Law Council
OF AUSTRALIA

Attachment—Submission to the Inquiry into Australia's transition to a renewable energy superpower

Law Council's approach to federal law and policy reforms responding to climate change

1. Under its Climate Change Policy,[1] Law Council of Australia has committed to assessing and advocating on federal law and policy reforms responding to climate change by reference to the following principles:

   (a) Australia's international law obligations with respect to climate change should be fully implemented domestically;[2]

   (b) Australia's response to climate change should give effect to rule of law principles, including that new laws should promote certainty, clarity and transparent outcomes;[3] and

   (c) Australia's response to climate change should be fair and equitable.[4]

2. This submission seeks to assist the Joint Standing Committee on Trade and Investment Growth by applying these principles to the development of policy and legal frameworks relating to trade and investment in renewable energy production and use.

International law obligations and their integration into domestic law

3. Australia has international obligations to mitigate its greenhouse gas emissions which may be given effect in part through replacing energy generation from fossil fuels with generation from renewable sources. This transitional process is sometimes referred to as decarbonisation.

4. Australia is a party to the Paris Agreement:[5] a treaty under which parties have agreed to long-term global temperature goals, and pursuing efforts to limit temperature gains, to significantly reduce the risks from and impacts of climate change.[6]

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[1] Law Council of Australia, 'Climate Change Policy' (27 November 2021) (**Climate Change Policy**) <https://www.lawcouncil.asn.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2021%2011%2027%20-%20P%20-%20Climate%20Change%20Policy.pdf>.
[2] Ibid [46]-[47].
[3] Ibid [48]-[50].
[4] Ibid [51]-[52].
[5] Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016) (Paris Agreement). Australia ratified the Paris Agreement on 10 November 2016: Statement by the Hon Greg Hunt MP, 'National Statement, Signing of the Paris Climate Change Agreement' (New York, 22 April 2016) < https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4523504/upload_binary/4523504.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4523504%22>.
[6] 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 temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.

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5. Relevantly, each party to the Paris Agreement is obliged to prepare, communicate, and maintain successive nationally determined contributions (**NDC**) (to the global response to climate change) that it intends to achieve for five-year periods.[7] Each party is also obliged to adopt mitigation measures with the aim of achieving the objectives of its NDC.[8]

6. The Law Council welcomed the passage of the *Climate Change Act 2022* (Cth), which sets Australia's greenhouse gas emissions targets[9] at a level that is consistent with the current NDC which Australia has communicated under the Paris Agreement.[10] Specifically, the Law Council recognised that a legislated target would provide increased certainty to policy makers, businesses, investors, and community sectors.[11]

7. Aside from setting those targets, the key function of the Climate Change Act is to oblige the Minister to prepare an annual climate change statement which, informed by advice from the Climate Change Authority (**CCA**),[12] addresses the progress made towards achieving Australia's greenhouse gas emissions reduction targets and the effectiveness of Commonwealth policies to achieve those targets.[13]

8. The first annual progress report of the CCA and the Minister's first annual statement under the Climate Change Act both make clear the considerable role of renewable energy sources in achieving those greenhouse gas emission targets, and the extent of the transition required.

9. The CCA has previously identified the generation of affordable, clean energy and deployment of existing, improved and new mitigation and sequestration technologies as being key to achieving greenhouse gas emissions targets.[14]

10. In its first annual progress report, the CCA notes that:[15]

    - the Australian Government has recognised that decarbonisation of the National Electricity Market (**NEM**) is 'central' to achieving Australia's greenhouse gas emissions targets; and

    - the Australian Energy Market Operator (**AEMO**) has modelled a grid with renewables generating 83 per cent of electricity in the NEM by 2030–31, which

