

Submission on the NSW EPA Climate Change Policy and Action Plan

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NSW Environment Protection Authority

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The NSW Young Lawyers Environment and Planning Sub-committee (**Sub-committee**) make the following submission in response to the Environment Protection Authority's draft Climate Change Policy (**Policy**) and Action Plan (**Action Plan**).

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 15 separate Sub-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.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Sub-committee comprises of a group of approximately 250 members interested in our natural and built environment. The Sub-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 Sub-committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of recommendations

1. Set interim targets under the Climate Change Policy and Action Plan to ensure that NSW remains on track to meet overarching targets by 2030 and 2050.
2. Develop a Protection of the Environment Policy under Chapter 2 of the *Protection of the Environment Operations Act 1997* (NSW) to provide a legislative basis for any targets, standards and guidelines in relation to Climate Change.
3. Engage with both climate change experts across the NSW Government and other jurisdictions, as well as independent experts in climate change.
4. Ensure that climate change considerations are based on objective criteria.
5. Amend KPI for “Inform and Plan” New Action 1 to relate to:
 - a. the extent to which officers are more informed and knowledgeable about climate change and the impacts of the EPA’s decision on climate change; and
 - b. the extent to which EPA decisions support effective mitigation of greenhouse gas emissions or adaptation to climate risks.
6. Clarify what constitutes a “reasonable” and “feasible” regulatory approach in relation to Climate Change Mitigation and Adaptation Plans (CCMAPs).
7. Include the requirement to prepare a CCMAP as a standard licence condition in all Environment Protection Licences.
8. Require publication of the entirety of CCMAPs on corporate websites, save for any information that is confidential or commercial in confidence etc.
9. Implement measures to prevent greenwashing of CCMAP updates and data, including by monitoring CCMAP reports and providing guidance on greenwashing for licensees when preparing CCMAPs.
10. Implement a provision equivalent to section 153B of the POEO Act in respect of CCMAPs.
11. Revise the KPIs for “Inform and Plan” New Action 2(b) to clarify the aims of CCMAPs and their intended effect.
12. Provide further guidance as to what constitutes a “significant variation” to an existing development that might require CCMAP to be prepared.
13. Clarify the circumstances in which a CCMAP would be required for developments that require both development consent and an EPL.
14. Amend “Mitigate” New Action 9 to add an additional KPI which tracks the reduction (or otherwise) of greenhouse gas emissions by licensees which have limits placed on their emissions.
15. Provide further detail on how the EPA will build environmental resilience, and in partnership with which agencies.
16. Release the proposed timeline for the development and consultation process to occur in creating the adaptation and resilience delivery plan.
17. Consult and foster partnerships with communities, industry stakeholders, Aboriginal people, and land managers to ensure environmental resilience programs and initiatives are informed and impactful.

- 18.** Provide more specific detail of what environmental resilience programs and initiatives are being considered and which issues, communities and/or industries are intended to be targeted.

Introduction

1. The Sub-committee welcomes the opportunity to comment on the NSW EPA's draft Climate Change Policy (**Policy**) and Action Plan (**Action Plan**). We acknowledge the NSW EPA's efforts to date in developing these important policy documents. Overall, the Policy and Action Plan are a positive first step in taking the required action to protect the environment from climate change. It reaffirms the NSW EPA's statutory duty to develop environmental quality objectives, guidelines and policies to ensure environment protection and recognises that this extends to the urgent and global challenge of climate change.
2. This submission makes recommendations for adjustments to the draft policy and action plan to clarify and strengthen their operation.

Comments on the Policy

Emissions targets

3. The NSW Government has committed to a reducing emissions by 50% below 2005 levels by 2030¹ and achieving net zero emissions in NSW by 2050². We recommend that the Policy set out interim targets to ensure that NSW remains on track to progressively meet or exceed the overarching targets. For example, s 10 of the *Climate Change Act 2010* (Vic) requires the Victorian Premier and Minister to set 5 yearly interim targets with a view to achieving the long term emissions target of net zero emissions by 2050 (see s 6). As the EPA intends to review the Policy and Action Plan every 3 years to align with strategic planning timeframes and the *NSW State of the Environment Report*, a reasonable approach would be to set an interim target on a triannual basis. The EPA should publish information on its progress against interim targets in its annual reports and the *State of the Environment Report*.
4. However, we note that interim targets should set a floor, not a ceiling. That is, any overachievement in meeting targets within a reporting period should not be 'carried over' so as to justify weakening the actions to be taken in the next reporting period. On the other hand, we consider that interim targets could indicate whether current efforts to mitigate emissions are sufficient. If interim targets are not being met, this would suggest that a stronger regulatory approach should be adopted in the next iterations of the Policy and Action Plan. We also encourage the NSW EPA to be guided by Australia's obligations under the Paris Agreement, noting that Nationally Determined Contributions are updated every 5 years. Each update to Australia's Nationally Determined Contribution must be a progression on the previous commitment, and reflect Australia's highest possible ambition in relation to climate change mitigation.³

