12
Subclause 15(7).....	12
Clause 17.....	12
<b>The role of the Climate Change Authority</b> .....	<b>12</b>
Matters the Climate Change Authority can consider in giving its advice.....	12
The Authority's capacity to perform the advice-giving function.....	13
Consistency in objects.....	14
<b>Analysis of clauses in the Climate Change (Consequential Amendments) Bill 2022</b> .....	<b>14</b>
Overview comment.....	14
Clause 7.....	15
Clauses 19 and 21 .....	15
Clauses 51, 52, 53 and 54.....	15

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000<sup>1</sup> lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

---

<sup>1</sup> Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

## Acknowledgement

The Law Council particularly acknowledges its Climate Change Working Group for its contribution to this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to make a submission to the Environment and Communications Legislation Committee for its inquiry into the provisions of the Climate Change Bill 2022 (Cth) (**the Bill**) and Climate Change (Consequential Amendments) Bill 2022 (Cth) (**the Consequential Amendments Bill**).

### The Law Council's Climate Change Policy

2. This submission is informed by the Law Council's [Climate Change Policy](#).<sup>2</sup> The Policy includes a commitment from the Law Council to advocate on federal climate change legislation on behalf of the legal profession and sets out three key principles for doing so.
3. The three key principles are:
  - (a) *Australia's international law obligations with respect to climate change should be fully implemented domestically and should represent Australia's highest possible ambition (implementation of international law obligations);*
  - (b) *Australia's response to climate change should give effect to rule of law principles, including that new laws in this area should promote certainty and clarity, and promote transparent outcomes (rule of law principles); and*
  - (c) *Australia's response should be fair and equitable and should promote public confidence (a fair and equitable response).*
4. The principles are set out in full on pages 10-11 of the [Climate Change Policy](#).

### Headline views

5. The Law Council welcomes the Bill which would enshrine Australia's greenhouse gas emissions reduction targets into domestic law. The Law Council recognises that a legislated target would provide increased certainty to policy makers, businesses, investors and community sectors.<sup>3</sup> The Intergovernmental Panel on Climate Change's 2022 Mitigation of Climate Change report found that climate laws enable mitigation action including, amongst other things, by setting targets.<sup>4</sup>
6. The targets reflect Australia's current nationally determined contribution (**NDC**) under the Paris Agreement,<sup>5</sup> a treaty under which parties have agreed to long-term temperature goals, and pursuing efforts to limit temperature gains, to significantly reduce the risks and impacts of climate change.<sup>6</sup>

---

<sup>2</sup> Law Council of Australia, Climate Change Policy, (November 2021).

<sup>3</sup> See Law Council of Australia, Supplementary submission to the Standing Committee on Environment and Energy regarding the Climate Change (National framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National framework for Adaptation and Mitigation) Consequential and Transitional Provisions) Bill 2020, 22 February 2021. See also Background Paper para 2.107, p72.

<sup>4</sup> Intergovernmental Panel on Climate Change, 'Mitigation of Climate Change – Summary for Policymakers' (2022), < [https://report.ipcc.ch/ar6wg3/pdf/IPCC\\_AR6\\_WGIII\\_FinalDraft\\_FullReport.pdf](https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf) > 59.

<sup>5</sup> [Australia's Nationally Determined Contribution Communication 2022](#), Australian Government Department of Industry, Science, Energy and Resources.

<sup>6</sup> Paris Agreement Article 2(1)(a) – the objective of the Paris Agreement includes holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the

