



Environmental
Justice Australia

Submission

in response to

Draft guideline for managing greenhouse gas emissions

Environmental Justice Australia

22 February 2022

**Environmental
Justice Australia**
ABN 74052124375

PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006
L3, 60 Leicester St, Carlton

T (03) 8341 3100
F (03) 8341 3111
E admin@envirojustice.org.au
W www.envirojustice.org.au

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

For further information on this submission, please contact:

Virginia Trescowthick, Lawyer, Environmental Justice Australia

T: 03 8341 3100

E: admin@envirojustice.org.au

Submitted to: <https://engage.vic.gov.au/new-draft-guideline-managing-greenhouse-gas-emissions>

And by email: GHGGuideline@epa.vic.gov.au; Melanie.Middleton@epa.vic.gov.au

22 February 2022

1. OPENING COMMENTS

“Climate change is the most significant environmental issue we face”.¹

Independent Inquiry in the Victorian Environment Protection Authority (2016)

“All anthropogenic GHG emissions contribute to climate change”.²

His Honour Brian Preston, Chief Judge of the NSW Land and Environment Court (2019)

“Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO2 and other greenhouse gas emissions occur in the coming decades”.³

Intergovernmental Panel on Climate Change (2021)

“It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next”.⁴

His Honour Mordecai Bromberg, Justice of the Federal Court of Australia (2021)

Thank you for the opportunity to provide input on the *Guideline for managing greenhouse gas emissions – draft for consultation (draft guidelines)*. We welcome the release of the draft guidelines, as the first EPA publication on the topic of greenhouse gas emissions since the commencement of the *Environment Protection Act 2017*.

However, given the current state of climate science and climate law, in combination with the strength of the new prevention-focused *Environmental Protection Act 2017*, we are dismayed by the tone and incoherence of the draft guidelines. In general, the draft guidelines are timid in the pursuit of minimising the risks of harm from greenhouse gas emissions and lack clarity on key legal concepts.

¹ *Independent Inquiry in the EPA (2016)* Chapter 8, 152.

² *Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 [514] (CJ Preston)*.

³ Intergovernmental Panel on Climate Change: Working Group 1, *AR6: Summary for Policymakers (2021)* <<https://www.ipcc.ch/report/ar6/wg1/#SPM>> 14.

⁴ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 [293] (J Bromberg)*.

We understand that EPA guidance is designed to provide information to help duty holders understand their obligations under the *Environment Protection Act 2017* and subordinate instruments,⁵ but the draft guidelines lack clarity and fail to convey:

- **A legally enforceable duty now applies** to any person engaging in an activity that may give rise to risks of harm to human health or the environment from greenhouse gas emissions.
- **Businesses are required by law to undertake a risk assessment regarding their greenhouse gas emissions** (i.e. businesses will be in contravention of the general environmental duty if they fail to, so far as reasonably practicable, use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from greenhouse gas emissions that may arise in connection with their activity).
- The concept of **minimising risks** of harm to human health and the environment **means eliminating risks of harm**, so far as reasonably practicable, in the first instance.
- **The concept of minimising the risk of harm ‘so far as reasonably practicable’ is of legal significance**, and duty holders need to understand each of its five constituent parts in the context of greenhouse gas emissions.
- Under the general environmental duty, **all levels of possible harm must be considered including small cumulative impacts that add up over time**. This is particularly important in the context of greenhouse gas emissions, whereby the combined effect of many small-scale and individual actions is significant, with every tonne of greenhouse gas emissions contributing to climate change.
- **Businesses are required to understand and minimise**, so far as reasonably practicable, their **Scope 3 greenhouse gas emissions**.

As a result, we are concerned that the draft guidelines will do little to help duty holders to properly understand their obligations under the *Environment Protection Act 2017*, or provide a clear pathway to reduce the harmful effects of greenhouse gas emissions (cf. maintaining ‘business as usual’).

We are also concerned that the draft guidelines prioritise the ‘principle of proportionality’⁶ at the expense of many other principles of environmental protection, including the primacy of prevention, polluter pays, precaution, conservation, and equity.⁷

Specific comments on how the guideline can be improved are set out below.

⁵ Guideline for managing greenhouse gas emissions – draft for consultation (January 2022) 3.

⁶ *Environment Protection Act 2017*, s 14.

⁷ *Environment Protection Act 2017*, ss 15, 17, 20, 21 and 23.

