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NSW EPA Draft Climate Change Policy and Action Plan

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the NSW EPA's Draft Climate Change Policy and Action Plan ('Climate Action Plan').

The Australian Energy Council is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

Australia's decarbonisation efforts have to date been driven almost entirely by the electricity sector. This is expected to continue over the next decade as governments prioritise driving carbon abatement primarily through the electricity sector. The aggressive decarbonisation goals set for the electricity sector are not without risk – governments need to balance their environmental ambition with other policy considerations, namely keeping prices affordable for consumers and maintaining a reliable supply of electricity. If these policy objectives are not balanced, there is a risk that public support for climate ambition will be eroded.

It is because of the need to balance these policy objectives that the AEC has concerns about the scope of the NSW EPA Climate Action Plan. Carbon regulation is a matter of national (and international) significance that has broad ranging social, environmental, and economic impacts for the community, workers, and industry. These impacts are broadly classed as the 'Just Transitions' question and is most appropriately answered through government deliberation. While an EPA might have the expertise to regulate carbon reduction limits, the setting of such limits for each facility and sector brings with it non-environmental policy challenges that an environmental administrative body may not be necessarily equipped to address.

These challenges are amplified by the nature of many government carbon targets being aspirational. In New South Wales, the targets are 50 percent greenhouse gas emission reductions by 2030, and net-zero by 2050. How the Government intends to reach this target is not set in stone and, as the Consultation Paper rightly notes, it is "neither intended nor feasible for all sectors of the NSW economy to reduce their emissions at the same rate".

The dilemma and risk for the electricity sector is that it already carries a disproportionate burden in driving decarbonisation, and this burden could grow as we approach 2030 if there is still minimal emission reductions in other sectors. The Climate Action Plan could, in theory, distribute this burden more equitably and it has indicated its intent to push abatement in sectors without existing government policy.

Alternatively, the Climate Action Plan could become politicised to ensure interim targets are met – in this scenario, the burden of meeting these targets is almost certain to be placed on electricity. Such an

outcome would be to the detriment of an orderly transition, hurting electricity reliability and affordability, and be contrary to the promised evidence-based process for setting facility limits.

Scope of EPA’s role in regulating carbon emissions should be clear

While it might sound counterintuitive, Australian environmental regulators have traditionally not been involved in carbon regulation. Responsibility has instead rested on government to develop carbon targets – this is primarily because climate change became a policy issue though international commitments Australia made over time. Federal government inaction saw state governments also become involved through the setting of aspirational carbon targets and developing policies for sectors and industries under their jurisdiction.

To date, these policies have overwhelmingly targeted the electricity sector and include flagship policies like the NSW Electricity Roadmap and Queensland Energy Plan. There is significant political capital attached to such policies with their economic, social, and environmental merit being regularly debated. Not surprisingly, carbon and climate policy has become a key election issue at federal and state elections for over a decade.

The public interest in carbon policy creates challenges for an administrative agency entering this space. These challenges recently played out in the United States, where their Supreme Court ruled that the United States Federal EPA had only limited powers to regulate carbon because climate change was a matter of national significance, and therefore any substantive policy must only go ahead if it has clear direction from Congress.¹

Promisingly, the NSW Land and Environment Court directive was less prescriptive, ordering the NSW EPA to “develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change”.² However, the decision also tempered expectations, stating “this does not demand that such instruments contain the level of specificity contended for by [the applicant], such as regulating sources of greenhouse gas emissions in a way consistent with limiting global temperature rise to 1.5C above pre-industrial levels”, and that the EPA retains its “discretion as to the specific content of the instruments it develops”.³

Given the public interest in carbon policy, the AEC considers the scope of the Climate Action Plan must be transparent and clearly bound. This should include making clear:

- Whether the policy is independent of the NSW Government’s aspirational carbon targets, or an additional mechanism to ensure these targets are met.
- How regularly facility and sector limits will be reviewed and adjusted, and whether there are special triggers for a review – e.g. would a change in government result in a review?
- Whether the EPA is liable for not adequately protecting against climate change if the evidence-based, sector targets are not met.

¹ *West Virginia et al. v Environmental Protection Agency et al* (2021) 20-1530, https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

² *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, 16, <https://www.caselaw.nsw.gov.au/decision/17b7569b9b3625518b58fd99>.

³ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, 16, <https://www.caselaw.nsw.gov.au/decision/17b7569b9b3625518b58fd99>.

- What processes will there be to allow stakeholders to inform the evidence-based setting of sector targets and facility limits?
- Whether the Climate Change Mitigation and Adaptation Plans (CCMAPs) will be limited to Scope 1 emissions or will also include Scope 2 emissions. The AEC has some concerns that broadening it to include Scope 2 emissions could have some unintended consequences, as it might distort the reported carbon footprint of important transition technologies like pumped hydro and batteries.

The Climate Action Plan must not create duplicative or inconsistent regulation

While we understand the regulator can only offer assurances at this stage of consultation that its Climate Action Plan will be complementary to existing government policies, it nonetheless remains a risk that this policy will place inconsistent or duplicative requirements on industry. This risk was eloquently [summarised](#) by the law firm Allens:

“Despite comments in the Plan that the EPA’s regulation of GHG emissions will complement existing regulation, some operators will now potentially be exposed to three levels of regulation of GHG emissions. If the requirements imposed by each regulator are inconsistent, this will raise major compliance issues.”⁴

The commencement of the Safeguard Mechanism reforms from 1 July 2023 heightens these risks, given that the Climate Action Plan proposes a similar cap system (minus the trade). The EPA will need to consider, for example, what happens if a facility exceeds its baseline under the Safeguard Mechanism but offsets the difference via Safeguard Mechanism Credits. Would this facility still be liable if the initial exceedance is above the limit set by the NSW EPA?

