



Law Council
OF AUSTRALIA

Office of the President

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Committee Secretary
Standing Committee on Environment & Energy
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: Environment.Reps@aph.gov.au

Dear Committee Secretary

Climate Change (National Framework for Adaption and Mitigation) Bill 2020 and Climate Change (National Framework for Adaption and Mitigation) (Consequential and Transitional Provisions) Bill 2020

1. Thank you for the opportunity to provide input to the House of Representatives Standing Committee on the Environment and Energy for its inquiry into the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 (**the Substantive Bill**) and the Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 (**the Consequential Bill**).
2. The Law Council acknowledges the work of the Australian Environment Planning Law Group (**AEPLG**) of its Legal Practice Section in the preparation of this submission. The Law Council is also grateful for the contribution of the Law Institute of Victoria, New South Wales Bar Association (**NSW Bar**), Law Society of New South Wales and Queensland Law Society. The Law Council further notes that it is currently considering its broader position on climate change issues and their legal implications. Its comments below regarding the Substantive and Consequential Bills are preliminary in this context.

Preliminary Comments

3. While not in a position to formally endorse the Substantive Bill in its current form, the Law Council believes that with the suggested amendments listed below, the Substantive Bill has the potential to transform Australia's approach to combatting climate change and its impact on our environment and society.
4. The obligations in the Substantive Bill to complete and maintain a national climate change risk assessment, a national adaptation plan and emissions budgets and reduction plans could enable potential improvement in the coordination of Australia's climate mitigation efforts, allowing for the development of cohesive government policy across different areas to respond to climate change impacts and improve certainty for

all sectors of the community and the economy. These national documents will also provide the framework for State and Territory governments to develop and improve their own responses to climate change and for the business sector to develop policies having regard to a national plan. However, this process also needs to be managed carefully so as not to reduce effective State and Territory legislative and policy approaches that are already in place.

5. The emphasis in the Substantive Bill on public reporting and Parliamentary scrutiny of the required advice and reports also facilitates transparency and accountability in government decision making.
6. The Law Council considers that the Substantive Bill would assist to “rule a line” under decades of national policy uncertainty and politics associated with responding to the changing climate and its associated impacts. It offers an opportunity to all Australian governments, business and the community to contribute to a comprehensive and transparent response to Australia’s international obligations.

Comments on the Substantive Bill

Guiding principles

7. The Law Council notes that Part 1, Division 2 of the Substantive Bill sets out the guiding principles that are to be applied by entities performing functions or exercising powers under the Bill. The Law Council also notes that these principles appear to have been based, in part, on the guiding principles set out at Part 4, Division 3 of the *Climate Change Act 2017* (Vic) (**Victorian Act**).
8. While the guiding principles in the Substantive Bill are comprehensive, the Law Council considers that the multi-generational impact of climate change is not sufficiently acknowledged. The guiding principles explicitly refer to the precautionary principle but do not mention other elements of the concept of sustainable development. Accordingly, the Law Council suggests that the principles of intergenerational and intragenerational equity (as described in the Law Council’s Sustainable Development Policy, dated 14 September 2019 and **annexed** to this submission) should also be explicitly acknowledged in this Part of the Substantive Bill.

Drafting issues with particular sections

9. Section 9 of the Substantive Bill states that the “Division applies in relation the performance of functions or duties, or exercise of powers, under this Act”, whereas the balance of the sections in Division 2 refer to “a decision, policy, program or process relating to performing functions or duties, or exercising powers”. The difference in drafting raises uncertainty about how section 9 should operate in conjunction with sections 10-16 (for example, the question arises whether section 9 limits the operation of sections 10-16 in any way). The Law Council suggests that to avoid confusion, the drafting of section 9 be aligned with sections 10-16.
10. Further, each of sections 10-16 requires decision makers to have regard to the principles set out under the respective sections when performing functions or duties, or exercising powers, under the Substantive Bill. This does not acknowledge the fact that not all of these principles may be relevant to every decision, policy, program or process that is made or undertaken under the Bill. To avoid the potential for challenges to any such decision, policy, program or process, the Law Council suggests that decision makers be permitted to identify when a particular guiding

principle is not relevant to their decision and that the written reasons for decision, or the policy, program or process, be required to identify which principles were not considered relevant in that instance.