2. COMMENTS ON HOW THE GUIDELINE CAN BE IMPROVED

2.1 The focus should be on *minimising* – rather than *managing* – greenhouse gas emissions.

The *Environment Protection Act 2017* focuses on the prevention of harm.⁸ The general environmental duty, the cornerstone on the new legislative regime, is a preventative duty and casts a positive obligation on duty holders to proactively *minimise* risks of harm to human health and the environment from pollution and waste.⁹

The main purposes of the *Environment Protection Act 2017* include –

- setting out the legislative framework for the *protection* of human health and the environment from pollution and waste (s 1(f))
- providing for a general environmental duty to *minimise* risks of harm to human health and the environment from pollution or waste (s 1(g))
- providing a framework for the *management* of waste (s 1(i)) (emphasis added).

Greenhouse gas emissions fall within the definition of both pollution and waste, as recognised in the draft guidelines.¹⁰ This means that the approach of *managing* GHG emissions – as a waste – is too narrow. It is also legally incorrect. Such an approach misinterprets the general environmental duty, which is to *minimise* risks of harm from pollution and waste, and is likely to mislead duty holders.

The legislative framework is clear that *minimising* – rather than *managing* – GHG emissions is the legal norm with which, and the end towards which, the EPA should develop the guidelines on GHG emissions.

As currently drafted, the guidelines do not reflect the preventative focus of the new legislative framework.

Recommendation: The draft guidelines should be redrafted to accurately advise that there is now a duty to *minimise* – rather than *manage* – GHG emissions. In practice, this means:

- changing the name from ‘Guideline for *managing* GHG emissions’ to ‘Guideline for *minimising* GHG emissions’ (or something similar); and

⁸ See *Second Reading Speech: Environment Protection Bill 2018* (Legislative Assembly, Minister D’Ambrosio, 20 June 2018) 2084.

⁹ Environment Protection Amendment Bill 2018: Explanatory Memorandum, 28.

¹⁰ Guideline for managing greenhouse gas emissions – draft for consultation (January 2022) 8.

- reviewing the draft in detail and rewriting it to ensure that readers clearly understand that they have a duty to *minimise* risks of harm to human health or the environment from GHG emissions.

2.2 The guidelines should be clear that a legally enforceable duty applies to any person engaging in an activity that may give rise to risks of harm to human health or the environment from greenhouse gas emissions.

We understand that the main purpose of the guidelines is to assist businesses to understand and meet their obligations under the general environmental duty, specific to greenhouse gas emissions. Despite this, the guidelines fail to set out in clear terms – and at the outset – that a legally enforceable duty now applies to any person engaging in an activity that may give rise to risks of harm to human health or the environment from greenhouse gas emissions.

Part 1 of the guidelines provides an introduction, which addresses climate change (Part 1.1), purpose (Part 1.2) and the general environmental duty (Part 1.3) in turn.

- The section on climate change (Part 1.1) states that “There are practical steps that can be taken across all sectors of the economy to reduce GHG emissions”. While this is true, it misses – or downplays – the point that all businesses who are a source of GHG emissions now have a positive duty to minimise the risks of harm from GHG emissions so far as reasonably practicable.
- The section on purpose (Part 1.2) explains *what* is addressed in the guidelines, but fails to address *why* (i.e. to assist businesses to understand and meet their obligations under the general environmental duty).
- The section on the general environmental duty (Part 1.3) sets out subsections (1), (4) and (5) of section 25 of the *Environment Protection Act 2017*, albeit without the provisions being discernible from the other guideline text and without explaining key concepts contained within those provisions.

As a result, it is not clear to the reader that a legally enforceable duty now applies to businesses engaging in an activity that may give rise to risks of harm to human health or the environment from greenhouse gas emissions.

By comparison, the proposed *Assessing and controlling contaminated land risks: A guide to meeting the duty to manage for those in management or control of land* (Publication 1977) (**draft**

contamination guidelines)¹¹ are much clearer and more likely to assist businesses to understand and meet their obligations. For example, the *draft contamination guidelines* include:

- A clear introduction (Part 1) which sets out the relevant duties under the *Environment Protection Act 2017* and states in the opening paragraph that “If you are a person in management or control of contaminated land you must meet this duty”.
- An explanation of key terms and obligations (Part 1.1 and 1.2), using the relevant sections of the *Environmental Protection Act 2017* (which are clearly discernible from the other guideline text).

