

Submission of the National Environmental Law Association to Climate Change Authority's 2025 Annual Progress Report

NELA's objects and its interest in this consultation

The National Environmental Law Association (**NELA**) welcomes the opportunity to provide inputs to the Climate Change Authority (**CCA**) 2025 Annual Progress Report.

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes Directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. When considering environmental legislative reforms, NELA considers several factors including whether the reform advances environment protection and restoration, the environment protection principles integral to environmental law, and the integrity and transparency of the reform. NELA is also a member of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors including finance, insurance, science, engineering, law, health, construction, and the built environment.

NELA established a Climate Change Working Group in 2023 (**Working Group**). Its scope and focus are directed to establishing and disseminating research and information to NELA's members and partners about climate change and law in Australia, which aligns with NELA's broader purpose of advancing knowledge and expertise of Australian environmental law.

Scope of this document

This document sets out NELA's responses to Question 1 in the issues paper ("How well is the Australian Government supporting the transition to net zero?") and suggests changes to the Government's approach to the transition, having specific regard to two recent court decisions that have implications for Australia's Nationally Determined Contributions (**NDCs**) under the Paris Agreement and national emissions reductions targets. The first decision is the Advisory Opinion on the obligations of States in respect of climate change (**Advisory Opinion**) delivered by the International Court of Justice (**ICJ**) on 23 July 2025. While not itself legally binding, the Advisory Opinion offers an authoritative statement on international law with respect to the obligations of States to mitigate and adapt to climate change, including Australia – and the legal consequences of failure to fulfil such responsibilities. The

second decision is that of the Federal Court of Australia in *Pabai Pabai v Commonwealth* [2025] FCA 796 (**Pabai Decision**) delivered on 15 July 2025, the findings of which shed light on the setting of national emissions reduction targets and which should now be read in light of the ICJ's Advisory Opinion.

NELA notes that under section 12(1) of the Climate Change Act 2022, the Annual Climate Change Statement is required to relate to “international developments during the year that are relevant to addressing climate change” (among other things). In NELA's view, the Advisory Opinion is one such international development and should therefore be considered in the Annual Climate Change Statement.

Through this submission, NELA does not seek to comprehensively answer each question posed in the Issues Paper, but instead to highlight some of the ways in which the Advisory Opinion and Pabai Decision should guide the Government's approach to climate law and policy going forward.

Question 1: How well is the Australian Government supporting the transition to net zero?

a) Approach to net zero should align with 1.5 degree temperature goal

NELA wishes to highlight the following elements of the Advisory Opinion which it considers of particular relevance to Australia's approach to supporting the net zero transition:

- The Advisory Opinion confirmed that while the Paris Agreement provides for limiting the global average temperature increase to well below 2°C above pre-industrial levels as a goal and 1.5°C as an additional effort, “1.5°C has become the scientifically based consensus target under the Paris Agreement”.¹ The ICJ therefore considers the 1.5°C threshold to be the parties' agreed primary temperature goal under the Paris Agreement.
- The Advisory Opinion also confirmed that obligations to prepare, communicate and maintain successive NDCs are obligations of result under the Paris Agreement,² but fulfilling these obligations is not enough to satisfy the requirements of the Paris Agreement. States must also ensure that the *content* of those NDCs satisfies particular requirements, i.e. States do not have unlimited discretion in determining the content of their NDCs:

“In light of the above, the Court considers that the discretion of parties in the preparation of their NDCs is limited. As such, in the exercise of their discretion, parties are obliged to exercise due diligence and ensure that their NDCs fulfil their obligations under the Paris Agreement and thus, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels, as well as the overall objective of the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” (at [245]).

¹ Para 224.

² Para 236.

