



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

9 April 2018

Minister Shane Rattenbury

Climate Change Policy
GPO Box 158
Canberra
ACT 2601

By email: climatechange@act.gov.au

Dear Climate Change Policy Team,

ACT's Climate Strategy to a Net Zero Emissions Territory: EDO ACT Submission

About the EDO ACT

The Environmental Defender's Office (ACT) Inc ('EDO ACT') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental policy and law reform, and offer community legal educational publications and programs.

ACT Climate Strategy

The ACT Government has been a leader in climate change legislation and policy in Australia and is best placed to continue to lead the way nationally to reduce greenhouse gas (GHG) emissions and reverse the impacts of climate change. The EDO ACT welcomes the opportunity to comment on the *ACT Government's Climate Strategy to a Net Zero Emissions Territory* (December 2017) ('Climate Strategy') and offers the following recommendations:

1. That ACT emission reduction targets and climate change strategies be integrated into decision-making processes of ACT Directorates and division, where it is likely that their decisions will impact on such targets. A greenhouse trigger needs to be including in the Planning and Development act, such that an EIS is required for projects with significant climate change target implications.
2. That ACT Climate Change legislation and policy incorporate the newest environmental law principles and legally enforceable mechanisms be introduced to implement them.



1. Integration of ACT Climate Change targets

The EDO ACT welcomes the ambitious interim emission reduction targets and commitment to reach net zero emissions by 2045. In order to ensure best prospects for successfully meeting these targets, EDO ACT strongly suggests all relevant ACT Directorates (including its constituent Divisions) incorporate active consideration of the ACT's emission reduction targets, and the impact of their decisions on these targets, in decision-making processes, and develop a plan to minimise emissions accordingly.

In particular, the EDO ACT is concerned that there is, and has been, limited coordination between ACT Directorates (and divisions within those Directorates) on environmental goals such as emission reduction targets. All relevant Directorates (and divisions within them) should be required to actively consider climate change legislation in decision-making likely to impact on ACT targets. For example, relevant decision-makers involved in the planning process should, as a matter of course, consider the impacts of large-scale land clearing required in a development (through the development application process) on the ACT's climate change emission reduction targets. The requirement for public bodies to consider emission reduction targets is not unusual. For example, the *Climate Change (Scotland) Act 2009* places specific duties on all public bodies which require them to exercise their functions in a way best calculated to deliver emission reduction targets.¹

The ACT Government has, from time to time, indicated its obligation to consider climate change targets. For example, the Environment, Planning and Sustainable Development Directorate's *Housing Choices Discussion Paper* (November 2017) considers the ACT Government's climate change targets, and measures it may take to ensure adaptation to climate change.² The ACT Climate Strategy Discussion Paper notes the importance of sustainable land use, including designing cities that increase the natural uptake of carbon, and limiting deforestation through greenfield development. However, active consideration in meeting the ACT Government's emission reduction targets does not appear to be considered by decision-makers generally, and this has, and will continue to have, an impact on ACT's emission reduction targets. The ACT Greenhouse Gas Inventory 2016-2017 indicated that last year was the first time that land use in the ACT was a net contributor to GHG emissions,³ partially due to land clearing for development. Given the number of large-scale housing developments currently planned, it is highly likely that land clearing for development will continue to be a net contributor to GHG emissions.

¹ *Climate Change Act 2009 (Scotland)* Part 4. See

www.gov.scot/Topics/Environment/climatechange/howyoucanhelp/publicbodies/publicsector

² Please refer to the EDO ACT submission to the *Housing Choices Discussion Paper*, available at www.edoact.org.au.

³ ACT Greenhouse Gas Inventory 2016-2017 (October 2017) section 3.7.



