



Environmental Defenders Office

30 October 2020

Committee Secretary
Senate Environment and Communications
Legislation Committee
By email: ec.sen@aph.gov.au

Cc: Parliamentary Joint Committee on Human Rights
By email: human.rights@aph.gov.au

The Hon Angus Taylor MP
Minister for Energy and Emissions Reduction
By email: angus.taylor.mp@aph.gov.au

Dear Committee Secretary

Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 – Failure to comply with the *Human Rights (Parliamentary Scrutiny) Act 2011*

1. We act for Greenpeace Australia Pacific Limited (**Greenpeace**).
2. We refer to the *Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (the CEFC Amendment Bill)* introduced by the Minister for Energy and Emissions Reduction (**Minister**) on 27 August 2020, which is currently before an inquiry (**Inquiry**) of the Senate Environment and Communications Legislation Committee (**the Committee**). We understand the Inquiry is due to hand down its report on 4 November 2020.
3. Our client, together with the Australian Conservation Foundation, 350.org, Solar Citizens, Uniting Church in Australia, Synod of Victoria and Tasmania and WWF Australia, made a submission to the Inquiry on 22 September 2020 (**Earlier Inquiry Submission**).¹ It has subsequently come to our client's attention that, when introducing the CEFC Amendment Bill, the Minister may have breached the *Human Rights (Parliamentary Scrutiny) Act 2011 (Human Rights Scrutiny Act)* by failing to adequately disclose the limitations that the CEFC Amendment Bill has on various human rights that have been substantially engaged. We set out the reasons why below.
4. Greenpeace respectfully requests that the CEFC Amendment Bill be remitted back to Parliament for reconsideration of its compliance with the *Human Rights Scrutiny Act*. Alternatively and/or in addition, we request that the CEFC Amendment Bill's compliance with the *Human Rights Scrutiny Act* be reconsidered by the Joint Parliamentary Committee on Human Rights.

¹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/GridReliabilityFundBil/Submissions

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The CEFC Amendment Bill

5. Our client is concerned that the effect of the CEFC Amendment Bill is to redirect funds away from renewable energy, and to fossil fuel projects, particularly gas. The CEFC Amendment Bill does this in three main ways.
6. **First**, the CEFC Amendment Bill amends the definition of “low emission technology” so as to remove the requirement that low emission technologies must achieve an emissions intensity of less than 50% of the existing baseline. Under the current CEFC Act, the Board of the CEFC has discretion over how to classify “low emissions technology”² under its ‘Complying Investments Guidelines.’³ The current ‘Complying Investments Guidelines’ provide that a technology is only a “low emission technology” if it results in emissions of carbon dioxide that are substantially lower than the current average of the most relevant baseline for the activity being undertaken. To demonstrate this, technology that is used solely for electricity generation must achieve an emissions intensity of less than 50% of the existing generation system as connected to the transmission network/grid, or less than 50% of the emissions intensity of the baseline activity (if not connected to a baseline grid).⁴ This current definition effectively excludes investment in any fossil fuels (including gas).
7. The CEFC Amendment Bill seeks to amend the definition such that any electricity storage, generation, transmission or distribution, or electricity grid stabilisation technology will be deemed a “low emission technology” if it supports *“the achievement of low-emission energy systems in Australia.”* There is no guidance in the Bill as to what “supporting the achievement of low-emission energy systems in Australia” means in practice. The Explanatory Memorandum states that *“certain types of gas-fired electricity generation will now fall under this new definition if their position in the market supports the achievement of a low-emissions system.”* It is clear, in our client’s view, that the purpose of this amendment and this Bill is to allow for investment into non-renewable technologies, namely gas.
8. **Second**, the CEFC Amendment Bill makes Grid Reliability Fund Investments, which are defined broadly to effectively encapsulate all energy storage, generation, transmission, distribution or grid stabilisation technologies including fossil fuels, exempt from the requirement that 50% of CEFC’s investments are to be in renewable technologies.
9. **Third**, the CEFC Amendment Bill amends the definition of “Investment” such as to, in relation to Grid Reliability Fund Investments (which, as stated in paragraph 8 above, are defined extremely broadly to effectively encapsulate most energy projects), the CEFC can only invest in projects that will provide a return on investment; and (b) in relation to Grid Reliability grants the executive the power to define, via regulations, any additional class of activities that qualify as “investments.” Our client is concerned that the removal of the requirement for an investment to provide a return will mean that the CEFC may be directed to invest in any loss-making activities directed by the Minister. Given the Minister has specifically referred to gas in the Explanatory Memorandum, our client is

² Section 60(4) of the current CEFC Act.

