



australian network of environmental defender's offices

Submission on the Clean Energy Legislative Package

22 August 2011

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8981 5883)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosasa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 8341 3100)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

Submitted to: Carbon Price Legislation Branch
Climate Strategy and Markets Division
Department of Climate Change and Energy Efficiency
GPO Box 854
CANBERRA ACT 2601

Submitted via Email: cleanenergybills@climatechange.gov.au

Introduction

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of nine community legal centres in each State and Territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to comment on the draft *Clean Energy Legislative Package* (**Legislative Package**). Over recent years, ANEDO has commented extensively on the various carbon pricing mechanisms proposed by the Australian Government.¹

ANEDO has consistently advocated for a series of elements to be included in any mechanism that attempts to put a price on carbon. This includes the widest possible coverage of an emissions trading scheme, the full auctioning of permits, sufficiently high penalties to deter non-compliance, and opposing the attribution of property rights to emitters. While the Government's policy does not address all of these matters optimally, rather than revisiting the broader policy parameters, this submission focuses on the Legislative Package and those matters the Government is calling for comments on.

Executive Summary

Overall, ANEDO strongly supports the Australian Government's July 2011 policy document, *Securing a clean energy future: The Australian Government's Climate Change Plan* (**Climate Change Plan**)² and believes the draft Legislative Package is generally sound. We urge the Parliament to pass the legislation with the few but important amendments identified in this submission.

The Government has specifically called for comments on whether:

- the drafting of the bills accurately reflect the policy set out in the Government's Climate Change Plan;
- the bills, as drafted, create any risk of unintended consequences; and
- the commentaries clearly explain the content of the bills.³

To begin with, ANEDO is pleased that the Climate Change Plan not only proposed to place a price on carbon, but also provides for a number of forward-thinking funds and programs that have the potential to bring about long and short term positive environmental outcomes. ANEDO's central concern is that many of these initiatives have either been left out of the Legislative Package or have been referred to in the

¹See www.edo.org.au/policy/policy.html. Eg: *Submission on the Carbon Pollution Reduction Scheme - draft exposure legislation* (April 2009); *Submission on the Carbon Pollution Reduction Scheme Green Paper* (Sept. 2008); *Submission regarding abatement incentives prior to the commencement of the Australian Emissions Trading Scheme* (Dec. 2007); *Submission on Prime Minister's Task Group on Emissions Trading* (March 2007); *Submission regarding the Possible Design for a National Greenhouse Gas Emissions Trading Scheme* (22 Dec. 2006).

²The *Climate Change Plan* is available via www.cleanenergyfuture.gov.au. Both the EDO Vic and EDO NSW offices have summarised the key elements of the Plan. These introductory summaries are available on the [EDO Vic](http://www.edo.vic.gov.au) and [EDO NSW](http://www.edo.nsw.gov.au) websites respectively.

³ Available at: <http://climatechange.gov.au/government/submissions/clean-energy-legislative-package.aspx>.

broadest terms only – leaving important parameters to future instruments or mechanisms.

ANEDO strongly recommends that the Legislative Package gives more substantive effect to those initiatives – including Clean Energy Investment Plans; the Biodiversity Fund and related functions; and high-polluting generator closures. This would give the public, environment groups, industry and investors greater certainty that these mitigation and environmental protection initiatives will be properly delivered.

This submission also recommends other measures to improve accountability, certainty and transparency in the Legislative Package. These measures aim to promote good public policy and law that will help to reduce Australia's emissions, and safeguard our environment for present and future generations.

Specifically, we have identified the following key areas where the Legislative Package (primarily the *Clean Energy Bill 2011*) should be amended to make it consistent with the Climate Change Plan:

- 1. The Minister must be required to consider all international commitments (not just legal obligations) when setting carbon pollution caps**
- 2. The process for setting pollution caps must be tied more closely to Australia's international commitments and the Climate Change Authority's recommendations**
- 3. The existence of a carbon price floor should not depend on disallowable regulations**
- 4. It is too easy for liable entities to dispute their obligations, and too hard for the public to uphold them**
- 5. The definition of 'low emissions generation' must be revised**
- 6. Clean Energy Investment Plans need to have minimum criteria and less discretion**
- 7. The power station closure program must be guaranteed**
- 8. The key parameters of the Jobs and Competitiveness Program should be set in legislation**
- 9. The biodiversity measures need legislative underpinning, and**
- 10. Stricter criteria should be applied to International Emissions Units.**

These issues are discussed in detail below.

