



Environmental
Defenders Office



Summary

Empowering the EPA to prevent climate pollution

The role of the NSW Environment Protection Authority in reducing the risk of harm to human health and the environment from greenhouse gas emissions and the impacts of climate change



Summary and Recommendations

Anthropogenic climate change is having significant impacts in Australia and across the globe. The annual global temperature in 2019 was 1.1 degrees Celsius (°C) warmer than pre-industrial conditions.¹ Australia's average annual temperature has warmed by around 1.5°C since 1850,² and the best available science tells us that average temperatures are projected to rise further.

Australia is already experiencing the impacts of climate change, which include increasing temperatures, the warming and acidification of oceans, sea level rise, decreased rainfall in southern parts of the country and increased and more extreme rainfall in the north, longer dry spells, greater number of extreme heat days and the long-term increase in extreme fire weather.³

The impacts of climate change are not just environmental. There are other significant implications, including social and economic impacts, across all sectors including health, tourism, agriculture, infrastructure and national security.

Urgent and rapid reductions in greenhouse gas (GHG) emissions from both direct and indirect sources are now required in order to meet the Paris Agreement goal of “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C”.⁴ The longer emissions reductions are delayed, the more pronounced and severe the effects of climate change will become. The ‘Black Summer’ bushfires of 2019/2020 served as a stark warning to all Australians that the dire

consequences of climate change have arrived. The bushfires should be a deafening ‘wake-up call’ to those with the power and responsibility to curb emissions – nothing less than urgent action and strong leadership will suffice.

The latest Climate of the Nation report found that 70% of Australians think that state governments should take a leading role in action on climate change.⁵ The NSW Environment Protection Authority (EPA) is the lead environmental regulator in NSW and is responsible for protecting the quality of our environment and human health. Key objectives of the EPA are:

- to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development, and
- to reduce the risks to human health and prevent the degradation of the environment.

In line with its key objectives and functions, the EPA can and should regulate GHG emissions using its existing powers to control pollution and waste, recognising the catastrophic consequences of uncontrolled emissions on all aspects of the environment and on human health. In doing so, the EPA would modernise the regulatory framework and set price signals consistent with the polluter pays principle, assisting in an orderly transition to a zero-carbon economy. This needs to happen now as part of NSW becoming a leader on climate action.



Anthropogenic climate change is already having impacts in Australia and across the globe.

Key Recommendations

With GHG emissions and a warming climate already impacting on the health, economy, environment and people of NSW, the EPA must play a leadership role and modernise its regulatory practice to ensure that GHG emissions are reduced, consistent with global efforts to limit warming to 1.5°C above pre-industrial levels.

The EPA can do this using existing powers and functions under existing legislation. Table 1 below sets out a number of tools available to the EPA to reduce GHG emissions.

We recommend that the EPA implement the following options on an urgent basis to address the issue of climate change, and reduce emissions in line with climate science.

Recommendation 1:

The EPA adopts an **environmental protection goal** of reducing greenhouse gas (GHG) emissions consistent with efforts to limit global average temperature rise to 1.5°C above pre-industrial levels.

In order to achieve this environmental protection goal, we recommend that:

Recommendation 2:

Consistent with the polluter pays principle, the EPA facilitates the reduction of GHG emissions by putting a **price on carbon**. This could be achieved by:

- (a) Introducing schemes for economic measures (such as an emissions trading scheme) that set an appropriate price signal for reducing GHG emissions in NSW.
- (b) The EPA immediately finalising the review of its load-based licensing (LBL) scheme and recommending that the LBL scheme be expanded to:
 - Include mining for coal and other related activities (which are currently not regulated by the LBL scheme);
 - Include carbon dioxide and methane (as well as other GHG pollutants not currently captured by the LBL scheme) as assessable pollutants (particularly for electricity generation, petroleum exploration, assessment and production, and mining for coal);
 - Increase fees to be more reflective of the costs of GHG pollution on society and drive cleaner production; and
 - Allow revenue from the LBL scheme to be used to fund GHG emissions reduction initiatives.