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[7] Ibid, arts 4.2, 4.8-4.9.
[8] Ibid, art 4.2.
[9] Climate Change Act section 10.
[10] Australian Government, 'Australia's Nationally Determined Contribution Communication 2022' 3 <https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf>.
[11] Law Council of Australia, Submission to Senate Environment and Communications Legislation Committee, 'Climate Change Bill 2022 and Climate Change (Consequential Amendments Bill) 2022' (10 August 2022) [5] https://www.lawcouncil.asn.au/publicassets/2971ae63-391c-ed11-9460-005056be13b5/2022%2008%2010%20-%20S%20-%20Climate%20Change%20Bills%20-%20final.pdf.
[12] Climate Change Act section 14.
[13] Ibid section 12.
[14] Climate Change Authority, 'Actions and enablers of a prosperous, resilient net zero – A strategic framework to guide Australia's response to climate change' (April 2022) 3. https://www.climatechangeauthority.gov.au/sites/default/files/2022-04/CCA%20Strategic%20Framework%202022.pdf 3.
[15] Climate Change Authority, 'First Annual Progress Report' (November 2022) (**CCA annual progress report**) < https://www.climatechangeauthority.gov.au/sites/default/files/2022-12/First%20Annual%20Progress%20Report%20FINAL%20pdf.pdf>.

AEMO considers to be closely aligned to Australia's national emissions reduction target for 2030.

11. The CCA notes that the current share of renewables in the NEM is around 30 per cent of electricity generated, which highlights 'the magnitude of the transition ahead', with renewables to be deployed between 2020 and 2030 at two to three times as much as in the previous decade.[16]

12. The Minister's annual statement asserts the central importance of achieving the 82 per cent national renewable electricity target by 2030 to meeting Australia's greenhouse gas emissions targets.[17] The statement further notes that, given Australia's abundance of renewable energy, and mineral resources used to make batteries and other technologies that support decarbonisation, it is anticipated that new industries will develop, creating a demand for workers and supporting regional communities.[18]

13. The remainder of this submission draws attention to, in the context of the further development of law and polices relating to trade and investment in renewable energy:

- consistent with rule of law principles—the need for coherent legislative and policy frameworks across the Commonwealth and States and Territories; and

- the need for the consideration of societal and environmental impacts in planning and undertaking activities relating to renewable energy.

The need for coherent legislative and policy frameworks across the Commonwealth and States and Territories

14. Australia's obligations to reduce greenhouse gas emissions under the Paris Agreement apply to all domestic emissions, and are the responsibility of the State and Territory governments, as well as the Commonwealth Government.

15. The CCA's first annual progress report under the Climate Change Act notes that every Australian State and Territory has committed to net zero emissions by no later than 2050.[19] It notes that most jurisdictions provide for interim 2030 emissions reduction targets, which will 'contribute substantially to the national target'.[20] However, the CCA records that most of these targets are supported by policy rather than legislated requirements,[21] and it emphasises the need for practical plans to reach these targets.[22] The Law Council's Climate Change Background Paper further details some State and Territory legislative frameworks directed to responding to climate change and its impacts, correct as of November 2021.[23]

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[16] Ibid.
[17] Department of Climate Change, Energy, the Environment and Water, 'Annual Climate Change Statement 2022' (2022) (**Minister's annual climate change statement**) 7 and 32 <https://www.dcceew.gov.au/sites/default/files/documents/annual-climate-change-statement-2022.pdf>.
[18] Ibid 22. See also 13.
[19] CCA annual progress report 36.
[20] Ibid 37.
[21] Ibid 36.
[22] Ibid.
[23] Law Council of Australia, 'Legal implications of Climate Change – Background Paper' (November 2021) [2.149]-[2.154] (Climate Change Background Paper) <https://www.lawcouncil.asn.au/publicassets/53537b56-d807-ed11-945e-005056be13b5/Climate%20Change%20Background%20Paper.pdf>.