7. The Bill would also:
  - (a) require any new NDC to represent a progression beyond the present NDC, and any adjusted NDC to represent an enhancement of Australia's level of ambition;
  - (b) require the Minister to prepare an annual statement to Parliament which relates to the progress against the targets and the effectiveness of the Commonwealth's climate change policies in contributing to their achievement; and
  - (c) provide for the Climate Change Authority to give advice to the Minister in relation to the annual statement and in relation to making a new NDC or adjustments to an existing one.
8. These measures are intended to ensure that the Commonwealth sets greenhouse gas emissions targets which are consistent with the Paris Agreement and is transparent in accounting for its achievement of those targets.
9. The Bill and the Consequential Amendments Bill contribute to a legislative framework to support Australia meeting its international commitments made under the Paris Agreement. The Law Council understands that more specific mechanisms to drive emissions reductions and/or increase sequestration are or will be set out in other policies or legislation under review or to be drafted. The Law Council looks forward to the release of the Australian Government's proposals to build on existing mechanisms over time.
10. While the Bill is broadly consistent with the three broad principles of the LCA Climate Change Policy, the Law Council has made recommendations throughout this submission on amendments which may be made or matters which may benefit from further consideration by the Committee, in order to address drafting ambiguities and to enhance achievement of the Bill's objects.
11. The Consequential Amendments Bill would amend 14 Acts, including through the insertion of new objects provisions, to enable consideration of the greenhouse gas emission reduction targets when specified Commonwealth agencies are exercising powers or performing functions. In the time available, the Law Council has not had an opportunity to resolve a position on whether amending each Act in this way will, in each case, contribute positively towards achieving the targets, and not inordinately impair the operation of those Acts. As discussed further in the submission, this may be a matter which the Committee seeks to satisfy itself.

## Comments on individual clauses in the Bill

### Paragraph 3(b)

12. The Law Council notes this paragraph would embed the concept of 'best available scientific knowledge' in the objects section of the Bill. The Law Council notes that there are no equivalent amendments in the Consequential Amendments Bill. The Law Council discusses the potential implications of this approach under clause 15 below.

---

temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

13. The Law Council suggests that the addition of ‘and ambition’ in paragraph 3(b) be reconsidered. It appears that the annual climate change statements and the tabling of those reports in Parliament referred to in that paragraph are rightly characterised as transparency measures, rather than measures which in themselves give effect to climate ambition.

## Clause 10

14. Clause 5 of the Bill provides that the term ‘Australia’s greenhouse gas emissions reduction targets’ has the meaning given by section 10.<sup>7</sup> There is some ambiguity as to exactly which parts of clause 10 actually give that meaning.
15. Outside of clause 10, the only operative reference to the term ‘Australia’s greenhouse gas emissions reduction targets’ in the Bill is in paragraph 12(1)(a), which requires the Minister to prepare an annual climate change statement which relates to ‘the progress made during the year towards achieving Australia’s greenhouse gas emissions reduction targets’.
16. The reference to ‘section 10’ in the definition of the term ‘Australia’s greenhouse gas emissions reduction targets’ in clause 5 suggests that all of clause 10 should be read as having some work to do in setting that target. However, it seems that all of the work is actually done by subclause 10(1). If it is the case that only subclause 10(1) gives content to the term ‘Australia’s greenhouse gas emissions reduction targets’, the Law Council suggests an amendment to the definition in clause 5 to make this clear.
17. The only reference to ‘Australia’s greenhouse gas emissions reduction targets’ in clause 10 is in the heading of that clause and subclause 10(1), which states that ‘Australia’s greenhouse gas emissions reduction targets’ are:
- reducing Australia’s net greenhouse gas emissions to 43% below 2005 levels by 2030; and
  - reducing Australia’s net greenhouse gas emissions to zero by 2050.
18. These are the targets contained in Australia’s current (June 2022) NDC. Subclauses 10(5)-(6) set out parameters for the making of new or adjusted NDCs. However, there does not appear to be any way in which to read subclause 10(1) as incorporating new or adjusted NDCs into the meaning of the term ‘Australia’s greenhouse gas emissions reduction targets’. The safest construction is to read the definition of ‘Australia’s greenhouse gas emission targets’ as static – always reflecting the targets in subclause 10(1), unless amended. This interpretation is supported by the Explanatory Memorandum, which suggests that future Governments would need to bring another Bill before Parliament to amend/replace the existing target to give effect to a new or adjusted NDC:<sup>8</sup>
- ...it would then be best practice to bring another Bill to Parliament to add to the targets in subclause (1) as those targets are included in relevant nationally determined contributions.*
19. The Law Council submits it would be more than ‘best practice’ to amend the Act to reflect a new or adjusted NDC, it would be necessary in order for clause 12 to

---

<sup>7</sup> See clause 5 of the Climate Change Bill 2022.

