Why Australia's environmental law does not protect the climate

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Australia's principal environmental law does not directly address climate protection. Why is this the case and what needs to change?

Reform of Australia's environmental law

Australia's principal environmental law, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act), is set to undergo 'fundamental reform' in 2024 (DCCEEW 2022). The 25-year-old legislation provides the key federal mechanism for assessing and approving projects to ensure they do not cause unacceptable environmental impacts. But the EPBC Act's provisions ignore one of the greatest challenges to national environmental protection, namely, climate change.

There is a strong case for reform of the EPBC Act to ensure that it better protects our environment and nature from the effects of climate change.

This discussion paper explores:

- Why the EPBC Act does not directly address climate change
- The limitations of other federal climate laws to provide an avenue for assessing the climate impact of major greenhouse gas emitting projects, like coal mines
- Litigation that has been brought attempting to extend the EPBC Act to cover the climate impacts of greenhouse gas-intensive projects and the reasons for its limited success in the courts to date
- The case for reform of the EPBC Act and the reform options that are currently being canvassed to provide better climate protection under Australia's main environmental law.

The discussion paper is based on an expert opinion prepared by Professor Peel for the Climate Council: *Gaps in the Environment Protection and Biodiversity Conservation Act and other federal laws for protection of the climate* (October 2023).

The EPBC Act does not explicitly address climate change

Triggers for assessment under the EPBC Act do not include climate

The EPBC Act was legislated by the Howard Government in 1999 with the intention of incorporating a wide range of environmental issues within a single legislative framework.

One of the principal functions of the legislation is to provide processes for national-level assessment and approval of projects so as to avoid unacceptable environmental impacts. These processes are triggered by projects which have, will have or are likely to have a significant impact on any of the 'matters of national environmental significance' included in the Act (referred to as 'controlled actions' – s.75 EPBC Act).

There are currently nine 'matters of national environmental significance' covered by the EPBC Act which seek to ensure protection for threatened species, the Great Barrier Reef and the protection of world heritage areas, among other issues. Climate change and/or greenhouse gas emissions are not among those listed 'matters of national environmental significance'. Despite many proposals over time to include a climate or greenhouse 'trigger' in the EPBC Act, these have never progressed (Macintosh 2007). This means the EPBC Act does not currently provide a specific or explicit regime for climate change or the regulation of projects with significant greenhouse gas emissions.

There is no climate-related 'matter of national environmental significance' included in the EPBC Act. A project's climate impacts alone do not trigger the need for assessment and approval of the project under the federal legislation.

Improved disclosure of project emissions will not address this gap

One of the proposals likely to be embraced by the Australian Government in its reforms of the EPBC Act is the introduction of requirements for project proponents to publish information on the expected 'Scope 1 and 2 emissions' of their proposals (DCCEEW 2022). This would provide greater public transparency about a particular project's contribution to greenhouse gas emissions and the climate change impacts these emissions cause.

However, it is important to note that scope 1 and 2 emissions represent a project's operational emissions, that is, the direct emissions from the activity (scope 1) and emissions from its electricity use (scope 2). This excludes a project's downstream 'scope 3' emissions, such as emissions that arise from the burning of coal harvested in a coal mining project. Scope 3 emissions represent the largest share of emissions from greenhouse gas emitting projects like coal mines or new gas extraction projects (GeoScience Australia 2023), but would not be required to be disclosed under these proposed reforms.

In addition, without any explicit direction in the EPBC Act for the Minister to consider the disclosures about emissions made by project proponents, there would be no mandatory requirement to take this information into account when deciding whether or not to approve a project.

New disclosure requirements for project greenhouse gas emissions should improve transparency around the climate impacts of projects but do not currently include scope 3 emissions (which are the largest share of emissions from greenhouse gas emitting projects). Disclosures about the emissions of proposals will not be required to be considered by the Minister in decision-making on individual projects.

Federal law offers no other place where the climate impacts of individual projects are assessed

The Australian Government has enacted new climate laws in the past two years: the Climate Change Act 2022 and the 2023 reforms to the Safeguard Mechanism. These laws enshrine Australia's targets for emissions reduction (43% below 2005 levels by 2030 and net zero emissions by 2050) and provide a key mechanism for meeting those targets through controls on the emissions of major industrial polluters.

Scope 3 emissions are not covered

The Climate Change Act sets economy-wide emissions reduction targets but does not specify how these should be considered in decision-making on individual emissions producing projects.

In addition, both the Climate Change Act targets and the reformed Safeguard Mechanism do not extend to scope 3 emissions which—as noted above—are the main source of greenhouse gas emissions for export-oriented coal mining and gas projects.

Expert estimates suggest that emissions associated with fossil fuel exports are around double the amount of Australia's domestic emissions and five times the amount of the projected annual emissions cuts under the 43% reduction target (ESD 2022).

There is no explicit requirement for consideration of greenhouse emissions

Amendments made as part of the Safeguard Mechanism reforms to include a so-called 'pollution trigger' in the Climate Change Act create a relationship between that legislation and the EPBC Act. This enables information exchange with the Environment Minister when she is assessing a project with significant scope 1 emissions. It may lead to the Climate Change Minister amending the Safeguard Mechanism rules to tighten the requirements placed on covered facilities.