Accordingly, decision-makers in the planning process need to actively consider the level of greenhouse gas emissions generated by proposals as grounds for approval or refusal of development applications. Environmental effects of activities are cumulative and inter-related, and governance systems and project-specific development approval processes often fail to address these cumulative impacts.⁴ The level of greenhouse gas emissions should also be relevant when considering whether a proposal is likely to have a significant adverse environmental impact as defined under the *Planning and Development Act*. A greenhouse gas emission trigger, requiring an Environmental Impact Statement for high-emissions projects needs to be added to development application considerations in the *Planning and Development Act*. The concept of a national greenhouse gas trigger has been the subject ongoing discussion, including being recommended in the independent Hawke Review of the *EPBC Act 1999*.

In addition, best practice techniques should be applied to proposed developments to decrease their environmental impact.⁵ The *Energy Efficiency (Cost of Living) Improvement Act 2012 (ACT)* and provisions in the *Building Act 2004 (ACT)* mandate energy efficiency requirements. New buildings that are currently being planned and developed should have high 'star ratings' under the nation-wide energy rating scheme.

Case study: Ginninderra Falls Association and development in West Belconnen

The EDO ACT provided advice to the Ginninderra Falls Association (GFA), a community group that advocates for the conservation and protection of the environment in the West Belconnen and adjacent NSW area. The GFA have been engaged in environmental protection and advocacy surrounding the proposed Ginninderry development in West Belconnen. The proposed development covers 1000 hectares of land in the ACT bordering the Murrumbidgee River and 600 hectares across the border in NSW. It will deliver up to 11,500 new homes, house an increasing population of at least 30,000 people and take about 30 years to complete.

The area to be cleared for development is a mix of greenfield land and native vegetation. It is also rich in types of biodiversity that are vulnerable to the impacts of climate change.⁶ The development is likely to cause the local extinction of the Rosenberg's Goanna, Little Eagle, Scarlet Robin and Spotted Harrier and to cause significant decline or decline of six other listed ACT and Commonwealth species.

⁴ Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017), Recommendation 3.1 p 17.

⁵ See for instance, EDO NSW, Planning for climate change: How the NSW planning system can better tackle greenhouse gas emissions (2016).

⁶ Preliminary Biodiversity Survey of the Ginninderra Falls Area (2016), Dr David Wong (Ecologist and Project Officer at the Ginninderra Catchment Group).



Reports by independent fire experts also indicate that the housing development is in fire-prone areas likely to be impacted by a warming climate.⁷

Despite the impacts on greenfield land and vulnerable biodiversity, this development has been approved. It is unclear whether consideration of ACT's emissions reduction targets have been considered in the development application process.

Recommendation: The ACT's emission reduction targets and other climate change strategies need to be integrated into the decision-making process of ACT Directorates and divisions, where it is likely that their decisions will impact on the ACT emission reduction targets. A greenhouse trigger needs to be included in the *Planning and Development Act*, such that an EIS is required for projects with significant climate change implications.

2. Key Principles to be Included in ACT Climate Change Policy

The Australian Panel of Experts on Environmental Law (APEEL) are a panel of environmental law experts who have recently produced a Blueprint for the Next Generation of Australian Environmental Law (2017). As a progressive and responsive jurisdiction, the ACT needs to incorporate and implement new principles into climate legislation and policy. These principles include:

- *Smart regulation principles*⁸ such as the policy mix principle,⁹ the parsimony principle¹⁰ and the escalation principle.¹¹ For example, this includes using an escalating range of enforcement mechanisms. At the lower end of the scale, government might require business to disclose information about greenhouse gas emissions, whereas at the upper end, it may require licencing to enforce emission levels.

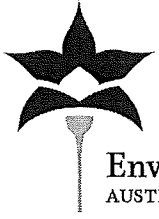
⁷ "Risk Implications of Dynamic Fire Propagation", presented to YVC on 25th October 2017, by UNSW bushfire scientist Dr Jason Sharples.

⁸ See Neil Gunningham, Peter Grabosky & Darren Sinclair (1998) *Smart regulation: designing environmental policy*. Oxford University Press.