<sup>8</sup> Explanatory Memorandum, Climate Change Bill 2022 (Cth) [23].

operate as intended. If the Act were not amended to adjust the definition of 'Australia's greenhouse gas emissions reduction targets' in subclause 10(1) to reflect new NDCs/targets, then annual statements made under clause 12 would be required to be made against the historic, outdated targets.

20. In contrast, the definition of 'Australia's greenhouse gas emissions reductions targets' which is used throughout Part 1 of Schedule 1 to the Consequential Amendments Bill provides:
  - if the NDC remains that expressed communicated in June 2022 – the legislated targets in the Climate Change Bill; and
  - if there is a new or adjusted NDC – any targets included in the new or adjusted NDCs under the Paris Agreement
21. The Explanatory Memorandum for the Consequential Amendments Bill states that this approach 'is essential to ensure that the Commonwealth legislation to be amended [by this Bill] is implementing Australia's international obligations under the Paris Agreement as in force from time to time'.<sup>9</sup>
22. It is not clear why the Bill does not use the dynamic definition of 'Australia's greenhouse gas emissions reductions targets' which is used throughout Part 1 of Schedule 1 to the Consequential Amendments Bill.
23. To address the issues raised above, the Law Council **recommends**:
  - if, as it seems, the definition of 'Australia's greenhouse gas emissions targets' is intended to be only the targets contained in subclause 10(1) then the definition in clause 5 be amended to make that clear by referencing subsection 10(1);<sup>10</sup> and
  - the Committee seek clarification as to why the Bill does not include a dynamic definition of 'Australia's greenhouse gas emissions targets' whereas the Consequential Amendments Bill does.

### Subclause 12(1)

24. Clause 12 obliges the Minister to prepare an annual climate change statement which contains the matters set out in subclause 12(1). The Law Council interprets paragraphs 12(1)(a) to (e) (including the parliamentary amendments that were agreed by the House of Representatives) as providing an exhaustive list in terms of the content for the Minister's statement. However, the Explanatory Memorandum states at paragraph 27 that subclause 12(1) does not limit the issues that may be addressed or additional information that may be tabled in the Minister's annual climate change statement.
25. If the intention is for subclause 12(1) to be open-ended, then the Law Council **recommends** that this be clarified in the Bill by, for example, adding a new item to the list that allows for the Minister to include other relevant matters in the statement. However, it might be preferable for the list to be exhaustive, because otherwise

---

<sup>9</sup> Explanatory Memorandum, Climate Change (Consequential Amendments) Bill 2022 (Cth) [23].

<sup>10</sup> For example, clause 5 provides that '**annual climate change statement** means a statement under subsection 12(1)'.



there could be uncertainty about what the Climate Change Authority needs to include in its advice to the Minister.

26. Subclause 14(1) provides that the Climate Change Authority must give the Minister advice that relates to the preparation of an annual climate change statement. If the intention is for the list to be exhaustive, then the Law Council **recommends** paragraph 27 of the Explanatory Memorandum be corrected.

### Paragraph 12(1)(c)

27. This clause requires the Minister's annual statement to relate to, among other things, 'climate change policy'. The Law Council acknowledges that the Explanatory Memorandum attempts to clarify that, under paragraph 12(1)(c), the Minister would report on general issues for climate change policy, including both mitigation and adaptation. The Law Council **recommends** that this should be made clear in the Bill itself, because the Bill relates predominately to mitigation measures. Mitigation, adaptation and transformation measures are all important in addressing the risks of climate change and the analysis of progress on emissions reduction must be considered in the context of the broader response to climate change and its impacts on the natural environment and on society.