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

The *Clean Energy Bill 2011* (CE Bill) provides that when setting carbon pollution caps, the Minister⁴ “must have regard to Australia’s international obligations under international climate change agreements”.⁵

Under the Definitions in the CE Bill, “international climate change agreement” means:

- (a) *the Climate Change Convention,*
- (b) *any other international agreement, signed by Australia, that:*
 - i) relates to climate change; and*
 - ii) imposes obligations on Australia to take action to reduce emissions; or*
- (c) *an international agreement, signed on behalf of Australia, that:*
 - i) relates to climate change; and*
 - ii) is specified in a legislative instrument made by the Minister for the purposes of this definition.*⁶

Therefore the three types of “international climate change agreements” the Minister must have regard to when setting carbon pollution caps are:

- the Climate Change Convention; and
- those international agreements signed by Australia that relate to climate change and either:
 - impose obligations to act to reduce emissions; or
 - are listed in a specific legislative instrument.

ANEDO has concerns that the above definition does not require the Minister to have regard to those international agreements that Australia has committed to, but that:

- do not impose legally binding “obligations” upon signatories and
- are not specified in the legislative instrument.

Specifically we have concerns that the above definition may exclude the most recent international climate change agreements, the Copenhagen Accord and Cancun Agreements, from falling into the category of instruments that “must” be considered by the Minister when setting pollution caps. The reasons for this are as follows.

Firstly they do not fall within category (a) – they are not the Climate Change Convention.

⁴ We understand this to mean the Climate Change Minister (or successor Minister responsible for the Act). While the CE Bill includes definitions for certain other Ministers, it doesn’t seem to include a definition for “the Minister”. We would welcome clarification in the Bill(s).

⁵ Clause 14(2)(a) of the *Clean Energy Bill 2011*. Under cl 14(1), the regulations may declare the ‘carbon pollution cap’ (i.e. a quantity of greenhouse gas with a specified carbon dioxide equivalence in tonnes) for a specified ‘flexible charge year’ (i.e. a financial year from 1 July 2015 or beyond – cl 5).

⁶ Clause 5 of the *Clean Energy Bill 2011*.

Secondly, they do not appear to impose “obligations” as required by category (b).⁷ As there is no “bond of legal necessity” in the Copenhagen Accord and Cancun Agreements, and they are not legally binding, it follows that these international instruments are not required to be considered when setting the carbon pollution cap in the regulations.⁸

Thirdly, unless these agreements are specified in a dedicated legislative instrument (less desirable than in legislation), they do not fall into category (c) of agreements that the Minister must consider.

Finally, it is not clear that the prerequisite that agreements be “signed by” or “on behalf of Australia” under (b) and (c) is broad enough to capture the Copenhagen Accord and Cancun Agreements.⁹ Other phrasing may be more appropriate here.

Clearly the Australian Government has expressed support for the Copenhagen Accord and Cancun Agreements.¹⁰ It would therefore be a serious omission, and potentially very damaging to ongoing international climate change negotiations, if the Minister did not have to consider these most recent international climate change agreements when setting carbon pollution caps.

ANEDO therefore submits that the definition of “international climate change agreement” be amended to address these concerns. For example, part (b) of the definition should include “any other international agreement” entered into by Australia that:

- i) *relates to climate change; and*
- ii) *imposes obligations on or includes commitments by Australia to reduce emissions.*

In addition, to reflect this change, clause 14(2)(a) of the CE Bill should be amended to read:

must have regard to Australia’s international obligations and commitments under international climate change agreements...