Recommendation: The draft guidelines should clearly state that any person engaging in an activity that may give rise to risks of harm to human health or the environment from greenhouse gas emissions has a positive obligation to minimise those risks so far as reasonably practicable.

2.3 The guidelines should be clear that minimising risks of harm means eliminating risks of harm in the first instance.

The draft guidelines do not clearly explain, or consistently adopt the language and meaning of, the concept of minimising risks of harm to human health or the environment, as defined in section 6 of the *Environment Protection Act 2017*.

Section 6

- (1) A duty imposed on a person under this Act to minimise, so far as reasonably practicable, risks of harm to human health and the environment requires the person—
 - (a) to eliminate risks of harm to human health and the environment so far as reasonably practicable; and
 - (b) if it is not reasonably practicable to eliminate risks of harm to human health and the environment, to reduce those risks so far as reasonably practicable.

This means *eliminating* risks of harm so far as reasonably practicable in the first instance. If elimination is not reasonably practicable, then risks of harm must be reduced so far as reasonably practicable. As currently drafted, the guidelines do not consistently adopt – or convey to the reader – this legislated meaning.

By comparison, the *draft contamination guidelines* clearly explain at Part 5.2 how section 6(1) interacts with the EPA’s hierarchy of risk control measures.¹² That is, there is a legal requirement to eliminate risks of harm, so far as reasonably practicable, in the first instance.

¹¹ Available at: <<https://engage.vic.gov.au/new-contaminated-land-duties-duty-manage-and-duty-notify>>.

¹² Ibid.

Recommendation: The draft guidelines should clearly explain, and consistently adopt the language and meaning of, the concept of minimising risks of harm to human health and the environment as set out in section 6 of the *Environment Protection Act 2017*.

2.4 The guidelines should explain the concept of ‘reasonably practicable’ at the beginning of the guidelines and in more detail.

The legislated meaning of ‘reasonably practicable’ needs to be explained at the beginning of the guidelines and in more detail. As an integral part of the general environmental duty, it is one of the most important concepts for duty holders to understand.

Section 6

- (2) To determine what is (or was at a particular time) reasonably practicable in relation to the minimisation of risks of harm to human health and the environment, regard must be had to the following matters —
- (a) the likelihood of those risks eventuating;
 - (b) the degree of harm that would result if those risks eventuated;
 - (c) what the person knows, or ought to reasonably know, about the harm or risks or harm and any ways of eliminating or reducing those risks;
 - (d) the availability and suitability of ways to eliminate or reduce those risks;
 - (e) the cost of eliminating or reducing those risks.

The draft guidelines introduce readers to the legislated meaning of ‘reasonably practicable’ in the back end of the document (at Part 5.2, page 21) and in a way that does not clearly convey the legal significance of the concept: namely, that all duty holders must have regard to the five factors to determine what is reasonably practicable to minimise risks of harm.

We commend the approach taken in the *draft contamination guidelines*,¹³ which sets out the legislated meaning of reasonably practicable in the introduction (Part 1), and then provides further information on how to understand the five factors in the context of contaminated land later in the document. We recommend that the draft guidelines take a similar approach.

Recommendation: The legislated meaning of ‘reasonably practicable’ needs to be explained at the beginning of the guidelines (i.e. in Part 1.3, Regulatory Context).

¹³ Available at: <<https://engage.vic.gov.au/new-contaminated-land-duties-duty-manage-and-duty-notify>>.

Recommendation: The legislated meaning of ‘reasonably practicable’ needs to be explained in more detail, with further information provided on the five factors in the context of GHG emissions (i.e. in Part 5, Implementing controls to minimise GHG emissions).

Providing further information on how to understand the five factors in the context of greenhouse gas emissions is critical to achieving the purpose of the guidelines, which is to assist businesses to understand and meet their obligations under the general environmental duty.

Clearly explaining that each of the five factors has its own legal meaning and effect and that all five factors apply, albeit in an integrated way, is also critical to achieving the purpose of the guidelines.

The following information (or something similar) which explains each of the five factors in the context of greenhouse gas emissions should be included in the guidelines –

1. Likelihood (s 6(2)(a))

This means considering *what’s the chance that harm will occur?*

Questions to consider:

- How well do you understand the nature and extent of the GHG emissions to be emitted? i.e.
 - What direct and indirect GHG emissions are likely to arise from your activities?
 - What is the quantity of your emissions in relation to each of your activities?
- How frequently will the GHG emissions be emitted?

