



Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100, Parliament House  
Canberra ACT 2600  
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15 August 2022

Dear Committee Secretary,

**RE: Senate Inquiry into the Climate Change Bill 2022 and the Climate Change (Consequential Amendments) Bill 2022**

The National Environmental Law Association Ltd ACN 008 657 761 ('NELA') welcomes the opportunity to contribute to the Senate Inquiry into the Climate Change Bill 2022 and the Climate Change (Consequential Amendments) Bill 2022 ('the Senate Inquiry' or 'this Inquiry'). This submission has been prepared by a group of NELA Directors and members and has been reviewed and approved by NELA's Board.<sup>1</sup>

**1. NELA's objects and its interest in this Senate Inquiry**

NELA is a peak body for advancing Australian environmental law. We are a national, multidisciplinary, member-based association focused on environmental law and sustainability. We are managed by a national board that includes Directors with expertise in climate markets and international climate agreements, international and domestic legal frameworks for climate mitigation and adaptation, environmental regulation and regulatory theory, natural resource laws and legal frameworks for natural disasters and biodiversity conservation.<sup>2</sup>

One of NELA's core objectives is to provide a forum for, and otherwise assist in the discussion, consideration, and advancement of, environmental law across the legal profession and the wider community. Australia's emissions target and its broader contribution to global efforts to mitigate emissions and minimise the harmful effects of climate change are key concerns for NELA's members. We are grateful for the opportunity to submit this Inquiry.

**2. Submission Overview**

NELA welcomes the Australian Government's decision to legislate a national emission reduction target. These Bills make an important statement about Australia's new focus on climate action, including to the international community and particularly to our neighbours in the Pacific region, who have been vocal in their criticism of Australia's limited efforts to date. These Bills also make a statement to

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<sup>2</sup> The board has a diverse mix of Directors and members from across Australia, including from State and Territory Bars, the private and not-for-profit sectors, law firms, government and academia. Profiles of NELA's Directors can be accessed from the organisation's website, at: [www.nela.org.au/about/board-members/](http://www.nela.org.au/about/board-members/).

Australian communities, industries and other economic actors, foreshadowing the new Government's commitment to acting on climate change.

While we support the crucial first step that these Bills represent, NELA submits that these Bills ought to be revised as follows:

- the role of the Climate Change Authority must be strengthened, limiting the Minister's discretion and improving reporting obligations to maximise the independence and efficiency of the oversight that this important Authority provides;
- the statutory timeframes and obligations for review of Australia's progress against the targets legislated in these Bills must be strengthened and shortened so that reports are provided to Parliament on an annual basis. Moreover, these Bills, when in force, ought to be reviewed more regularly than every five years. NELA submits that every two years would be a more appropriate timeframe for mandatory reviews; and
- the Consequential Amendments Bill ought to be revised to require that administrative decisions made, and the exercise of administrative powers under Commonwealth legislation, must be consistent with (not merely that they should 'consider') Australia meeting its nationally determined contributions to global emission reduction efforts.

We also take this opportunity to highlight important legal gaps and shortfalls for addressing climate change that could have been integrated into these Bills, but which are currently absent. While NELA acknowledges that these outstanding issues are unlikely to be included in the current Bills, we submit that these issues must be the subject of urgent and ongoing statutory reform by the Australian Government. In particular:

- **as a matter of urgency:** the Australian Government and the Parliament must work together to rapidly increase the nation's efforts to mitigate climate change, including by increasing the statutory target the subject of this Inquiry, to bring Australia into line with the climate science articulated in recent Intergovernmental Panel on Climate Change reports and the global agreement in Paris to keep warming below 2 degrees Celsius and as close as possible to 1.5 degrees of warming; and
- **as an ongoing commitment to Australians, our region and the international community:** the Australian Government must embrace the whole-of-government, whole-of-economy and whole-of-community challenge of responding to climate change, including by addressing a host of issues that have not been included in the provisions of these Bills and which we list in the final section of this submission, below.

