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Review of the National Greenhouse and Energy Reporting legislation

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Submission from NSW Young Lawyers Environment and Planning Law Committee

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The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) makes the following submission in response to the 2018 Review of the National Greenhouse and Energy Reporting legislation (**NGER Scheme**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises of a group of approximately 50 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

The Committee makes the following recommendations in relation to the 2018 Review of the NGER Scheme with reference to the following chapters of the attendant Consultation Paper published by the Climate Change Authority (**Consultation Paper**):

Chapter 2:

1. Reporting thresholds under the NGER Scheme should be lowered to capture emissions from a greater proportion of entities with substantial emissions.
2. Scope 3 emissions should be measured and reported on under the NGER Scheme.
3. Reporting under the NGER Scheme should be carried out on a monthly, rather than annual basis, and the National Greenhouse Accounts maintained accordingly.

Chapter 3:

4. The objective of the safeguard mechanism should be redefined with reference to its role in facilitating the realisation of Australia's long-term emissions reduction targets.
5. A clearly defined framework for ratcheting down the emissions thresholds under the safeguard mechanism should be developed in line with Australia's long-term emissions reduction targets.
6. The scope of the safeguard mechanism should be expanded so that it applies to all facilities which have a cumulative scope 1-3 emissions footprint that exceeds the safeguard emissions threshold.
7. Emissions abatement from ERF projects should not be used in the calculation of safeguard facilities' net emissions.
8. Safeguard facilities should no longer have the ability to increase their emissions baselines.
9. Safeguard facilities should no longer have the ability to utilise multi-year monitoring periods.
10. Consideration should be given to how the safeguard mechanism could be linked with international markets.

Chapter 4:

11. The publication requirements under the NGER Scheme should apply to a broader range of entities.

12. The threshold for data publication under the NGER Scheme should be expanded to take into account scope 3 emissions.
13. Data collected under the NGER Scheme should be published on a monthly, rather than annual basis in accordance with the more frequent reporting requirements recommended in relation to Chapter 2 of the Consultation Paper.
14. Entities' scope 3 emissions should be published to enhance their accountability and better inform public policy.
15. Emissions data from the agriculture, land use, land use change, forestry, private vehicle transport and residential sectors should be published under the NGER Scheme.
16. The NGER legislation should expressly identify the factors the Clean Energy Regulator must take into account when considering a request not to publish emissions data.
17. Consideration should be given as to how the interface of the Clean Energy Regulator website and information published on that website could be made more user-friendly for members of the public without a working understanding of the NGER Scheme and those looking for entity-specific emissions data.
18. Measures to proactively encourage public participation and engagement with published NGER Scheme data should be included in NGER Act. This may involve making public announcements, news items and interviews in the local media or local focus group meetings regarding the publication of such data mandatory under the NGER Act.
19. The publication requirements for emissions data should be refined to facilitate the drawing of comparisons between corporations based on their source and activity type.

Chapter 5:

20. All reporters (and especially those subject to the safeguard mechanism) should be required to engage a registered greenhouse and energy auditor to confirm they comply with reporting requirements prior to submitting their reports under the NGER Scheme.

General comments

In April 2016, Australian became a signatory to the "Paris Agreement"[1] on greenhouse gas (**GHG**) emission mitigation. The Agreement obliges signatories to work towards keeping global temperature rises to well below two degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.

Article 4.2 of the Agreement provides that Australia's current nationally determined contribution (**NDC**), to support the aim of limiting global warming to well below 2ºC, is to reduce our emissions by 26–28 per cent below 2005 levels by 2030 (**2030 Target**).[2] Australia's 2030 Target has been widely criticised as one of the least ambitious targets adopted by a developed country under the Paris Agreement.[3]

Despite a generous NDC for 2030, based on current policy settings in Australia it appears that the 2030 Target is currently out of reach. In December 2017, the Australian Government released a report on Australia's current emissions trajectory which indicates that Australia will not meet its 2030 Target unless additional emissions reduction measures are put in place.[4]

Australia remains the highest producer of GHG) emissions per capita in the world, largely driven by a reliance on coal-fired energy production which accounts for more than 75% of electricity produced in the mainland eastern states of Queensland, New South Wales and Victoria.[5]

Despite the need to address GHG emissions, in August 2018 the Australian Government announced that it would not go ahead with its plan to legislate an emissions reduction target for the electricity sector as part of its proposed National Energy Guarantee (**NEG**).