16. Importantly, the CCA emphasises the need for a whole-of-economy approach:[24]

> *Reducing emissions is a whole-of-economy issue that cuts across federal, state and territory, and local government responsibilities. The Authority has previously identified that coordination across levels of government leads to more effective, integrated policy responses, avoiding unnecessary duplication and regulation, and lowering costs for businesses and households (Climate Change Authority, 2020). Equally, stable and predictable policies also provide investment certainty (Climate Change Authority, 2016).*

17. In its Climate Change Background Paper, the Law Council suggests, in light of the jurisdictional policies and laws for addressing climate change employed by States, Territories and the Commonwealth, that 'a national climate action plan, underpinned by legislative frameworks as required, could more clearly set out respective roles and responsibilities of federal, State and Territory governments, as a way to aligning and achieving long-term objectives'.[25]

18. The Law Council reiterates the importance of a coherent, national approach in general, and specifically as required to achieve a renewable energy transition of the magnitude required (as described above). It notes the importance of clarity in the law in this regard, drawing attention to the principle stated in its Climate Change Policy that new laws should promote certainty and clarity for those affected by climate change mitigation and adaptation measures, noting that uncertainty may itself amplify mitigation and adaptation risk.[26]

19. It is helpful to briefly explore the manner in which State and Territory and Commonwealth regulatory frameworks each contribute to the development of renewable energy, and can assist in expanding that development through trade and investment.

20. The CCA notes that the rollout of clean energy technologies:

> *requires a number of supporting factors to be in place and which should be factored into policy considerations:*
>
> - *supply chains;*
> - *planning and approvals;*
> - *skills and workforces; and*
> - *financing and incentives'*.[27]

21. Such planning should recognise the regulatory roles and responsibilities of the States and Territories in the development of renewable energy. Energy generation from renewable sources is land intensive and Commonwealth measures cannot operate independently from State and Territory approval regimes. For example, supply chains for critical mineral market opportunities rely from the outset on State and Territory approvals to access land to explore for such minerals and develop mining projects in accordance with State and Territory mining, planning and environmental laws.

[24] Ibid 37.
[25] Climate Change Background Paper 7. See also, Climate Change Policy [26]-[30].
[26] Climate Change Policy [48].
[27] CCA annual progress report 39.

22. Similarly, initiatives for rooftop solar and solar banks generally involve State and Territory planning regulation as well as Commonwealth components and funding.[28] The Law Council notes that the October 2022–23 Federal Budget included funding of $224.3 million over four years for 400 community batteries to store excess solar energy, and funding of $102.2 million over four years for a Community Solar Banks program to help up to 25,000 households access cheap solar-powered energy.[29] The Law Council suggests that integrated planning is required between the Commonwealth and States and Territories to make sure that initiatives such as these co-optimise investment in an economically efficient way, and that the burden of implementation is shared.[30]

23. The Law Council is aware of a number of initiatives that demonstrate collaboration between State and Territories and the new Australian Government in the development of renewable energy projects.

24. For example, the Minister's annual statement records that the Commonwealth and State and Territory Energy Ministers are collaborating in planning the transition of large-scale energy production to renewable energy sources. It notes that:[31]

> *Australian Energy Ministers have recognised the need to ensure sufficient investment in clean energy capacity and are developing a framework that delivers this capacity, ensures an orderly transition, and incentivises new investment in firmed renewable energy to ensure the system can meet peak demand.*

25. In August 2022, Commonwealth and State and Territory Energy Ministers agreed on a National Energy Transformation Partnership (**Partnership**) described as 'a framework for national alignment and cooperative action by governments to support the smooth transformation of Australia's energy sector' to 'provide additional certainty to support investment in renewables, storage and transmission, and ensure the economic opportunities offered by the clean energy transformation are realised for Australian households, businesses and communities'.[32] That Partnership expresses principles for collaboration and commits governments to work together on reforms to national energy governance, including to integrate an emissions reduction objective in national energy laws[33]—work which has just commenced.[34]

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[28] See, for example, NSW Department of Planning and Environment, 'Large Scale Solar Energy Guideline' (August 2022) <https://shared-drupal-s3fs.s3.ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Lisa+Drupal+Documents/16007_DPIE+Large+Scale+Solar+Energy+Guidelines_26-9-22.pdf>; Victorian Department of Environment, Land, Water and Planning, 'Permits and applications – Solar energy facilities' (webpage, accessed 20 December 2022) <https://www.planning.vic.gov.au/permits-and-applications/specific-permit-topics/solar-energy-facilities>; and Business Queensland, 'Renewable energy project planning and approvals', (webpage, accessed on 20 December 2022) <https://www.business.qld.gov.au/industries/mining-energy-water/energy/renewable/project-development/planning-approvals>.

