COUNTRY REPORT: AUSTRALIA

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Introduction

In 2015, the Federal Government introduced a Bill designed to block environmental groups using 'lawfare' to delay and disrupt coal mining projects. The Bill followed closely on the heels of the Federal Court's decision to set aside the Commonwealth Environment Minister's approval of the Adani Carmichael coal mine in Queensland, one of a number of Federal and State court cases commenced and/or decided in relation to coal mining projects in 2015. This Report will examine the Federal Government's proposed reforms to the test for standing under Commonwealth environmental legislation, as well as the court cases that immediately preceded the introduction of the Bill. Separately, the Report will also discuss the Humane Society International Incorporation's successful application for orders that Kyodo Senpaku Kaisha Ltd, the company responsible for conducting Japan's scientific whaling program, be held in contempt of the Federal Court of Australia, and recent developments in Australia's climate policy that were announced in the lead up to the 2015 United Nations Climate Change Conference in Paris.

Federal Government Attempts to Limit Environmental Challenges

Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') currently provides, for both individuals and organisations, a statutory test for standing in relation to applications for judicial review of decisions made under the Act. It extends the meaning of the term 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), allowing an environmental group that has engaged in relevant environmental research or activities in the previous two years, and has environmental research or protection included in its objects of association, to bring an action under the EPBC Act. The *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* ('the Bill'),[1] introduced on 20 August 2015, would amend the EPBC Act to repeal the extended standing provision under s 487, with the effect that only 'aggrieved persons' within the meaning of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

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[1] Australian Parliament, at:
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5522.

would be entitled to lodge an application for judicial review of decisions made under the EPBC Act.[2]

The Bill was introduced following the Federal Court's consent orders in *Mackay Conservation Group v Minister for Environmen*t,[3] which set aside a decision of the Commonwealth Environment Minister under the EPBC Act to approve a proposed action to develop the Carmichael mine, an open cut and underground coal mine with rail link and associated infrastructure in central Queensland, which is discussed in detail below. In his second reading speech for the Bill the Minister for the Environment, the Hon Greg Hunt MP, identified this litigation, among other coal mining challenges in Queensland, as 'a major threat to the administration of the EPBC Act', referring to the 'direct Americanisation' of litigation through 'the use of litigation to disrupt and delay key projects and infrastructure within Australia and to directly increase investor risk'.[4] The Minister then went on to state that:

> *Changing the EPBC Act will not prevent those who may be affected from seeking judicial review. It will maintain and protect their rights. However, it will prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure where it has been appropriately considered under the EPBC Act*.[5]

The proposed amendment is not, however, likely to remove the ability of environmental groups to challenge decisions under the EPBC Act.[6] Rather, the courts will need to engage in the lengthy assessments required in order to establish common law standing.[7] When

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[2] See Law Council of Australia, Submission No 61, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 10 September 2015, 4.

[3] Federal Court of Australia, No: NSD33/2015, Consent Order, 4 August 2015.

[4] The Hon Greg Hunt MP, Minister for the Environment, House of Representatives, Hansard, 20 August 2015, 8987.

[5] The Hon Greg Hunt MP, Minister for the Environment, House of Representatives, Hansard, 20 August 2015, 8990, cited in Australian Parliament, The Senate, Environment and Communications Legislation Committee, Report on the Provisions of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, November 2015, 2.

[6] Andrew Edgar, 'Proposed Repeal of s 487 of the EPBC Act: The end of litigation by environmental groups?', 7 September 2015, AUSPUBLAW

[7] Andrew Edgar, 'Proposed Repeal of s 487 of the EPBC Act: The end of litigation by environmental groups?', 7 September 2015, AUSPUBLAW; National Environmental Law Association, Submission

determining whether a person is aggrieved,[8] the courts have commonly referred to the 'special interest' test under the common law in relation to environmental groups set out in *Australian Conservation Foundation v Commonwealth*.[9] In that case, the High Court held that something more than a mere intellectual or emotional interest was required in order to meet the threshold of having a 'special interest' in the subject matter of the decision.[10] Justice Gibbs stated:[11]