In the absence of any effective emissions reduction strategy in Australia, the 2018 review of the NGER Scheme is both timely and crucial to ensuring Australia will be able to meet its 2030 Target.

The NGER Scheme, with the amendments outlined in this submission, is an opportunity to reduce our emissions in line with our international obligations in the foreseeable future.

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[1] "Paris Agreement". United Nations Treaty Collection. 8 July 2016.

[2] Commonwealth of Australia, 'Australia's 2030 Emission Reduction Target' (2015) <https://www.pmc.gov.au/sites/default/files/publications/Summary%20Report%20Australias%202030%20Emission%20Reduction%20Target.pdf>.

[3] Rob Fowler et al, 'Climate Law (Technical Paper 5)' (Australian Panel of Experts on Environmental Law, Melbourne, April 2017), 8, 10 ('*APEEL Technical Paper 5*').

[4] Department of Environment and Energy, 'Australia's Emissions Projections 2017' (2017).

[5] Commonwealth of Australia (Department of the Environment and Energy) "Australia's 7th National Communication on Climate Change", December 2017, 31.

Consultation Questions: Chapter 2

Q. 1 Do the National Greenhouse and Energy Reporting scheme reporting thresholds balance coverage with administrative costs? Should thresholds be increased, decreased or kept as is?

Australia's reporting mechanism under the NGER Scheme collects data in relation to entities' GHG emissions from processes and product use and the waste sector with emissions estimates above 25,000 tonnes CO2-e per year, or energy consumed or produced above the same threshold. The reporting is used to inform policy and legislative choices to advance mitigation techniques and technologies that will assist to reduce emissions.

To achieve our 2030 Target and make Australia's per capita emissions more proportionate in respect of the global carbon budget that has been agreed under the Paris Agreement, the full scope of Australia's GHG emissions should inform policy-making in this space. On that basis, the Committee submits that the reporting thresholds under the NGER Scheme should to be lowered to capture emissions from a greater proportion of entities with substantial emissions, and that the reporting requirements should capture scope 3 emissions to provide an accurate picture of Australia's contribution to the global carbon budget. This is discussed in greater detail in relation to Question 2 below.

Recommendation 1: *Reporting thresholds under the NGER Scheme should be lowered to capture emissions from a greater proportion of entities with substantial emissions.*

Q. 2 Should the scope of reporting under the National Greenhouse and Energy Reporting scheme be expanded or reduced e.g. to include or exclude certain GHG, emissions sources, inventory sectors or types of entities who report?

Currently the NGER Scheme requires reporting on carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), perfluorocarbons (PFCs), hydrofluorocarbons (HFCs), sulphur hexafluoride (SF6) and nitrogen trifluoride (NF3). Indirect GHG covered in ancillary fashion for reporting under the UNFCCC are: carbon monoxide (CO), oxides of nitrogen (NOX), and non-methane volatile organic compounds

(NMVOCs). Sulphur dioxide (SO2), an aerosol precursor, is included because emissions of this gas influence global warming.

However, as identified in relation to Question 1 above, Australia does not report on its scope 3 emissions as this is not a formal requirement under its international climate change obligations. The Committee submits that an absence of reporting on scope 3 emissions, which contribute significantly to Australia's GHG footprint in the context of the global carbon budget, masks Australia's actual GHG footprint and shifts reporting obligations in relation to emissions from the burning of coal mined in Australia on to third parties. The Committee submits this is a material risk in the face of the consequences of exceeding the 2°C warming limit under the Paris Agreement, given that many of the countries to whom Australia exports coal are unlikely to have access to reporting mechanisms that are as sophisticated as those available in Australia.

The Committee submits that recent legal actions determined in various jurisdictions[6] illustrate that courts are open to viewing the need to address climate change as a matter of "public interest". While a court is yet to hold that GHG effects are a mandatory consideration in planning decisions, or a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), the increase in community-led actions based on climate change arguments illustrates a growing public interest in the reduction of GHG emissions.

In order to inform Australia's approach to the regulation of our downstream emissions and the approval of new resource extraction projects, the Committee submits that scope 3 emissions should be measured and reported on under the NGER Scheme so that evidence-based policy and legislative mitigation measures can be implemented to accurately and adequately reduce Australia's carbon footprint. The Committee also recommends that activities contributing to climate change should be a matter of national environmental significance under the EPBC Act in similar terms as developments has or will likely have a significant impact on water resources.[7]

Recommendation 2: *Scope 3 emissions should be measured and reported on under the NGER Scheme.*

[6] See, *Wildlife Preservation Society v Minister for the Environment and Heritage* (2006) 232 ALR 510; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784. 6; *Gray v Macquarie Generation* [2010] NSWLEC 34; *Gray v Macquarie Generation* (No 3) [2011] NSWLEC 3; *Coast and Country Association of Queensland Inc v Smith & Anor; Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection & Ors* [2015] QSC 260; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LEGRA 347 on appeal; *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 307 ALR 262.

