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Dr Tom Hatton
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Prime House
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By email: greenhousegasconsult@epa.wa.gov.au
By post: EPA Greenhouse Gas Guidance Consultation
Locked Bag 10
Joondalup DC
WA 6919

Dear Dr Hatton,

Environmental Protection Authority - Greenhouse Gas Assessment Guidance

Set out below are the submissions made on behalf of the West Australian Branch of the National Environmental Law Association (NELA(WA)) regarding the Environmental Protection Authority's (EPA) development of its greenhouse gas assessment guidance.

About NELA

NELA is a multi-disciplinary organisation serving the needs of practitioners in law, planning, natural resources and environmental science and management, to obtain and exchange information on issues relevant to environmental law and policy.

One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community.

Background

On 7 March 2019 the EPA released *Environmental Factor Guideline – Greenhouse Gas Emissions (Guideline)*. The Guideline required major resource projects in Western Australia to completely offset their greenhouse gas emissions if those projects would emit more than 100,000 tonnes of CO₂ – e per annum.

The Guideline was withdrawn on 14 March 2019 and the EPA has entered into public consultation period to undertake consultation on the regulation of greenhouse gas emissions.

As part of the consultation period, the EPA issued a background paper on greenhouse gas assessment guidance.¹

As you are aware, NELA(WA) hosted a seminar on 13 June 2019 to discuss the Guideline, the response from industry which led to the Guideline being withdrawn and the role of policy in environmental impact assessment (**Seminar**). The panel of speakers included, among others, the Honourable Robert French AC. The matters addressed by his Honour in the speech given at the Seminar are particularly relevant to the issues on which NELA(WA) is making these submissions. A copy of the speech is **enclosed** and will be referred to below.

Submissions

Against the above background, NELA(WA) makes the following submissions.

Long term changes to the global climate system caused by anthropogenic emissions such as CO₂ are predicted to persist.² It is therefore reasonable to conclude that greenhouse gas emissions have the capacity to cause ‘environmental harm’ as it is defined in section 3A(2) of the *Environmental Protection Act 1986 (WA) (EP Act)*. Section 15 of the EP Act provides that it is an objective of the EPA to use its best endeavours to:

- (a) protect the environment; and
- (b) prevent, control and abate pollution and environmental harm.

Like most government agencies, the EPA has many policies to guide it and those who rely on its decisions and recommendations. This was recognised by the now Hon. Chief Justice and former Solicitor General, Peter Quinlan SC who, prior to those roles, was the lead author of the ‘Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the *Environmental Protection Act 1986 (WA)*’.³

NELA(WA) would like to draw the EPA’s attention to the following statement by his Honour at the Seminar:

‘Authorities administering important public statutes must be proactive in the exercise of their functions. It is appropriate that they publish guidelines about how they approach the administration of the law in particular cases. It is also

¹ Environmental Protection Authority, ‘Background Paper on Greenhouse Gas Assessment Guidance’, (June 2019).

² IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. *World Meteorological Organization, Geneva, Switzerland, 32 pp.*

³ P D Quinlan SC, E M Heenan, S U Govinnage, 6 May 2016: *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986(WA)*, pages 46 – 47.

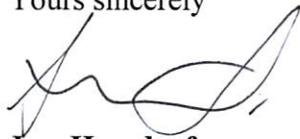
*appropriate that they explain their statutory responsibilities and the policies which they apply. Statutes do not advocate for themselves.*⁴

NELA(WA) considers the Guideline to be a result of the EPA performing its statutory duties under the Act.

Further, NELA(WA) notes that, if adopted, the operation of the Guideline needs to be considered in its broader context. That is, the EPA is not an approval authority. Approval, or more strictly speaking authorisation, is in the hands of the Minister for the Environment. The Minister's functions include taking into account 'triple bottom line' matters. It is therefore open to the Minister for the Environment to authorise a proposal, despite an inconsistency with the Guideline. However, it is relevant to note that the State Government recently announced its policy to achieve net zero emissions by 2050.⁵

Please contact me if you have any questions.

Yours sincerely



Jess Hamdorf

President

WA Chapter of the National Environmental Law Association

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⁴ The Hon. Robert French AC, 'Regulation of Greenhouse Gas Emissions Seminar' (Speech delivered at the National Environmental Law Association (WA Chapter) Seminar, Perth, Western Australia, 13 June 2019).

⁵ Government of Western Australia, 'State Government details emissions for major projects' (Media Release, Wednesday, 28 August 2019).