> *A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.*

However, subsequent courts have taken a more flexible approach, and have had regard to a variety of features indicative of a 'special interest' in the subject matter of the dispute, such as whether a group is recognised as the 'peak body' on a certain matter, and whether the group is granted government funding for its activities and included in public consultation processes in relation to the subject matter of the decision.[12]

No 80, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment
(Standing) Bill 2015, 4 September 2015, 4-5; Stephen Keim and Chris McGrath, 'Chicken Little Abbott and Brandis wrong on "lawfare"', The Canberra Times, 21 August 2015.

[8] In terms of s 5 of the *Administrative Decisions (Judicial Review) Act 1977*) (other than those acting for unincorporated associations (s 488) and those seeking an injunction under the Act (s 475(6) and s 475(7)).

[9] (1980) 146 CLR 493. See Andrew Edgar, 'Proposed Repeal of s 487 of the EPBC Act: The end of litigation by environmental groups?', 7 September 2015, AUSPUBLAW.

[10] Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493, 530-1.

[11] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530-1; see also Andrew Edgar, 'Proposed Repeal of s 487 of the EPBC Act: The end of litigation by environmental groups?', 7 September 2015, AUSPUBLAW.

[12] See, for example, *ACF v Minister for Resources* (1989) 76 LGRA 200 and *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, both cited in National Environmental Law Association, Submission No 80, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 4 September 2015, 4 and Faculty of Law, University of Tasmania, Submission No 60, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 10 September 2015, 3.

Many submissions on the Bill also noted that the provision for extended standing is a key component of the original architecture of the EPBC Act,[13] which indicated 'the importance the legislature attached to the involvement and input of concerned members of the community – an importance that reflects the objects set out in s 3 of the Act'.[14] Extended standing provisions of this nature are based on the principle of the rule of law, and ensure that the potential environmental impacts of a project are appropriately assessed, and that decision-making processes are accountable and transparent.[15] Statistics also indicate that, contrary to the observations of the Minister for the Environment, the extended standing provisions have been used very sparingly.[16]

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[13] See, for example, Professor Jacqueline Peel et al, Submission No 76, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment; (Standing) Bill 2015, 10 September 2015, 3, and National Environmental Law Association, Submission No 80, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 4 September 2015, 2.

[14] Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480.

[15] Professor Rosemary Lyster and Dr Andrew Edgar, Australian Centre for Climate and Environmental Law, Submission No 55, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 2; Law Council of Australia, Submission No 61, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015,10 September 2015, 7-10; Andrew Edgar, 'Proposed Repeal of s 487 of the EPBC Act: The end of litigation by environmental groups?', 7 September 2015, AUSPUBLAW.

[16] See, for example, Dr Chris McGrath, Submission No 96, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 11 September 2015, 5-8; Dr Jacqueline Peel et al, Submission No 76, to Senate Standing Committee on Environment and Communications, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 10 September 2015, 2-4, and Australian Parliament, The Senate, Environment and Communications Legislation Committee, Report on the Provisions of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, November 2015, 4-6. The grounds upon which judicial review can be sought under both the EPBC Act and the AD (JR) Act are narrow, and confined to questions of due process and the lawfulness of decision-making. Of the approximately 5500 referrals of projects for approval under the legislation, only 22 have been challenged in judicial review proceedings since 2000.

On 20 August 2015, the Senate referred the Bill for inquiry and report, and on 18 November 2015, the Environment and Communications Legislation Committee released its final report, recommending that the Bill be passed (a view not supported by the Labor or Greens Senators on the Committee). The Committee considered that:[17]

> *The repeal of section 487 will not diminish the protection of Australia's environment and the conservation of biodiversity and heritage provided by the EPBC Act. The provisions of the EPBC Act specify the arrangements for environmental impact assessment and the matters that the minister must have to regard to when deciding to grant an approval. These provisions, which are the core of the Commonwealth regime for the protection of matters of national environmental significance, will not be altered by the repeal of section 487.*

The committee notes that review of decisions under the EPBC Act will remain available through the ADJR Act and Judiciary Act. In addition, the committee notes that there is continuous engagement with interested stakeholders, including communities where projects are proposed, in both Commonwealth and state and territory environmental assessment processes.