Recommendation 1: Set interim targets under the Policy and Action Plan to ensure that NSW remains on track to meet overarching targets by 2030 and 2050.

¹ NSW Department of Planning Industry and Environment 'Net Zero Plan Stage 1: 2020-2030 Implementation Update' (2021) accessed at <https://www.environment.nsw.gov.au/research-and-publications/publications-search/netzero-plan-stage-1-2020-30-implementation-update>

² NSW Office of Environment and Heritage 'NSW Climate Change Policy Framework' (2016) accessed at <https://www.energy.nsw.gov.au/sites/default/files/2022-08/nsw-climate-change-policy-framework-160618.pdf>

³ See Art 4.3, Paris Agreement, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016). https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

Consistency in statutory decision-making

5. It will be crucial to ensure that decision-making in relation to planning and development and environment protection is consistent with the EPA's climate change targets and standards. The benefits of the Policy and Action Plan could be negated if new developments continue to lock in emissions intensive land uses, and do not plan effectively for the risks and impacts associated with a changing climate.
6. In this regard, we acknowledge EPA's intent to 'collaborate and partner' with other NSW Government agencies to align approaches where appropriate. The action plan should set out more detail on the ways in which the EPA will work with the Department of Environment and Planning (**DPE**) and other consent authorities to ensure consistency in decision-making. We make further comments on this theme under the heading "Inform and Plan, new action 2(c)" below.
7. We also recommend that the EPA consider developing a 'Protection of the Environment Policy' (**PEP**) under Chapter 2 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Such a policy would provide a firmer legislative basis for any targets, standards, and guidelines that the EPA sets in relation to Climate Change. In particular, we note that the PEPs *must* be taken into account in decisions under the POEO Act and environment legislation (POEO Act, s 28); and the *Environment Planning and Assessment Act 1979* (NSW) (POEO Act, s 29).

Recommendation 2: Develop a Protection of the Environment Policy under Chapter 2 of the *Protection of the Environment Operations Act 1997* (NSW) to provide a legislative basis for any targets, standards and guidelines in relation to Climate Change.

Comments on the draft Action Plan

Pillar 1 – Inform and Plan

Continuing Action 2

Engage and collaborate with climate change experts across the NSW Government, and with other jurisdictions, as the EPA develops and implements its climate change actions.

8. The Sub-committee supports continuing Action 2 and notes the importance of engaging with, and being informed by, quality data and analysis in addressing climate change. To that end, we would recommend that the EPA also engage and collaborate with independent climate experts, so that a broad range of quality data from different perspectives may be obtained.

Recommendation 3: Engage with both climate change experts across the NSW Government and other jurisdictions, as well as independent experts in climate change.

New Action 1

Support EPA officers to make climate-change-related decisions

9. The Sub-committee supports New Action 1, but consider that further detail is required in relation to this action. In particular, the Action Plan should specify what the relevant climate change considerations will be, whether they will be mandatory considerations and whether the various training materials to be prepared will be made public.
10. We would recommend that all climate change considerations be based on objective criteria and be mandatory considerations in decision-making processes.
11. We also note the that relevant “Key Performance Indicator” (**KPI**) for New Action 1 is “[t]he proportion of identified high priority documents that has [sic] been prepared”. We submit that more effective KPIs for this action would relate to:
 - the extent to which officers are more informed and knowledgeable about climate change and the impacts of the EPA’s decisions on climate change; and
 - the extent to which EPA decisions support effective mitigation of greenhouse gas emissions or adaptation to climate risks.

Recommendation 4: Ensure that climate change considerations are based on objective criteria and be mandatory considerations in decision-making processes.