[29] Federal Budget 2022-23, <https://budget.gov.au/2022-23-october/content/stronger-economy.htm>, Budget Paper No. 2, <https://budget.gov.au/2022-23-october/content/bp2/download/bp2_2022-23.pdf>, pp 69- 73.

[30] Climate Change Policy [51].

[31] Minister's annual climate change statement 32.

[32] National Energy Transformation Partnership (August 2022) 2 <https://www.energy.gov.au/sites/default/files/2022-08/National%20Energy%20Transformation%20Partnership.pdf>. See also, the vision at 5.

[33] Ibid 7.

[34] Department of Climate Change, the Environment, Energy and Water, 'Consultation on proposed legislative changes to incorporate an emissions reduction objective into the national energy objectives' (webpage, accessed on 20 December 2022) <https://www.energy.gov.au/government-priorities/energy-ministers/priorities/national-energy-transformation-partnership/incorporating-emissions-reduction-objective-national-energy-objectives>.

26. The Law Council also notes agreements between the Commonwealth Government and States and Territories to build transmission infrastructure to facilitate renewable energy projects, including offshore wind farms in Victoria,[35] and undersea cables connecting renewable energy produced in Tasmania with mainland Australia.[36]

27. Finally, several Commonwealth statutory bodies have been established to accelerate carbon abatement and assist with the transition to a clean energy economy. The *Climate Change (Consequential Amendments) Act 2022* (Cth) (**Consequential Amendments Act**) amended a number of the empowering Acts for these agencies, to enable consideration of the greenhouse gas emission reduction targets when specified Commonwealth agencies are exercising powers or performing functions.

28. The Joint Committee may wish to consider the extent to which the activities of these bodies have already made a positive impact on the transition; what measures have worked; and whether they have the capacity and funding to continue to support the transition. It may also wish to consider the extent to which these authorities, exercising their statutory powers and functions, assist collaboration with State and Territory governments or with similar statutory authorities. The Law Council has not conducted that analysis for the purposes of this submission.

The Clean Energy Finance Corporation

29. The Clean Energy Finance Corporation (**CEFC**) is a corporate Commonwealth entity established under the *Clean Energy Finance Corporation Act 2012* (Cth) to facilitate increased flows of finance into the clean energy sector and, since passage of the Consequential Amendments Act, to facilitate the achievement of Australia's greenhouse gas emissions reduction targets.[37]

30. The CEFC's key functions include to invest, directly and indirectly, in clean energy technologies (**investment function**).[38] It also has the function of liaising with the Australian Renewable Energy Agency (**ARENA**), the Clean Energy Regulator (**CER**), other Commonwealth agencies and State and Territory governments, for the purposes of facilitating its investment function.[39] Along with institutional investors, business, industry and cleantech innovators, the CEFC has generated $37.15 billion in investment in Australia's low emissions technologies in its first 10 years.[40]

Australian Renewable Energy Agency

31. The ARENA is a corporate Commonwealth entity established by the *Australian Renewable Energy Agency Act 2011* (Cth) (**ARENA Act**) to administer grant-based

[35] Anthony Albanese MP, Prime Minister of Australia, The Hon Daniel Andrews MP, Premier of Victoria, The Hon Chris Bowen MP, Minister for Climate Change and Energy. The Hon Lily D'Ambrosio MP, Victorian Minister for Energy, The Environment and Climate Action, 'Joint media release: Rewiring the nation to supercharge Victorian renewables' (media release, 19 October 2022) < https://minister.dcceew.gov.au/bowen/media-releases/joint-media-release-rewiring-nation-supercharge-victorian-renewables>.
[36] Anthony Albanese MP, Prime Minister of Australia, The Hon Jeremy Rockliff MP, Premier of Tasmania The Hon Guy Barnett, Tasmanian Minister for Energy and Renewables, The Hon Chris Bowen MP, Minister for Climate Change and Energy, 'Joint media release: Rewiring the Nation plugs in Marinus Link and Tasmanian jobs' (media release, 19 October 2022) <https://minister.dcceew.gov.au/bowen/media-releases/joint-media-release-rewiring-nation-plugs-marinus-link-and-tasmanian-jobs>.
[37] *Clean Energy Finance Corporation Act 2012* (Cth) section 3.
[38] Ibid paragraph 9(1)(a).
[39] Ibid paragraph 9(1)(b).
[40] Clean Energy Finance Corporation, Annual Report 2021-22 1 https://www.cefc.com.au/annual-report-2022/.