We provide more detail on each of these submissions in the sections that follow, beginning with the central consideration of what Australia's emission reduction target *ought* to be, given our international obligations and the weight of scientific evidence about climate vulnerability and impacts.

### **3. The need for a more substantial emissions target**

The new Labor Government was elected with a policy of reducing emissions by 43% below 2005 levels by 2030. The emissions target that is the subject of this Inquiry should be considered a floor as the science tells us there is a need for a more substantial target. We acknowledge that - as a result of negotiations with non-government members of the House of Representatives - amendments have already been made to the Bill to highlight the role of this target as a 'floor not a ceiling'. Nevertheless, we take this opportunity to urge the Australian Government to adopt a net zero policy that more closely aligns with the weight of scientific evidence, both in terms of how rapidly the world must decarbonise, and in terms of how dire the effects of climate change will be for us all if we do not meet the targets set out in the Paris Agreement. **We urge the Australian Government, in the strongest possible terms, to legislate a target that better represents our international obligations to contribute meaningfully to global climate action.** In practice, this means that Australia must both strengthen its commitment to

reducing emissions by 2030, by setting a far-more ambitious interim national target and also undertake to achieve net zero emissions well-before 2050.

#### Utilising the most current scientific evidence

Our most significant concern is the modest 2030 target adopted by the Australian Government, which takes a minimalist approach to applying the most up-to-date scientific evidence. Using the same methodology as the Australian Climate Change Authority, the independent Climate Targets Panel recently found that if Australia were to aim for net-zero in 2050 and not earlier, a 2030 target of at least 58% reduction on 2005 levels would be required.<sup>3</sup> A goal of achieving net-zero before 2050 would require an even more substantial increase to our national 2030 target. Although a target of reducing emissions by 43% represents progress, it fails to meet even the conservative recommendations published by these advisory bodies. NELA, therefore, submits that **the Senate Inquiry should recommend to the Australian Government that it increase the national emission reduction target to no less than 58% below 2005 levels.**

**We also urge the Senate Inquiry to recommend adjusting Australia's net zero targets, so that Australia works to achieve net-zero emissions well-before 2050.** For Australia to remain within its share of the global carbon budget (which, if effectively implemented, would ensure that we keep the planet below 2°C of warming), we would need to reduce emissions by 50% on 2005 levels by 2030 and reach net zero emissions by 2045, and to remain within the 1.5°C carbon budget, targets would need to be 74% below 2005 levels by 2030 and net zero emissions by 2035.<sup>4</sup>

#### Australia's international obligations

The Paris Agreement and Glasgow Climate Pact, which were both signed by Australia, set clear goals of keeping global warming to as close to 1.5°C as possible and halving global emissions by 2030.<sup>5</sup> As a signatory, Australia is required to set out its NDCs, including targets for reducing emissions by 2030. Both agreements recognise that countries have 'common but differentiated responsibilities'.<sup>6</sup> As one of the global leaders in emissions per capita,<sup>7</sup> Australia has a greater responsibility to reduce its emissions and a greater capacity to act. As such, Australia ought to consider itself obliged to set considerably higher standards than the present target of 43% below 2005 levels.

#### **4. The role of the Climate Change Authority**

Having an independent source of advice focused on science is an important and commendable aspect of the Climate Change Bill. Good governance requires that Ministerial discretions be well-informed, including by independent authorities.

We note that Section 14 of the Bill requires that the Climate Change Authority advise the Minister about the preparation of the Minister's annual climate change statement (as required under Section 12). NELA welcomes Section 14(7) which details the requirement of the Minister to prepare a written statement of reasons if the Minister decides not to accept aspects of the advice given by the Climate Change Authority. However, **NELA submits that the advice of the Authority should be given paramount consideration, and that the ability of the Minister to not accept aspects of the advice should be narrowed to limited circumstances, such as for matters of national security.**

We also share the concerns of the Law Council of Australia that Section 15 does not require the Minister to seek the advice of the Climate Change Authority on adjustments to the NDC. We respectfully adopt

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<sup>3</sup> Climate Targets Panel, *Australia's emissions reduction tasks over coming decades* (March 2021).