Recommendation 3:

The EPA adopts **other mechanisms** to reduce GHG emissions in recognition of their impacts as an environmental pollutant, including:

- The development of guidelines and policies for the reduction of GHG emissions, including standards or limits on GHG emissions;
- Placing conditions on environment protection licences (**EPLs**), including GHG limit conditions (consistent with relevant EPA guidelines or policies developed in relation to the reduction of GHG emissions);
- Implementing Pollution Reduction Programs via EPL licence conditions that require holders of EPLs to reduce GHG emissions; and/or
- The reduction of GHG emissions through emissions standards under the *Protection of the Environment Operations Act 1997* and *Protection of Environment Operations (Clean Air) Regulation 2010*.

Recommendation 4:

The EPA prepares and recommends the making of a **Protection of the Environment Policy (PEP)** in accordance with Chapter 2 of the *Protection of the Environment Operations Act 1997* to address the transition to a zero-emissions economy and the prevention of climate change impacts on human health and the environment of NSW.

Consistent with Recommendation 1, the PEP should contain an overarching environmental protection goal of reducing GHG emissions consistent with efforts to limit global average temperature rise to 1.5°C above pre-industrial levels.

The PEP should also:

- Identify mechanisms for the EPA to reduce GHG emissions via an appropriate regulatory scheme (consistent with Recommendation 2 and 3);
- Include guidelines for the reduction of GHG emissions across various sectors in NSW; and
- Include protocols to guide NSW government agencies to assess and respond to the impacts of climate change in decision-making.

Table 1 – Overview of possible mechanisms for reducing GHG emissions under NSW pollution and waste laws

Key mechanism	Options	Key provisions and features	Enforcement mechanism
Schemes for economic measures	Tradeable emission scheme	<ul style="list-style-type: none"> Part 9.3 of the POEO Act provides that the EPA may develop and implement schemes involving economic measures as a means of achieving cost-effective environmental regulation or environment protection. Part 9.3A of the POEO Act outlines how an ETS could be developed under the POEO Act. 	<ul style="list-style-type: none"> Tradeable emission scheme can be implemented via conditions on EPLs (section 295D, POEO Act). Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.
	Green offset scheme	<ul style="list-style-type: none"> Part 9.3 of the POEO Act provides that the EPA may develop and implement schemes involving economic measures as a means of achieving cost-effective environmental regulation or environment protection. Part 9.3B of the POEO Act outlines how a green offsets schemes could be developed under the POEO Act. 	<ul style="list-style-type: none"> Green offset schemes can be implemented via conditions on EPLs (section 295N, POEO Act). Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.
Environment Protection Licences (EPLs)	Licence conditions	<ul style="list-style-type: none"> The EPA has broad powers to attach conditions to EPLs (section 63, POEO Act). Part 3.5 of the POEO Act contains examples of conditions that can be attached to a licence (e.g. conditions relating to monitoring and reporting, mandatory environmental audits, financial assurances or remediation work), but does not prevent other conditions being attached to a licence. GHG emissions could be regulated by the EPA via conditions on EPLs. 	<ul style="list-style-type: none"> Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.
	Load-based licensing (LBL)	<ul style="list-style-type: none"> An existing NSW load-based licensing scheme operates under the POEO Act and the <i>Protection of the Environment Operations (General) Regulation 2009</i>. It regulates pollutants by imposing a licence fee system for certain prescribed activities. It also establishes load-based limits for certain pollutants for prescribed activities. The existing NSW LBL scheme could be expanded to regulate GHG emissions as a pollutant under the scheme. 	<ul style="list-style-type: none"> Load-based limits are implemented via conditions on EPLs. Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.
	Pollution Reduction Programs (PRPs)	<ul style="list-style-type: none"> PRPs aim to reduce pollution from regulated activities at licensed premises through a program of actions that can include carrying out works or installing plant and equipment. Section 68 of the POEO Act allows the EPA to impose conditions requiring EPL holders to develop and comply with a PRP. 	<ul style="list-style-type: none"> PRPs are implemented via conditions on EPLs. Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.