funding for renewable energy and energy efficiency technologies across multiple programs.[41] The funding is in the form of early-stage grants and financing assistance for research and development, demonstration, and commercialisation of these technologies. The objects of the ARENA Act are to improve the competitiveness of renewable energy technologies, increase the supply of renewable energy in Australia, and (since passage of the Consequential Amendments Act) to facilitate the achievement of Australia's greenhouse gas emissions reduction targets.[42]

32. Since 2012, ARENA has supported 632 projects with $1.96 billion in grant funding, with a total investment value of $8.81 billion in Australia's renewable energy industry.[43] ARENA's most recent annual report details a number of collaborations with State and Territory governments.[44]

The Clean Energy Regulator

33. The CER is an independent statutory authority established under the *Clean Energy Regulator Act 2011* (Cth), responsible for administering legislation that will reduce carbon emissions and increase the use of clean energy. The CER administers the Australian National Registry of Emissions Units under the *Australian National Registry of Emissions Units Act 2011* (Cth)*;* the Emissions Reduction Fund under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); the Renewable Energy Target under the *Renewable Energy (Electricity) Act 2000* (Cth)*;* and the National Greenhouse and Energy Reporting Scheme, under the *National Greenhouse and Energy Reporting Act 2007* (Cth).

Australia's response should be fair and equitable and should promote public confidence

34. The impacts of Commonwealth trade and investment policy for renewable energy will affect the natural environment and civil society in a real and immediate way.

35. Under its Climate Change Policy, the Law Council emphasises the need for Australia's response to climate change to be fair and equitable and promote public confidence. It suggests that mitigation measures adopted by Australia should:[45]

(a) be environmentally effective and have regard to direct, indirect and cumulative impacts on the natural environment;

(b) be economically efficient;

(c) provide for assessment of, and transparent reporting on, the effectiveness of specific measures over time;

(d) be fair and equitable;

(e) promote the long-term interest of households, workers and communities with respect to effective action to the physical risks of climate change and consider the

[41] *Australian Renewable Energy Agency Act 2011* (Cth) section 8.
[42] Ibid section 3.
[43] Australian Renewable Energy Agency, 'Key Statistics 2012-2022', <https://arena.gov.au/assets/2019/07/arena-at-a-glance.pdf>.
[44] Australian Renewable Energy Agency, Annual Report 2021-22 49 51, 67 <https://arena.gov.au/assets/2022/10/arena-annual-report-21-22.pdf>.
[45] The following is quoted verbatim, with footnotes in the original.

principles of a just transition,[46] with a view to respecting, protecting and fulfilling the rights to work, social security, an adequate standard of living, non-discrimination and cultural rights;[47]

(f) identify and address the needs of marginalised communities and groups which are most vulnerable to the physical and transition risks of climate change;[48] and

(g) be informed by the knowledge and leadership of diverse communities—in particular, of First Nations communities as the original custodians of the land, by reference to principles of self-determination and free, prior and informed consent.[49]

36. In relation to principle (c), policy measures should be transparent and supported by analysis to explain the economic strengths, opportunities and benefits alongside the costs, risks and threats with a clear articulation of the environmental outcomes to be achieved. Policy should include information about who will bear the burden and risk as well as those who will enjoy the benefits and opportunities.[50]