Recommendation 5: Amend KPI for New Action 1 to relate to:

- **the extent to which officers are more informed and knowledgeable about climate change and the impacts of the EPA’s decision on climate change; and**
- **the extent to which EPA decisions support effective mitigation of greenhouse gas emissions or adaptation to climate risks.**

New Actions 2, 2(a), 2(b) and 2(c)

(2) Require and support our regulated community to develop and implement plans to minimise emissions and exposure to climate risks

12. The Sub-committee supports and welcomes the EPA’s proposal to have Environment Protection Licence (**EPL**) holders develop and implement Climate Change Mitigation and Adaptation Plans (**CCMAPs**).
13. On page 17 of the Action Plan, the EPA identifies that it will be seeking climate-related information from its licensees in beginning the process of developing CCMAPs. It goes on to say that this will allow the EPA to “develop fit-for-purpose regulatory approaches that are practical, reasonable, feasible and appropriately placed”.
14. We support the EPA’s first step of consulting with licensees, but consider that more guidance is required around what will constitute “reasonable” and “feasible” regulatory approaches for CCMAPs.

15. We appreciate that a balance needs to be reached between what can be implemented by licensees and the need for urgent and definitive action on climate change. Providing greater clarity around what will be “reasonable” and “feasible” would both assist licensees in developing their plans and assist the EPA and the community in assessing their effectiveness.

Recommendation 6: Clarify what constitutes a “reasonable” and “feasible” regulatory approach in relation to CCMAPs.

(2)(a) Focus our regulatory effort by first listening to our regulated community, so we understand the climate change actions already being taken

16. As noted above, the Sub-committee recognises the need to balance the needs and capacities of licensees against the need for urgent action on climate change. We support conducting a mandatory survey to establish what actions licensees are already taking and to inform the EPA’s regulatory approach.
17. In light of the need for urgent action on climate change, we would recommend that the survey of licensees be undertaken as a priority, and that the results of those surveys be made publicly available, in line with the EPA’s powers under section 8(c) and (d) of the *Protection of the Environment Administration Act 1991* (NSW).

(2)(b) Progressively require and support our licensees to prepare, implement and report on climate change mitigation and adaptation plans

18. The Sub-committee strongly supports the development of CCMAPs as part of the Action Plan.
19. The proposed CCMAP regime could be strengthened in a number of respects, as set out below.
20. At page 18, the Action Plan states that the EPA will “...also consider using licence conditions to explicitly require practical mitigation and adaptation actions identified in CCMAPs to be implemented.” The sub-committee supports the use of licence conditions to ensure that actions identified in CCMAPs are carried out. We would recommend that the requirement to have a CCMAP also be included as a standard licence condition, so that the requirement to have a CCMAP is enforceable.
21. Page 18 of the Action Plan also notes that the EPA will “...require CCMAPs (or sections of them) to be published on corporate websites including progress updates.” We would recommend that the entirety of CCMAPs be published (save for information that may be commercial in confidence, trade secrets or the like) to facilitate transparency and accountability. We would also recommend that the EPA provide sufficient oversight of the publication of CCMAPs to prevent greenwashing of progress updates and data collected in connection with CCMAPs. The EPA might also consider including guidance on greenwashing in its proposed guidance for preparing CCMAPs.
22. We would also encourage the EPA to adopt the structure in place for the preparation of Pollution Incident Response Management Plans (**PIRMP**) set out in sections 153A and 153B of POEO Act for CCMAPs. Section 153A requires a licence holder to prepare a PIRMP, while section 153B gives the EPA powers to require an occupier of premises at which industry is carried out (but that is not necessarily subject to an EPL) to prepare a PIRMP. Adopting this structure would ensure that the EPA had power to require non-licensees to develop CCMAPS if that course was appropriate. It would be

advisable to prepare relevant regulations to guide when that course would be appropriate and to ensure that small businesses were not adversely affected by regulatory burdens.

23. Finally, we would also recommend that the EPA consider amending its KPIs for New Action 2(b). We have set out below the proposed KPIs and our comments in respect of each:

Current KPI	Comments
Proportion of licensees with appropriate CCMAPs (or similar).	The EPA should specify criteria for how CCMAPs will be determined to be “appropriate”. Clarification is also required around the words “or similar”. This suggests that there may be another type of plan that licensees may be required to implement. If that is the case, the EPA should specify what this is.
Proportion of licensees that report that the process of developing CCMAPs (or similar) has encouraged and assisted them to reduce their emissions and/or exposure to climate risks.	This KPI should relate to actual reductions in emissions. It is not sufficient to assess the effect of CCMAPs against whether they have encouraged licensees to reduce their emissions “and/or” climate risks. We would consider this is the bare minimum outcome for CCMAPs.
EPA is responding to all requests from licensees for additional support.	The EPA should clarify how this relates to the outcomes intended to be achieved by CCMAPs and in particular how this would result in lower greenhouse gas emissions.
EPA is tracking licensees’ reported progress against their CCMAP commitments.	We support this KPI and repeat our comments above in relation to ensuring that greenwashing of CCMAP commitments and outcomes does not occur.

