



australian network of environmental defender's offices

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Joint Select Committee on Australia's Clean Energy Future Legislation
Parliament House
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Inquiry into Australia's Clean Energy Future

The Australian Network of Environment Defenders Offices (**ANEDO**) welcomes the opportunity to make a submission to this Inquiry. We strongly support the *Clean Energy Future* policy, and urge Parliament to pass the legislation to implement it.

As a network of nine community legal centres in each State and Territory specialising in public interest environmental law and policy, ANEDO's interest in the legislation is the public interest in laws that support a safe and healthy environment.

We have already made a submission on the exposure draft legislation,¹ which we don't intend simply to repeat here. We recognise that some positive changes to the exposure draft legislation have been made. Our purpose in making this submission is to update our initial comments, and outline our remaining top priorities for reform.

Consideration of politically binding international agreements

Amend s 14(2)(a) and the definition of 'international climate change agreement' to ensure that the Minister has regard to *all* Australia's international climate change commitments.

In setting pollution caps under the scheme, the Minister must have regard to "Australia's international *obligations* under international climate change agreements." International climate change agreements are defined as any international agreement that imposes *obligations* on Australia to take action to reduce greenhouse gas emissions.

The problem with this wording is that the meaning of 'obligations' may be read narrowly to mean commitments that are legally binding under international law. This would

¹ Available at <http://www.edo.org.au/edonsw/site/policy.php>.

exclude Australia's international obligations under the Copenhagen and Cancun agreements, which are not strictly legally binding.

The Cancun and Copenhagen agreements are critical to the negotiation of an international response to climate change. They are the most up-to-date statement of the international consensus on climate change policy. It would be a serious omission if the Minister was allowed to set pollution caps without considering Australia's commitments under these agreements.

To ensure that the full spectrum of Australia's international obligations are considered in setting the pollution cap, and prevent future Ministers undermining the effectiveness of the emissions trading scheme and international climate change negotiations, the relevant sections should be amended to refer to our international *commitments*.

Clean Energy Investment Plans

Section 178 should be amended to require generators to make plans for clean energy investment, rather than just document whatever plans they already have.

The *Clean Energy Future Plan* provides that free permits will not be issued to electricity generators unless they prepare a Clean Energy Investment Plan, which identifies proposals to reduce pollution from existing facilities and invest in cleaner energy technology and capacity.

Section 177 imposes that condition, and section 178 defines what a Clean Energy Investment Plan is. We welcome the additional detail that has been included in this definition since the exposure draft legislation. However, section 178 is still inadequate in that it requires generators to identify the emissions intensity reduction and clean energy investments plans that they have, "*if any*".

In other words, it doesn't require them to make those plans at all — it just requires them to document whatever plans they happen to have in place already. It reduces the promising requirement outlined in the *Clean Energy Future Plan* to a mere documentary requirement, which contributes next to nothing to clean energy transition.

To take full advantage of the promise that the Clean Energy Investment Plans hold, and give full effect to the terms and the spirit of the *Clean Energy Future Plan*, section 178 should be amended to require generators to make plans for the items outlined therein.

That amendment should be required as a minimum. To make the plans even more effective, s 177 should be amended to require generators to actually *implement* them.

Climate Change Authority

Amend s 39 to require that the minutes of meetings of the Climate Change Authority (including disclosure of members' interests) be published.

The Climate Change Authority (**the Authority**) is one of the most important components of the scheme. It is critical that its composition and operation reflect the commitment made in the *Clean Energy Future Plan* to an 'independent body to provide expert advice'.

Ensuring that the persons who are appointed to the Authority have sufficient expertise in climate science, greenhouse accounting and climate change mitigation (not just economics and business) will be crucial. So will the appointment of a truly independent and expert Chair. This is primarily a matter for the Minister in making these appointments.

It is also crucial that the Authority conducts its business in an open and transparent manner. Publishing the minutes of the meetings of the Authority will go a long way to increasing public understanding of and confidence in the workings of the carbon price scheme. It is analogous to the proceedings of the Reserve Bank of Australia, whose public standing as an independent expert body is a useful model for the Authority.