<sup>4</sup> Climate Targets Panel, *Australia's emissions reduction tasks over coming decades* (March 2021).

<sup>5</sup> Paris Agreement, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) ("Paris Agreement"); see also UNFCCC, 'Glasgow Climate Pact, Decision -/CP.26, advance unedited version' (13 November 2021).

<sup>6</sup> Paris Agreement, art 4(1) and 4(19).

<sup>7</sup> Ember, *Global Electricity Review 2021*, Global Trends (March 2021) pp. 14-17.

the Law Council's submissions in this regard (paragraphs 35-37). However, we digress from that submission in that, even if the Bill's drafting - which does not require advice from the Climate Change Authority - is by design and not a mere oversight, **we submit that an amendment ought to be made, to require the Minister to seek the advice of the Climate Change Authority on adjustments to Australia's NDC.** As noted above, independent advice is vital for appropriate decision-making and transparency.

## **5. Ministerial discretion and administrative decision making**

NELA acknowledges that incorporating Australia's NDCs into domestic law, particularly through the objects and purposes clauses of other legislation, creates an opportunity for administrative decision-makers to consider Australia's emissions reduction target when exercising their statutory powers. However, NELA is concerned that the Climate Change Bill enables 'mere consideration' of Australia's NDC rather than requiring that administrative decisions be 'consistent with' Australia's NDC; thus limiting the potential power of this Bill to prompt rapid and ambitious action to reduce emissions.

While the object of the Bill is to promote government accountability for its progress in meeting its emission reduction targets and climate change policies, the only substantive obligations created under the Bill are to prepare and table Annual Reports and receive advice from the Climate Change Authority. To improve the accountability mechanisms in the Bill, and in place of an independent regulatory and enforcement body that oversees Australia's progress on meeting its climate commitments, **provisions should be incorporated into the Bill requiring that all administrative decisions made under Australian legislation should be consistent with Australia's legislated emission reduction targets.** This approach was at the core of Professor Graeme Samuel's recommendations in the *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, published in 2020 (the 'Samuel Review').

NELA submits that a far broader range of decisions than those currently contemplated in the Consequential Amendments Bill (at present, limited to certain Ministerial directions) should be required to be consistent with Australia's NDC. The Explanatory Memorandum to that Bill states that:

These amendments set out in the Bill are not intended to limit or constrain the exercise of powers or performance of the existing functions of the relevant entities and schemes... consideration of Australia's emissions reduction target will inform decision-making under those Acts or by those bodies generally, rather than incorporating requirements into particular functions or powers.

NELA submits that constraining the exercise of existing statutory functions and powers is appropriate, given the most recent climate science and Australia's lived experience of climate disruptions in recent years (such as repeated flood events, catastrophic bushfires, extended droughts and, in many cases, the co-occurrence of multiple such events). If the Australian Government is to achieve its NDC and contribute meaningfully to global action on climate change, it should invite the kind of accountability that legally enforceable provisions would create. In its current form, the Bill allows too wide a discretion to administrative decision-makers in the exercise of their functions and powers, and risks allowing short-term interests to prevail over the protection of Australian environments, communities and the wellbeing of both current and future generations.

The Bill - and its recently amended object, to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge - are a step in the right direction in Australia's efforts to mitigate climate change. However, **NELA submits that the Bill and Amendments must go further, and include provisions that require that the exercise of decision-making powers by Commonwealth officials are consistent with Australia achieving its NDC's under the Paris Agreement.**

Consistent with the recommendations of the Samuel Review, **NELA submits that the Bill could include an exception for Ministers to act inconsistently with Australia's NDC if such a departure**

**can be justified** in the public interest, and accompanied by a published statement of reasons that articulate the short- and long-term environmental, social and economic implications of the decision.