The Bill is now awaiting further debate in the Senate, which is the Upper House in the Australian Parliament.[18]

Mega-Mine Proposals Locked in Litigation

Queensland's Galilee Basin has become one of the 'key battlegrounds' in the fight to phase out fossil fuels, where a number of proposed coal mines are being challenged by environmental and community groups.[19] Potential land use conflicts and growing concern over the Great Barrier Reef's endangered coral system are likely to keep these proposed coal developments high on the public agenda in 2016. The following section will focus on the legal challenges to the Carmichael Mine in the Galilee Basin, which is the most advanced proposal, and which also precipitated the Federal Government's proposed reforms to standing. The Carmichael mine is, however, only one of a number of large coal mining

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[17] Australian Parliament, The Senate, Environment and Communications Legislation Committee, Report on the Provisions of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, November 2015, 27.

[18] See Australian Parliament, Bills and Legislation, Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5522>

[19] Jamie Smyth, 'Great Barrier Reef: Battle under the sea', 19 May 2015, *Financial Times,* http://www.ft.com/intl/cms/s/0/5fa694fa-fae8-11e4-9aed-00144feab7de.html#axzz3wSZZR16g.

developments proposed within the Gaililee Basin. Other mines the subject of challenge also include the Alpha Coal mine and Kevin's Corner.[20]

Carmichael Mine in Queensland

Judicial Review in the Federal Court

Adani Mining Pty Ltd, a wholly owned subsidiary of India's Adani Group, proposes to construct a AU$16 billion open-cut and underground coal mine and 189-kilometre rail line, but has faced repeated challenges from environmental groups.[21] The mine will extract approximately 60 million tonnes of coal per annum, and operate for approximately 90 years, making it one of the largest coal mines in the world.[22] Environmental campaigners have focussed on the impacts of the project on climate change, with the burning of coal produced by the mine likely to generate an estimated 4.7 billion tonnes of greenhouse gas emissions.[23]

On 12 January 2015, the Mackay Conservation Group filed an application for judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of the decision of the Minister for the Environment made under the EPBC Act to approve proposed action to develop an open cut and underground coal mine, rail link and associated infrastructure in central Queensland, subject to certain conditions.[24] The challenge was based on a number of grounds, including:[25]

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[20] For detailed and helpful case studies in relation to the mines see Dr Chris McGrath, Environmental Law Australia, 'Case Studies', at http://envlaw.com.au/alpha-coal-mine-case/.

[21] See Queensland Government, Department of State Development, Coordinator-General Projects, Carmichael Coal Mine and Rail Project, http://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html.

[22] Environmental Impact Statement, Executive Summary, E-I, www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-environmental-impact-statement.html.

[23] See Dr Chris McGrath, Environmental Law Australia, 'Case Studies' citing Joint Expert Report to the Land Court of Queensland on 'Climate Change –Emissions', Taylor & Meinshausen, < http://envlaw.com.au/carmichael-coal-mine-federal-court/>; see also, Australian Conservation Foundation Incorporated v Minister for the Environment, QUD1017/2015, [15].

[24] *Mackay Conservation Group v Minister for Environment*, Originating Application for Judicial Review, NSD33/2015.

[25] Sue Higginson, 'Is the Carmichael Court win a mere technical hitch?', 5 August 2015, www.edonsw.org.au/carmichael_not_a_technical_hitch.