If in fact it was the Government’s original intention to capture and include such agreements as the Copenhagen Accord and the Cancun Agreements, this intention should be stated and the definition tested to ensure their inclusion.

⁷ An obligation can be defined as “A duty: the bond of legal necessity which binds together two or more individuals.” Osborn’s Concise Law Dictionary, Eighth Edition, 1993.

⁸ The Department of Climate Change and Energy Efficiency (Department) itself notes: “The Cancun Agreements anchored mitigation pledges of developed and developing countries made under the Copenhagen Accord in the UNFCCC. *Although not legally binding at international law*, the Cancun Agreements establish a process to better understand these pledges and begin to build a more durable mitigation architecture.” (emphasis added) See: www.climatechange.gov.au/government/international/post-2012-architecture.aspx.

⁹ As we understand it, technically no States signed either of these documents. In regard to the Copenhagen Accord the UNFCCC Secretariat in its “notification to parties” invited “those Parties that wish to be associated with the Copenhagen Accord to transmit this information to the secretariat.” Therefore, Australia technically associated itself with, but did not sign, the Copenhagen Accord. The Cancun Agreements were a series of COP decisions, also not requiring signature.

¹⁰ See, eg, the Department’s website, at <http://www.climatechange.gov.au/government/international/international-climate-change-negotiations.aspx>.

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

As noted above, the setting of annual carbon pollution caps requires the Minister to consider the obligations (and if the above recommendation is accepted, *the commitments*) set out in international climate change agreements to which Australia is a party.

The CE Bill also requires that the Minister:

must have regard to the most recent report that:

- i) was given to the Minister by the Climate Change Authority under section 292; and*
- ii) dealt with carbon pollution caps.¹¹*

ANEDO's preferred position would be that the development of such figures is, to the extent possible, free from political influence. Therefore we submit that the above clause should read:

must act consistently with the most recent report that:

- i) was given to the Minister by the Climate Change Authority under section 292; and*
- ii) dealt with carbon pollution caps*

However, if the Government has made the policy decision to retain the power to make final decisions about the annual pollution cap numbers (as opposed to requiring decisions to be consistent with with the Climate Change Authority's (CCA) report), then safeguards are needed to prevent future governments from setting very low caps that are not in good faith.

In the United Kingdom, the independent Committee on Climate Change, established under the *Climate Change Act 2008 (UK Act)*, advises the UK Government on setting and meeting carbon budgets¹² – with the Government making the final decision. However, the UK Act includes stricter safeguards to ensure the recommendations of the Committee on Climate Change are given primacy in the decision making process.

Comparably to the CE Bill, the UK Act requires:

Before laying before Parliament a draft of a statutory instrument containing an order under section 8 (order setting carbon budget), the Secretary of State must –

- (a) take into account the advice of the Committee on Climate Change under section 34 (advice in connection with carbon budgets).¹³*

In addition though, the UK Act provides that:

If the order sets the carbon budget at a different level from that recommended by the Committee, the Secretary of State must also publish a statement setting out the reasons for that decision.¹⁴

¹¹ Clause 14(2)(b) of the *Clean Energy Bill 2011*.

¹² Similar to the carbon pollution caps proposed here.

¹³ Section 9(1)(a) of the *Climate Change Act 2008*.

¹⁴ Section 9(4) of the *Climate Change Act 2008*.

ANEDO believes that a similar amount of accountability and transparency should be introduced into the CE Bill. We recommend inserting requirements analogous to those under the UK Act, requiring the Minister to table reasons in Parliament if a discrepancy exists between the carbon pollution cap number and the recommendations of the independent CCA.

We would welcome further measures to enhance the role and authority of the CCA given its proposed independence and expertise. This would in fact assist governments charged with making difficult decisions in the medium- and long-term national interest. Limiting the breadth of ministerial discretion can also assist good public policy, limiting the influence of powerful sectors which may seek to pursue their private interests at the expense of public ones (such as attempting to dilute expert recommendations for emissions reduction).