11. The Law Council also notes that section 11 of the Substantive Bill requires regard to be had to best available peer reviewed research and any Technology Investment Roadmap, amongst other things. The Law Council understands there is a view that the current Technology Investment Roadmap, with its reference to fossil fuels, is inconsistent with peer reviewed research. It is also queried whether giving precedence to certain sources of information over others is appropriate in all circumstances¹ and potentially limits the flexibility that might otherwise be needed. The Law Council suggests that consideration be given to including some sort of acknowledgement in this section that there may be inconsistencies between the different information sources that must be considered.
12. In addition, the Law Council notes that section 22 of the Substantive Bill enshrines an emissions reduction target in legislation. The Executive retains control over whether this target will be met earlier and how, meaning that flexibility is retained in addressing any resulting social, economic and environmental issues and concerns. It is important, therefore, that the Minister is advised (as provided under sections 23 and 37) by a Climate Change Commission (**Commission**) that has the necessary experience across a broad range of economic, social and scientific disciplines. This will ensure that the concerns of the broadest range of stakeholders are considered and that the Minister makes decisions based on sound and defensible evidence.
13. The Law Council notes that the NSW Bar has raised that in its view, a target of net zero emissions by 2050, while better than nothing, is not sufficiently ambitious. It considers that an interim target of a 50 per cent reduction in emissions by 2030 merits endorsement on the ground that action over the next decade is critical to Australia's long-term future.
14. The Law Council notes that aspects of Parts 4 and 5 of the Substantive Bill are similar to the requirements of the Victorian Act and the *Climate Change Act 2008 (UK)* (**UK Act**). To this end, the Law Council notes that section 9(4) of the UK Act requires the UK Secretary of State to publish a statement explaining their reasons for setting a carbon budget that is at a different level to that recommended by the independent UK Climate Change Committee, which the UK Act establishes.
15. While subsection 26(6) of the Substantive Bill requires the Minister to obtain and consider advice from the Climate Commission before the Minister can set an emissions budget, subsection 26(7) requires the Commission to publish its advice on a proposed emissions budget, and subsection 26(8) requires the Minister to publish a statement in response to that advice, there is no express requirement in the Substantive Bill to explain why the Minister's decision departs from the Commission's advice (if it does so). The Law Council suggests that, in the interests of transparent decision making, there should be a similar obligation imposed on the Minister as the one imposed on the Secretary of State under the UK Act.
16. The Law Council supports the requirement at paragraph 37(5)(b) of the Substantive Bill that at least one member of the Commission is an Indigenous Australian. Consistent with the views expressed by the Law Council in its submissions on the Independent Review of the *Environment Protection and Biodiversity Conservation Act*

¹ Noting that the operation of section 11(2) is limited to academic sources.

1999 (Cth) and to the Parliamentary Inquiry into the destruction of the Juukan Caves,² it is essential to recognise and utilise the knowledge that Indigenous Australians hold. The involvement of an Indigenous Australian in the Commission should ensure that Indigenous knowledge and perspectives are incorporated into the Commission's work and ensure that any engagement and consultation is with the appropriate Indigenous peoples (that is, those with authority and knowledge of Country).