Regulation of Greenhouse Gas Emissions Seminar
National Environmental Law Association
(WA Chapter)

The Hon Robert French AC

13 June 2019, Perth

Statutory authorities which are charged with responsibility in politically sensitive areas of public governance and regulation can lead a dangerous life.

My experience as President of the National Native Title Tribunal between 1994 and 1998 led me to understand the dangers. A high point of that understanding came when my approach to testing the merits of native title applications for registration purposes was summarily overturned by the High Court in the presence of Yamatji People from Far North Queensland wearing T-shirts saying ‘Ban French Testing’. Another high point was the observation from former Senator Bill O’Chee of Queensland that I was ‘responsible for this hillbilly tribunal and for all the stuff-ups and blunders that have occurred.’¹ So I can say to Dr Hatton, the Chair of the Environmental Protection Authority (EPA), that I have been where he has been recently, but probably with more pain. The administration of the *Native Title Act 1993* (Cth) involved interactions with indigenous communities and the pastoral, mining, agricultural and fisheries industries, local authorities, State and Territory governments and many others – a suite of interactions which rather resembles those found in the administration of environmental laws.

The development of public policy in relation to greenhouse gas emissions is an area of intense public discourse. Public and private interests are in tension. Affected private interests are not just those of potentially emitting proponents, but also those of their employees, actual and potential, and others who may be affected by the economic impact of regulation of emissions in relation to particular proposals. The collectivity of those private interests merges into the public interest. Distracting background noise is also provided by

¹ Senator Bill O’Chee, ABC Radio, 24 December 1996, reflecting on the author and the National Native Title Tribunal cited in National Native Title Tribunal, *Native Title: A Five Year Retrospective 1994-1998* (1999) 47.

vocal ideological warriors, including those who reject the basic science of anthropogenic climate change and see the development of greenhouse gas limiting policies as some kind of cover for left-wing social engineering.

Environmental protection authorities charged with responsibility in this area must discharge that responsibility even though, in doing what they are authorised by statute to do, they may attract sectoral criticism and sometimes mischaracterisation as in some way ideological or partisan. It is generally impossible to please everybody. For some they will go too far, for others not far enough. All sides typically put their cases with confidence, authority and moral conviction.

Authorities administering important public statutes must be proactive in the exercise of their functions. It is appropriate that they publish guidelines about how they approach the administration of the law in particular cases. It is also appropriate that they explain their statutory responsibilities and the policies which they apply. Statutes do not advocate for themselves.

The statutory remit of the EPA is wide. The object of the *Environmental Protection Act 1986* (WA) (the Act), set out in s 4A is ‘to protect the environment of the State’ having regard to a number of principles, the precautionary principle, intergenerational equity, the conservation of biological diversity and ecological integrity, and principles relating to improved valuation, pricing and incentive mechanisms, and waste minimisation. The word ‘environment’ is defined expansively. It means ‘living things, their physical, biological and social surroundings, and interactions between all of these’.² This is elaborated in s 3(2) which provides that the ‘social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.’

The term ‘environmental harm’ is central to the scope of the EPA’s responsibilities and is also defined expansively in s 3A(2):

direct or indirect —

(a) harm to the environment involving removal or destruction of, or damage to

² *Environmental Protection Act 1986* (WA) s 3(1).

- (i) native vegetation; or
 - (ii) the habitat of native vegetation or indigenous aquatic or terrestrial animals;
- or
- (b) alteration of the environment to its detriment or degradation or potential detriment or degradation; or
 - (c) alteration of the environment to the detriment or potential detriment of an environmental value; or
 - (d) alteration of the environment of a prescribed kind...

There are cognate definitions of material environmental harm and serious environmental harm. Damage to the environment caused by anthropogenic climate change may not have been in the minds of the legislatures when they enacted the Act but it plainly encompasses harms of the kind set out in the definition of ‘harm’ in the Act.

It is against that background that the objective of the EPA, set out in s 15 of the Act, must be understood:

It is the objective of the Authority to use its best endeavours —

- (a) to protect the environment; and
- (b) to prevent, control and abate pollution and environmental harm.

The EPA has a large number of functions which are conferred upon it by s 16. The first of them is to conduct environmental impact assessments, under Pt IV, of proposals referred to it. Other functions include considering and initiating means of protecting the environment and the means of preventing, controlling and abating pollution and environmental harm. It has a research function and a function of advising the relevant minister in relation to regulations and on environmental matters generally. It is also a function of the EPA to prepare and seek approval for environmental protection policies. It has an educative role promoting environmental awareness within the community and encouraging understanding by the community of the environment. One of its functions, described in s 16(k) is:

to publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in such a manner as to minimise the effect on the environment of those activities or the results thereof ...