³ Section 60(5) of the current CEFC Act.

⁴ The Current CEFC Complying Investment Guidelines, available at: <https://www.cefc.com.au/media/402277/cefc-complying-investments-guidelines.pdf>

concerned that this amendment will be used for the purposes of funding loss-making gas projects.

The Human Rights Scrutiny Act

10. As you are aware, section 8 of the *Human Rights Scrutiny Act* requires that a member of Parliament who proposes to introduce a Bill into a House of Parliament draft a statement of compatibility which includes an assessment of whether the relevant bill is in accordance with 'human rights' (**Statement of Compatibility**). 'Human Rights' is defined by reference to seven international human rights treaties ratified by Australia.⁵
11. Guidance Note 1 '*Drafting Statements of Compatibility*' released by the Parliamentary Joint Committee on Human Rights provides that:
 - a. Statements of Compatibility needs to identify those human rights that are substantially engaged; and
 - b. where a Bill limits a human right, the Statement of Compatibility must provide a detailed and evidence-based assessment showing that the limitation is reasonable on the basis that:
 - i. the limitation has a clear legal basis; and
 - ii. the limitation must be shown to be necessary in pursuit of a legitimate objective, in that the objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient;
 - c. the limitation must have a rational connection to the objective; and
 - d. the limitation must be proportionate to the objective. In considering proportionality, the Statement of Compatibility should consider:
 - i. whether there are other less restrictive ways to achieve the same aim;
 - ii. whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
 - iii. the extent of any interference with human rights;
 - iv. whether affected groups are particularly vulnerable; and
 - v. whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

The Statement of Compatibility for the CEFC Amendment Bill

12. The Statement of Compatibility for the CEFC Amendment Bill, drafted by the Minister, identified that only one human right was engaged - Article 11 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). The Statement of Compatibility concluded that:

"The Bill engages positively with this right as investments under the Grid Reliability Fund will improve affordability for energy users, including residential

⁵ International Convention on the Elimination of all Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities.

households, businesses and industries, as well as deliver new reliable generation into the market in ensuring a secure and stable energy supply to Australians.”

The CEFC Amendment Bill’s impact on climate change and human health

13. As noted above, our client considers that the effect of the CEFC Amendment Bill is to redirect funds away from renewable energy, and instead to fossil fuel projects, particularly gas. In this way, our client considers that the CEFC Amendment Bill is likely to result in an increase of Australia’s greenhouse gas emissions at a time when immediate and deep cuts in emissions are required in order to meet the goals of the Paris Agreement and avoid the most dangerous impacts of climate change.
14. The Paris Agreement provides that global temperature increase must be limited to between 1.5 degrees and well below 2 degrees above pre-industrial levels (**Paris Agreement Targets**). This is the limit of global warming that the Intergovernmental Panel on Climate Change (**IPCC**) has determined, and the international community, including Australia, has agreed in the Paris Agreement, is necessary to avoid the most dangerous effects of climate change.
15. A failure to reach the Paris Agreement Targets will have a detrimental impact on human health. One study has concluded that at the 1.5 degrees Celsius level there will be a 0.3% increase in global deaths due to heat.⁶ In comparison, a 2 degrees Celsius increase will lead to a 0.5% increase in deaths, and a 4 degrees Celsius increase will lead to a 1.8% increase in deaths. Even the difference between health outcomes at 1.5 degrees as opposed to 2 degrees of warming is significant. The IPCC has stated that studies comparing the health risks associated with reduced food security at the 1.5 degree Celsius and 2 degrees Celsius levels have concluded that risks would be higher, and the globally undernourished population larger, at the 2 degree Celsius level.⁷
16. In order to meet the Paris Agreement Targets, a *minimum* of 75% of our electricity needs to be supplied by renewable energy (noting that our client’s view is that 100% of electricity will need to be supplied by renewable energy to avoid dangerous climate change).⁸ Australian Government projections indicate that at the current pace of change, i.e. without the amendments proposed by the CEFC Amendment Bill, renewable energy will only provide around 48% of Australia’s electricity by 2030. It is clear that at the current rate, there is a renewable energy deficit, and that without further investment, Australia will fall short of its Paris Agreement Targets. The CEFC was brought into existence for the very purpose of narrowing and removing Australia’s renewable energy deficit.
17. However, the CEFC Amendment Bill, in our client’s view, has the effect of redirecting funds that would have previously been spent by the CEFC on renewable energy technologies to the development of fossil fuel projects, including gas. Far from being a “clean” energy source, gas is comprised mostly of methane, which is 86 times more potent in global warming potential than carbon dioxide over a 20 year period, and is already said to have

