Policy and Law Reform

Environment Defenders Office

EDO NSW and EDO Victoria
Briefing Paper

Draft Clean Energy Bills
Our top priorities for amendment

Background

The Australian Government has released exposure drafts of the clean energy bills that it plans to introduce to Parliament in September. It is seeking public submissions on whether the legislation is consistent with the Clean Energy Future policy announced on 10 July, and whether the bills would lead to any unintended consequences. You can find all the details on the Department of Climate Change website. Submissions are due by 22 August 2011.[1]

EDO Victoria and EDO NSW strongly support the Government's Clean Energy Future policy. We think that the draft legislation is generally sound and urge the Parliament to pass the legislation.

However, we have identified a number of key areas where the draft legislation should be changed to make it consistent with the Clean Energy Future policy. We will be making a detailed submission in due course, but to assist you to make a submission in the meantime, here are our top priorities for amendment.

(This paper sets out technical suggestions, and assumes that readers have a high degree of knowledge in this area. If you're looking for something a little less detailed, check out these summaries from EDO Vic[2] and EDO NSW[3].)

1. The Minister must consider all international commitments (not just legal obligations) when setting pollution caps

When setting pollution caps, the Minister 'must have regard to Australia's international obligations under international climate change agreements'. International climate change agreements is defined in s 5 to include (a) the UNFCCC, (b) any other international agreement signed by Australia that relates to climate change and 'imposes obligations on Australia' to reduce emissions, or (c) any other international agreement signed by Australia specified by legislative instrument.

This definition apparently excludes the non-binding Copenhagen and Cancun climate change agreements. It would be an egregious omission if the Minister did not have to consider these agreements when setting pollution caps. The definition should be amended to include all international agreements signed by Australia that relate to climate change and include 'commitments' by Australia to reduce emissions. Clause 14(2)(a) should refer to 'commitments' rather than 'obligations'.

1 http://www.climatechange.gov.au/en/government/submissions/clean-energy-legislative-package.aspx
2 http://www.edo.org.au/edovic/policy/edo_vic_carbon_price_briefing120711.pdf
3 http://www.edo.org.au/edonsw/site/pdf/papers/110727overview_australian_government_climate_change_scheme.pdf

2. The process for setting the pollution cap must be tied more closely to our international commitments and the Climate Change Authority's recommendations

It is understandable that the final decision on pollution caps will rest with the Government. However, some safeguards are needed to prevent future governments setting very low caps in bad faith. The legislation should be amended to require that:

- the Minister must 'act consistently with' (not just have regard to) Australia's international commitments under international climate change agreements (cl 14(2)(a));
- the Minister must 'act consistently with' (not just have regard to) the report of the CCA (cl 14(2)(b)) — or at the very least, the Government must prepare reasons for departing from the advice of the CCA, and table those reasons in Parliament with the cap regulations (cl 289).

3. The price floor should not depend on disallowable regulations

If the international unit surrender charge regulations are disallowed, the price floor will not take effect (cl 111(5)). This makes the entire price floor vulnerable to disallowance of the regulations. A smarter way would be to impose the price floor on international units through the *Clean Energy (International Unit Surrender Charge) Act 2011* itself to prevent disallowance. This could be done by setting the amount of the charge at 'so much as is necessary to make the net permit price $15'.

4. It is too easy for liable entities to dispute their obligations, and too hard for environment groups to uphold them

The legislation gives the Regulator the power to remit a unit shortfall charge (i.e. waive the price on an entity) if it is 'fair and reasonable' (cl 130(2)).[4] This power is far too broad. It is made worse by the fact that liable entities have the right to appeal against the decision if the Regulator does not remit the charge (cl 281), and worse still by the fact that nobody has the power to appeal the decision if the Regulator does remit the charge.

This poses an unacceptably large invitation to polluters to dispute their obligations and lobby the Regulator to have them waived. It also gives unbalanced rights of appeal, allowing nobody to speak for the environment. The power to remit should be removed, and the rights of appeal should be balanced.