These are evidently distinct from guidelines relating to the EPA's environmental impact assessments.

The EPA is also required, under s 16(n), to 'establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm'. There are regulatory and enforcement functions, which it is not necessary to elaborate for present purposes.

There is specific provision in Pt III of the Act for the formulation and promulgation of formal environmental protection policies under the Act. Drafts are published in the *Gazette*. There is a consultation process. There may be a public hearing and, ultimately, a Ministerial approval. An approved policy is given the force of law by s 33. Outside that process, the EPA is able, like any other public authority, to issue non-statutory guidelines explaining its approach to the exercise of its functions.

The legal significance of Pt III policies was considered by the Court of Appeal of the Supreme Court of Western Australia in *Jacob v Save Beeliar Wetlands (Inc)*.³ The case concerned a challenge to the extension of Roe Highway from its terminus at Kwinana Freeway in Jandakot to Stock Road in Coolbellup. There were three 'policies' in issue none of which were formal Environmental Protection policies under Pt III. They were a Position Paper on Environmental Offsets, a Guidance Statement for Assessment of Environmental Factors and an Environmental Protection Bulletin on Environmental Offsets in relation to biodiversity. The Court held, contrary to the primary judge, that none of them was a mandatory relevant consideration which the EPA had to take into account in undertaking its assessment function under Pt IV. Indeed the Court said:

Part III of the EPA Act provides a lengthy, tortuous process involving all stakeholders, public and private, in the formulation of draft policies for the ultimate

³ [2016] WASCA 126; 50 WAR 313.

decision of the Minister ... it is inconceivable that the legislature intended the EPA to have the power to make its own policies on the same matters (being those falling within the objectives specified in s 15) which it is then impliedly required to take into account in the performance of its duties under s 44 of the EPA Act.⁴

As the Court went on to point out an assessment report under s 44 is not a final decision on the proposal in question. It is the Minister who has to decide whether the proposal may be implemented and, if so, on what conditions and procedures.⁵

The decision of the Court of Appeal depended very much on the existence of specific formal policy making processes. Absent such processes there would be room for argument that administrative policies issued by statutory decision-makers may be mandatory relevant considerations in some cases. The area is not without doubt — see *Minister for Foreign Affairs v Lee*.⁶ It may also be the case that departure by a decision-maker from a published non-statutory policy, without notice to the person affected, may constitute a failure of natural justice. It seems that a departure from an established practice of consultation may not.⁷

The Western Australian Ombudsman has issued guidelines about guidelines relating to the exercise of discretion in administrative decision-making.⁸ They can provide guidance to decision-makers when delivering a government service and making a decision and to those with an interest in the decisions. They can assist to ensure decisions are made consistently and fairly. To ensure that policies and guidelines are most effective they should:

- contain a clear purpose of what the policy or guideline is intended to achieve;
- be flexible to cover a range of circumstances under which discretion is to be exercised;
- set out the relevant considerations to be taken into account by the decision-maker;
- be expressed clearly to allow easy application and interpretation;

⁴ Ibid [56].

⁵ Ibid [57].

⁶ (2014) 227 FCR 279, 290–91 [58]–[61] and cases referred to therein. See also *Mandalia v Secretary for State for the Home Department* [2015] UKSC 59; (2015) 1 WLR 4546 [30]–[31] in which the UK Supreme Court held that if a government decision-maker has adopted a lawful policy, an individual has a public law right to have their case considered by that policy.

⁷ *Geelong Community for Good Life Inc v Environmental Protection Authority* (2008) 20 VR 338.

⁸ Ombudsman Western Australia, *Guidelines: Exercise of discretion in administrative decision making*, (Revised April 2019).

- be transparent;
- state how they relate to relevant legislation;
- be communicated to relevant staff; and
- be made available to members of the public.

Background to the Background paper on greenhouse gas assessment guidance

This seminar focusses on the ‘Background Paper on greenhouse gas assessment guidance’ issued on 10 June 2019 by the EPA. It has a short pre-history probably known to most here.

In March 2019, the EPA issued a document entitled ‘Technical Guidance Mitigating Greenhouse Gas Emissions’.⁹ Its purpose and scope as set out in s 1.0 was to address the EPA’s objectives for greenhouse gas emissions from new or expanding operations, consistent with the mitigation hierarchy (avoid, reduce, offset). It was said to:

- discuss circumstances under which the EPA would assess greenhouse gas emissions associated with development proposals;
- outline relevant considerations for mitigating greenhouse gas emissions consistent with the objects of the Act;
- ensure proposals that contribute to Western Australia’s greenhouse gas emissions are assessed in a sound and consistent manner that demonstrates how the EPA’s objectives for the Factor ‘greenhouse gas emissions’ will be met.