The setting of sector targets and facility limits

The Climate Action Plan states that it does not intend to set sector targets all at once. Rather, they will be released in stages based on whether “there is no explicit policy in place to reduce emissions, and where there are still significant opportunities for [the EPA] to both influence and require emission reductions”.

The AEC sees it as sensible to target lagging sectors and help distribute the burden of decarbonisation more equitably across all facilities, but we are also wary of how it will work in practice. First, many high-emitting facilities can be claimed as caught under existing policies via the Safeguard Mechanism reforms. Second, if a facility does not have an existing policy, it is usually because they are hard-to-abate (e.g. aviation), politically sensitive (e.g. agriculture), or both (e.g. aluminum and agriculture). It is not entirely clear then which priority sectors the regulator has in mind for this policy.

As for electricity, the Climate Action Plan states it is not an initial priority because there are existing policies in place (the NSW Electricity Infrastructure Roadmap and Electricity Strategy) to drive emission reductions and enable an orderly transition. The challenge with this is that these policies are ultimately electricity generation, not carbon emission, policies. The emission reductions are a by-product of new low or zero emission generation being built, but how fast and to what extent reductions will occur can only be projected.

⁴ Allens Linklaters, ‘Third layer of greenhouse gas emissions regulation to apply to some NSW operations’, 29 September 2022, <https://www.allens.com.au/insights-news/insights/2022/09/third-layer-of-greenhouse-gas-emissions-regulation-to-apply-to-some-nsw-operations/>.

Presently, the emissions modelling underpinning the NSW Government's interim target of 50 percent projects a more aggressive closure of power stations than is currently announced. While earlier closures are expected, whether they align with this emissions modelling is less certain.

This creates challenges for the sector when it comes to the regulator progressively setting its electricity sector target and facility limits on individual power stations. Specifically, will the EPA seek to align these targets with the NSW Government's emissions modelling or will its evidence-based process be independent from the modelling?

If it is aligned with the modelling, this creates heightened risk of a disorderly transition and will place considerable strain on the already deteriorating economics of coal-fired power stations, which might force a station to close earlier than expected. Such an outcome might meet an environmental objective but would ultimately do so at the expense of an affordable and reliable supply of electricity.

The need for careful government, and now regulator foresight, was highlighted by the Australian Energy Market Operator (AEMO) earlier this year. AEMO needed to revise its [Electricity Statement of Opportunities](#) to accommodate Origin Energy bringing forward the closure of Eraring to – at earliest – 2025. This accelerated closure resulted in AEMO forecasting a breach in the reliability standards from 2025 of almost 600 MW in NSW.⁵

Similar [modelling](#) from AEMO last year – before Origin brought forward Eraring's closure from 2032 to 2025 – concluded that the unplanned early closure of Vales Point power station would 'pose substantial risk to consumers as there would be little time for the market to respond'.⁶ The AEC considers a recognition of these risks must be part of the regulator's evidence-based process when setting facility limits.

Another conundrum for the regulator is the nature of electricity generation. Because the electricity produced is centrally coordinated to meet demand in real time, electricity generators do not necessarily operate as independent, stand-alone facilities like two competing manufacturers or farms would. For this reason, the Safeguard Mechanism has opted to treat electricity generation sector as a single entity when setting a baseline, rather than individual facilities.

With the Climate Action Plan proposing to give each facility a carbon limit, this might create some challenges in coordinating electricity supply. These challenges will become particularly acute following the closure of an electricity generation facility. While the closure would result in overall sectoral emissions declining, other facilities might need to generate more electricity to cover supply, which could lead to small carbon increases at the individual facility.

In circumstances where this electricity supply cannot be provided because it breaches the facility limit, the reliability of the electricity grid might be compromised. The AEC considers the regulator should have special arrangements or exemptions in place to accommodate these types of circumstances.

⁵ Australian Energy Market Operator, 'Update to 2021 Electricity Statement of Opportunities', April 2022, p12, https://aemo.com.au/-/media/files/electricity/nem/planning_and_forecasting/nem_esoo/2022/update-to-2021-electricity-statement-of-opportunities.pdf?la=en.

⁶ Australian Energy Market Operator, '2021 Electricity Statement of Opportunities', August 2021, p11, https://aemo.com.au/-/media/files/electricity/nem/planning_and_forecasting/nem_esoo/2021/2021-nem-esoo.pdf?la=en.

Load-Based Licensing Scheme

The Climate Action Plans states that there is no proposal to charge fees for greenhouse gas emissions in load-based licensing ('LBL'), however it may be considered in the future. The AEC considers that market-based approaches like a LBL scheme for carbon are best achieved at a federal level to maximise efficiency and minimise market distortion.

Any questions about this submission should be addressed to Rhys Thomas, by email Rhys.Thomas@energycouncil.com.au or mobile on 0450 150 794.

Yours sincerely,

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