

Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

Summary

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Date:

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Which chapter(s) of the interim report are you commenting on?

Chapter 8: Climate Change

Key points of submission

- Climate change is the greatest emerging threat to Australia's environment and biodiversity.
- Given the EPBC Act's objectives, the Act should play a role in combating greenhouse gas emissions.
- While some emissions sources will be regulated elsewhere, the indirect emissions from the burning of Australia's coal exports are enormous and are mostly unregulated.
- The EPBC Act is well-placed to fill this regulatory gap.
- New export coalmines should automatically require approval under the EPBC Act and those approvals should be withheld until CCS technology is available.
- In the alternative, new exporting coalmines should only be approved with conditions to require contract clauses which mandate limitations on the emissions from the use of the coal, or with conditions to offset the embedded indirect emissions in the coal before export.

References (if possible, include a bibliography of any documents you may wish to make available)
Attached at end.

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Submission to the Independent Review of the *Environment*

Protection and Biodiversity Conservation Act 1999

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(I) INTRODUCTION

Thank you for the opportunity to submit to the review of the *Environment Protection and Biodiversity Act 1999* (Cth) (*EPBC Act*). I make this submission having noted the Interim Report on the first round of comments, released by independent reviewer Dr Allan Hawke.¹

To remain relevant in the environment protection sphere, the *EPBC Act* must be equipped with tools to address the greatest emerging threat to Australia's natural environment, climate change. This submission focuses on the greenhouse emissions from the overseas burning of Australia's coal exports – emissions which are mostly unregulated, yet which exceed Australia's total direct emissions. I will look at why these indirect emissions need to be addressed, and how an amended *EPBC Act* could help.

(II) THE EVIDENCE FOR CLIMATE CHANGE

The world's leading scientific body on climate change, the Intergovernmental Panel on Climate Change ('IPCC'), concluded in 2007 that 'warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea

¹ Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 - Interim Report* (2009) ('Independent Review Interim Report')

level'.² Further, the IPCC stated that 'most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations.'³ They went on to predict that if the global average temperature increases by more than 1.5-2.5°C, there will be major changes in ecosystem function and biodiversity.⁴ To avoid a global temperature rise of more than 2 degrees, the IPCC believes that global greenhouse emissions will need to peak by 2015, and decrease significantly thereafter.⁵

It is worth noting that the IPCC is a body made up hundreds of scientists from around the world, as well as representatives from member governments. The statements of the IPCC can thus be seen as very much a middle ground, a compromise between hundreds of experts and leaders with different backgrounds, interests and agendas. While Chris Mitchell and Senator Fielding continue to debate whether the climate is changing and if it is, whether the changes are due to human influences, the broad majority of the world's scientific and political community have moved on.

² IPCC, *Summary for Policymakers. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, S. Solomon et al (eds), Cambridge University Press (2007) 5.

³ Ibid 10.

⁴ IPCC, *Summary for Policymakers. In: Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry et al (eds), Cambridge University Press, 7-22 (2007) 11.

⁵ IPCC, *Summary for Policymakers. In: Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, B. Metz et al (eds), Cambridge University Press (2007) 15.

(III) PREDICTED EFFECTS OF CLIMATE CHANGE ON AUSTRALIA'S ENVIRONMENT AND BIODIVERSITY

Climate change has been identified as one of the greatest threats to the world's⁶ and especially Australia's⁷ biodiversity and ecosystems. Increased temperatures, more extreme weather events, changed rainfall patterns and more bushfires will all affect the natural environment, but many of Australia's ecosystems are especially vulnerable because they are highly fragmented and many of the remnants are on areas of naturally poor soil quality.⁸

The tropical forests of Queensland, encompassing the Wet Tropics World Heritage Area, are very sensitive to climate change. Twenty-three species of forest-dwelling endemic vertebrates, including 6 mammal species, are predicted to lose more than half of their current habitat with only a 1 degree rise in average temperature.⁹

Climate change is expected to increase the temperature and acidity of the oceans and raise the sea level by 80cm by the end of the century.¹⁰ These changes will affect many marine ecosystems and will endanger all the world's coral reefs, including the World Heritage Great Barrier Reef.¹¹

⁶ See eg, IPCC, above n 4; Nicholas Stern, *The Stern Review: The Economics of Climate Change* (2006).