It was said in the document that the approaches it outlined were not new and had been applied to significant and relevant proposals subject to formal environmental impact assessment for almost two decades. Nevertheless it was widely seen as adopting a more stringent approach. The Guidance was described as complementary to existing national policy settings and consistent with goals for reducing greenhouse gas emissions under the United Nations Framework Convention on Climate Change (UNFCCC).

⁹ Environmental Protection Authority, ‘Technical Guidance Mitigating Greenhouse Gas Emissions’ (7 March 2019).

Section 2 set out a background and rationale by reference to the Australian Government's Emissions Reduction Fund and the associated safeguard mechanism. It noted an observation by the International Energy Agency about the lack of an effective 'carbon constraint or rate under the ERF or Safeguard' and the need for additional measures to meet Australia's 2030 targets. That view was said to be reinforced by the United Nations Environment Program's Emissions Gap Report 2018 and a Review by the Organisation for Economic Cooperation and Development (OECD) showing that Australia is one of the most emissions-intensive of OECD countries and will fall short of its 2030 Paris Agreement targets.¹⁰ Western Australia was said to have the second highest per capita emissions of all Australian States and Territories with emissions per capita well above those of other developed economies including resource-based economies such as Canada. The emissions trajectory in Western Australia was said to be concerning in light of Australia's international commitments and increasingly stringent global agreements. The document then stated:

This technical guidance acknowledges that, in the absence of effective national mechanisms, a greater share of the burden will fall to regulators in state and territory jurisdictions.¹¹

On its face the Guidance reflected a State regulator responding to Australia's international obligations in relation to protection of the global environment. A black-letter lawyer might ask: does this exceed the functions of the EPA in relation to the protection of the environment of the State? One short answer is no, because what happens to the global atmosphere, happens to us and we share its environmental consequences in various ways with the rest of the global community. A recent precedent for State-based action in this area may be seen in the decision of the Land and Environment Court of New South Wales delivered on 8 February 2019 in *Gloucester Resources Ltd v Minister for Planning*.¹² In that case Preston CJ considered an application to mine coal from an old open coal mine one or two kilometres from the boundary of a country town. Ministerial consent had been refused. A number of factors weighed against the mine and, as his Honour found, so did greenhouse gas emissions. The emissions were those associated with the construction and operation of the

¹⁰ Ibid citing OECD Environment Performance Reviews: Australia 2019.

¹¹ Ibid 3.

¹² [2019] NSWLEC 7; 234 LGERA 257.

mine and those associated with the transport and combustion of the coal which would all contribute to climate change.

The Court found a causal link between the project's cumulative greenhouse gas emissions and climate change and its consequences. The cumulative emissions would contribute to the global total of greenhouse gas concentrations in the atmosphere and thereby affect the climate system and cause climate change impacts. In that way the project would be likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment and people.¹³ The fact that the aggregate emissions of a particular project represented only a small portion of the total of greenhouse gas emissions across the globe did not matter. All greenhouse gas emissions are cumulatively important and must be addressed through abatement from a range of small sources. His Honour also dismissed the argument that another coal mine would be approved in another country with less stringent environmental policies to meet global demand for coking coal and that the greenhouse gas emissions would nevertheless occur.

The judgment made extensive reference to scientific expert evidence, including evidence of the influence of climate change on worsening extreme weather in Australia.¹⁴ The judgment quoted from the evidence of Professor Steffen who observed that:

global greenhouse gas emissions are made up of millions, and probably hundreds of millions of individual emissions around the globe. All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.¹⁵

A recent precedent for subnational action on climate change may be seen in the United States. The *Atlantic* magazine in September 2018 reported an announcement by 17 State Governors of a new suite of policies directed at controlling climate change and working around what was described as the stripping out by President Trump of large sways of climate change policy, including his withdrawal from the Paris Agreement. The Governors Agreement included restricting the release of 'short-lived climate pollutants' such as methane

¹³ Ibid [525].

¹⁴ Ibid [436].

¹⁵ Ibid [450].

gas. The policies were referred to as ‘one of the broadest set of actions yet taken to keep carbon emissions falling in the face of the Trump administration’s rollbacks.’ Notably the announcement by the State Governors was made in conjunction with similar announcements by the Governments of Mexico and Canada.¹⁶

Despite the fact that the March Guidelines issued by the EPA had no legal force and that the EPA is not the final decision-maker on proposals, they were perceived as creating a more stringent regulatory regime for the proponents of emitting developments. And, at a practical level, that may well have been the case.