Note: The higher the likelihood of risks eventuating (and harm occurring), the greater the importance for the duty holder to focus on minimising it.

2. Degree of harm (s 6(2)(b))

This means considering *how severe could harm be on human health or the environment?*

Questions to consider:

- How sensitive is the receiving environment (i.e. what is the **carbon budget**)?
- How severe would the consequences of the greenhouse gas emissions likely to arise from your activities be, in the absence of control measures?
- Can the greenhouse gas emissions result in environmental impacts that are serious or irreversible?

This factor requires further explanation, given the unique context of climate change. In particular, duty holders needs to understand the concepts of **harm** and **receiving environment**.

Harm

The concept of **harm** is defined broadly in the *Environment Protection Act 2017* –

Section 4

- (1) In this Act, **harm**, in relation to human health or the environment, means an adverse effect on human health or the environment (of whatever degree or duration)...
- (2) For the purposes of subsection (1), harm may arise as a result of the cumulative effect of harm arising from an activity combined with harm arising from other activities or factors.

This means that all levels of possible harm must be considered, including small cumulative impacts that add up over time.

Cumulative impacts are particularly important in the context of climate change. It is well established that climate change is a cumulative problem, including in judicial reasoning on the issue. The combined effect of many small-scale and individual actions is significant, with *every tonne of CO₂ emissions*¹⁴ contributing to climate change. As summarised by His Honour Brian Preston, Chief Judge of the NSW Land and Environment Court:

Global greenhouse gas emissions are made up of millions, and probably hundreds of millions, of individual emissions around the globe. *All emissions are important because cumulatively they constitute the global total greenhouse gas emissions, which are destabilising the global climate system at a rapid rate* (emphasis added).¹⁵

Recommendation: The draft guidelines should make it clear to duty holders that all levels of possible harm must be considered, including small cumulative impacts.

Receiving environment

The concept of **receiving environment** is not defined in the *Environment Protection Act 2017*, but it is of relevance to assessing the degree of harm.¹⁶ The EPA Publication *Reasonably Practicable* (No. 1856) states that the ‘the degree of harm carries more importance in especially sensitive environments’.¹⁷

It is difficult to think of a more sensitive environment than the Earth’s atmosphere – and climate system more generally – in its current state:

¹⁴ Intergovernmental Panel on Climate Change: Working Group 1, *AR6: Summary for Policymakers* (2021) <<https://www.ipcc.ch/report/ar6/wg1/#SPM>> 28.

¹⁵ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [515] (CJ Preston, citing Professor W Steffen).

¹⁶ Note: the concept of ‘receiving environment’ is readily translatable from the old regulatory regime, as it was used in the State Environment Protection Policies (SEPPs). i.e. ‘receiving waters’ in SEPP (Waters).

¹⁷ *Reasonably Practicable* (Publication 1856) (September 2020) <<https://www.epa.vic.gov.au/about-epa/publications/1856>> 9.

- Atmospheric CO₂ concentrations have risen from around 280 parts per million at the start of the industrial revolution, to above 400 parts per million today.¹⁸
- By 2019, human activities had already emitted 70 per cent of the cumulative emissions allowed to keep global temperatures below 2 °C warming (since 1850) with at least a 66 per cent chance.¹⁹
- Global warming of 2°C will be exceeded during this century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades.²⁰

Increasing concentrations of greenhouse gases in the Earth’s atmosphere are warming the planet at an unprecedented rate, and the severity of climate change impacts will depend on the greenhouse gas emissions pathway the world follows from hereon. That is, action to deeply reduce emissions this decade will determine whether the climate system can or cannot be stabilised at warming of well below 2°C.²¹ This information needs to be included in the draft guidelines, to ensure that duty holders understand the potential consequences of greenhouse gas emissions likely to arise from their activities.

Recommendation: The draft guidelines should make it clear that, in its current state, the Earth’s atmosphere – and climate system more generally – is a very sensitive receiving environment.

3. State of knowledge (s 6(2)(c))

What a duty holder knows, or should know, about risks of harm and ways of reducing those risks is otherwise known as the **state of knowledge**.

This means considering *what do you know, or what can you find out, about the risks your activities pose and any ways of reducing those risks?*

Questions to consider:

- How well are the potential risks understood (based on your state of knowledge and what you should reasonably know about the risk)?
- How well have risks from greenhouse gas emissions been characterised?
- What types of practices are being adopted in eliminating or reducing those risks on comparable sites?
- What information exists in the public domain on this matter?