⁷ R Beeton et al, *Australia State of the Environment 2006 - Independent report to the Australian Government Minister for the Environment and Heritage* (2006) 227-9.

⁸ Ibid 33.

⁹ Co-operative Research Centre for Tropical Rainforest Ecology and Management, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland* (2004) <http://www.rainforest-crc.jcu.edu.au/publications/environmental_crisis.pdf> at 24 June 2009, 4.

¹⁰ CSIRO, *Climate Change in Australia Science Update* (2009) Issue 1 <<http://www.climatechangeinaustralia.gov.au/documents/resources/CC%20science%20update%202009%20issue1.pdf>> at 25 June 2009, 2.

¹¹ IPCC, above n 4, Ch 11.

The Coorong and Lakes Alexandrina and Albert wetland at the mouth of the Murray river is one of Australia's most important RAMSAR wetlands. Historically the Murray ceased to flow at its mouth only 1 per cent of the time, but this has increased to 40 per cent of the time and the wetland is now at unprecedented low levels. Climate change is anticipated to increase the number of cease-to-flow events, which will lead to even lower water levels and the risk of acidification of the water which would have catastrophic effects on the wetland ecosystem.¹²

Another important RAMSAR wetland, the Kakadu National Park faces grave threats from sea-level rise, increases in temperature and more intense monsoons. Kakadu is an important link in the network of wetlands frequented by migratory birds across the East Asian-Australasian Flyway.¹³

Australia's alpine regions, encompassing 11 different National Heritage parks, and containing numerous unique cold climate plants and animals, are also vulnerable to even modest temperature rises under climate change.¹⁴

The forecasted impacts of climate change on Australia's environment and biodiversity, of which I have just quoted a select sample, are neither radical nor unprofessional science. Most of the sources I have quoted were either written by or for the government. Surely

¹² Department of Environment, Water, Heritage and the Arts, *Coorong and Lakes Alexandrina and Albert RAMSAR Wetland – Fact Sheet* <<http://www.environment.gov.au/water/publications/environmental/wetlands/coorong-factsheet.html>> at 25 June 2009.

¹³ United Nations Environment Program and Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals, Migratory Species and Climate Change, *Impacts of a Changing Environment on Wild Animals*, (2006) <http://www.cms.int/publications/pdf/CMS_CimateChange.pdf> at 28 June 2009, 18-24.

¹⁴ Department of Climate Change, *Australia's Biodiversity – Impacts of Climate Change* <<http://www.climatechange.gov.au/impacts/biodiversity.html>> at 25 June 2009.

then, the government's primary piece of legislation protecting the environment and biodiversity should attempt to mitigate this most serious threat.

(IV) GREENHOUSE GAS EMISSIONS FROM COAL MINES

While the greenhouse emissions from extracting coal are relatively low, the burning of that coal for energy use and steel production will account for 98% of the direct and indirect emissions from a mine.¹⁵ A great deal of Australia's coal is exported where the indirect emissions are generated overseas, and, as discussed below, Australia has chosen not to regulate these indirect emissions embodied in the coal before it is exported. However, a tonne of CO₂ emitted in Japan has the same effect on the global atmosphere as a tonne of CO₂ emitted in Australia, and Australia's environment will suffer regardless of the origin of greenhouse emissions.

What makes this situation more alarming is that the total emissions from the burning of Australia's exported coal exceed the direct emissions from all activities within Australia. Following Dr Chris McGrath's work in this area¹⁶ and updating his figures, I have calculated that the projected emissions from the overseas use of coal exports in 2008 total 666.7 million tonnes (Mt) CO₂-eq, much greater than Australia's 2008 estimated direct emissions of 553Mt CO₂-eq.¹⁷ Australia is effectively ignoring more than half of the greenhouse gas emissions under its control.

¹⁵Evidence led by Dr Saddler in *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* (2007) 155 LGERA 322; [2007] QCA 338 (*Xstrata case*). See also Chris McGrath, *Regulating Greenhouse Gas Emissions from Australian Coal Mines* (2008) 25 EPLJ 240, 252.

¹⁶ Chris McGrath, above n 15, 242, using the methodology in the Department of Climate Change, *National Greenhouse Accounts (NGA) Factors*, (2009) (<<http://www.climatechange.gov.au/workbook/pubs/workbook-jun09.pdf>> at 19 May 2009) at 11.