There was an immediate reaction. The ABC News, on 8 March 2019, reported that concerns had been raised with the Premier by investors and industry representatives. In the event, the EPA withdrew the Guidelines with a view to consulting further with stakeholders and the public.

There may be a question whether it was appropriate for the EPA to withdraw its Guidelines as a response to industry concerns. That might have been a question raised if there had been full consultation. There is, however, nothing inherently wrong with that response. This is an important area of public policy affecting a range of public and private interests. They will not be able to be completely reconciled but whenever a balance is struck it will have a degree of legitimacy if it follows a full consultation process. By such processes, public authorities are themselves better informed and have an opportunity to better inform those participating about issues of implementation.

The Background Paper

On 10 June 2019, the EPA issued a ‘Background paper on greenhouse gas assessment guidance’ in which it referred to its March Guidelines. It described them as embodying more explicit and more onerous information and emission expectations than previously. That had been done in anticipation of likely future increases in proposals involving the emission of significant quantities of greenhouse gases and a cumulative impact.

The Background Paper is not a draft guideline but does a number of things:

¹⁶ Robinson Meyer, ‘17 Bipartisan Governors Vow to Fight Climate Change—And President Trump’, *The Atlantic* (online 13 September 2018) <<http://www.theatlantic.com/science/archive/2018/09/17-states-vow-to-fight-climate-change-with-new-policies/570172/>>.

1. It explains the role of the EPA and how it frames its advice in environmental protection.
2. It summarises information on greenhouse gas emissions and trends and implications for impacts on our environment.
3. It invites input from stakeholders and the community.
4. It explains the approach taken to the development of the guidelines.¹⁷

The paper then describes in more detail the role of the EPA, its application of the mitigation hierarchy, avoid, reduce and offset and sets out what the EPA does when it assesses proposals which, if implemented, would be likely to have a significant effect on the environment. It makes the point, which may have escaped notice by some, that EPA guidelines are not binding rules. They are neither regulation nor State policy. They are not subject to government endorsement. They are ideally constructed to apply to any type of proposal and are not tailored for a specific industry or sector.¹⁸

The EPA's objective in respect of greenhouse gas assessment is said in the Background Paper to mitigate greenhouse gas emissions and consequently minimise the risk of contributing to climate change.¹⁹

The EPA's Stakeholder Reference Group provided submissions in January 2019 on draft revisions to the air quality/greenhouse gas guidelines. The advice from the Stakeholder Reference Group included the need for guidelines to set emissions thresholds which would usually apply and the degree of any expected offsetting. There was disagreement on whether there was a need for any State controls on emissions in addition to existing Commonwealth regulation and the appropriateness or level of any offsetting.²⁰

It is not clear what further consultation will achieve given the input of the Stakeholder Reference Group.

The EPA's Background Paper does consider the relationship between State and Commonwealth policy. As the EPA points out in its paper in relation to the Paris Agreement,

¹⁷ Environmental Protection Authority, 'Background paper on greenhouse gas assessment guidance' (June 2019) 2.

¹⁸ Ibid 5.

¹⁹ Ibid.

²⁰ Ibid 7.

only the Australian Government can make treaty-level commitments. It is therefore appropriate for sub-national jurisdictions to defer to national legislation and policies to meet international commitments where those frameworks can be relied upon.²¹ The Paper refers to the Australian Government's Safeguard Mechanism under the *National Greenhouse and Energy Reporting Act 2007* which is designed to keep emissions from large facilities at or below baseline levels. About one third of the emissions covered by the Safeguard Mechanism are from facilities based in Western Australia and the major resource developments that comprise a large proportion of the State's emissions. The EPA observes that new resource industries are anticipated in the coming decade that can be expected to add significantly to Western Australia and therefore Australia's emissions. The EPA concludes that the national framework for emissions reductions no longer imposes effective limitations on emissions through either taxation or capped trading.²²

All of this, and the global, regional and local significance of climate change for our environment points in the direction of a robust State level policy. The private interests which weighed upon the Premier following the publication of the March Guidelines are not necessarily inherently antagonistic to climate change safeguards being imposed. In the long term climate change affects them and their operations as much as anyone else. It has the potential, not only to adversely affect the environments in which they operate but also to disrupt economies and international trade and commerce in the very products which they are producing.

Wherever the Guidelines lead in this case, their limits cannot be determined solely by their short term economics.

²¹ Ibid 8.
²² Ibid 9.