¹⁸ Department of Environment, Land, Water and Planning, *Climate Science Report* (2019) 10.

¹⁹ Commonwealth Scientific and Industrial Research Organisation (CSIRO) and Bureau of Meteorology, *State of the Climate 2020* <<https://www.csiro.au/en/research/environmental-impacts/climate-change/State-of-the-Climite>> 18.

²⁰ Intergovernmental Panel on Climate Change: Working Group 1, *AR6: Summary for Policymakers* (2021) <<https://www.ipcc.ch/report/ar6/wg1/#SPM>> 14.

²¹ Professor Will Steffen et al, *Aim High, Go Fast: Why emissions need to plummet this decade* (Climate Council, 2021) <<https://www.climatecouncil.org.au/wp-content/uploads/2021/04/aim-high-go-fast-why-emissions-must-plummet-climate-council-report-210421.pdf>>.

The state of knowledge will underpin the standard of behaviour required of duty holders to comply with the general environmental duty. In such circumstances, it is critically important that the draft guidelines explain the concept in detail in the context of GHG emissions.

In particular, duty holders need to understand that:

- The state of knowledge is a dynamic concept, a progressive and evolving standard. As information increases about the risks of harm from greenhouse gas emissions and any ways to minimise those risks, the EPA's expectations on how the risks of harm are assessed and responded to under the GED will also increase.²²
- What a person knows, or ought to reasonably know, about **the harm or risks or harm** requires an understanding of:
 - the receiving environment in the context of greenhouse gas emissions (addressed above); and
 - cumulative harm in the context of greenhouse gas emissions and the threats posed by others' activities, since an individually minor activity may become harmful when aggregated with others (addressed above).

The complexity of cumulative harms arising from greenhouse gas emissions means that the EPA has an important role in building the foundations of the state of knowledge among all duty holders on this point.

- What a person knows, or ought to reasonably know, about **any ways of eliminating or reducing the risks** (i.e. the technical knowledge) is always open to development, innovation and experimentation (in pursuit of minimising risks of harm so far as reasonably practicable).

Our view is that that EPA has an important role in advancing the state of knowledge and raising awareness on how to minimise risks of harm, particularly at this early stage of regulating greenhouse gas emissions under the general environmental duty.

EPA guidance is not mandatory or directly enforceable, but it does provide an information base against which a duty holder's conduct can be assessed. Publication of such guidance can help

²² As recognised in the *Draft contamination guidelines*, <<https://engage.vic.gov.au/new-contaminated-land-duties-duty-manage-and-duty-notify>> 42.

establish what a duty holder knows, or what they should have known on the basis that it is publicly available to inform compliance.²³

Recommendation: The draft guidelines should explain the concept of the state of knowledge, specific to greenhouse gas emissions, including:

- The state of knowledge is a dynamic concept, a progressive and evolving standard.
- What a duty holder knows (or should know) about risks of harm requires an understanding of the receiving environment and the threats posed by others' activities (cumulative harm).
- What a duty holder knows (or should know) about any ways of eliminating or reducing risks (i.e. their technical knowledge) should be open to development and innovation.

4. Availability and suitability (s 6(2)(d))

The availability and suitability of ways to eliminate or reduce risks means considering *what technology, processes or equipment are available to control the risk? Are they suitable in the circumstances?*

Questions to consider regarding **availability**:

- Is it feasible to purchase or manufacture the control measure?
- Where it is a work process, is it feasible to implement in the particular circumstances?

Questions to consider regarding **suitability**:

- Is it effective in eliminating or reducing the likelihood or degree of harm?
- Does it introduce new and higher risks, having regard to all the circumstances?

5. Cost (s 6(2)(e))

This means considering *how much does the control cost to put in place compared to how effective it would be in reducing the risk?*

2.5 The guidelines should be clear about the interaction between the *Environment Protection Act 2017* and the *Climate Change Act 2017*.

When setting out the regulatory context, the draft guidelines fail to address the interaction between the *Environment Protection Act 2017* and the *Climate Change Act 2017*.

²³ We acknowledge the work of Nelson, Marsh and Lindsay (forthcoming publication) which addresses this point.