5. The definition of 'low emissions generation' must be revised

The power system reliability test allows generators to receive free permits if they reduce or cancel an existing generator, but replace it with equal or greater 'low emissions intensity' generation capacity (cll 170(3)-(g)). This could be a valuable incentive to ensure that generators who receive free permits only install replacement generation if it is cleaner than existing plants.

However, the test for 'low emissions' is weak (cl 172). It defines 'low emissions intensity' as 0.8 $CO_{2\text{-}e}$/MWh. This would allow coal-fired power stations that are far from best practice (about the equivalent of black coal) to be built — indeed, it would encourage it. The standard should be set at 0.5 $CO_{2\text{-}e}$/MWh. We understand that this would allow nothing more polluting than Combined Cycle Gas Turbine generators to be installed.

6. Clean Energy Investment Plans have to be taken seriously

At present, the content of the Clean Energy Investment Plans is left entirely to the Resources and Energy Minister (cl 178). It is bad enough that these plans will only require generators to identify efficiency improvements, not implement them (unlike the Environment and Resource Efficiency Plan scheme in Victoria). At the very least, the legislation must set out some key minimum requirements for these plans.

4 A unit shortfall charge is a fee imposed on a liable entity when it fails surrender the number of 'eligible emissions units' equal to its annual emissions.

The legislation should require that Clean Energy Investment Plans:

- include the content that was promised in the Clean Energy Plan (i.e. 'identify proposals to reduce pollution from existing facilities and invest in research and development and new low- or zero-emissions capacity', and 'possible projects identified under the Energy Efficiency Opportunities Program'); and

- be consistent with the need to reduce the overall emissions intensity of the electricity generation sector in a manner consistent with Australia's long-term emission reduction targets.

7. The power station closure program must be guaranteed

It is important that this commitment is set in legislation — even if in very general terms — so that future Governments can't abandon it completely without amending the legislation (as the Victorian Coalition Government has done).

The legislation cannot be too prescriptive, otherwise the Government's hands will be tied in negotiations with generators and the public will get a bad deal. This would mean less money to close down generators.

However, the legislation should require the Minister to initiate a tender process by a certain date (2015, say) for making payments to close power stations with emissions intensity of 1.2 $CO_{2\text{-}e}$/MWh or more — without putting numbers on megawatt capacity or the amount of funding available.

8. The key parameters of the Jobs and Competitiveness Program should be set in legislation

Currently, this assistance scheme is almost entirely left to regulations. Even if the Government has resolved to rely primarily on regulations to implement this program, the broad parameters should be set in legislation to ensure consistency with the Clean Energy Plan.

The legislation should make it clear that the rate of assistance will reduce over time. It should provide that the rate of decay should be *at least* 1.3% per year.

Decisions as to eligibility must be put in the Regulator's hands, not the Minister's. The Regulator should have the power to gather information relevant to eligibility set out in cl 152.

9. The biodiversity measures need legislative underpinning

The biodiversity components of the Clean Energy Plan are hardly mentioned in the draft legislation at all. This is a serious failure to ensure consistency between the policy and the exposure bills.

The functions of the Land Sector Carbon and Biodiversity Board (**the Board**) as defined in the Climate Change Authority Bill 2011 give it a strong focus on ways to ensure carbon sequestration and farm productivity improvements, but do not talk about the need to restore the natural environment, or consider biodiversity adaptation plans or biodiversity conservation planning at a state or regional level (cl 62). The functions of the Board need to be amended to take account of this.

Worse still, the legislation does not require the Board to perform its key function under the Clean Energy Future Plan — to prepare guidelines for the priorities, streaming of funding and criteria for funding the Biodiversity Fund. It also fails to require the Government to table these guidelines in Parliament, and to respond to any issues raised by the Board in the formulation of these guidelines. The legislation must be amended to require the Board and the Government to do these things, and to set the parameters for the Biodiversity Fund.

About the authors

EDO Vic and EDO NSW are members of the Australian Network of Environmental Defender's Offices (ANEDO), which will make a joint submission to the Government on the bills. This briefing paper may not reflect ANEDO's final views.

Environmental Defender's Office New South Wales (Ltd)

The Environmental Defender's Office (EDO) is an independent community legal centre that helps individuals and community groups working to protect the built and natural environment.

Mission Statement – To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

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