[7] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 24D.

Q. 5 Does the frequency and timing for reporting cause any particular issues for companies?

While the annual reporting regime under the NGER Scheme provides efficiency for business by streamlining the administrative process, it creates a lag of some 6-9 months before the National Greenhouse Accounts under the NGER Scheme are made available. The Committee submits that the delay of 6-9 months is undesirable given the importance of this information in making policy and legislative decisions to encourage industry to reduce emissions. Therefore, the Committee recommends that reporting under the NGER Scheme should be carried out on a monthly, rather than annual basis, and the National Greenhouse Accounts maintained accordingly.

Recommendation 3: *Reporting under the NGER Scheme should be carried out on a monthly, rather than annual basis, and the National Greenhouse Accounts maintained accordingly.*

Consultation Questions: Chapter 3

Q. 12 Is the safeguard mechanism delivering on its objectives and fit for purpose?

According to the Clean Energy Regulator's website, the objective of the safeguard mechanism is to "ensure that emissions reductions purchased through the Emissions Reduction Fund are not offset by significant increases in emissions above business-as-usual levels elsewhere in the economy".[8] However, Australia's 2030 Target calls for a reduction in emissions below "business-as-usual".

The Committee recommends that the stated object of the safeguard mechanism should reflect the fact that it is the primary legislative mechanism which has the potential to drive emissions reductions in Australia. The Committee submits that the objective of the safeguard mechanism should be redefined with reference to its role in facilitating the realisation of Australia's 2030 Target and future NDCs under the Paris Agreement.

In addition, while the *design* of the safeguard mechanism is effective in terms of providing a framework for companies to measure, report on and manage their GHG emissions, the *operation* of the safeguard mechanism should adapted to realise its potential to be used as a market-based mechanism to ensure absolute emissions reductions.

Changes to the following key elements of the safeguard mechanism are required to ensure that it is fit for purpose:

1. the emissions threshold that determines which facilities are covered by the safeguard mechanism; and
2. the level at which their 'baseline' emissions are set.

This is discussed in greater detail in relation to Questions 13 and 18 below.

Recommendation 4: *The objective of the safeguard mechanism should be redefined with reference to its role in facilitating the realisation of Australia's long-term emissions reduction targets.*

[8] Clean Energy Regulator, 'What We Do' (14 December 2016) <http://www.cleanenergyregulator.gov.au/About/What-we-do>.

Q. 13 Are the emissions thresholds under the safeguard mechanism efficient and effective or should they be changed so more or fewer emissions are covered?

The Committee submits that the emissions threshold that determines which facilities are covered by the safeguard mechanism should be changed so that more emissions are covered. This should be done by reference to a clearly defined, long-term framework for ratcheting down emissions, which will enable Australia to meet its 2030 Target and future NDCs under the Paris Agreement. This would provide a clear signal to industry about the need to reduce the emissions intensity of their operations, while ensuring they have time to respond effectively to the regulatory mechanism.

Reducing the emissions thresholds would also ensure that the burden of reducing GHG emissions is shared across a greater number of entities, rather than affecting only relatively few companies that have the largest emissions footprints, and ultimately mean that the realities of operating in a carbon constrained future are more appropriately factored into long-term investment decisions across the economy.

Recommendation 5: *A clearly defined framework for ratcheting down the emissions thresholds under the safeguard mechanism should be developed in line with Australia's long-term emissions reduction targets.*

Q. 14 Should the scope of the safeguard mechanism be expanded or reduced if changes are made to the emissions and energy reporting scheme?

The scope of the safeguard mechanism should be expanded so that it applies to facilities that have a cumulative scope 1-3 emissions footprint, which exceeds the emissions threshold. The Committee acknowledges that it will be difficult for facilities in the resource extraction industry to reduce their actual emissions. However, the Committee submits that those emitters should be held to account for their contribution to the global carbon budget by being required to offset their emissions by surrendering Australian Carbon Credit Units (**ACCUs**). This would also have the positive effect of further stimulating Australia's carbon market, noting that the first year of operation of the Safeguard Mechanism in its current form (to 30 June 2017) has already reinvigorated the market for ACCUs.[9]

[9] Carbon Market Institute, 'Safeguard Mechanism Reboots Australia's Carbon Market' (14 March 2016) < http://carbonmarketinstitute.org/safeguard-mechanism-reboots-australias-carbon-market/>.

