



THE LAW SOCIETY
OF NEW SOUTH WALES

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26 November 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
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Canberra ACT 2601

By email: alexandra.wormald@lawcouncil.asn.au

Dear Mr Tidball,

Inquiry into the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and the Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020

Thank you for the opportunity to contribute to the Law Council's submission to the House of Representatives Standing Committee on the Environment and Energy's inquiry into the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 ("substantive Bill") and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020.

The Law Society's Public Law, Human Rights and Environmental, Planning & Development Committees have contributed to this submission.

The Law Society acknowledges the prominence of climate change as an issue confronting governments, businesses, the legal profession and the community generally, both in Australia and overseas. Overall, the Law Society is of the view that the proposed framework is a suitable mechanism to support the achievement of the substantive Bill's objectives.¹

The Bills are aimed at providing a policy framework for adapting to and mitigating the effects of climate change,² and seek to achieve this aim by setting a net-zero emissions target by 2050, establishing national plans for adapting to climate change for a five-year period, five-year national emissions budget that seeks to move towards the 2050 target, and five-year national plans for achieving the five-year emissions budget.³ The stated objects also include assisting the national economy to adapt to climate change, and aligning government and the private sector in the assessment of climate risks.

¹ In this regard, we understand that the Environmental Defenders Office NSW has prepared a report setting out elements of effective climate change adaptation and mitigation legislation, and has noted that the Bills adopt many of those features. See *Climate-ready planning laws for NSW: Rocky Hill and beyond*, (March 2019), available online; <http://www.edo.org.au/wp-content/uploads/2019/11/EDO-CC-FINAL-full-report-double-spreads.pdf>.

² Explanatory Memorandum to the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 (Substantive Bill), 'Outline'.

³ *Ibid.*

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CONSTITUENT BODY

The Bill also seeks to establish an independent Climate Change Commission ('Commission') which will monitor and report on the progress of the framework and its targets; prepare annual national climate change risk assessments and low emission technology statements; and advise the Australian government on compliance with the framework.⁴

The Law Society notes that the setting of a concrete legislative target for emissions reduction could provide much needed regulatory certainty to business, finance and the markets, and ensure that Australia improves compliance with its international obligations under the *Paris Agreement*.⁵

By leaving ultimate control to the Executive over when and how a 2050 emissions target will be met, Australia can remain flexible in addressing the social, economic, and environmental concerns that a transition to a lower-carbon economy necessarily entails. The requirement that the Minister appoint Commission members who are experienced in a wide range of disciplines including business competitiveness, economic analysis and forecasting, energy production and supply, climate change policy and regional development should help to ensure that the diverse interests of a wide range of stakeholders and the community at large are considered and that the Commission and the Minister have a strong evidentiary basis to inform their scientific and economic decisions.⁶

We note that the Law Council has sought comment in respect of the breadth of proposed s 75 of the Bill, which provides that:

- (1) The Minister may, by legislative instrument, make rules (**rules**) prescribing matters:
 - (a) required or permitted by this Act to be prescribed by the rules; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The Bills expressly provide that the Minister cannot promulgate rules to create an offence or civil penalty, provide powers of arrest, detention, entry, search or seizure, impose a tax, appropriate moneys from the Consolidated Revenue Fund, or directly amend the Act.

In other circumstances, the Law Society has expressed its strong preference for substantive and policy matters to be dealt with in the primary legislation. However, we note that, similar to the overarching public interest (including public health) reasons why we did not oppose the passage of emergency legislation to address the COVID-19 pandemic, we are of the view that there are justifications for this Bill to be structured the way it is. Given that the Bill sets a firm standard to be met in a particular time frame, the Government needs reasonable flexibility to respond in an ongoing way.

The subject matter is inherently complex, and the situation is evolving in respect of technological advances and international standards. As the Bills have the aim of facilitating an economy-wide transition to a low-carbon economy, every industry is likely to be affected by the legislation. The regulation of different industries and different stakeholders will need to be relatively bespoke in order to succeed. Furthermore, the likelihood of unintentional consequences for industries will be high. In our view, the flexibility allowed by use of this legislative approach is, in this case, currently both necessary and proportionate to the inherently complex subject of climate change, and to equipping the Government to respond in a timely and iterative way, including to unintentional impacts. It may be that as Australia's approach to climate change adaptation and mitigation matures and its knowledge base improves, the appropriate legislative approach will change.

⁴ Ibid, 'Part 2'.

⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁶ Substantive Bill, s 37.

We suggest that some concerns in respect of the breadth of proposed s 75 could be allayed by deleting the word “convenient” from proposed s 75(1)(b) and replacing it with words that convey the concepts of both effectiveness and efficiency.

Proposed s 75 should also be balanced by safeguards, ideally set out in the legislation. First, although the Commission will have responsibility for reviewing its own work, we believe that the Bills should be subject to a periodic Parliamentary review. Second, given the breadth of the Minister’s power under s 75 to prescribe rules, any subordinate legislation created under the Bills should be disallowable. Third, we suggest that, prior to any regulatory action being taken, regulatory impact assessment takes place through *inter alia*, proper consultations with the public, and any industry or any other stakeholder likely to be affected.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 02 9926 0354.

Yours sincerely,



Richard Harvey
President