- When preparing their NDCs, States must exercise due diligence – and because of the seriousness of the threat posed by climate change, the standard of due diligence is *stringent*, meaning that each Party must do its utmost to ensure that its NDC represents its highest possible ambition in order to realise the objectives of the Paris Agreement. Importantly, the NDC must be capable of making an “adequate contribution” to the achievement of the 1.5-degree temperature goal;³ and must take into account outcomes of the global stocktake, the first of which recognised that *“limiting global warming to 1.5°C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050”*.⁴ As well as preparing NDCs, States have a legal obligation to act with due diligence in taking necessary measures to achieve the objectives set out in those NDCs, in accordance with Article 4, paragraph 2 of the Paris Agreement (at [242]).
- The ICJ noted that the principle of common but differentiated responsibilities is a relevant consideration for determining the specific standard of due diligence required of a State. This principle *“reflects the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, inter alia, States’ historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development.”*⁵ The ICJ confirmed that under Article 4, paragraph 4, of the Paris Agreement, developed country parties *“should continue taking the lead by undertaking economy-wide absolute emission reduction targets”*.
- The ICJ found that under customary international law, States must fulfil their duty to prevent significant harm to the environment in the context of climate change by acting with due diligence. This requires States to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment. This means that States must (among other things):
 - put in place rules and measures which *“include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. ... These rules and measures must regulate the conduct of public and private operators within the States’ jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.”*
 - provide for and conduct Environmental Impact Assessments (**EIAs**) for *“particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control, on the basis of the best available science.”* The ICJ found that the reports of the IPCC

³ Para 242.

⁴ Para 243.

⁵ ICJ Advisory Opinion, [148]. See also [247].

represented the “best available science”, a finding that was also made in the Pabai Decision (at [224]). In the context of considering transboundary environmental harm, the ICJ stated that *“possible specific climate-related effects must be assessed ... at the level of proposed individual activities, e.g. for the purpose of assessing their possible downstream effects”*.

As Judges Bhandari and Cleveland point out in their Joint Declaration, the Advisory Opinion acknowledged that assessments of potential risk of significant harm to the climate system must take into account the cumulative effect of all relevant activities occurring within a State’s jurisdiction or control, including risks resulting from fossil fuel production, licensing and subsidies and the foreseeable “downstream” consequences of such activities in other jurisdictions.⁶ This means that EIAs for fossil fuel projects require consideration of the downstream impacts of fossil fuel production (i.e., the combustion of fossil fuels by end users), even if these impacts take place in overseas jurisdictions.⁷

Based on the above observations, NELA makes the following comments:

- The Australian Government’s approach to supporting the transition to net zero should be aligned with Australia contributing to the 1.5 degree temperature goal, with an economy-wide 1.5C-aligned emission reduction target. We observe that according to some analysis, Australia’s current NDC does not appear to be aligned with 1.5C: According to Climate Action Tracker, an Australian 2030 NDC target in line with 1.5°C compatible modelled domestic pathways would require emissions reductions of 41% below 2005 levels by 2030 excluding Land Use, Land-Use Change, and Forestry (**LULUCF**), and 60% when including LULUCF; and that for Australia’s 2035 target, Australia would need to reduce emissions 57% below 2005 levels by 2035 excluding LULUCF, and 76% when including LULUCF.⁸ Without commenting on the accuracy of this analysis, NELA emphasises that in order to comply with its international obligations according to the ICJ, the Australian Government must align its approach to net zero with the 1.5 goal, and other obligations as set out by the ICJ in the Advisory Opinion.
- The ICJ Advisory Opinion makes clear that there are limitations on the discretion afforded to the Commonwealth in setting NDCs and domestic emissions reduction targets. In the Pabai Decision, Justice Wigney found there to be no common law duty of care owed by the Commonwealth to Torres Strait Islanders to set emissions reduction targets solely by reference to the best available science. One reason for this finding was that the setting of such targets involved a value and policy judgment for each country and there was no consensus approach: at [1002]. As such, a reasonable country would in the Court’s view be expected to refer to *“economic, social, political and practical factors”* in addition to the best available science. However, in light of the ICJ Advisory Opinion, it is clear now that this discretion is not unfettered. As set out above, the ICJ has confirmed that the standard of due diligence to be applied in preparing NDCs is “stringent”, and each party to the Paris

⁶ Para 13.