Recommendation 6: The scope of the safeguard mechanism should be expanded so that it applies to all facilities that have a cumulative scope 1-3 emissions footprint, which exceeds the emissions threshold.

Q. 17 Should facilities be able to use the same emission reductions to meet safeguard mechanism and Emissions Reduction Fund contract obligations?

Entities covered by the safeguard mechanism can currently undertake Emissions Reduction Fund (**ERF**) projects to generate ACCUs, reducing the net emissions from a facility by way of a "deemed surrender". However, the ACCUs can also be sold to the Australian Government under an Emissions Reduction Fund contract. This means that participating in the ERF scheme represents a double benefit to safeguard mechanism entities. This result offends the general principle that ACCUs can only be used once. Accordingly, the Committee submits that emissions abatement from ERF projects should not be used in the calculation of safeguard facilities' net emissions.

Recommendation 7: *Emissions abatement from ERF projects should not be used in the calculation of safeguard facilities' net emissions.*

Q. 18 What actions are facilities taking to meet safeguard mechanism obligations and are the options available to facilities to manage their excess emissions effective and efficient?

If a safeguard facility's emissions exceed its baseline, the operator can currently manage their excess emissions in a number of ways, including:

1 applying to vary their emissions baseline;

2 applying for a multi-year monitoring period smooth their emissions intensity;

3 offsetting their emissions by surrendering ACCUs; or

4 applying for an exemption where exceptional circumstances apply.

In relation to the first option for managing excess emissions, where historical baselines apply to a facility, operators can apply to increase its baseline if:

1 the facility exceeds its baseline in 2016-17;

2 production at the facility increases by more than 20 per cent;

3 there is natural variability in the emissions from a resource-based facility (ie. mining, oil and gas facilities); or

4 the facility's net emissions increase, but the emissions-intensity of the facility is improving.

The Committee submits that, having regard to the fact that Australia's 2030 Target seeks to reduce our national emissions by reference to 2005 levels, it is inappropriate to allow safeguard facilities to continue to increase their emissions baselines. If this practice is allowed, the benefit of emissions reductions achieved across the economy will be eroded by increased emissions from these facilities and significantly hamper Australia's ability to comply with the 2030 Target.

The Committee submits that the safeguard mechanism should be used as a tool to encourage entities to transition away from emissions-intensive industries, rather than accommodating growth in those sectors.

The Committee also submits that multi-year monitoring periods should no longer be allowed. Where safeguard facilities exceed their baseline emissions for any reporting year, they should be required to manage their emissions intensity by purchasing and surrendering ACCUs. This will stimulate the domestic market for ACCUs, helping to drive investment in carbon abatement initiatives and in turn assist Australia to meet its 2030 Target.

In relation to the use of offsets to manage emissions exceedances, the Committee submits that consideration should be given to how the safeguard mechanism could be linked with international markets instituted in accordance with Article 6 of the Paris Agreement. This is necessary in order to ensure that safeguard facilities have access to the lowest-cost means of reducing their net emissions.

Recommendation 8: *Safeguard facilities should no longer have the ability to increase their emissions baselines.*

Recommendation 9: *Safeguard facilities should no longer have the ability to utilise multi-year monitoring periods.*

Recommendation 10: *Consideration should be given to how the safeguard mechanism could be linked with international markets.*

Consultation Questions: Chapter 4

Q 19: Are the publication thresholds set at the right level?

The Committee submits that the appropriateness of publication thresholds should be decided with regard to the relevant objectives of the legislation, as outlined in section 3 of the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**). As discussed with reference to Chapter 2 of the Discussion Paper, the NGER Act creates the framework for the reporting and dissemination of information relating to GHG emissions of corporations.[10] Further objectives of the NGER Act include the use of such GHG emissions data for informing government policy formulation and the Australian public, as well as meeting Australia's international reporting obligations.[11] Having regard to these objectives, the Committee submits that the setting of 50 kt Co2-e a year as the corporate group threshold is too high for various reasons.