### Paragraph 12(1)(e)

28. The Law Council acknowledges the parliamentary amendments made to clause 12 to include provisions for the Minister's statement to relate to the impact of the policies on rural and regional Australia, including the social, employment and economic benefits<sup>11</sup>. The Law Council supports a requirement for the Minister's report to relate to the impact of 'climate change' policy, in order to promote transparency about the extent to which Australia's response to climate change is fair and equitable. While it agrees that it will be particularly important to understand the impacts on rural and regional Australia, the Law Council **recommends** that clause 12 should:

- also refer to 'remote' Australia, given the very different dynamics involved;
- allow the report to consider social, employment and economic impacts with respect to other parts of Australia beyond rural, regional and remote Australia, and key groups such as First Nations people;<sup>12</sup> and
- require that 'impacts' discussed should address both positive and negative impacts.

### Subclause 12(3)

29. In terms of transparency and accountability to the public, the Law Council notes that the tabling in each House of Parliament of the annual climate change statement under subclause 12(3) would be a form of publication of that document.<sup>13</sup> However, if there is a substantial period of time between the 31<sup>st</sup> of December and the fifth

---

<sup>11</sup> Parliamentary amendment no. 10, Ms Helen Haines amendment.

<sup>12</sup> Law Council of Australia, 'Climate Change Policy' (21 November 2021), <<https://www.lawcouncil.asn.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2021%2011%2027%20-%20P%20-%20Climate%20Change%20Policy.pdf>> [51].

<sup>13</sup> Parliament of Australia, 'Tabled Papers', (webpage, accessed 9 August 2022) [https://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Tabled\\_Papers](https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers).

Parliamentary sitting day, there will be a substantial period before the Minister's statement would be published. The Committee might consider other mechanisms to ensure timely publication.

### Subclause 14(1)

30. The Law Council notes that the scope of the Climate Change Authority's advice appears to be determined by the matters included under subclause 12(1). If the list in paragraphs 12(1)(a) – (e) is not exhaustive, then the Climate Change Authority's advice would seem to be unlimited in scope. The Law Council **recommends** that the Committee seeks clarification as to whether this is the intention and whether amendments are required to clause 12 to make this clear, as discussed above.

### Subclause 14(3)

31. The Law Council notes that this clause envisages that public consultation **may** occur when preparing its annual advice to the Minister. While it may be appropriate for there to be a discretion in this circumstance (compared to subclauses 15(3) and 17(2)), the Law Council **suggests** that it would be appropriate, in the interests of transparency, to require that the Climate Change Authority include a statement in its annual advice addressing why public consultation was or was not sought in preparing that advice, and **recommends** consideration be given to an amendment to that end.

### Subclause 14(5)

32. This clause allows the Minister to consider advice from other sources when preparing an annual statement. The Law Council **suggests** that the annual statement should also include a clear statement as to what other advice the Minister had regard to when preparing the annual statement, and **recommends** consideration be given to an amendment to that end.

### Subclause 14(6)

33. The Law Council notes the requirement in subclause 14(6) that the Climate Change Authority publish on its website advice given to the Minister under subclause 14(1). The Law Council submits that a requirement to publish advice is ineffective as a transparency measure unless it is carried out in a timely fashion. The Law Council notes that paragraph 14(7)(d) requires the Minister to table reasons for departing from the Climate Change Authority's advice within 5 sitting days of completion of the preparation of the annual statement (which date would presumably not be made public).
34. The Law Council **recommends** that the Climate Change Authority should be required to publish its advice at least before the Minister's statement of reasons is tabled and ideally 15 days after providing it to the Minister. The Law Council notes that a requirement for the Climate Change Authority to table its advice within 15 days of providing it to the Minister was added through parliamentary amendments.<sup>14</sup> This extra layer of transparency would assist parliamentarians to reference the Authority's advice while reading the Minister's report.

---

<sup>14</sup> Parliamentary amendment no 16: Ms Tink.