> *The failure to take into account the scope 3 greenhouse gas emissions that will result from the burning of the coal that is mined, and the impact of those emissions on the World Heritage listed Great Barrier Reef*
> *The failure to take into account Adani's poor environmental history*
> *The failure to take into account two Approved Conservation Advices for two nationally threatened species that will be significantly impacted by the mine – the Yakka Skink and the Ornamental Snake.*

The Minister and Adani conceded the case on the basis of the third point, and the parties filed orders requesting that the Minister's approval of the mine be set aside by consent. The proposed orders were presented to the Federal Court via a letter from the Australian Government Solicitor (AGS), acting for the Minister and the Commonwealth, which was written with the agreement of Mackay Conservation Group and Adani Mining Pty Ltd. The Federal Court then made orders by consent setting aside the Minister's decision on 4 August 2015.26 On 14 October 2015, the Minister re-approved the Carmichael Coal Mine and Rail project, stating that the project had been approved 'in accordance with national environment law subject to 36 of the strictest conditions in Australian history'.27 This second EPBC Act approval is now the subject of a separate application for judicial review lodged on 9 November 2015 by the Australian Conservation Foundation in the Federal Court in Brisbane.28 The application alleges that the Minister failed to properly consider the impacts of the climate pollution from the mine on the Great Barrier Reef World Heritage Area, including that the Federal Minister failed to consider the effect on the Great Barrier Reef of 'emissions from transport by rail, shipping and combustion of the product coal overseas', contravening the EPBC Act and, by extension, Australia's international obligations to protect the Great Barrier Reef.29

Merits review in the Land Court of Queensland

The Carmichael mine also requires a mining lease under the Mineral Resources Act 1989 (Qld) (MRA), and an environmental authority under the Environmental Protection Act 1994

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[26] Federal Court of Australia, Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment, 19 August 2015, http://www.fedcourt.gov.au/news-and-events/20-august-2015.

[27] The Hon Greg Hunt MP, Minister for the Environment, 'Carmichael Coal Mine and Rail Infrastructure Project', Media Release, 15 October 2015.

[28] Australian Conservation Foundation Incorporated v Minister for the Environment, Originating Application for Judicial Review, QUD1017/2015.

[29] Australian Conservation Foundation Incorporated v Minister for the Environment, Originating Application for Judicial Review, QUD1017/2015.

(Qld) (EPA). These State approval processes have resulted in a number of additional objections in the Land Court of Queensland under the MRA and EPA, including from a conservation group, Land Services of Coast and Country Inc, which objected to the grant of the mining lease and the environmental authority on a number of grounds, including impacts on groundwater systems and biodiversity, particularly the black-throated finch, which is an endangered bird species.[30] The Land Court delivered its decision on 15 December 2015, recommending that the mining lease and environmental authority be granted subject to further conditions in relation to monitoring of impacts on Black-throated Finch, which the Queensland State Government will now take into consideration in making its decision on the mining lease and environmental authority for the proposed project.[31]

The Carmichael mine also relies on the expansion of the Abbot Point Coal Terminal, and on 24 December 2015, the Federal Government approved the third iteration of this proposal, known as the Abbot Point Growth Gateway Project.[32] Previous versions of the project have been challenged by environmental groups, on the basis of, among other matters, the Terminal's proximity to the Great Barrier Reef and proposals to dispose of dredge spoil in the marine park.[33] It is expected that further challenges will be lodged in relation to the Government's 24 December 2015 decision.[34]

Within months of the Federal Court challenge to the Carmichael mine in Queensland, a local community group in NSW, the Upper Mooki Landcare Group, with the assistance of the Environmental Defenders Office NSW, applied for judicial review in the NSW Land and Environment Court of the NSW Government's decision to grant approval to Shenhua Watermark's open cut coal mine on the Liverpool Plains in north-western NSW on the basis

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[30] Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48, [15].

[31] See Dr Chris McGrath, Environmental Law Australia, 'Case Studies', < http://envlaw.com.au/carmichael-coal-mine-federal-court/>.