The *Climate Change Act 2017* requires decision makers to have regard to climate change when making decisions relating to licences and permits under the *Environment Protection Act 2017*.²⁴ This includes having regard to both the impacts of climate change on a particular decision, and how the decision will contribute to Victoria's greenhouse gas emissions.

The draft guidelines on GHG emissions are the only material foreshadowed for publication to assist all businesses (licence holders, permit holders and others) to understand their obligations specific to the topic of GHG emissions and climate change. In such circumstances, it is important that these guidelines are comprehensive and address the interaction between the *Environment Protection Act 2017* and the *Climate Change Act 2017*.

We acknowledge that *EPA Publication 2011 (Development Licence Application Guidance)* addresses the additional requirements under the *Climate Change Act 2017*.²⁵ However, it only applies to development licences, and not to permit holders.

Recommendation: The draft guidelines should clearly explain the interaction between the *Environment Protection Act 2017* and the *Climate Change Act 2017*.

2.6 The guidelines should be clear that businesses are required to understand and minimise, so far as reasonably practicable, their Scope 3 GHG emissions. It is not optional.

The draft guidelines address Scope 3 GHG emissions in two places (Parts 3.3 and 4.4).

Part 3.3 explains what Scope 3 GHG emissions are. It is quite unclear and should be rewritten. For a concise explanation of Scope 1, 2 and 3 GHG emissions see *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [424]-[428].²⁶

Part 4.4 is titled *Benefits of understanding scope 3 emissions*. This section needs to be strengthened. It states that 'there are several benefits associated with calculating your Scope 3 emissions', rather than conveying that businesses are required to understand, assess and control their Scope 3 GHG emissions by law.

If a person engaging in an activity that may give rise to risks of harm from GHG emissions minimises Scope 1 and 2 emissions, but not Scope 3 emissions, it follows that they have not minimised the risks of harm from GHG emissions so far as reasonably practicable (and would therefore be in contravention of the general environmental duty).

²⁴ *Climate Change Act 2017*, s 17.

²⁵ See: *Development licence application guidance* (EPA Publication 2011, 8 July 2021) 26-30.

²⁶ Available at: <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWLEC/2019/7.html>>.

More specifically, the *Environment Protection Act 2017* provides that a person conducting a business and engaging in an activity that involves the supply of a substance contravenes the general environmental duty if they fail to, so far as reasonably practicable, minimise risks of harm to human health and the environment from pollution and waste arising from the supply of the substance.²⁷

This means that duty holders engaging in an activity that involves the supply of a **greenhouse gas substance** (defined in sections 3 to mean carbon dioxide, methane, nitrous oxide or sulphur hexafluoride, whether in a gaseous or liquid state) are required to understand and minimise risks of harm arising from that supply (i.e. from the Scope 3 GHG emissions arising from that supply) so far as reasonably practicable.

Recommendation: Part 3.3 of the draft guidelines should be rewritten to clearly explain what Scope 3 GHG emissions are (by way of example, see *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [424]-[428]).

Recommendation: The draft guidelines should clearly set out that businesses are required to understand and minimise, so far as reasonably practicable, their Scope 3 GHG emissions.

2.7 The guidelines should include risk management examples for high emitting sectors

The draft guidelines identify that the main sources of GHG emissions in Victoria are from the energy sector (including electricity generation, direct combustion, transport and fugitive emissions) and agriculture (including from livestock and fertiliser use).²⁸ Despite this, the risk management examples contained in Part 7 are for:

- Small business (restaurant)
- Office building
- Medium sized factory / industry
- EPA licenced business (widget manufacturer)

The draft guidelines should include risk management examples which better reflect the main sources of GHG emissions in Victoria. For example:

- Energy sector (i.e. for onshore gas production)
- Agriculture (i.e. broad acre farming, fertiliser use)
- Transport (i.e. trucking/transport operations)

²⁷ See: *Environment Protection Act 2017*, s 25(5)(a).

²⁸ See also *Victorian Greenhouse Gas Emissions Report 2019*

<https://www.climatechange.vic.gov.au/data/assets/pdf_file/0037/546976/Victorian-Greenhouse-Gas-Emissions-Report_2019.pdf> 16.

Recommendation: The draft guidelines should include risk management examples which better reflect the main sources of GHG emissions in Victoria.

2.8 Update further reading and references to better reflect environmental best practice

We support the inclusion of Part 9, which sets out further reading and references.