## Clause 15

### Possible amendments - No express obligation to seek advice on an adjustment

35. Notably, while the Minister is *required* under subclause 15(2) to seek the Climate Change Authority's advice on a new NDC (at least once every five years – to reflect the obligation in paragraph 9 of Article 4 of the Paris Agreement), the Bill does not expressly require the Minister to seek the Authority's advice before communicating an adjustment for the purposes of paragraph 11 of Article 4 of the Paris Agreement. It is not clear whether this is by design or oversight. The Explanatory Memorandum does not make this clear.<sup>15</sup> It is an object of the Bill to 'ensure' that the Authority's advice informs the targets to be included in an adjusted NDC<sup>16</sup> and there may be a question as to whether that objective can be properly pursued when the Bill does not require the Minister to seek that advice. Assuming the absence of an obligation is by design, perhaps on the basis that it would be reasonable not to seek the advice in certain circumstances, it is notable that the Bill does not regulate when the Minister may decide not to seek that advice.
36. It seems incongruous, in light of that object, to require that any advice by the Authority on an adjustment must be considered, published and responded to, yet there is an apparently open discretion as to whether to seek that advice at all with respect to the adjustment of an NDC.
37. The Law Council **recommends** that:
- the Committee clarify whether the absence of any obligation on the Minister to seek advice from the Authority on an adjustment to the NDC is an oversight or by design; and
  - if the absence of the obligation is:
    - by design, consideration be given to inserting an express discretionary power in the Bill which seeks to indicate when seeking advice on an adjustment may or may not be warranted; and
    - an oversight, consideration be given to amending clause 15 to insert an obligation that the Minister seek advice from the Authority before making an adjustment.

### Transparency and accountability should be strengthened

38. The Law Council recommends that consideration be given to strengthening the transparency and accountability of the process by which the Minister addresses the advice of the Climate Change Authority in relation to new or adjusted NDCs through the following measures.

### Subclause 15(1A)

39. The Parliamentary amendment put forward by Dr Helen Haines MP, and agreed by the House of Representatives, inserts a requirement for the Climate Change Authority's advice to include consideration of social, employment and economic benefits and the physical impacts of climate change. The Law Council

---

<sup>15</sup> See Khalil's comments page 83, [Hansard]

<sup>16</sup> Bill, paragraph 3(c)(ii).

**recommends**, in line with its remarks on clause 12 above, that clause 15 be amended to specifically require the Authority's advice to include consideration of impacts with respect to remote Australia, other parts of Australia beyond rural and regional Australia, and both positive and negative impacts.

### Subclause 15(5)

40. This clause allows the Minister to have regard to other advice. The Law Council **recommends** that a clause be included in the Bill that requires the Minister to provide a clear statement about what other advice has been received (subject to maintaining confidentiality, as appropriate, including in relation to client legal privilege), and the extent to which that advice weighed on the Minister's decision whether (or not) to accept the Authority's advice on a new or adjusted NDC. Such a requirement, which could be inserted into subclause 15(7), would assist to provide accountability in relation to the grounds for the Minister's decision.

### Subclause 15(6)

41. This clause does not impose any temporal requirement in relation to the publication of the Climate Change Authority's advice. The Law Council **recommends** a specific period be imposed within which the Authority must publish its advice to the Minister – for example, within 15 days of its provision.

### Subclause 15(7)

42. It is not clear why the Minister is obliged to table the statement in response to the Authority's advice regarding a new or adjusted NDC within 15 sitting days of its preparation, when the obligation to table the response to the annual statement requires a response within five days. The Law Council suggests the Committee make inquiries as to why the obligation to table the response to the Authority's advice regarding a new or adjusted NDC should not also be five days.

### Clause 17

43. This clause requires the Minister to cause independent reviews to be conducted into the operation of the Act. A review must include public consultation (subclause 17(2)). The first review must be completed within 5 years after commencement of the Act (subclause 17(5)), and each subsequent review must be completed within 10 years after completion of the previous review (subclause 17(6)). The Law Council **recommends** that the clause should include a requirement for the panel for the review to include an appropriate mix of experts.

## The role of the Climate Change Authority

### Matters the Climate Change Authority can consider in giving its advice

44. The Law Council notes that clause 29 of Schedule 1 to the Consequential Amendments Bill would amend section 12 of the *Climate Change Authority Act 2011* (Cth) (**CCA Act**), which provides that the Authority must have regard to particular principles in performing its functions, to add paragraph 12(viii) requiring the Climate Change Authority to take account of the matters set out in Article 2 of the Paris Agreement.