[32] Australian Government, Department of the Environment, Approval, Abbot Point Growth Gateway Project, Queensland (EPBC 2015/7467), <epbcnotices.environment.gov.au/_entity/annotation/2f828db4-2fa8-e511-9621-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1450740730681>.

[33] MacKay Conservation Group, 'Abbot Point – a disaster in the making', www.mackayconservationgroup.org.au/abbot_point_a_disaster_in_the_making.

[34] Emily Smith, 'Long Road Awaits Adani despite coal expansion approval', *Daily Mercury*, 24 December 2015, <www.dailymercury.com.au/news/long-road-awaits-adani-despite-port-tick/2882484/>; SBS, 'Donations Flow to Abbot Point Challenge', 23 December 2015, www.sbs.com.au/news/article/2015/12/23/donations-flow-abbot-point-challenge.

of the Minister's failure to consider the mine's impacts on a local population of Koala's.[35] The Liverpool Plains is one of Australia's most productive farming areas and Shenhua, a Chinese company, plans to extract up to 10 million tonnes of coal from the open cut mine each year for 30 years.[36]

Challenges under Australia's National Laws to Japan's Scientific Whaling Program

This year also saw the revival of the Federal Court's 2008 decision in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd,*[37] in which Humane Society International ('HSI') successfully obtained a declaration and an injunction from the Federal Court of Australia to restrain Japanese whaling in the Australian Whale Sanctuary, within the waters of Australia's exclusive economic zone around its Antarctic territory. HSI challenged Japan's scientific whaling program on the basis that Kyodo Senpaku Kaisha Ltd ('Kyodo'), the company responsible for conducting the whaling program, was breaching the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), given that the company did not, at any time, hold a permit or authority as required under the EPBC Act for killing, taking and treating Antarctic minke whales off the coast of Antarctica in the Australian Whale Sanctuary. These orders were served by HSI representatives on Kyodo, which continued to conduct 'scientific' whaling activities in the Australian Whale Sanctuary between 2008 and 2013 in contravention of the orders.[38] The Australian Government did not take enforcement action in relation to those orders pending the outcome of the International Court of Justice hearing into Japan's whaling program (examined in the 2014 Country Report). However, with the recommencement of Japan's whaling program scheduled for December 2015, HSI sought to enforce the 2008 injunction,[39] making an application for orders that the respondent, Kyodo, be found guilty of contempt of court on the basis that it has killed, taken and treated Antarctic minke whales off the coast of Antarctica in the Australian Whale Sanctuary in each of the summers of 2008 to 2009, 2009 to 2010,

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[35] EDO NSW, 'Current Cases: Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd and NSW Minister for Planning', <www.edonsw.org.au/current_cases>.

[36] Shenhua Watermark Coal Pty Ltd, Watermark Coal Project, Environmental Impact Statement, February 2013, iii, <majorprojects.affinitylive.com/public/a86af1422205f18302ef3aafb59cb191/01.%20Watermark%20Coal%20Project%20EIS%20-%20Main%20Report.pdf> .

[37] (2008) 165 FCR 510; [2008] FCA 3.

[38] EDO NSW, 'Current Cases: Humane Society International v Kyodo Senpaku Kaisha Ltd' www.edonsw.org.au/current_cases.

[39] EDO NSW, 'Current Cases: Humane Society International v Kyodo Senpaku Kaisha Ltd' www.edonsw.org.au/current_cases.

2011 to 2012 and 2012 to 2013 in breach of the 2008 Injunction.[40] On 18 November 2015, the Federal Court ruled that Kyodo is in contempt of Court and fined the company AU$1 million dollars.[41]

Compromise reached on Renewable Energy Target

After months of deadlock and uncertainty in relation to the future of renewable energy in Australia, the Australian Parliament passed the Renewable Energy (Electricity) Amendment Bill 2015 to amend the *Renewable Energy (Electricity) Act 2000* (Cth). The Bill reflects the bipartisan deal reached between the Federal Government and Labour opposition to reduce Australia's large-scale Renewable Energy Target from 41 000 GWh (about 27 percent of current forecast energy demand) to 33 000 GWh in 2020 (about 23 percent of current forecast energy demand), with interim and post-2020 targets adjusted accordingly. For a detailed overview of the framework and aims of the Renewable Energy Target ('RET') and the 2014 RET Review, please see the 2014 Country Report.