¹⁷ Department of Climate Change, *Australia's National Greenhouse Accounts: National Greenhouse Gas Inventory Accounting for the Kyoto Target* (2009) (<http://www.climatechange.gov.au/inventory/2007/pubs/nggi_2007.pdf> at 5 July 2009, 1.

(V) THE PLACE OF THE *EPBC ACT* IN THE CLIMATE CHANGE

MITIGATION SPHERE

(A) *The Objects of the EPBC Act*

The *EPBC Act* lists a number of objects, but the first is ‘to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance’.¹⁸ ‘Matters of national environmental significance’ are defined in the Act and include all the climate-change-threatened natural treasures outlined in Chapter III: World and National Heritage properties, RAMSAR wetlands, listed threatened species and communities, listed migratory species and Commonwealth marine areas.¹⁹ The Act also has objects of promoting biodiversity²⁰ and providing for the protection of heritage.²¹

Clearly then, the *EPBC Act* should have a role in mitigating climate change, such a great threat to its core objectives.

The *EPBC Act* also has an object of promoting ‘ecologically sustainable development through the conservation and ecologically sustainable use of natural resources’.²² So it is undoubtedly within the ambit of the *EPBC Act* to regulate the environmental impacts of coalmines.

¹⁸ *EPBC Act* s 3(1)(a).

¹⁹ *EPBC Act* pt 3, div 1.

²⁰ *EPBC Act* s 3(1)(c).

²¹ *EPBC Act* s 3(1)(ca).

²² *EPBC Act* s 3(1)(b).

(B) *Complementarity with Other Climate Change Mitigation Policies*

(1) *Carbon Pollution Reduction Scheme (CPRS)*

The proposed CPRS is the government's flagship climate change mitigation policy.

How effective the proposed CPRS will be is highly debateable, with its timid commitment to reduce emissions by 5% by 2020, the exclusion of agriculture and land-use change, and the large concessions to coal-fired electricity generators²³ and emissions-intensive trade-exposed industries.²⁴ However, the fact remains, as stated by the Senate Select Committee on Climate Policy that:

The Productivity Commission, in their submission to the committee, stated 'under a 'pure' ETS with a binding quota, the quantum of emissions is fixed. In this case, other abatement policies aimed at sectors covered by the ETS could change the composition of emissions reductions but not total emissions.' In other words, additional actions can only change the composition of the emissions mix, or influence the cost of abatement (including easing costs for particular parts of the community), or achieve other policy goals, such as industry development.²⁵

Therefore, due to the administrative burden and questionable environmental benefit, I would argue against the use of the *EPBC Act* to mitigate greenhouse emissions from sectors covered by the CPRS. However, it should be noted that the CPRS will not start until 1 July 2011 at the earliest, and it is far from certain it will be passed at all, so there should be a role for the *EPBC Act* in mitigating climate change for CPRS-covered sectors before the scheme starts operating.

²³ Carbon Pollution Reduction Scheme Bill 2009 ('CPRS Bill'), Part 9.

²⁴ CPRS Bill, Part 8.

²⁵ Senate Standing Committee on Climate Policy, Report (2009)

<http://www.aph.gov.au/senate/committee/climate_ctte/report/c05.htm#anc1> at 2 July 2009, para 5.10.

On the other hand, emissions from the overseas burning of Australia's coal exports will never be covered by the CPRS.²⁶ The CPRS will only apply to entities emitting more than 25,000 tonnes of CO₂-e per year,²⁷ and in calculating whether that threshold is reached, an entity need only include the emissions 'released into the atmosphere as a direct result of the operation of the facility'.²⁸

The government has stated that it will, where practical, apply alternative mitigation policies to target market failures not addressed by the CPRS and which impinge on the CPRS's effectiveness.²⁹ Giving the *EPBC Act* the tools to mitigate indirect emissions from exporting coalmines is surely one such alternative policy.

(2) *Mitigation Efforts by Importers of Australian Coal*

So if Australia is not regulating the indirect emissions from our export coalmines, are the emissions being controlled in the countries using Australian coal? Japan, South Korea, the European Union (EU), China and India are the biggest importers of Australian coal, together accounting for over 85% of Australia's coal exports in the year to December 2008.³⁰ These are 5 of the 10 biggest greenhouse emitters in the world.³¹

²⁶ While this submission focuses on the indirect emissions from coalmines, I note that other sources of emissions will also fall outside the CPRS, and I would endorse proposals to extend the *EPBC Act* to cover land clearance and deforestation.