45. Article 2 sets the global temperature reduction goals that significantly reduce the risks and impacts of climate change. The Law Council understands the purpose of each Paris Agreement party's greenhouse gas emissions targets is to achieve those temperature reduction goals.
46. Subclause 15(1) of the Bill requires the Climate Change Authority to advise on the greenhouse gas emissions targets that it considers should be included in a new or adjusted NDC in accordance with Article 4 of the Paris Agreement.<sup>17</sup>
47. However, it is unclear why the principles to which the Climate Change Authority must have regard under amended section 12 only focus on Article 2 of the Paris Agreement, rather than Article 4 (or giving effect to Australia's obligations under the Paris Agreement more broadly).
48. The Law Council notes that this suggests that the Climate Change Authority is not to take account of the matters provided for in Article 4 of the Paris Agreement.
49. The Law Council **recommends** the Committee seek clarification on the rationale for the specific reference to Article 2 only in the amendment made by clause 29 of Schedule 1.

### The Authority's capacity to perform the advice-giving function

50. Clause 28 of Schedule 1 to the Consequential Amendments Bill would amend section 11 of the CCA Act to insert a function of giving advice under Part 4 of the Climate Change Act.
51. The Law Council notes it will be important that that Climate Change Authority is appropriately constituted under its statute to perform this significant additional function.
52. As noted above, section 12 of the CCA Act provides that the Authority must be guided by certain principles when performing its functions, such that any measures to respond to climate change should be: equitable, economically efficient and environmentally effective; in the public interest, taking into account impacts on households, business, workers and communities; supportive of the development of an effective global response to climate change; consistent with Australia's foreign policy and trade objectives; and such other principles (if any) as the Authority considers relevant.
53. Further, subsection 18(2) of the CCA provides that a person is not eligible for appointment as an Authority member (other than the Chief Scientist) unless the Climate Change Minister is satisfied that the person has substantial expertise or knowledge and significant standing in at least one of a list of 15 different fields of expertise.<sup>18</sup> While one of these fields is 'climate science', the Law Council notes it is not necessary to have a climate science expert on the Authority. Nor, having regard to the Bill's additional focus on addressing climate impacts on regional and rural Australia, is it necessary to have particular expertise in this area.

---

<sup>17</sup> Or, for the adjusted NDC, paragraph 11 of Article 4 of the Paris Agreement.

<sup>18</sup> Climate science, economics (including environmental economics), industry, social policy, technology development and adoption, employment policy, energy production and supply, greenhouse gas emissions measurement and reporting, greenhouse gas abatement measures, financial markets and investment, trading of environmental instruments, land resource management, environmental management and public administration.

54. While this may not be a matter to address in the context of the Consequential Amendments Bill, the Law Council **suggests** consideration to be given to reviewing present settings under the CCA Act to ensure that the Climate Change Authority is best placed to perform its additional functions under the Bill going forward.

### Consistency in objects

55. The concept of 'best available scientific knowledge' is in paragraph 3(aa) of the Bill but there is no equivalent amendment in the Consequential Amendments Bill. On this basis, the Climate Change Authority would not be required to take into account the best available scientific knowledge when considering progress against the temperature goals for the purpose of advising the Minister.
56. The Law Council **recommends** that, for consistency in approach between the two Bills, and to avoid uncertainty, the Consequential Amendments Bill should be amended to embed the concept of 'best available scientific knowledge' in the objects/functions of the Climate Change Authority under the CCA Act (or alternatively for these to require broader regard to the Paris Agreement, which incorporates this concept).