Firstly, the threshold leads to the exclusion of many smaller corporations. Notwithstanding privacy and commercial concerns, the emissions of smaller corporations collectively account for a large contribution to the total net emissions of GHGs in Australia[12]. Accordingly, the Committee submits that the publication of NGER Scheme data captured in relation to smaller corporations is crucial to developing an accurate, transparent and robust reporting system. For example, road transport activities in 2013 accounted for 14.3% of Australia's annual GHG emissions,[13] but high publication thresholds meant that most data regarding road transport activities was excluded from publication. In fact, data accounting for only 1% of the emissions from road transport activities was published.[14]

The Committee submits that where the completeness of publicly available data for comparison across industry sectors is compromised, one of the key incidental benefits of the NGER Scheme - competition - is lost. Removing publication thresholds would allow corporations and the public to compare the emissions reduction performance of similar companies of all sizes, stimulating competition within industry sectors.[15]

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[10] *National Greenhouse and Energy Reporting Act* 2007 (Cth), s 3.
[11] *Ibid*.
[12] *National Greenhouse and Energy Reporting Act* 2007 (Cth), s 22X(3).
[13] Commonwealth of Australia, Australian National Greenhouse Accounts: National Inventory Report 2013, The Australian Government Submission to the United Nations Framework Convention on Climate Change (2015) Vol 1, Table 2.1.
[14] Clean Energy Regulator, Australia's Source of Reported Scope 1 Emissions By Industry for 2013-14, National Greenhouse and Energy Reporting (Fact Sheet) <http://www.cleanenergyregulator.gov.au/DocumentAssets/Documents/NGER%20Australias%20sources%20of%20reported%20scope%201%20emissions%20by%20industry%20in%202013-14.pdf>.
[15] Commonwealth of Australia House of Representatives, 'National Greenhouse And Energy Reporting Bill 2007 Explanatory Memorandum' (2007).

It is also worth noting that Australia's publication thresholds under the NGER Scheme are considerably higher than those in many other jurisdictions. For example, the publication threshold under the European Union Emissions Trading System is almost half of that under the NGER Scheme, at 28 kt CO2-e a year.[16] Some jurisdictions have also implemented alternate publication triggers, with a notable example being the French regime which requires corporations with more than 500 employees to publish their emissions data.[17] More broadly, the Organisation for Economic Co-operation and Development has identified a global trend in moving away from traditional laws requiring only the reporting of large emitters, toward a gradual removal of thresholds.[18]

Finally, the Committee submits that from a practical perspective, there is little utility in setting different reporting and publication requirements under the NGER Scheme because, once the emissions from a particular source or activity have been quantified to ensure they are under the emissions intensity threshold, most of the benefit of having a publication threshold (ie. cost efficiencies through reduced administration) is lost.[19]

Recommendation 11: *The threshold for data publication under the NGER Scheme should be either reduced or removed, with consideration given to the appropriateness of other limitations such as the number of employees of the corporation.*

Recommendation 12: *The threshold for data publication under the NGER Scheme should be expanded to take into account scope 3 emissions.*

Q 20 Are any changes required to the data reported, when it is published or how it is published?

The Committee submits that the publication of NGER Scheme data by 28 February preceding financial year is inadequate because it creates a lag of some 6-9 months before the NGER Scheme data is made available for that financial year. The Committee submits that the delay of 6-9 months is undesirable given the importance of this data in making policy and legislative decisions and the data collected should be made available to policy makers and the public more quickly to ensure that

[16] Céline Kauffmann, Cristina Tébar Less, Dorothee Teichmann, 'Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes', OECD Working Papers on International Investment, 2012/01, OECD Publishing <http://dx.doi.org/10.1787/5k97g3x674lq-e>.
[17] *Grenelle II Act* 2012 (France), art 75.
[18] Céline Kauffmann, Cristina Tébar Less, Dorothee Teichmann, 'Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes', OECD Working Papers on International Investment, 2012/01, OECD Publishing <http://dx.doi.org/10.1787/5k97g3x674lq-e>.
[19] World Business Council for Sustainable Development and World Resources Institute, 'The Greenhouse Gas Protocol' (Greenhouse Gas Protocol, 2012) <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> 8.

decisions made around adaptation and/or mitigation are based on the most up to date and accurate information possible.