The expert consensus appears to be that, although the new target is significantly lower than the current target of 41,000GWh, the revised target will still require substantial increase in renewable energy capacity over the next five years.[42] However, as part of the bipartisan agreement, emissions-intensive trade-exposed industries are now fully exempted from the target, and the requirement for legislated biennial reviews of the RET have been removed. The Bill has also reinstated biomass from native wood waste as an eligible source of renewable energy under the same conditions that existed prior to its removal from eligibility in 2011. The latter change was the subject of considerable debate in the Senate, with amendments to remove the change moved by the Greens (with the support of Labor) on account of concerns that the reinstatement of native forest wood waste provide an incentive for logging high conservation value forests for the purposes of electricity generation.[43] The

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[40] Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2015] FCA 1275, [1].

[41] Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2015] FCA 1275, [46].

[42] Sallyanne Everett et al, 'More wind farms likely as a result of changes to the Renewable Energy Target' Clayton Utz Insights, 25 June 2015; www.claytonutz.com/publications/edition/25_june_2015/20150625/more_wind_farms_likely_as_a_result_of_changes_to_the_renewable_energy_target.page.

[43] Australian Parliament, Senate Hansard, Bills, Renewable Energy (Electricity) Amendment Bill 2015, 15 June 2015, 3348. See also Australian Government, Climate Change Authority, Renewable Energy Target Review, December 2012, 7.1.5.

Bill was, however, passed with this provision after the Federal Government reached a deal with four crossbenchers to establish a National Wind Farm Commissioner.[44]

Emissions Reduction Fund Safeguard Mechanism Finalised

In August 2015, the Federal Government announced Australia's Intended Nationally Determined Contribution, or post-2020 target, for presentation to the UNFCCC conference in Paris. The target proposes a reduction of Australia's emissions by 26-28% by 2030 based on 2005 levels,[45] which falls significantly short of the Climate Change Authority's recommended targets of 30% below 2000 levels by 2025, and 40-60% below 2000 levels by 2030.[46] The Government has indicated that it will meet the target by implementing a 'suite of Direct Action policies' that were outlined in the 2014 Country report for Australia, including the Emissions Reduction Fund and Safeguard Mechanism, along with the Renewable Energy Target and initiatives in energy efficiency and energy productivity.[47]

This year, the Government also finalised rules to support the Safeguard Mechanism for Emissions Reduction Fund ('ERF'), which is designed to ensure that emissions reductions purchased through the ERF are not displaced by increased emissions elsewhere in the economy.[48] The key requirement under the Safeguard Mechanism, which is to come into effect on 1 July 2016, is that facilities that emit more than 100,000 tonnes of greenhouse

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[44] Melissa Clarke, 'Renewable Energy Target: Greens accuse Government of creating 'dead koala certificates', ABC News, 24 June 2015, <www.abc.net.au/news/2015-06-24/greens-accuse-government-of-creating-27dead-koala-certificates/6569594>. The Wind Farm Commissioner will deal primarily with health concerns in relation to wind farms: see The Hon Greg Hunt MP, Minister for the Environment, 'Appointment of National Wind Farm Commissioner and Independent Scientific Committee on Wind Turbines', Media Release, 9 October 2015, www.environment.gov.au/minister/hunt/2015/mr20151009.html.

[45] Australian Government, Department of the Environment, 'Australia's 2030 climate target', www.environment.gov.au/climate-change/publications/factsheet-australias-2030-climate-change-target.

[46] Australian Government, Climate Change Authority, 'Targets and Progress Review', www.climatechangeauthority.gov.au/reviews/targets-and-progress-review-3.