## Analysis of clauses in the Consequential Amendments Bill

### Overview comment

57. The Bill would amend 14 Commonwealth Acts to insert the objective to either facilitate or contribute to the achievement of 'Australia's greenhouse gas emissions reduction targets'.
58. As a matter of statutory interpretation, an objects clause:
- informs how an Act is to be interpreted, with the interpretation that would best achieve the purpose or object of the Act to be preferred to each other interpretation;<sup>19</sup> and
  - in turn informs the scope of a discretionary power (put another way – whether a discretionary exercise of power is legally reasonable because it is consistent with the scope, purpose and object of the Act).<sup>20</sup>
59. In the Acts included in the Consequential Amendments Bill, which tend to provide for statutory authorities to perform functions in pursuit of the Act's objects, the addition of these new amendments through the Consequential Amendments Bill will affect the functions of that entity.
60. As a general proposition, inserting into an Act an object that compels a statutory authority to exercise its functions and powers in a way which furthers the achievement of Australia's greenhouse gas emissions reduction targets may be helpful in some cases, while in others it may either expose those authorities to legal uncertainty when performing their main functions or create a tension with existing objects.

---

<sup>19</sup> Section 15AA of the *Acts Interpretation Act 1901* (Cth).

<sup>20</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, per Mason J [11]-[12]; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11, [12] (per Allsop CJ).

61. In the time available, the Law Council has not had an opportunity to undertake an holistic analysis of the way in which all of the amendments could affect the operation of the amended Acts. The Law Council suggests the Committee may make inquiries to satisfy itself that amending each entity's objects will, in each case, contribute positively towards achieving the targets.
62. Subject to the above, the Law Council offers the following specific observations:

### Clause 7

63. This clause inserts a fifth object into the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). This object appears to be a restatement of the first object already in the Act rather than a separate object. The Law Council recommends that it be merged with the first object or omitted.

### Clauses 19 and 21

64. These clauses propose amendments to the *Clean Energy Regulator Act 2011* (Cth) that allow for the Clean Energy Regulator (**CER**) to be given 'such functions contributing towards the achievement of Australia's greenhouse gas emissions reduction targets as are conferred on the Regulator by the regulations'.
65. While there are other examples of legislation that allows additional functions to be conferred on a statutory body by regulation, in this case the power is being granted under a legislative scheme that establishes the CER but leaves its functions to be conferred by other legislation. When performing its functions under that other legislation, the CER is guided by the objects and other principles in the other legislation. The Clean Energy Regulator Act does not provide a framework, such as an objects clause, to guide the CER in the exercise of any functions that may be conferred by regulations made under the Clean Energy Regulator Act (as provided for in proposed new paragraph 12(ba)).
66. This is a material gap and seems inconsistent with good regulatory practice. One approach might be to recommend that an additional section be added to the Clean Energy Regulator Act governing the making of regulations under proposed new paragraph 12(ba). The section would include a requirement for the regulations to provide guidance on the objectives of any new function conferred and any relevant guiding principles for the exercise of the function. An alternative would be for each of the current Acts conferring functions on the CER to be amended to allow for new functions to be conferred by regulation made under the Act.
67. The Law Council **recommends** further consideration be given to a mechanism to ensure any additional functions conferred on the CER by regulation are clearly guided by policy objectives.

### Clauses 51, 52, 53 and 54

68. These four clauses all amend provisions in the *Offshore Electricity Infrastructure Act 2021* (Cth) setting out matters to which the Minister must have regard when making decisions relating to the declared areas – broadly speaking, whether an area is suitable for offshore renewable energy infrastructure.
69. In the first three instances:
- the primary consideration is 'the potential impacts of the construction, installation, commissioning, operation, maintenance or decommissioning of

offshore renewable energy infrastructure in the area on other marine users and interests'; and

- the Minister will also take into account submissions, advice, Australia's international obligations in relation to the area and any other matters that the Minister considers relevant.

70. The fourth instance relates to revocation of a declaration in circumstances where, among other things, the Minister is satisfied that the declared area is no longer suitable for offshore renewable energy infrastructure.
71. The proposed amendments add, as an additional consideration, 'Australia's greenhouse gas emissions reduction targets'. The relevance of Australia's emissions targets to a decision whether to declare an area is not clear. The insertion of the targets as a mandatory consideration may operate in an unintended manner, such as ruling out more distant areas due to the extra emissions involved in installing and maintaining infrastructure in the area, or opening the Minister to challenge on the grounds that an area not otherwise suitable should be declared due to Australia's emissions targets.
72. The Law Council **recommends** that these amendments not be made.