In circumstances where one of the legislated functions of the EPA is to provide information to the Victorian community in relation to environmental best practice and improvements,²⁹ we urge the EPA to ensure that Part 9 contains the most up-to-date material on environmental best practice and improvements. The draft guidelines should also clearly state that environmental best practice for large enterprises and high emitting sectors includes international, not just national, techniques, methods, processes and technology.

Recommendation: The EPA Policy & Regulation Branch should directly seek feedback from leading authorities on climate science and minimising greenhouse gas emissions (i.e. the Climate Council) to ensure that Part 9 contains the most up-to-date material on environmental best practice and improvements.

2.9 Miscellaneous suggested additions and amendments

- At Part 1.1, page 6, the text box states '*These targets are informed by climate science, including the latest IPCC Report*', which is incorrect. The latest IPCC Report was published in August 2021, which was after the release of the interim targets in May 2021.
- At Part 4.4, the list of 'typical scope 3 emissions sources' is quite vague, and could be improved with specific examples.
- At Part 5.1.2, page 19, it states '*hazard substitution is preferred over implementing other controls*', which is incorrect. Eliminating the hazard is preferred over implementing other controls, and hazard substitution is preferred over engineering controls and administrative controls (in that order).

²⁹ *Environment Protection Act 2017*, s 358(g).

3. CLOSING COMMENTS

3.1 The EPA should use its full legal toolkit to minimise harm to human health and the environment from greenhouse gas emissions

While the focus of the public consultation is the draft guidelines, it is nevertheless important to highlight that the EPA is not employing its full legal toolkit to protect human health and the environment from GHG emissions.

Stronger instruments and tools are available to regulate GHG emissions and address climate change under the *Environment Protection Act 2017*, including the making of regulations and environmental reference standards.

The *Environment Protection Act 2017* provides that regulations can be made to:³⁰

- regulate or prohibit the emission or discharge of GHG substances, including for the purposes of contributing to the State’s long-term emissions reduction target and interim emissions reduction targets under the *Climate Change Act 2017*;
- prescribe standards for the emission or discharge of GHG substances, including emission intensity standards and maximum levels of emissions of GHG substances; and / or
- prescribe the conditions under which GHG substances may be emitted or discharged.

The *Environment Protection Act 2017* provides that environmental reference standards can be made for assessing and reporting on environmental conditions in the whole or any part of Victoria.³¹ An environmental reference standard may specify indicators or objectives to be used to measure whether environmental values (such as a safe climate) are being achieved, maintained or threatened, and an indicator or objective may specify targets for emissions of pollutants.³² The Explanatory Memorandum for the Environment Protection Bill 2018 specifically identified ‘tonnes of carbon dioxide to the Victorian air-shed in a year’ as an example indicator to be used in an environmental reference standard.³³

The *Environment Protection Regulations 2021* make no mention of climate change, nor do they attempt to regulate GHG emissions. Similarly, the Environmental Reference Standard made on 26 May 2021 does not address tackling climate change or GHG emissions. The latter includes ‘climate systems’ as an environmental value of the ambient air environment, but only to the extent that air pollution should not be made worse by climate change (i.e. that air quality is not undermined by a warming or drying climate).³⁴ That is, the regulations and environmental reference standard – much

³⁰ *Environment Protection Act 2017*, s 465 and Schedule 1, 8.5-8.7.

³¹ *Environment Protection Act 2017*, Part 5.2.

³² *Environment Protection Act 2017*, s 93(5).

³³ Explanatory Memorandum – Environment Protection Bill 2018, 58.

³⁴ Environment Reference Standard (Victorian Government Gazette No. S245, 26 May 2021) 8 (Tabled 2.1).

stronger legal tools than guidelines – are not being employed to minimise greenhouse gas emissions and address climate change.

One of the EPA’s functions is to provide advice and recommendations to the Minister in relation to human health and the environment including, but not limited to, the making of subordinate legislation and environment reference standards.³⁵ Moreover, the EPA has the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions and duties and to enable it to achieve its objective, which is to protect human health and the environment by reducing the harmful effects of pollution and waste.³⁶

Recommendation: The EPA should revisit the legal toolkit available under the *Environment Protection Act 2017*, with the intention of providing updated advice and recommendations to the Minister on how the regulations and environmental reference standard can be amended to minimise GHG emissions and address climate change.

³⁵ *Environment Protection Act 2017*, s 358(e).

³⁶ *Environment Protection Act 2017*, ss 357(1) and 359(1)(b).