37. An example of policy transparency is to acknowledge the impact that construction of new energy generation and transmission infrastructure will have on the exercise of native title rights and interests, and the protection of Aboriginal cultural heritage. Not only should new policies consider how those rights and interests are to be protected, but consideration should also be given to the ways in which traditional owners can participate in new renewable energy projects, should they wish to do so, or how the benefits of a project can otherwise be shared equitably with the relevant traditional owners.[51] The Law Council recognises the commitment under the Partnership to co-design 'a new First Nations Clean Energy Strategy, to ensure First Nations people in Australia shape and drive the clean energy transformation'.[52]

38. In relation to principle (a) above, to the extent that the transition involves investment in new infrastructure in Australia, particularly linear infrastructure such as transmission lines, there will be an impact on the natural environment and Commonwealth, State and Territory environmental laws must be fit for purpose to deal with the potential impacts. For example, the new *Offshore Electricity Act 2021* (Cth) was enacted to provide 'an effective regulatory framework' for offshore renewable infrastructure and offshore electricity transmission infrastructure.[53] It is important that both the regulatory activities under this Act, and the policies supporting its implementation, adequately address the environmental impacts (including cumulative

[46] Paris Agreement, Preamble; For one description of the principles involved in a just transition, see International Labour Organisation, Guidelines for a just transition towards environmentally sustainable economies and societies for all, (2015). This states that 'A just transition for all towards an environmentally sustainable economy needs to be well managed and contribute to the goals of decent work for all, social inclusion and the eradication of poverty (4, [4]).
[47] International Covenant on Economic, Social and Cultural Rights opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), arts 6,7, 8, 9 and 11; International Covenant on Civil and Political Rights opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 2, 3, 26.
[48] Paris Agreement, Preamble, arts 6, 7, 9, 11.
[49] Law Council of Australia, Indigenous Australians and the Legal Profession, Policy Statement, February 2010.
[50] Climate Change Policy [52].
[51] One example of benefit sharing on a large scale is provided by the establishment of the First Nations Clean Energy Business Fund under section 20 of the Clean Energy Act of British Columbia, Canada.
[52] National Energy Transformation Partnership [7].
[53] *Offshore Electricity Act 2021* (Cth) section 3.

environmental impacts) of the construction, operation and decommissioning of new offshore electricity infrastructure. This means that the regulators responsible for administering this new framework must be adequately resourced to assess environmental impacts, and to investigate and enforce non-compliance with the Act and the approvals issued under it.

39. It is important that both the Commonwealth and relevant State or Territory governments, when addressing the onshore aspects of a new offshore electricity project, work together efficiently to ensure all environmental and societal impacts are considered and assessed efficiently.

40. Another example of the need for environmentally effective measures is the need to address the recycling and waste management issues that will arise with an increase in the numbers of wind turbines and photovoltaic cells in use. Policies for investment in storage batteries, including community-owned batteries, should address how these batteries will be disposed of and the costs for the environment.[54] Similarly, solar panels do not have an unlimited lifespan, which means there must be strategic and long term planning to deal with this infrastructure once it has reached the end of its operating life. These issues also link to the broader 'circular economy' objectives, which were agreed by the Commonwealth, State and Territory Environment Ministers in October 2022.[55]

Conclusion

41. The above discussion of the key principles of the Law Council's Climate Change Policy may be applied to the development of law and policy frameworks to support the substantial transition to renewable energy. It is provided to assist the Joint Standing Committee on Trade and Investment Growth in its inquiry.

42. To discuss this matter further, please contact Mr Matthew Wood, Principal Policy Lawyer, on 02 6246 3755 or at matthew.wood@lawcouncil.asn.au.

[54] Community Batteries: A Cost/Benefit Analysis – Australian Renewable Energy Agency, <https://arena.gov.au/knowledge-bank/community-batteries-a-cost-benefit-analysis/>.

[55] The Commonwealth Environment Minister announced the formation of an expert advisory group to guide this process, see media release 'New expert group to guide Australia's transition to a circular economy' (25 November 2022); <https://minister.dcceew.gov.au/plibersek/media-releases/new-expert-group-guide-australias-transition-circular-economy>.