## **6. Timeframes for the review and advice processes**

NELA welcomes the fact that the Climate Change Bill 2022 sets out a clear process for the Climate Change Authority to provide advice to the Australian Government, and the review process is designed to ensure the achievement of Australia's nationally determined contribution to global emission reductions ('NDC'). However, those provisions are less ambitious than they should be, in light of the timeframes discussed below.

Section 15 of the Climate Change Bill 2022 requires the Climate Change Authority to advise the Minister on Australia's NDC, but only 'if requested to do so by the Minister'. The Bill only imposes an obligation on the Minister to make such a request once every five years. Furthermore, Section 17 provides that the first review should be five years after the commencement of the section and the next review should be every ten years. Given that Australia has committed to achieving the first target under its NDC by 2030, and to achieving net zero emissions by 2050, this review period will be wholly inadequate to support the rapid adaptation of Australia's domestic targets, strategies and legal frameworks, if required. For example, according to the current government,<sup>8</sup> Australia will submit its second NDC to the UNFCCC in 2025, which is only three years after the updated first NDC was submitted to the UNFCCC in 2022, yet two years before the Minister is required to obtain advice from the Climate Change Authority under this Bill. Given the need to review Australia's NDC in just three years, the review periods set under this Bill (every five or ten years) are insufficient. Whether or not the emission reduction target legislated in the Bill is sufficient, **the Minister must be required to review Australia's national emission reduction target more frequently.**

Science and technology are rapidly evolving and scientific projections about the effects, speed and severity of climate impacts are becoming more precise. A re-evaluation of Australia's emissions target is very likely to be required in less than five years, including to comply with the Paris Agreement's 'ratchet mechanism'. Although the Paris Agreement requires parties to communicate their NDCs every five years (Article 4(9)), a party may at any time adjust its existing NDC to enhance its level of ambition (Article 4(11)).

NELA is concerned about the Bill's capacity to legally incorporate new or adjusted NDCs into the meaning of the term 'Australia's Greenhouse Gas Emission Reduction Targets' as defined in Section 10(1). **NELA adopts the submission of the Law Council of Australia (paragraphs 18-19) on this issue.**

## **7. Consequential amendments legislation**

NELA recognises that the Climate Change (Consequential Amendments) Bill now expands and incorporates the NDC targets determined by Australia and references the Paris Agreement across other relevant legislation. However, this Bill is only aimed at enabling consideration of the activities resulting in the reduction of greenhouse emissions by Australian federal entities as under the Paris Agreement.<sup>9</sup>

The consequences of this position are:<sup>10</sup>

a. The Bill provides a limited incentive for the move away from a fossil fuel-based energy economy to a renewable energy-based economy. However, there is no national plan outlined to make this transition.

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<sup>8</sup> See [International climate change commitments - DCCEEW](#)

<sup>9</sup> Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change

<sup>10</sup> IPCC Working Group II, Climate Change 2014: Impacts, Adaptation, and Vulnerability, Summary for Policymakers, (WMO and UNEP) p. 6.

b. The Bill is symbolic in achieving a commitment to act on climate change, yet does not require climate change commitments of federal entities.

c. There are no formal avenues in this Bill that incentivise the rapid adoption of carbon capture technology to reduce the level of carbon emissions (or incentivise a far-more-rapid shift away from polluting infrastructure that cannot - in an economically viable way - be fitted with effective carbon capture technology) and to avoid a rise in overall global temperatures.

**We submit that the Senate Inquiry should provide specific recommendations to the Australian Government on each of these identified consequences**, either by recommending revisions to the Bill, as appropriate or by urging the Australian Government to act on these statutory shortfalls through separate legislative processes as a matter of urgency.

**8. Many climate challenges that are not addressed by these Bills should be the subject of focused and ongoing attention by the Australian Government**

NELA is concerned that a range of legal reforms that are necessary for effective action on climate change are not contained within this Bill (nor in other legislation at the Commonwealth scale). We draw the Senate Inquiry's attention to the recommendations set out in the Environmental Defenders Office ('EDO') report, titled *A Roadmap for Climate Reform* (Attachment A). NELA supports the EDO in arguing that it "is time for a national Climate Act to set the path to real net zero, define responsibilities, galvanise transition and incentivise innovation in meeting our targets to stay within a carbon budget that will limit warming to 1.5°C" (p 4, Attachment A).