²⁷ CPRS Bill, s 17(4).

²⁸ CPRS Bill, s 24.

²⁹ Australian Government Department of Climate Change, *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future - White Paper* (2008) vol 1, 6-6, 6-45, 6-62.

³⁰ Australian Bureau of Agricultural and Resource Economics (ABARE), *Australian Mineral Statistics - March Quarter* (2009) <http://www.abareconomics.com/publications_html/ams/ams_09/ams_jun09.pdf> at 30 June 2009, 17.

³¹ United Nations Statistics Division, *Millenium Development Goals Indicators: Carbon Dioxide Emissions* (2007) <<http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=749&crid=>> at 8 July 2009.

The EU has imposed an emissions trading scheme (ETS) under which emissions from power stations and steel producers are covered under a cap. Therefore, in the same way that the proposed CPRS cap makes further greenhouse mitigation efforts on covered industries redundant, a requirement on a new coalmine to include contract conditions imposing a mandatory percentage of sequestration on an EU coal importer could have no environmental benefit. But the EU ETS provides little incentive to reduce emissions, with Member States required to allocate at least 90% of their permits for free.³² Therefore, there are still many opportunities for emissions reductions, and requiring a new Australian coalmine to *offset* the emissions embodied in coal sent to the EU could be one such way. Offsets bought outside the scope of the EU ETS could be surrendered in Australia, thereby lowering Australia's cap for a net environmental benefit. Contract conditions and offsets are discussed further in Chapter VII.

None of the other major importers of Australian coal have imposed an ETS. Japan has trialled a voluntary emissions trading scheme, showing a willingness to mitigate climate change, but recently announced a greenhouse gas reduction target of only 8% below 1990 levels by 2020.³³ While the South Korean government has announced it intends to impose a carbon tax in the future, the government has also stated it expects the country's greenhouse emissions to increase from 600Mt per year to 1000Mt per year in 2030.³⁴ China has introduced a target of reducing the energy intensity of its economy by 20 per cent on 2005 levels by 2010, and has announced it will increase renewable energy to up to 10 per cent of

³² European Parliament and Council, *Directive Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community*, Directive 2003/87/EC (2003) Article 10.

³³ Richard Black, 'Japan Sets Weak Climate Target', BBC News, 10 June 2009
<<http://news.bbc.co.uk/2/hi/science/nature/8092866.stm>> at 1 July 2009.

³⁴ Kim Hyun-cheol, 'Carbon Tax to be Introduced in 2010', Korea Times, 22 August 2008
<http://www.koreatimes.co.kr/www/news/nation/2008/08/123_29803.html> at 2 July 2009.

energy supply by 2010.³⁵ India is promoting renewable energy and plans to increase forest cover from 23 per cent to 33 per cent.³⁶

Such modest policies will not allow the world to stabilise global emissions by 2015, let alone make drastic reductions thereafter. There is still clearly room for Australia to regulate the embodied emissions in its export coal without impinging on other countries' mitigation policies.

(VI) PROBLEMS WITH ATTEMPTING TO ADDRESS THE INDIRECT EMISSIONS OF A COALMINE UNDER THE CURRENT *EPBC ACT*

(A) *A Case Study*

A recent case study highlights the problems of addressing the indirect emissions of a coalmine under the current *EPBC Act*. Bowen Basin Coal Joint Venture ('BB Coal JV') applied under the *EPBC Act* for approval to develop an open-cut black-coal mine at Codrilla in the Bowen Basin, 120km south-west of Mackay in Queensland ('the Codrilla project').³⁷ The Codrilla project is expected to produce an average of 3.8 Mt of black coal each year for 16 years. The coal will be exported and used for power production,³⁸ where it

³⁵ Department of Climate Change, *What the Rest of the World Is Doing on Climate Change - Fact Sheet* (2008) <<http://www.climatechange.gov.au/whitepaper/factsheets/pubs/009-what-the-rest-of-the-world-is-doing-on-climate-change.pdf>> at 2 July 2009.

³⁶ *Ibid.*

³⁷ Bowen Basin Coal Joint Venture, *Referral of Proposed Action under Environment Protection and Biodiversity Conservation Act 1999*, ('BB Coal JV Referral Document') <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=4892> at 19 May 2009.