Key mechanism	Options	Key provisions and features	Enforcement mechanism
Pollution and waste standards and limits	Non-statutory limits (guidelines etc.)	<ul style="list-style-type: none"> Guidelines and policies for the regulation of pollution or waste can provide standards or limits (e.g. EPA <i>Noise Policy for Industry</i> (2017)). The EPA could develop a guideline or policy that outlines how GHG emissions can be assessed and regulated by certain industries, and set standards for decision-makers to consider in assessing and determining EPL applications and issuing licence conditions under the POEO Act. 	<ul style="list-style-type: none"> Standards set out in guidelines may be implemented via conditions on EPLs. Failure to comply with a condition of an EPL is an offence under section 64 of the POEO Act.
	Statutory limits	<ul style="list-style-type: none"> Part 5.4 of the POEO Act and the POEO (Clean Air) Regulation currently regulate air pollution (e.g. emissions from wood heaters, fires, motor vehicles and fuels and industry) by prescribing standards or limits in the regulation, or directly prohibiting certain activities. The scope of the POEO Act and POEO (Clean Air) Regulation could be expanded to include the regulation of GHG emissions. 	<ul style="list-style-type: none"> The POEO Act contains various offence provisions for exceeding standards of concentration or rate (e.g. s128 - Standards of air impurities not to be exceeded).
Protection of the Environment Policy (PEP)	Protection of the Environment Policy	<ul style="list-style-type: none"> PEPs can establish policies for protecting the environment in NSW – to further the objectives of the EPA and manage the cumulative impact on that environment of existing and future human activities (Chapter 2, POEO Act). The EPA can initiate the preparation of a draft PEP in its own right or may be directed to prepare a draft PEP by the Minister. A PEP must specify one or more of the following - (a) an environment protection goal, (b) an environment protection standard, (c) an environment protection guideline, or (d) an environment protection protocol. The EPA could draft a PEP that addresses climate change and the regulation of GHG emission, set science-based, state-wide goals and standards and assist in managing cumulative impacts and achieving long-term outcomes 	<ul style="list-style-type: none"> A PEP must be taken into consideration when making certain decisions under the POEO Act, other environmental protection legislation, the <i>Environmental Planning and Assessment Act 1979</i>, or undertaken by a public authority exercising certain function (POEO Act, Part 2.7). Failure to consider a PEP as required would be a breach of the POEO Act.



End Notes

¹ See World Meteorological Organisation, *WMO confirms 2019 as second hottest year on record*, 15 January 2020, available at <https://public.wmo.int/en/media/press-release/wmo-confirms-2019-second-hottest-year-record>

² See CSIRO (Commonwealth Scientific and Industrial Research Organisation), *Response to Notice to Give Information 21 April 2020 for the Royal Commission into National Natural Disaster Arrangements*, 21 April 2020, available at <https://naturaldisaster.royalcommission.gov.au/system/files/exhibit/CSI.500.001.0001.pdf>

³ See, for example, State of NSW and the Environment Protection Authority, *NSW State of the Environment 2018*, December 2018, p.109, www.soe.epa.nsw.gov.au/sites/default/files/2019-05/18p1370-nsw-state-of-the-environment-2018-WEB_9-5-19.pdf

⁴ In December 2015, over 190 nations affirmed a goal to reduce greenhouse gas emissions in order to limit average global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit warming to 1.5°C. United Nations Framework Convention on Climate Change Conference of the Parties 21, *Adoption of the Paris Agreement*, 'Annex - Paris Agreement', Article 2 (FCCC/CP/2015/L.9/Rev.1). The Paris Agreement builds on past international commitments in Cancun, Lima and elsewhere under the 1992 UN Framework Convention on Climate Change.

⁵ The Australia Institute, *Climate of the Nation 2020 Tracking Australia's attitudes towards climate change and energy*, October 2020, available at <https://www.tai.org.au/content/climate-nation-climate-change-concern-hits-82>



Environmental Defenders Office

EDO is the leading public interest environmental law organisation in Australia, with a formidable track record of successful court outcomes and in driving systemic change through our policy and law reform expertise. We provide expert, independent analysis of laws and regulations, legal education and support to communities across Australia and the Pacific, and we pursue litigation in the public interest.

Our vision is for a world where nature thrives.

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Acknowledgement of Country

We recognise the Traditional Owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past and present and aspire to learn from traditional knowledge and customs so that together we can protect our environment and cultural heritage through law.



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