⁶ Carbon Brief, ‘Impact of climate change at 1.5C, 2C and beyond’ Available at: https://interactive.carbonbrief.org/impacts-climate-change-one-point-five-degrees-two-degrees/?utm_source=web&utm_campaign=Redirect#reference-list

⁷ Hales et al., 2014; Ishida et al., 2014; Hasegawa et al., 2016 cited in IPCC Report October 2018, ‘Global Warming of 1.5 degrees Celsius’ – Chapter 3: ‘Impacts of 1.5 degree of Global Warming on Natural and Human Systems’ at 239.

⁸ Climate Works 2020.

been responsible for at 25% of global warming.⁹ Current estimates indicate that in 2019 methane emitted from venting and flaring accounted for 6% of Australia's greenhouse gas emissions.¹⁰ However, more recent scientific evidence¹¹ has revealed that there has been a historic underestimation of methane in the atmosphere (by as much as 40%). This makes it highly likely that the real estimate of Australia's methane emissions caused by the venting and flaring of natural gas is much higher than 6%. This is extremely concerning, given the potency of methane's global warming potential in comparison to carbon dioxide.

18. Scientific evidence also indicates that if we are to reach the Paris Agreement Targets, most of Australia's existing fossil fuel reserves – coal, oil and gas – must be left in the ground, unburned.¹² This means that currently operating mines and gas wells must be closed before their economic lifetimes are completed, and that no approved but not yet operating, and no proposed fossil fuel projects (based on existing reserves) can be implemented.¹³
19. Accordingly, in our client's view, the CEFC Amendment Bill will encourage investment in new gas and other fossil fuel projects and the diversion of funds away from renewable energy, which will most certainly result in a failure to meet the Paris Agreement Targets. This will expose Australians to the effects of dangerous climate change and limit several human rights guaranteed under the ICESCR, the *Convention on the Rights of the Child (CRC)* and the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)* (**the Engaged Rights**). We set out the reasons why these rights are substantially engaged and limited in paragraphs 22 to 32 below.

Potential failure to comply with The Human Rights Scrutiny Act

20. In our client's view, the CEFC Amendment Bill's Statement of Compatibility potentially fails to comply with the *Human Rights Scrutiny Act* because it:
 - a. fails to identify the substantial engagement of, and limitation of, the Engaged Rights; and
 - b. fails to provide a detailed and evidence-based assessment showing that the limitation of the Engaged Rights is reasonable.

⁹ Dmitri Lafleur, Tim Forcey, Hugh Saddler and Mike Sandifor (2016) 'A review of current and future methane emissions from Australian unconventional oil and gas production,' Melbourne Energy Institute. Available at: <http://climatecollege.unimelb.edu.au/review-current-and-future-methane-emissions-australian-unconventional-oil-and-gas-production>

¹⁰ Climate Council, 2020. Available at: <https://www.climatecouncil.org.au/gas-transition-plan-is-a-dangerous-road-to-nowhere/>

¹¹ Benjamin Hmiel, V.V. Petrenko, M.M.N. Dyonisius, C. Bulizert, A.M. Smith, P.F. Place, C. Harth, R. Beaudette, Q. Hua, B. Yang, I. Vimont, S.E. Michel, J.P. Severinghaus, D. Etheridge, T. Bromley, J. Schmitt, X. Fain, R.F. Weiss, E. Dlugokencky (2020) *Nature*, Vol 578. Also, Lafleur et al (2015).

¹² McGlade C and Ekins P (2015) 'The geographical distribution of fossil fuels unused when limiting global warming to 2 degrees Celsius.' *Nature* 517: 187-190.

¹³ 30 June 2020, Professor Will Steffen Expert report, NSW Independent Planning Commission – Public Hearing – Vickery Extension Project. Available at: <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/03/vickery-extension-project/comments/200630-will-steffen.pdf>

Failure to identify the engagement and limitation of the Engaged Rights

21. The Engaged Rights, as set out below, are engaged and limited in circumstances where the CEFC Amendment Bill redirects funds away from investment in renewable energy and towards investment in fossil fuels which:
 - a. exacerbates the effects of dangerous climate change thereby limiting the right to life and health guaranteed by the Engaged Rights; and
 - b. fails to comply with Australia's obligations under the instruments establishing the Engaged Rights to take action to mitigate against climate change.