Section 39 should be amended to require that the minutes of meetings of the Climate Change Authority must be published on the Climate Change Authority (or Department of Climate Change) website within 1-2 days of each meeting. Those published minutes should include any disclosures of interests that have been made by members of the Authority under ss 26-27.

Biodiversity Fund

Amend the Climate Change Authority Bill to include a definition of the 'Biodiversity Fund', which makes its purpose and its mandate clear.

The Biodiversity Fund is another very promising component of the *Clean Energy Future* policy package. The *Clean Energy Future Plan* commits to providing \$946 million to restore and protect biodiversity through protection and management, in a way that will improve biodiversity and reduce atmospheric carbon. However, the clean energy future legislation as presently drafted includes almost no mention of the Biodiversity Fund.

We recognise that positive changes have been made in this respect since the exposure draft legislation was released, in that the Land Sector Carbon and Biodiversity Board must now advise the Environment Minister as to how the Biodiversity Fund should be applied. However, the legislation still contains very little detail as to the mandate and purpose of the Biodiversity Fund itself.

To ensure that the true nature of the Biodiversity Fund as identified in the *Clean Energy Future Plan* is not lost or distorted over time, s 4 of the Climate Change Authority Bill 2011 should be amended to include a comprehensive, detailed definition of the Biodiversity Fund.

The definition should set out the commitment made in the *Clean Energy Future Plan* itself:

The Biodiversity Fund will be established, with \$946 million over six years from 2011-12, to provide funding to:

- establish biodiverse carbon plantings in areas of high conservation value such as wildlife corridors, riparian zones and wetlands;
- prevent the spread of invasive species across connected landscapes; and
- manage existing biodiverse carbon stores, including on land already under conservation covenants or subject to land clearing restrictions, and publicly owned native forests.

Third party rights

Amend the legislation to give third parties rights to judicial review, merits review, and enforcement of the legislation and decisions made under it.

To make the proposed emissions trading scheme as accountable and as balanced as possible, the legislation should contain three kinds of third party rights.

First, as a minimum, the legislation should allow any person to bring proceedings to enforce a breach of the legislation. This is a relatively straightforward and uncontroversial suggestion. The law is there to be enforced, so allowing open standing to enforce it is simply a low-cost way to ensure that Parliament's will is done.²

Second, the legislation should provide extended standing to persons applying for judicial review of decisions made under the scheme. A useful example is s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) which allows groups who have been involved in environment conservation or research within 2 years prior to apply for judicial review. Such a provision would provide balance to the rights that liable entities enjoy under the common law 'special interest' test of standing. It would allow someone to speak for the environment, to match those speaking for industry.

Third, the legislation should allow concerned groups and individuals to apply for merits review of the decisions listed in s 281. This will provide balance. The decisions listed in s 281 are structured such that only liable entities (i.e. polluters) get to appeal decisions that are against their interests — nobody is given the right to speak for the environment. The legislation should be amended to allow established environment groups (i.e. those who would meet the criteria of s 487 of the EPBC Act) to appeal the decisions listed in s 281. The decisions in s 281 should be amended so that they are appealable where the decision is against the interests of the environment, not just the interests of industry.

Similar provisions exist in many other pieces of Commonwealth and State legislation.³ None of them have proven to induce vexatious or obstructive litigation. All of them have proven to improve enforcement and accountability, and to balance the rights of review that industry enjoys with rights for public interest environmental groups.

Further comment

We are happy to discuss this submission in more detail with the Committee, or appear at any hearings the Committee may hold, if that would be useful. For further information, please contact Michael Power, on (03) 8341 3100 or at michael.power@edo.org.au.

Yours sincerely,

The Australian Network of Environment Defenders Offices

² See, for example, *Competition and Consumer Act 2010* (Cth s 80, which allows any person to apply for an injunction to restrain a breach of the Act.

³ See, for example, *Environment Planning and Assessment Act 1979* (NSW) s 123; *Planning and Environment Act 1987* (Vic) s 114.