³⁸ *Ibid.* 4.

will generate approximately 9.1 Mt of CO₂-e per year.³⁹ That makes Codrilla's annual indirect emissions more than 350 times the CPRS threshold.

BB Coal JV referred the Codrilla project to the Environment Minister to determine whether the project is a 'controlled action' and therefore requires approval under the *EPBC Act*.⁴⁰ The BB Coal JV Referral Document did not refer to the greenhouse emissions arising from the use of coal mined from the project,⁴¹ and it would appear that the Minister's delegate did not require that information,⁴² despite having the power to do so.⁴³

In the end, the Minister's delegate decided that the Codrilla project is likely to have a significant impact only on an area of Brigalow woodlands – an endangered regional ecosystem – through vegetation clearing for the project. Yet, as discussed above, climate change poses a risk to much of Australia's environment and biodiversity, including many matters of national environmental significance, and the Codrilla project will indirectly make a significant contribution to the greenhouse gas emissions which are causing climate change.

In short, the Codrilla project is not a 'controlled action' under the *EPBC Act* because the indirect emissions from the mine will not have a 'significant effect' on a matter of national environmental significance. Climate change will have a significant effect on many matters

³⁹ Using the methodology in the Department of Climate Change, *National Greenhouse Accounts (NGA) Factors*, (2009) (<<http://www.climatechange.gov.au/workbook/pubs/workbook-jun09.pdf>> at 19 May 2009) at 11.

⁴⁰ Department of the Environment, Water, Heritage and the Arts, *EPBC Act Referrals List* <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=4892> at 19 May 2009.

⁴¹ Although BB Coal JV do attach to the referral a one-page broad aspirational document entitled 'Climate Change Policy' (BB Coal JV Referral Document, at Attachment 3).

⁴² Department of the Environment, Water, Heritage and the Arts, *EPBC Act Referrals List* <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=4892> at 27 June 2009.

⁴³ *EPBC Act* s 76.

of national environmental significance, but the emissions attributable to the mine, despite being comparatively large, will not have a measurable influence on the climate.

(B) *Relevant Case Law*

The argument that the emissions from a single project are just a ‘drop in the ocean’ of worldwide emissions causing climate change has been adopted by government delegates assessing new projects under the *EPBC Act*, and has been approved in the Federal Court. In the *Anvil Hill case*,⁴⁴ the applicant sought judicial review of a decision by the Minister’s delegate that the proposed Anvil Hill coalmine in NSW was not a ‘controlled action’. The Minister’s delegate had examined climate change impacts but concluded that ‘the emissions from the proposed mine would not be a substantial cause of climate change affecting matters protected under Part 3 of the Act.’⁴⁵ The Anvil Hill mine was expected to generate 8Mt of export coal per year for 20 years, which when used would generate 12.4 Mt CO₂-e per year, almost 500 times the CPRS threshold. Stone J concluded that ‘the relatively small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact.’⁴⁶

In the *Wildlife Whitsunday case*⁴⁷, an environment group unsuccessfully challenged the Minister’s consideration of greenhouse emissions from two large coal mines approved under the *EPBC Act*. In a similar finding to the *Anvil Hill case*, Dowsett J stated that

⁴⁴ *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3 (*Anvil Hill case*).

⁴⁵ *Anvil Hill case* [38].

⁴⁶ *Anvil Hill case* [40].

⁴⁷ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 (*Wildlife Whitsunday case*).

‘[t]here has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter’.⁴⁸

The *Your Water Your Say case*⁴⁹ recently confirmed that a decision-maker under the *EPBC Act* does not even need to consider greenhouse emissions when determining whether a proposal is a ‘controlled action’, stating:

To establish the ground that a decision-maker has failed to take a relevant consideration into account ... it must be shown that he or she was *bound* by law to have regard to the particular consideration ... The question of greenhouse gas emissions was not such a matter.⁵⁰

But to argue that the Codrilla project’s emissions will not directly cause the climate change which will destroy the Great Barrier Reef is to miss the point. There is no one source in the world that is causing climate change on its own – it is the contribution of many power plants, industries, farms and land-clearances which are all individually small parts of total global emissions. In proposing the CPRS, the government has made the link between the predicted impacts of climate change and the many comparatively small contributions of individual industries to this problem. The *EPBC Act* now needs to be amended to do the same.