International Convention on Economic, Social and Cultural Rights

Article 12

22. Article 12 recognizes the *"right of everyone to the enjoyment of the highest attainable standard of physical and mental health."* Article 12(2)(b) specifically requires States to improve *"all aspects of environmental and industrial hygiene."*
23. The UN Committee on Economic, Social and Cultural Rights (**CESCR**), has confirmed that the Right to Health in Article 12 implicitly includes the right to a healthy environment.¹⁴ On 8 October 2018, the CESCR stated that *"a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach [of State's obligations under the ICESCR]."* The CESCR has also interpreted Article 12(2)(b) as requiring that States implement prevention measures in respect of *"detrimental environmental conditions that directly or indirectly impact upon human health."*¹⁵ In its 2018 Report, the IPCC stated that *"any increase in global temperature (e.g. +0.5 degree Celsius) is projected to affect human health, with primary negative consequences."*¹⁶ The IPCC noted that lower risks are projected at 1.5 degrees Celsius of warming than at 2 degree Celsius, for heat-related morbidity and mortality and for ozone-related mortality, and for vector-borne diseases such as malaria and dengue fever.¹⁷
24. In light of the above, it is clear that there is a direct link between climate change and human health, and that the ICESCR imposes obligations on State Parties to act to mitigate against climate change. Article 12 of the ICESCR is substantially engaged and limited by the CEFC Amendment Bill, as the effect of the Bill is to redirect funds away from renewable energy and towards gas and other fossil fuels, which is inconsistent with the deep and rapid cuts in emissions that are required to avoid dangerous climate change, and is therefore in direct conflict with the right to a healthy environment.

Article 15

25. Article 15 of the ICESCR requires that State parties recognise the right of everyone *"to enjoy the benefits of scientific progress and its applications."*

¹⁴ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, General Comment No.14: the Right to the Highest Attainable Standard of Health (Art.12). Available at:

<https://www.refworld.org/pdfid/4538838d0.pdf>

¹⁵ Ibid.

¹⁶ IPCC Report October 2018, 'Global Warming of 1.5 degrees Celsius' – Chapter 3: 'Impacts of 1.5 degree of Global Warming on Natural and Human Systems' at 180.

¹⁷ Ibid.

26. The CESCR¹⁸ and the UN High Commissioner for Human Rights¹⁹ have stated that Article 15 requires States to take action to mitigate against and adapt to climate change, including actively supporting the development and sharing of new climate mitigation and adaptation technologies such as renewable energy technologies.²⁰
27. Article 15 is engaged and limited by the CEFC Amendment Bill as it impacts investment in renewable energy technologies, and promotes investment in gas and other fossil fuels, which will hamper efforts to mitigate and adapt to climate change.

Convention on the Rights of the Child

Article 24

28. Article 24 of the CRC recognises the right of the Child to “*to the enjoyment of the highest attainable standard of health.*” Subsection (2)(c) of the Article 24 requires State parties to “*combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.*”
29. The UN Committee on the Rights of the Child has held that that the right under Article 24(2)(c) requires state intervention to address climate change “*...as this is one of the biggest threats to children’s health and exacerbates health disparities*”²¹ and that states have a responsibility to protect children from environmental harm.²² The IPCC has warned that climate change will exacerbate current levels of childhood undernutrition and stunting through reduced food availability.²³
30. The CEFC Amendment Bill engages and limits the right under Article 24 because it redirects funds away from renewable energy and towards gas and other fossil fuels, thereby hindering the mitigation efforts required to avoid dangerous climate change, and efforts to ensure the right to a safe climate and environment necessary for the highest attainable standard of children’s health.

Convention on the Elimination of All forms of Discrimination against Women

31. The UN Committee on the Elimination of Discrimination against women has stated that States’ obligations under the CEDAW require action in the areas of disaster risk reduction

¹⁸ 8 October 2018, Statement of the Committee on Economic, social and Cultural Rights, “*Climate change and the International Covenant on Economic, Social and Cultural Rights.*” Available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

¹⁹ 6 May 2016, Report of the Office of the UN High Commissioner for Human Rights, “*Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*” Available at: <https://digitallibrary.un.org/record/841798?ln=en>

²⁰ May 2016 Report on Climate Change and Health, the UN High Commissioner for Human Rights; 8 October 2018, the Committee’s Statement on Climate Change and the IECESR.