[47] Australian Government, Department of Foreign Affairs and Trade, 'Australia's 2030 Emission Reduction Target'; www.dpmc.gov.au/sites/default/files/publications/Summary%20Report%20Australias%202030%20Emission%20Reduction%20Target.pdf.

[48] The rules are contained in the following legislative instruments: National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015, National Greenhouse and Energy Reporting Amendment (2015 Measures No. 2) Regulation 2015; and National Greenhouse and Energy Reporting (Audit) Amendment Determination 2015 (No 1).

gas annually[49] must keep their net emissions below a specified baseline. The Rules include, among other matters, methods for establishing baselines for existing and new projects and the means by which baselines may be met and/or altered. Civil penalties of up to AU$1.8 million may be imposed on responsible emitters who exceed their baselines.

A major criticism of the baselines to be set under the Safeguard Mechanism is that those baselines are not expected to drive emissions reduction activities within the relevant facilities.[50] However the Explanatory Statement makes it clear that the Government's objective is to achieve national emissions reductions through the ERF, and not the Safeguard Mechanism. The role of the Safeguard Mechanism, according to the Federal Government, is to ensure that reductions purchased under the ERF are not displaced by a significant rise in emissions above business as usual.[51]

Although Australia will technically meet its 2020 greenhouse emission reductions targets, primarily due to Kyoto carryovers, absolute emissions will not reach minus 5 per cent by 2020.[52] RepuTex projects that:[53]

> *[N]ational emissions will increase from minus 2 per cent on 2000 levels to 4 per cent above 2000 levels by 2020. Emissions growth will be driven by increased activity in the land-clearing, generation and export sectors, with new LNG and Coal facilities – including Gorgon,*

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[49] Around 140 facilities will be captured by this threshold.

[50] Elisa de Wit, 'Exposure Draft Rules released for Safeguard Mechanism', Norton Rose, 7 September 2015, <www.nortonrosefulbright.com/au/knowledge/publications/132039/exposure-draft-rules-released-for-safeguard-mechanism?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>; RepuTex, 'Government lets top 20 polluters off the hook', 3 August 2015, www.businessspectator.com.au/article/2015/8/3/carbon-markets/government-lets-top-20-polluters-hook?utm_source=exact.

[51] Australian Government, Explanatory Statement, *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015*, 6, 10-12; Elisa de Wit, 'Exposure Draft Rules released for Safeguard Mechanism', Norton Rose, 7 September 2015; <www.nortonrosefulbright.com/au/knowledge/publications/132039/exposure-draft-rules-released-for-safeguard-mechanism?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

[52] Lenore Taylor, 'Greg Hunt confirms Australia has 'officially' met its 2020 climate goal', 25 November 2015, <www.theguardian.com/environment/2015/nov/25/greg-hunt-confirms-australia-has-officially-met-its-2020-climate-goal.

[53] RepuTex, 'Update: The Price of Emissions Growth – Accounting to 2020', 20 November 2015, www.reputex.com/publications/market-update/update-market-to-pay-for-australian-emissions-growth-accounting-our-way-to-2020/.

> *Wheatstone, APLNG, Maules Creek and Grosvenor – becoming operational between 2015 and 2017.*
>
> *While immaterial to Australia's 2020 Kyoto commitment, short-term growth will place significant pressure on Australia's 2030 emissions target, given any emissions increases from today will ultimately need to be reduced later.*
>
> *Analysis indicates that emissions increases over 2015-20 may double the rate of Australia's annual abatement task out to 2030, while compounding the cost of action. From today, we estimate Australia requires nearly 6 million tonnes (Mt) of "new" abatement each year to meet its 2030 target. Should emissions grow as expected, Australia would instead require 13 Mt of "new" abatement each year over 2020-2030, more than double the current rate.*

Accordingly, it remains to be seen how the Australian Government will transition from its current policy approach, with ERF funding to end in 2016, to a pathway that will position Australia to meet its pledged targets for 2030.