Recommendation 7: Include the requirement to prepare a CCMAP as a standard licence condition in all Environment Protection Licences.

Recommendation 8: Require publication of the entirety of CCMAPs on corporate websites, save for any information that is confidential or commercial in confidence etc.

Recommendation 9: Implement measures to prevent greenwashing of CCMAP updates and data, including by monitoring CCMAP reports and providing guidance on greenwashing for licensees when preparing CCMAPs.

Recommendation 10: Implement a provision equivalent to section 153B of the POEO Act in respect of CCMAPs.

Recommendation 11: Revise the KPIs for New Action 2(b) to clarify the aims of CCMAPs and their intended effect.

(2)(c) Partner with DPE to seek to ensure climate change is being adequately addressed by proponents of activities we'll regulate, and that approvals contain appropriate conditions

24. The Sub-committee strongly supports New Action 2(c). Climate change considerations must be embedded in both planning and development decisions, as well as decisions around environmental licensing and pollution. This will ensure that both existing risks for climate change are continually addressed and that new risks are anticipated and where possible, prevented.
25. The Action Plan sets out a number of ways in which climate considerations are proposed to be integrated into the planning system. These include requiring proponents to adequately consider climate change, implementing CCMAPS and developing appropriate consent conditions around climate change. We consider that this is an appropriate starting point for integrating climate considerations into planning decisions and would recommend that these proposals be strengthened as set out below.
26. On page 20 of the Action Plan, the EPA notes that:
"Proponents will be required to develop and commit to implementing CCMAPs for their proposed operations (see New action 2(b) for a description of CCMAPs). This requirement will also apply to significant variations to existing developments."
27. Further guidance should be provided on what constitutes a "significant variation" to an existing development. As currently drafted, this could capture all modifications to existing developments, or it could capture a subset of existing developments. If it is intended to capture a subset of developments, guidance should be provided (with opportunity for public comment) around what subset would be covered.
28. Page 20 goes on to say that:
"CCMAPs developed in the planning approvals process will serve a slightly different purpose to CCMAPs for existing environment protection licences. The CCMAP for the licence will focus on the operational

stage of the project and the ongoing performance of the activity (i.e. minimising emissions and exposure to climate risk). In the planning process, CCMAPs will also consider how the development proposal itself can be modified to achieve the best outcomes.”

29. From the current text of the Action Plan, it appears that there might be situations where two CCMAPs are required (i.e. one relating to an EPL and one relating to a development consent). If CCMAPs would be required in relation to both an EPL and a development consent, further guidance is required with regards to how these two types of CCMAPs would differ and how regulatory burden would be avoided. The distinction between the two types of CCMAPs in the Action Plan is somewhat arbitrary. Both EPLs and development consents exist for the life of a project. If the intention is to facilitate climate-conscious development, it may be more appropriate to address climate considerations in the planning space through:
- criteria for environmental assessment; and
 - consent conditions,
- rather than having a second CCMAP.

Recommendation 12: Provide further guidance as to what constitutes a “significant variation” to an existing development that might require CCMAP to be prepared.

Recommendation 13: Clarify the circumstances in which a CCMAP would be required for developments that require both development consent and an EPL.

Pillar 2 – Mitigate

Continuing Action 7

Ensure methane emissions from EPA licensed offshore gas operators are minimised; review existing leak detection and repair programs

30. The Sub-committee supports Continuing Action 7. However, more broadly, we would also encourage the EPA to plan effectively for a transition away from reliance on gas as an energy source, to ensure that NSW is able to embrace cleaner forms of energy while continuing to meet the State’s energy needs..

New action 9

Progressively place greenhouse gas emission limits and other requirements on licences for key industry sectors

31. The Sub-committee strongly supports New Action 9. New Action 9 could be strengthened by:
- Clarifying the circumstances in which licences would contain conditions that require monitoring or emission estimation conditions; and the timeframe for implementing the conditions.); and amending the KPI for this action. As currently drafted the KPI is “[t]he proportion of identified high-priority licences with greenhouse gas emission limits or other requirements.” We would recommend that this is strengthened by also adding a KPI which tracks the reduction (or otherwise) of greenhouse gas emissions by licensees with these limits.