Even so, there is no requirement for the Environment Minister to consider the greenhouse gas emissions and climate impacts of the project under the EPBC Act in reaching her own decision about approval of the project under the federal environmental law.

Neither the Climate Change Act nor the Safeguard Mechanism reforms allows for assessing the greenhouse gas emissions and associated climate impacts of individual projects such as new coal mines or gas extraction projects.

Litigation provides an uncertain route for broadening the EPBC Act's climate coverage

Litigation challenging decisions of the Environment Minister under the EPBC Act in respect of particular greenhouse gas-intensive projects has been brought to the Federal Court over the past two decades (MCF 2024).

Some of these cases seek to extend the EPBC Act's coverage of climate change by arguing for a broad interpretation of the legislation's concept of the 'impact' of a project on matters of national environmental significance protected under the legislation (Godden & Peel 2007). In essence, litigants have contended that a

coal or gas project's 'impact' can extend to its indirect effects on listed 'matters of national environmental significance' as, for example, in the case of a coal mine that will generate significant greenhouse gas emissions (mostly scope 3), contributing to global climate change that will adversely impact the Great Barrier Reef (a protected environmental matter under the EPBC Act).

There has been limited success with these arguments in past litigation before the Federal Court (McGinness & Raff 2020; Peel 2024), although the most recent case in the *Living Wonders* litigation is again testing these ideas in an appeal to the Full Federal Court (Living Wonders 2023). A particular constraint is that litigants are limited to mounting 'judicial review' challenges, which can only question the process applied by the Environment Minister in reaching a decision and cannot extend to the substantive merits of the claim, including the extent of environmental impacts a project is likely to have if approved.

State courts in Australia considering challenges to fossil fuel projects under environmental laws have taken a broader approach in examining the 'impacts' of these projects, including climate impacts in their decision-making (Peel 2022). Many such cases have been decided in 'merits review' proceedings where judges are able to 'stand in the shoes' of the original decision-maker and consider all the scientific and economic evidence afresh. Notably, the Australian Government has rejected proposals for the inclusion of 'merits review' as part of its reforms to the EPBC Act (DCCEEW 2022).

Lack of success in past judicial review challenges to coal mines before the Federal Court suggests that using an 'indirect impacts' argument to broaden interpretation of the EPBC Act's climate coverage represents a more uncertain route to securing the assessment of greenhouse gas-intensive projects than would be the case if the legislation included explicit requirements to consider climate impacts from greenhouse gas emissions directly.

There is a strong case for EPBC Act reform to improve protection of the environment from climate change

As it stands, the EPBC Act is not fit-for-purpose as a legislative tool for protecting the Australian environment and nature from the harmful effects of one of the greatest environmental threats we face, namely, climate change. There is a strong argument for reform of the legislation to address this gap.

Several options have been proposed for improving the EPBC Act's effectiveness in protecting Australia's environment and nature from climate change impacts.

One option is to include a **specific climate or greenhouse gas emissions-related decision-making trigger** in the EPBC Act. Such a reform would require explicit assessment of the climate impacts of projects in federal decision-making under the EPBC Act.

A 'climate trigger' of this kind has been proposed before, most recently in Senator Hanson-Young's (Greens) Climate Trigger Bill. This Bill proposes a ban on developments with annual emissions exceeding 100,000 tonnes of carbon dioxide equivalent (CO2-e) and a requirement for any projects emitting between 25,000 and 100,000 tonnes of CO2-e to undergo federal assessment. In February 2024, a Senate Committee considering the Bill recommended against its enactment.

While not a specific reform to the EPBC Act, Senator Pocock's **Duty of Care Bill**, which is currently before Parliament, provides another avenue to ensure consideration of the climate impacts of fossil fuel projects affecting children and future generations as part of environmental decision-making. The Bill was inspired by the Sharma litigation where the Federal Court found the Environment Minister owed a 'duty of care' to children and future generations in her decision-making on expansion of a coal mine (although this initial ruling was later overturned on appeal to the Full Federal Court). The Bill proposes to amend the Climate Change Act to introduce a duty to consider the health and wellbeing of children in Australia when making decisions contributing to climate change.

Another option for reform would not seek to include a 'climate trigger' but instead seek to **embed requirements for the consideration of climate impacts** at various points in the EPBC Act's decision-making process on projects. Alternatively, a similar result might be achieved through widening the definition of 'impact' included in the legislation. These reforms would allow greater scope for the Environment Minister to give explicit consideration to climate impacts in assessing the environmental risks associated with particular projects.

With the Australian Government's proposal to create an independent Environmental Protection Authority (EPA) as part of its EPBC Act reforms (DCCEEW 2022), a further reform option—following models in other jurisdictions such as NSW—would be to **give the new federal EPA powers to issue pollution licences or similar permits** to project proponents, which place greenhouse gas emissions limits on these projects. This would allow the federal EPA to regulate the greenhouse emissions from development in Australia directly, in line with the emissions reduction targets set out in the Commonwealth Climate Change Act.

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