The Committee submits that the completeness of the data published under the NGER Scheme is compromised by the lack of information on scope 3 emissions and the exclusion of data on emissions from certain sectors. In particular, given downstream emissions often account for a corporation's greatest proportion of GHG emissions,[20] the Committee submits that the publication of data on scope 3 emissions is vital to enhance accountability and ensure that public policy makers are able to accurately assess risks, opportunities and emissions hotspots in supply chains.[21]

In relation to the publication of data from agriculture, land use, land use change, forestry, private vehicle transport and residential sectors from publication, the Committee submits that the exclusion of that data from publication is inappropriate as it distorts the picture of the major contributors to Australia's emissions footprint on a company by company basis. In addition, many of the excluded sectors are amongst the largest emitters in Australia and ought not be exempt from a national reporting scheme aiming to ensure accountability. For example, the agricultural industry accounted for 13% of Australia's emissions in 2017, and the public and private transport sectors accounted for 19%.[22]

According to the explanatory memorandum for the 2007 NGER Bill,[23] emissions from land-use, land-use change and forestry (**LULUCF**) activities under the NGER Scheme were exempt from publication because the methodologies for reporting within the agriculture sector were not yet sufficiently robust to provide meaningful data to the company level. However, the Committee submits that this justification is no longer valid due to improvements in technology and methodologies for measuring LULUCF emissions. For example, many novel strategies have now been developed to measure and reduce emissions from agricultural livestock, which accounts for around 10.2% of Australia's GHG emissions.

In addition, LULUCF activities are identified under Article 3.3 of the Kyoto Protocol as an emissions source to be accounted for in meeting the Kyoto Protocol's emissions reduction targets. Furthermore,

[20] Greenhouse Gas Protocol, 'Greenhouse Gas Protocol FAQ' (2018) <https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf>
[21] *Ibid.*
[22] Department of the Environment and Energy (Cth), 'Revised 18 May 2018 Quarterly Update of Australia's
National Greenhouse Gas Inventory: December 2017 Incorporating NEM electricity emissions up to March 2018' (2018).
[23] Commonwealth of Australia House of Representatives, 'National Greenhouse And Energy Reporting Bill 2007 Explanatory Memorandum' (2007).

emissions experts have called for increased recognition of the importance of measuring and regulating LULUCF emissions for better global climate change policy-making.[24]

While the Committee acknowledges that emissions from the sectors excluded from the NGER Scheme publication requirements are captured at a high level in the National Greenhouse Accounts, the Committee submits that the National Greenhouse Accounts serve a separate function which is, by itself, insufficient to satisfy the aims of the NGER Scheme. The National Greenhouse Accounts aim to provide a complete picture of national emissions through the estimation of emissions at an aggregate level by sector, while the data publication mechanic under the NGER Scheme captures emissions data in a bottom-up manner to identify the specific emissions sources in a given sector and enhance accountability of individual emitters.[25] Accordingly, the Committee submits that the exclusion of the publication of data from specific sectors leads to a loss of valuable information that would better satisfy the objectives of the NGER Scheme.

Recommendation 13: *Data collected under the NGER Scheme should be published on a monthly, rather than annual basis in accordance with the more frequent reporting requirements recommended in relation to Chapter 2 of the Consultation Paper.*

Recommendation 14: *Entities' scope 3 emissions should be published to enhance their accountability and better inform public policy.*

Recommendation 15: *Emissions data from the agriculture, land use, land use change, forestry, private vehicle transport and residential sectors should be published under the NGER Scheme.*

Q. 21 Do the rules for data publication and sharing balance the public interest with commercial or other interests or should they be changed?

In principle, the Committee supports the balancing of public and commercial interests within the rules for data publication and sharing set out under the NGER Act, and the vesting of power in the Clean

[24] David Ellison, Mattias Lundblad and Hans Petersson, 'Reforming the EU approach to LULUCF and the climate policy framework' (2014) 40 (2014/06/01/) *Environmental Science & Policy* 1; Joachim H. A. Krug, 'Accounting of GHG emissions and removals from forest management: a long road from Kyoto to Paris' (2018) 13 *Carbon Balance and Management* 1.

[25] Céline Kauffmann, Cristina Tébar Less, Dorothee Teichmann, 'Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes', OECD Working Papers on International Investment, 2012/01, OECD Publishing <http://dx.doi.org/10.1787/5k97g3x674lq-e>.

Energy Regulator, as an independent body to make decisions with respect to requests that information not to be published is appropriate.[26]

However, the Committee submits that a more prescriptive framework is required to ensure the Clean Energy Regulator applies a consistent approach to the evaluation of such requests and enhance transparency. For example, the circumstances in which the publication of certain data may will vary greatly from case to case, across various industries and between corporations of different sizes.