²¹ UN Committee on the Rights of the Child, General Comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vHCIs1B9k1r3x0aA7FYrehlNUfw4dHmlOxmFtmhaiMOKH80yWS3uq6Q3bqZ3A3yQ0%2b4u6214CSatnrBIZT8nZmj>

²² 23 June 2017, Report of the Office of the UN High Commissioner for Human Rights, ‘*Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child.*’ Available at: <https://undocs.org/en/A/HRC/35/13>

²³ IPCC Report October 2018, ‘Global Warming of 1.5 degrees Celsius’ – Chapter 3: ‘Impacts of 1.5 degree of Global Warming on Natural and Human Systems’ at 239.

and climate change mitigation and adaptation.²⁴ The Office of the UN High Commissioner for Human Rights stated that such measures should include limiting fossil fuel use, reducing transboundary pollution and greenhouse gas emissions and promoting the transition to renewable energies.²⁵

32. In our client's view, the redirection of funds away from renewable energy and towards gas and other fossil fuels as a result of the CEFC Amendment Bill is in breach of State parties' obligations under CEDAW as it directly hinders the promotion of renewable energy, and will lead to increases in greenhouse gas emissions from further fossil fuel development, at a time when immediate and deep reductions in emissions are required if we are to avoid the most dangerous impacts of climate change.

Failure to provide an assessment of the reasonableness of the limitation of the Engaged Human Rights

33. In failing to identify that the Engaged Human Rights set out above were substantially engaged and limited by the CEFC Amendment Bill, the Statement of Compatibility has also failed to provide an assessment of the reasonableness of the limitation. In our client's view, the Minister would be unable to demonstrate that the CEFC Amendment Bill reasonably limits the human rights set out above because:
 34. *First*, the dilution of the CEFC's mandate to invest in renewable energy is not a necessary condition to achieving the CEFC Amendment Bill's objective of improving reliability and cost affordability of electricity. No evidence has been cited that investment in renewable energy has the effect of increasing electricity cost and/or decreasing energy reliability. As noted in our client's Earlier Inquiry Submission, the CEFC is already investing in the most cost-effective solutions. In fact, the 2020 Investment Mandate, which the CEFC is required to follow pursuant to section 64 of the CEFC Act, already directs the CEFC to prioritise investments that support reliability and security of energy supply. There is therefore no legitimate need for the amendments set out in the CEFC Amendment Bill to address the stated objectives of cost-effective and reliable energy. There is therefore no reasonable basis for the CEFC Amendment Bill to limit the Engaged Human Rights in the manner set out above.
 35. *Second*, in the event that there is an incompatibility between the objectives of the CESR and the CEFC Amendment Bill (which is not admitted), there is no reasonable basis cited as to why the Grid Reliability Fund needs to be managed by the CEFC. The CEFC was brought into existence in 2012 in recognition that "*Australia [was] a late starter in the transformation to clean technology due to its access to low cost fossil fuels*" and was tasked with financing "*Australia's clean energy sector using financial products and structures to address the barriers currently inhibiting investment.*" Requiring the CESR to manage the Grid Reliability Fund would only seek to dilute the CESR's clear renewable energy mandate and thereby limit the Engaged Human Rights, in circumstances where another body dedicated to consumer-protection would be better placed to achieve the Grid Reliability Fund's objectives (although our client maintains that any investment in fossil fuels by any public authority or government-funded body is inconsistent with the Engaged Human Rights).

²⁴ UN Committee on the Elimination of Discrimination against Women – General Recommendation NO. 37 on Gender-related dimensions of disaster risk reduction in the context of Climate change. Available at:

https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_37_8642_E.pdf

²⁵ Ibid.

36. **Third**, the limitations imposed on the CEFC, which in turn result in the limitation of the Engaged Human Rights, are not reasonably proportionate to the CEFC Amendment Bill's objective in circumstances where:
- a. as stated above, there is no reasonable basis as to why the Grid Reliability Fund needs to be managed by the CESR as opposed to a consumer-protection specific body; and
 - b. the detriment caused by the CEFC Amendment Bill to the CESR's ability to support renewable energy is greater than the benefit of having the CESR administer the Grid Reliability Fund.

Requested Action

37. In light of the above, our client respectfully requests that the CEFC Amendment Bill be remitted back to Parliament for reconsideration of its compliance with the *Human Rights Scrutiny Act*. Alternatively and/or in addition, we request that the CEFC Amendment Bill's compliance with the *Human Rights Scrutiny Act* be reconsidered by the Joint Parliamentary Committee on Human Rights.
38. We would be grateful if you could provide a response to this letter by 3 November 2020.

Please contact anna.gudkov@edo.org.au if you would like to discuss this letter or require further information.

Yours sincerely
Environmental Defenders Office



Anna Gudkov
Senior Solicitor