Drawing on the EDO report, NELA highlights the following critical issues that must be the focus of climate law reform in Australia, but which have been excluded from the current Bill:

- articulating a national plan to achieve net zero emissions - not just a target - and managing the effects of any 'overshoot' of Australia's emissions targets;
- allocating clear and specific responsibilities for different aspects of the challenge of planning for and responding to climate change, and the accountability mechanisms that should accompany such responsibilities;
- developing a national plan for ensuring a just transition to a renewable-energy-led economy, including supporting vulnerable communities such as Aboriginal and Torres Strait Islander peoples, renters, migrants, people with disabilities, children and the elderly, and communities in regional and remote Australia;
- mainstreaming the tasks of climate mitigation, adaptation and greenhouse gas removal across all sectors of society and all levels of government and private enterprise, to maximise the chances of maintaining a liveable environment over the coming decades (we note the work already being done here by the Professional Bodies Climate Action Charter);
- implementing a framework for supporting climate action in a way, and at a level of ambition, that will protect Australia's children and future generations from the worst climate impacts by building resilience and fostering adaptive capacity;
- articulating a plan to harness and maximise the benefits of climate change for Australian communities, environments and economies (including taking advantage of Australia's ability to be a leader in renewable energy in our region and around the world); and
- developing, in collaboration with state and territory governments, a national strategy for preparing, responding and recovering from the extreme events that will become more frequent, extended, severe and compounding over coming decades, such as heatwaves, floods, droughts and bushfires.

A particularly important gap in the proposed legislation is the failure to prohibit activities and developments that would, if approved, render the legislated climate targets impotent. That is, there is currently no legislative mechanism in the proposed Bills or Australian laws more generally, to prevent Commonwealth (or other government) approval of activities that will contribute to climate change and undermine the achievement of the targets set out in the Climate Change Bill.

Further, and in place of an independent regulatory and enforcement body to keep Australia ‘on track’ with its climate change mitigation commitments, one means of promoting substantive, legal accountability would be to draft a supplementary Bill that requires the activities and decisions made by Ministers and consent authorities under relevant legislation to be consistent with meeting or exceeding Australia’s legislated emissions reduction targets. This approach was at the core of the recommendations in the 2020 Final Report of the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* undertaken by Professor Graeme Samuel (the ‘Samuel Review’). This would bring Australia closer to a best-practice, evidence-based approach to law and policy-making.

Lastly, the Bill fails to acknowledge the deep connection between human rights and climate change and recognises that connection in Australian law. Recognising the interplay between climate change and human rights in law would help Australian decision-makers to integrate considerations of, for example, the long-term impacts on the population that are caused by climate-related weather events, and support recognition of the right to a healthy environment (as recently approved by the United Nations General Assembly in Resolution 48/13). A human rights approach to climate change law would encourage Australian governments to proactively set firm limits on emissions and avoid loose and unenforceable statements of ambition about targets set under the Paris Agreement.<sup>11</sup>

The Australian Government had an opportunity, in these Bills, to streamline and maximise the efficiency of its mitigation targets and pass a coherent climate change framework. An efficient and coherent climate change framework will help to ensure that all parts of the Australian government are united in their climate ambition, from Commonwealth through to state, regional and local government scales, and across all actors from the public sector through to private corporations and businesses, not-for-profits and individuals. While the opportunity for national coherence and efficiency has been missed in the current iteration of these Bills, **NELA urges the Australian Government to embrace these challenges and commit to tackling them through legal and policy reform, over the remainder of its current term in office.**

We would be happy to provide additional information about the issues we have raised in this submission.

Yours Sincerely,



NELA Vice-President, on behalf of NELA

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<sup>11</sup> United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on its sixteenth session (Cancun: United Nations, 2010), FCCC/CP/2010/7/Add.1.