⁷ <https://voelkerrechtsblog.org/the-private-life-of-the-icj-advisory-opinion-on-climate-change/>.

⁸ <https://climateactiontracker.org/countries/australia/targets/>.

Agreement has a due diligence obligation to do its utmost to ensure the NDC represents the highest possible ambition in order to realise the objectives of the Agreement.⁹ Further, as an industrialised country possessing the characteristics of relatively high per capita emissions, a substantial contribution to historical emissions (particularly downstream emissions), a mature regulatory system, and the financial and technological resources to decarbonise its economy, it is likely that the standard of due diligence for Australia to meet this obligation would be higher than less industrialised countries that have caused limited emissions historically.

- Australia’s approach to net zero must involve putting in place regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. Australia must regulate the conduct of public and private operators within its jurisdiction or control, and these regulations must be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation. Given the “general and urgent” risk of significant harm to the climate system posed by anthropogenic greenhouse gas emissions, the ICJ emphasised that a “*heightened degree of vigilance and prevention*” is required to meet the standard of due diligence for preventing significant harm to the climate system: [138]. The CCA’s assessment of the efficacy of existing federal mitigation mechanisms such as the Safeguard Mechanism in driving emissions reductions should have regard to whether these mechanisms are achieving the deep, rapid, and sustained reductions of GHG emissions that the ICJ calls for.
- Australia is required to provide for and conduct EIAs for particularly significant proposed individual activities contributing to GHG emissions to be undertaken within its jurisdiction or control, on the basis of the best available science. Reforms to the EPBC Act should ensure that scope 1, 2 and 3 emissions of significant projects are meaningfully considered in assessment processes against the full context of the remaining global carbon budget to work toward a 1.5C global temperature goal, the progress of other countries in implementing their NDCs, and the climate impacts of such emissions both internationally and domestically. If such reforms are not implemented via the EPBC Act, such considerations should be mandated via other legislation or sub-national State and Territory legislation to ensure the necessary level of “vigilance” confirmed by the ICJ Advisory Opinion. We note that following a ruling of the UK Supreme Court that a council’s approval of an onshore oil field was unlawful because it failed to consider the climate impacts of downstream oil consumption,¹⁰ the UK Government has recently introduced guidance for assessing the effects of downstream scope 3 emissions on climate from offshore oil and gas projects.¹¹

b) Support for fossil fuel projects inconsistent with international law

⁹ ICJ Advisory Opinion, [246].

¹⁰ R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others [2024] UKSC 20.

¹¹ https://assets.publishing.service.gov.uk/media/6853fa3d1203c00468ba2b15/Supplementary_guidance_-_Effects_of_Scope_3_Emissions.pdf.

- The ICJ states in the Advisory Opinion that “*failure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State*”.¹² Given this statement, NELA is concerned that the Australian Government’s current approach to continuing to approve fossil fuel projects;¹³ subsidise fossil fuel production;¹⁴ and grant fossil fuel exploration licences¹⁵ (among other things) is inconsistent with Australia’s obligations under international law. The CCA should ensure that its advice for the purposes of the Climate Change Statement supports changes to ensure Australia is meeting its international law obligations.

NELA would welcome the opportunity to discuss this submission in further detail with the CCA.

NELA Climate Change Working Group

On behalf of the NELA Board

¹² Para 247.

¹³ See, for example, approval of brownfield extensions to coal mines such as Mount Pleasant Optimisation Project and Narrabri Underground Mine Stage 3 Extension Project, as well as approval of greenfield coal mine, Vulcan South Coal Mine.

¹⁴ According to the Australia Institute, In the 2023–24 Budget, the Federal Government provided \$11.8 billion worth of subsidies to fossil fuel producers and major consumers. <https://australiainstitute.org.au/report/fossil-fuel-subsidies-in-australia-2024/>.

¹⁵ See, for example, the recent grant of petroleum exploration licences PEL 803 in the Eyre Peninsula and renewal of coal exploration licence no. 6428 in NSW.