⁴⁸ *Wildlife Whitsunday case* [72].

⁴⁹ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 (‘*Your Water Your Say case*’).

⁵⁰ *Your Water Your Say case*, [22] (per Heerey J).

(VII) AMENDING THE *EPBC ACT* TO HELP MITIGATE CLIMATE CHANGE

(A) *Lessons from Previous Attempts*

The need for the *EPBC Act* to consider greenhouse gas emissions has been debated throughout the legislation's life.⁵¹ In 2001 the government released draft regulations under the *EPBC Act* implementing a greenhouse trigger, but the regulations were never implemented. In 2005, the Shadow Environment Minister, Anthony Albanese MP, proposed amending the *EPBC Act* to include a greenhouse trigger,⁵² but the Bill was defeated by the Coalition government of the day.

MP Albanese's Bill proposed the following insertions:

25AA Requirement for approval of climate change actions

- (1) A person must not knowingly, intentionally or recklessly take a climate change action that has, will have, or be likely to have a significant impact on the environment.

25AB What is a climate change action? A climate change action means any of the following:

- (a) establishing an industrial plant or other facility which emits, or is likely to emit, more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year; or
- (b) any other action, series of actions, or program of actions, which will lead, or are likely to lead, directly or indirectly to the emission of more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year.

I would argue against similar amendments were they proposed today, for three reasons.

Firstly, the broadly defined 'climate change action' would include many projects covered

⁵¹ Andrew Macintosh, 'The Greenhouse Trigger: Where Did it Go and What of its Future?' in T Bonyhady and P Christoff (eds), *Climate Law in Australia* (2007) Ch 4.

⁵² Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005.

by the CPRS, and thus, as discussed above, would increase red-tape for little environmental gain. If the *EPBC Act* is to cast such a wide net, those provisions which duplicate the work of the CPRS should sunset on the implementation of the CPRS.

Secondly, clause 25AA does nothing to solve the problem that it is very difficult to link the emissions of a particular project directly to significant climate change effects on the environment. If one follows the current government and Federal Court reasoning, the Codrilla project's annual emissions of 8.8Mt CO₂-e are not likely to have 'a significant impact on the environment'.

Secondly, the threshold of 500,000 tonnes CO₂-e is too high. The *National Greenhouse and Energy Reporting Act 2007* (Cth), mandates reporting of greenhouse gases for all facilities emitting more than 25,000 tonnes CO₂-e per year. The CPRS proposes the same 25,000 tonnes CO₂-e threshold, indicating what the government considers is a significant contribution to climate change. To show a consistency of government thinking the same threshold should be set in the *EPBC Act*. This would still avoid the unfavourable situation of a red-tape explosion where every action, no matter how small, becomes a 'controlled action'.

(B) *Suggested Changes to the EPBC Act*

(1) *Coalmine Trigger*

A specific trigger for mines which will export coal should be added to the *EPBC Act*.⁵³

Rather than linking the trigger to an environmental impact, Parliament should acknowledge now that coalmines will produce coal which, when burnt, will produce greenhouse gases, which will contribute to climate change, which will have a significant effect on Australia's environment and biodiversity. This submission has shown that this is not a great leap of faith.

Every proposed mine which plans to export more than 10,500 tonnes of coal per year⁵⁴ should be considered a 'controlled action' under the *EPBC Act*, and therefore require assessment and approval before it can proceed.

(2) *The Capacity to Refuse Coalmine Approvals*

Australia's environment and biodiversity demands that emissions be drastically reduced, however there is currently not the technology to sequester on a large scale the emissions from burning coal. A response could be to cease the approval of any new coalmines until that technology came on line and coal could be used sustainably.⁵⁵ This approach would align with one of the principles of ecologically sustainable development, a mandatory consideration in assessing 'controlled actions' under the *EPBC Act*⁵⁶:

⁵³ Although not a focus of this submission I would also recommend a temporary general greenhouse gas trigger which would sunset once the CPRS took effect.

⁵⁴ This equates to 25,000 tonnes of CO₂-e emissions per year.

⁵⁵ Chris McGrath, above n 15, 242.

⁵⁶ *EPBC Act* s 136(2).

'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'.⁵⁷

While short-term economic considerations would lose out, the coal is still in the ground, like money in the bank, so the long-term economics makes sense. No new jobs would be created in the short-term, but creating jobs in an unsustainable industry is not good social policy anyway. The environment would win, and the argument for intergenerational equity demands such a long-term sustainable approach.