Recommendation 14: Amend New Action 9 to add an additional KPI which tracks the reduction (or otherwise) of greenhouse gas emissions by licensees which have limits placed on their emissions.

Pillar 3 – Adapt

32. The Sub-committee generally supports the actions, both continuing and new, proposed by the EPA's Climate Change Policy and Action Plan and makes the below specific comments.

Continuing Action 10

Protect the environment during emergency response and recovery, and strengthen our approach by being better prepared for the impacts of climate change

33. The Action Plan commits to reviewing EnviroPlan to ensure that it adequately addresses climate risks, however, it lacks detail in what those risks are, what type of action could be taken to address such risks, and what specific power or oversight the EPA might have over each risk. If a certain "climate risk" is better managed by another agency, the Climate Change Policy and Action Plan does not specify where the EPA would *not* have oversight nor whether it would partner with other agencies, and which ones, to achieve its goal. The Action Plan also commits to reviewing EnviroPlan to ensure it "incorporates the concept of building environmental resilience" but does not indicate how this would occur. Further detail here would strengthen Continuing Action 10.

Recommendation 15: Provide further detail on how the EPA will build environmental resilience, and in partnership with which agencies.

New action 11

Develop an adaptation and resilience delivery plan for the EPA

34. The Sub-committee supports the concept of an adaptation and resilience delivery plan (**A&RDP**) for the EPA. However, further detail is required in the Action Plan regarding the relevant agencies that will be consulted in the development of the A&RDP and the timeline of the consultation and development process. The time frame provided by the Action Plan for development of the A&RDP is 12-24 months – in this context, a timeline for the drafting, consultation process and publication of the A&RDP should be provided.

Recommendation 16: Release the proposed timeline for the development and consultation process to occur in creating the adaptation and resilience delivery plan.

New actions 12 and 13

12 Develop and implement environmental resilience programs and initiatives

13 Prepare or adopt climate change adaptation guidance for key industry sectors we license, including the performance outcomes we seek

35. The Sub-committee agrees that one of the EPA's focuses should be on planning, preparing for and preventing climate change-related incidents, emergencies and disasters. In addition to "building on lessons" learned from its "bushfire and flood recovery programs and the work of other jurisdictions", the Committee recommends that the EPA consult and foster partnerships with communities, industry stakeholders, Aboriginal people, and land managers, to ensure that the programs and initiatives properly respond to the case-by-case issues faced by different communities and areas of land. It is imperative that the programs and initiatives implemented are appropriately informed by the community and other stakeholders to ensure that the EPA's response is as effective and impactful as possible.
36. Further, in the presently-rapidly changing state of the environment and climate, what is "season ready" in 12-24 months' time may not be as relevant in multiple years' or decades' time. Thus, the programs and initiatives developed should be flexible and able to be adapted quickly.
37. While the Action Plan's example of how New Action 12 can be reflected in the waste sector is a helpful illustration of how this action can be implemented, the Sub-committee recommends that the EPA provide further details of what other specific programs and initiatives are being considered, and at the very least, which issues, communities and/or industries are intended to be targeted.
38. In relation to New Action 13, similar to the comments above, the Sub-committee maintains that any climate change adaptation guidance that the EPA prepares and provides to key industry sectors it licenses should be flexible and able to be adapted quickly. Further, while the Subcommittee accepts that the adaptation guidance will be useful in assisting the EPA's licensees prepare their climate change mitigation and adaptation plans, caution must be exercised that these plans are appropriately driven by such adaptation guidance and do not too-acutely focus on mitigation guidance, a pattern that much of the relevant scholarship about and the global approach to mitigation and adaptation tends to follow. The sub-committee recommends that the EPA remains conscious of the risk of paying mere "lip service" to adaptation at the cost of missed opportunities.

Recommendation 17: Consult and foster partnerships with communities, industry stakeholders, Aboriginal people, and land managers to ensure its programs and initiatives are informed and impactful.

Recommendation 18: Provide more specific detail of what programs and initiatives are being considered and which issues, communities and/or industries are intended to be targeted.

Concluding Comments

NSW Young Lawyers 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.

Sincerely,

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