⁹ The principle that a complementary range of instruments is desirable to address an issue. These should include regulatory tools, economic measures, information-based measures, self-regulatory alternatives (for low impact, low risk activities) and voluntary measures. See Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

¹⁰ The principle that less interventionist instruments or approaches should be applied first to achieve desired environmental outcomes (for example, it would make little sense to deploy scarce enforcement resources on those who are willing to comply voluntarily under less interventionist approaches). See Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

¹¹ The principle that regulatory measures should ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals. See Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).



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- *Principles that promote particular economic measures, for example, that polluters pay for their environmental impacts.* This includes current price mechanisms as a deterrent for failing to meet emissions reduction targets.
- *Principles that endorse particular tools or mechanisms for environmental management (for example, environmental impact assessment (EIA) - both project and strategic).* It is relevant that in the case of GFA (described above), the development was assessed in the merit track (rather than the impact track) and therefore no EIS was completed, despite the development's significant climate implications.
- *Principles related to environmental democracy such as access to environmental information, public participation and access to justice.* For example, with respect to access to justice, there must be legislative provision for open standing or the avoidance of costs awards in public interest cases.
- *A principle of responsive and flexible environmental governance.* For instance, current nature conservation approaches approach often fail to respond to environmental change, which is magnified by the impacts of climate change. Measurable triggers should be implemented, which, if exceeded will required more precautionary responses and increased protections for species at risk of exceeding these triggers.¹²
- *A principle of environmental restoration.* Although the reality of ongoing ecological change (which will intensify if climate change is not mitigated), means that the environment will not be restored to its original state, a principle of environmental restoration aims to improve the complexity, structure and resilience of ecosystems to enable them to adapt to a changing climate.
- *A principle of non-regression.* This involves the idea that there should be no retreat or backwards movement with respect to the level of protection afforded to the environment.
- *A precautionary principle and prevention of harm principle.* This involves taking precautionary measures if there is some risk to human health or the environment, even if some cause and effect relationships are not fully established scientifically. The prevention of harm principle involves the prevention of tangible harms to individuals and the environment and provide for appropriate recovery for those harms if they occur.

In addition, the following two new and relevant principles should be incorporated:

- *“a principle of achieving a high level of environment protection, which requires that decisions and actions aim for an optimal level of environmental protection and biodiversity;”¹³ and*

¹² See Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Nature Management (Technical Paper 3, 2017) Recommendation 4.2.4.

¹³ For more information, see Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017) p 45.



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- “a principle of applying best available techniques by mandating up-to-date tools and methods suitable for protecting the environment and conserving biological diversity”.¹⁴

Principles of equity are particularly relevant. The economic costs of inaction on climate change far outweigh the costs of acting now.¹⁵ However, the immediate costs associated with climate action most strongly impact lower income earners. The Climate Change strategy notes that *‘the ACT is committed to ensuring any present costs to residents are coupled with cost saving measures and support for our most vulnerable.’*¹⁶ The EDO ACT welcomes measures to assist low income earners adjust, such as initiatives which encourage the energy efficiency measures in rental properties. Public transport investment is particularly important in outer suburbs where lower income households are forced to rely on their private vehicles, which will become more expensive as petrol prices increase.

Finally, the Australian Network of EDOs (ANEDO) has consistently raised concerns relating to the use of offsets as a means of ‘reducing’ emissions. The EDO ACT welcomes the Climate Strategy’s method of reinvesting the costs of missed targets back into the ACT economy, rather than using offsets.

Recommendation: The environmental principles outlined above should be explicitly set out in ACT climate change legislation and policy and legally enforceable mechanisms should be introduced to implement them.

If you have any questions or wish to clarify any of the above, please do not hesitate to contact the EDO ACT on (02) 6243 3460 or Stephanie.Booker@edoact.org.au.

Yours faithfully,

Stephanie Booker
Principal Solicitor

¹⁴ Australian Panel of Experts on Environmental Law, Terrestrial Biodiversity Conservation and Natural Resources Management (Technical Paper 3, 2017).

¹⁵ Sir Stern, Nicolas ‘The Stern review on the Economics of Climate Change’, quoted from http://www.aussmc.org/Stern_Review.php

¹⁶ ACT Climate Strategy Page 23.