However, I note that total coal exports were estimated to be worth over \$46.6 billion in the year to December 2008.⁵⁸ Predicted exports for the 2008/2009 financial year will be worth nearly \$60 billion.⁵⁹ Given the short-term economic gains and associated tax revenue, the government may find it hard to refuse approval for new coalmines, so approvals could be granted with strict conditions to mitigate their indirect emissions impacts.

(3) *Mandatory Considerations*

The coalmine trigger could be linked to new assessment criteria specific to greenhouse emissions. A decision-maker assessing a coalmine should have to consider:

- **The total direct and indirect emissions from the mine.**
- **The amount of coal which will be exported.**
- **The climate change mitigation policies relevant to coal-fired power stations and/or steel production in the coal-importing countries.** Although this sounds onerous, there are only 5 major importers of Australian coal, and the government would probably already have information on the mitigation policies in these

⁵⁷ *EPBC Act* s 3A(a).

⁵⁸ ABARE, above n 30, 18.

⁵⁹ *Ibid* (averaging the first 3 quarters of the 08/09 financial year and extrapolating for the full year).

countries within the Department of Climate Change. To educate proponents, this information could be posted on the *EPBC Act* website, and regularly updated.

- **The potential to include conditions in export contracts to require a percentage of carbon emissions be sequestered.** When ‘clean coal’ technology becomes more viable the percentage could be increased. The British Climate Change Minister recently proposed that new coal power stations will only be approved if they can demonstrate carbon capture on 25 per cent of output, and once the technology is proven, on 100 per cent.⁶⁰ As a parallel for imposing contract conditions, the Australian Government already requires certain conditions in commercial contracts for the export of Australian uranium, including that Australian prior consent is needed for any enrichment.⁶¹
- **The use of offsets.** The mine should be required to offset those indirect emissions which will not be controlled by the importing country. Those offsets could be required to be surrendered so they are cancelled on Australia’s national register thus effectively lowering the cap of the CPRS, acknowledging the true impact of these indirect emissions on Australia’s environment and economy. I note that *EPBC Act* approvals can be conditional on offsetting other environmental impacts.⁶²

(C) *Further Benefits from Amending the EPBC Act*

Requiring new Australian coalmines to address their indirect emissions from the overseas use of their coal would demonstrate a move away from the currently irresponsible and

⁶⁰ Helen Liddell, 'Greener Can Mean Opportunity, after All, UK Is OK', *The Age*, 29 June 2009 <<http://business.theage.com.au/business/greener-can-mean-opportunity-after-all-uk-is-ok-20090629-d2m8.html>> at 29 June 2009.

⁶¹ Department of Foreign Affairs and Trade, *Nuclear Non-Proliferation, Trade and Security - Australia's Uranium Export Policy* <http://www.dfat.gov.au/security/aus_uran_exp_policy.html> at 8 July 2009.

⁶² Independent Review Interim Report, above n 1, 76.

hypocritical carte blanche given to coal exports. Given an estimated 23% of China's total direct emissions stem from production of exported goods,⁶³ the question of who is responsible for which emissions is likely to be hotly debated at the negotiations over a Kyoto Protocol successor in Copenhagen in December. It would be a good bargaining chip to reach a strong global mitigation agreement, if Australia could show it is taking responsibility for some of its indirect emissions.

(VIII) CONCLUSION

This submission has shown what a major threat climate change is to Australia's environment and biodiversity, and how a substantial source of climate changing greenhouse emissions – export coalmines – is currently unregulated. This policy gap must be filled. The Independent Review Interim Report states that 'the primary question for this review is whether the current legislative regime is capable of adapting and responding to emerging threats and a changing environment.'⁶⁴ It is my opinion that the *EPBC Act* can adapt and respond to the great emerging threat of climate change. While the *EPBC Act* will not be able to prevent dangerous climate change on its own, it can play a role, and if it does not address climate change it does not deserve its name.

⁶³ Tao Wang and Jim Watson, *Who Owns China's Carbon Emissions?* Tyndall Centre for Climate Change Research (2007) <http://www.tyndall.ac.uk/publications/briefing_notes/bn23.pdf> at 5 July 2009, 1.

⁶⁴ Independent Review Interim Report, above n 1, 32.

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