17. Concern has been expressed about the lack of limits on the power to request certain information from constitutional corporations under section 73 of the Substantive Bill. While publication of information is appropriately limited by subsections 73(5) to 73(7), there is no limit on the power to request information in the first place.
18. The Law Council suggests that the power to request information under section 73 should be limited by reference to the information being required for specific purposes under the Substantive Bill. Further, an element of reasonableness should be applied when requests for information are made and corporations should be permitted to refuse to disclose information which comprises a trade secret or is subject to legal professional privilege. Given that subsection 73(2) makes it an offence for a corporation to fail to comply with a request for information, proper considerations and constraints in the making and meeting of information requests are warranted.
19. In addition, the broad terms of the proposed paragraph 75(1)(b) give rise to a query as to the potential scope of rules that could be "necessary or convenient" for giving effect to the Substantive Bill. The Law Council suggests amending this section to replace the concept of "convenience" with those of efficiency, efficacy and reasonableness. Given the breadth of the Minister's power under this section, the Law Council suggests that:
 - (a) before legislative instruments are made, a thorough regulatory impact assessment is carried out including proper consultation with the public and any industry or stakeholder likely to be affected;³ and
 - (b) the primary legislation provides that legislative instruments that are made under the Bills are disallowable.
20. As Australia's approach to climate change adaptation matures and collective understanding and knowledge of climate change impacts grows, the Law Council considers that it appropriate for the Substantive Bill to be subject to periodic Parliamentary or independent review to ensure that it remains fit for purpose.
21. A further concern raised by the NSW Bar is that the Substantive Bill does not include any requirement that Australian listed companies disclose climate-related financial risks in a consistent and useful way, along the lines of (for example) the Task Force

² See, Law Council of Australia, 'Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia' (21 August 2020).

³ In this context, the Law Council understands that Regulatory Impact Statements (**RISs**) must be provided with respect to all Cabinet submissions. If a decision is not going to Cabinet, a RIS is still required where the policy proposal is likely to have a more than minor impact on business, community organisations or individuals. This includes new regulations, amendments to existing regulations and in some cases, sunsetted regulations being remade: Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulatory Impact Analysis* Commonwealth of Australia 2020.

on Climate-related Financial Disclosures (TFCD) framework.⁴ The NSW Bar considers that a mandatory reporting requirement should be included in the Bill.

Comments on the Consequential Bill

22. The Law Council notes that Part 3 of the Consequential Bill includes a substantive amendment to the *Public Governance Performance and Accountability Act 2013* (Cth) (**Accountability Act**). The objects of this Act include to require the Commonwealth and Commonwealth entities “to meet high standards of governance, performance and accountability” and “to provide meaningful information to the Parliament and the public”.⁵
23. The Consequential Bill inserts a new section 19A into the Accountability Act to require the accountable authority of a Commonwealth entity (which includes Secretaries of Commonwealth Departments and the governing bodies of bodies corporate established by law) to consider the following when performing functions or duties or exercising powers:
 - (a) the potential risks from, and impacts of, climate change relevant to the performance of the function or duty, or exercise of the power (which are further explained in subsection 19A(2)); and
 - (b) the potential contribution to Australia’s emissions of greenhouse gases or the potential contribution to the broader impacts associated with climate change from the performance of the function or duty or exercise of power.
24. The Law Council notes that this section appears to be based on a similar obligation in section 17 of the Victorian Act. However, the Victorian Act limits this obligation to specific decisions or actions made under specific pieces of legislation listed in Schedule 1 to the Victorian Act. The proposed section 19A is not so limited and therefore will require certain Departments to consider climate change risks when they might never have done so before.
25. While the array of activities that contribute to climate change (through energy use or otherwise) and the range of activities affected by the impacts of climate change is wide, it may be more difficult to identify and quantify climate change risks in some Commonwealth entities than others. For example, climate change risks associated with decisions made in the Department of Agriculture, Water and the Environment are likely to be far more evident than decisions made by the Department of Social Services.
26. Therefore, if the duty set out in section 19A is to be properly understood by the Commonwealth entities that are subject to it and to be meaningfully applied, training and education must be provided to those Commonwealth entities. The proposed Commission could be tasked with carrying out this education function.

⁴ See, Task Force on Climate-Related Financial Disclosures at <<https://www.fsb-tcfd.org/>>.

⁵ See, section 5.

27. The Law Council would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the AELPG Chair, Robyn Glindemann on robyn.glindemann@lantegy.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President