Accordingly, the Committee submits that the factors the Clean Energy Regulator must take into account when considering a request not to publish emissions data should be expressly identified in the NGER legislation.

Examples of the mandatory factors to be considered Clean Energy Regulator, apart from the public interest factors in favour of publication, could include:

- Organisational structures: control (operational and financial), ownership, legal agreements, joint ventures;
- Operational boundaries: on-site and off-site activities, processes, services, and impacts; and
- Business context: nature of activities, geographic locations, industry sector(s), purposes of information, and users of information.[27]

Recommendation 16: *The NGER legislation should expressly identify the factors the Clean Energy Regulator must take into account when considering a request not to publish emissions data.*

Q. 22 Are the processes in place for accessing National Greenhouse and Energy Reporting data efficient and user-friendly?

The Committee generally commends the accessibility of NGER Scheme data for the general public through the Clean Energy Regulator website. However, the Committee submits that certain improvements to the interface and efficiency of the page would the user experience.

Firstly, the Committee submits that the introduction page of the Clean Energy Regulator is confusing for members of the public who do not have a working understanding of the NGER Scheme. For example, all 8 data categories are listed under the tab: “National greenhouse and energy reporting

[26] Clean Energy Regulator (Cth), *Who we are* (July 2017). <http://www.cleanenergyregulator.gov.au/About/Who-we-are>.
[27] World Business Council for Sustainable Development and World Resources Institute, 'The Greenhouse Gas Protocol' (Greenhouse Gas Protocol, 2012) <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

data". However, the webpage entitled: "What data is published and why", provides insufficient information to assist users to understand the nature of the various data categories.

The Committee submits that, the names of the data categories are often not intuitive or informative. For example, the tab entitled: "A closer look at emissions and energy data", provides little guidance as to the type, or year of data available under that under the tab. Similarly, a user looking for information pertaining to a specific company or emissions group on the: "Greenhouse and energy information by controlling corporation 2016 -17" webpage would have no way of doing so except by manually scrolling through the pages of tables online or downloading the whole data table.

Recommendation 17: *Consideration should be given as to how the interface of the Clean Energy Regulator website and information published on that website could be made more user-friendly for members of the public without a working understanding of the NGER Scheme and those looking for entity-specific emissions data.*

Q. 23 How do you access and use emissions and energy data published or shared under the National Greenhouse and Energy Reporting legislation and are any improvements required?

The Committee generally commends the role of data publication requirements under the NGER Scheme in filling important gaps in the publication of emission data in Australia. In particular, the use of the NGER Scheme to address inconsistencies in the different reporting schemes across States and Territories in Australia has been effective.

However, the Committee submits that the level of engagement from general public with the emissions and energy data published under the NGER Scheme is limited. The Committee notes that the NGER legislation does not contain a requirement to encourage public engagement with the published data, with Australia being awarded an Environmental Democracy Index (EDI) score of 0 out of 3 in this regard.[28]

As a guiding principle of environmental democracy, states should, as far as possible, seek to proactively encourage public participation.[29] The Committee submits that this requirement goes beyond the publication of data and requires active steps to be taken to encourage public engagement with the information available, potentially by making measures such as public announcements, news

[28] *Ibid* 225 – 226.

[29] *Ibid* 225.

items and interviews in the local media or local focus group meetings mandatory under the NGER Act.[30]

The Committee also submits that the NGER legislation has the potential to achieve better outcomes for corporate action in improving emission reduction strategies. The NGER Scheme is currently geared towards underpinning Australia's carbon trading market and, as a result, its scope is more limited than analogous schemes from other nations.[31] For example, reporting schemes in France and the UK seek to provide companies with internal management systems to facilitate the uptake of low-carbon corporate actions.[32] As the primary focus of these schemes is to raise awareness and incentivise action by companies to reduce their emissions, the data publication obligations include scope 3 emissions and encompass smaller, less energy-intensive companies.

Accordingly, the Committee submits that the NGER Scheme should place greater emphasis on the use of emissions data for informing and incentivising corporate action to reduce emissions by facilitating comparison of the performance of comparable entities.[33] This would involve changes to the publication requirements under the NGER Scheme to include scope 3 emissions, abolish publication exemptions for specific sectors and reduce publication thresholds. The Committee refers to its earlier submissions at Chapter 4 of the Consultation Paper.

Recommendation 18: *Measures to proactively encourage public participation and engagement with published NGER Scheme data should be included in NGER Act. This may involve legislating for an educative function [performed by the Regulator], entailing the power to educate and disseminate information to the public and Scheme participants.*

Recommendation 19: *The publication requirements for emissions data should be refined to facilitate the drawing of comparisons between corporations based on their source and activity type.*

Q. 24 How should the National Greenhouse and Energy Reporting scheme evolve over time to support changing data needs?

[30] Guy J Dwyer and Judith A Preston, 'Striving for best practice in environmental governance and justice: Reporting on the inaugural Environmental Democracy Index for Australia' (2015) 32(3) *Environmental and Planning Law Journal 202.*
[31] Céline Kauffmann, Cristina Tébar Less, Dorothee Teichmann, 'Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes', OECD Working Papers on International Investment, 2012/01, OECD Publishing <http://dx.doi.org/10.1787/5k97g3x674lq-e>.
[32] *Grenelle II Act 2012* (France), art 75; Food and Rural Affairs Department for Environment, 'Guidance on how to measure and report your greenhouse gas emissions ' (2009) <http://www.defra.gov.uk/publications/files/pb13309-ghg-guidance-0909011.pdf>.
[33] GHG Protocol World Business Council for Sustainable Development and World Resources Institute, 'The Greenhouse Gas Protocol' (Greenhouse Gas Protocol, 2012) <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

The Committee submits that there has been an increase in urgency and viability of legislating to improve Australia's response to climate change. Several key events have contributed to this observation:

- **International obligations**: it is crucial for Australia to have an accurate picture of its emissions footprint in order to facilitate the development of policy and legislative mechanisms to ensure we are able to meet our 2030 Target;
- **Climate variability**: Australia has a more variable climate than many parts of the world and is more vulnerable to the effects of climate change, with the 2018 drought crisis signalling the need for urgent action to prevent the worst effects of global warming;[34] and
- **Improvements in technology**: more accurate and holistic techniques for the measurement GHGs is now available, meaning legislative requirements can now seek to institute more in-depth reporting and publication of GHG data.[35]

Accordingly, the NGER Scheme should evolve over time to ensure that it provides an accurate picture of Australia's GHG emissions (including scope 3 and LULUCF emissions). The enhanced quality of data will enable the development of policy and legislative mechanisms to effectively improve Australia's response to climate change.

[34] Albert I. J. M. Dijk et al, 'The Millennium Drought in southeast Australia (2001–2009): Natural and human causes and implications for water resources, ecosystems, economy, and society' (2013) 49(2) *Water Resources Research* 1040; Climate Council, 'Factsheet Climate Change and Drought June 2018' (2018) <https://www.climatecouncil.org.au/wp-content/uploads/2018/06/CC_MVSA0146-Fact-Sheet-Drought_V2-FA_High-Res_Single-Pages.pdf>.

[35] Department of Agriculture (Cth), 'Australian agriculture: reducing emissions and adapting to a changing climate Key findings of the Climate Change Research Program' (2013).

Consultation Questions: Chapter 5

Q. 25 Is the audit framework in the National Greenhouse and Energy Reporting legislation effective and efficient at ensuring compliance?

In order to ensure compliance with the GHG emissions reporting requirements under the NGER Scheme, the Committee submits that all reporters (and especially those subject to the safeguard mechanism) should be required to engage a registered greenhouse and energy auditor to confirm they comply with reporting requirements prior to submitting their reports.

This is necessary to bring additional rigour to the reporting process given the Clean Energy Regulator uses a risk-based approach to detecting non-compliance by focusing on those areas or companies they believe are at greatest risk of material breaches of the NGER legislation. While the Committee recognises that the Clean Energy Regulator has certain resource constraints in relation to enforcing compliance, the Committee submits that the current auditing framework may allow for non-compliant entities to slip through the regulatory cracks in the NGER Scheme.

As previously emphasised in this submission, the Committee is of the view that the accuracy of reporting under the NGER Scheme is vital to ensuring effective policy decisions are made and legislative mechanisms put in place to improve Australia's response to climate change.

Recommendation 20: *All reporters (and especially those subject to the safeguard mechanism) should be required to engage a registered greenhouse and energy auditor to confirm they comply with reporting requirements prior to submitting their reports under the NGER Scheme.*

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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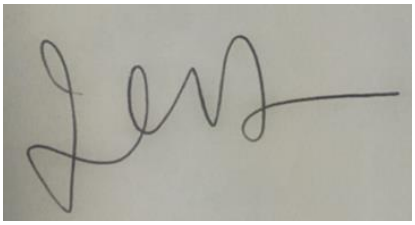

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