3. The existence of a carbon price floor should not depend on disallowable regulations

ANEDO has concerns that if the international unit surrender charge regulations are disallowed, the price floor will not take effect.¹⁵ This makes the entire price floor vulnerable to disallowance of the regulations. A more effective 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”, or an equation or other provision to that effect.

If additional flexibility were needed in resetting the price floor in future, a regulation-making power could be included to supplement the legislated floor.¹⁶

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

The CE Bill currently provides that:

*The Regulator may remit the whole or a part of an amount of unit shortfall charge imposed on the unit shortfall if the Regulator is satisfied that there are circumstances that make it fair and reasonable to remit some or all of that amount.*¹⁷

This clause gives the Clean Energy Regulator the power to remit a “unit shortfall charge” (i.e. waive or reduce the charge imposed on an entity for failing to relinquish sufficient permits) if the Regulator believes this is “fair and reasonable”. The Bill provides no further criteria for what amounts to “fair and reasonable”, allowing the Regulator to make decisions on an unclear and open-ended basis. We also understand there was no such power in the previously proposed Carbon Pollution Reduction Scheme. ANEDO submits that this decision-making power is far too broad, and lacks safeguards for transparent and objective decisions. This provides an invitation to big polluting

¹⁵ Section 111(5) of the *Climate Change Act 2008*.

¹⁶ In which case the Bill would need to make provision for a later regulation to displace the \$15 floor.

¹⁷ Clause 130(2) of the *Clean Energy Bill 2011*.

companies to dispute their obligations, rather than focus on complying with them; while reducing certainty for other entities and the public.

That invitation is exacerbated by the inequitable proposal that liable entities may appeal against the decision if the Regulator does not remit the charge.¹⁸ By contrast, should the Regulator decide to remit such a charge, the CE Bill provides no opportunity for third parties who represent the public interest to appeal this decision. The lack of balanced appeal rights unduly favours one entity's interests (in minimising liability) over the public interest (in achieving robust emissions reductions).

ANEDO therefore submits that the CE Bill should:

- not include the power to remit the unit shortfall charges, to ensure consistency with the 'polluter pays' principle; or, in the alternative
- include clear limits, greater clarity and transparency for the basis to remit such charges; and
- provide more balanced rights of appeal regarding the Regulator's decisions.

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.¹⁹ 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, firstly, the proposed test for 'low emissions intensity' is weak (0.8 CO₂-e/MWh).²⁰ This would allow coal-fired power stations that are far from best practice (about the equivalent of black coal) to be built while relying on free permits issued by the Government – indeed, it may encourage this.

ANEDO submits that the standard for 'low emissions intensity' should therefore be set at a figure 0.65 CO₂-e/MWh. We understand that this would allow nothing more polluting than Combined Cycle Gas Turbine generators to be installed, and would further encourage the transition to renewable energy.²¹

¹⁸ Clause 281 of the *Clean Energy Bill 2011*.

¹⁹ Clause 170 of the *Clean Energy Bill 2011*.

²⁰ Clause 172(1)(f) of the *Clean Energy Bill 2011*.

²¹ **Table 1: Comparison of current electricity technologies and greenhouse gas intensities.** Adapted from Lenzen, M. (2008), "Life cycle energy and greenhouse gas emissions of nuclear energy: A review". *Energy Conversion and Management* 49, 2178-2199. Intensity calculations are inclusive of the full energy chain.

Electricity technology	Greenhouse gas intensity (kT CO ₂ -e/GWh)
Brown coal (new subcritical)	1.175 (1.011 – 1.506)
Black coal (new subcritical)	0.941 (0.843 – 1.171)
Black coal (supercritical)	0.863 (0.774 – 1.046)
Natural gas (open cycle)	0.751 (0.627 – 0.891)
Natural gas (combined cycle)	0.577 (0.491 – 0.655)
Photovoltaics	0.106 (0.053 – 0.217)
Wind turbines	0.021 (0.013 – 0.040)
Hydroelectricity (run-of-river)	0.015 (0.0065 – 0.044)

Secondly, the power system reliability test also makes it hard for replacement capacity to be renewable energy, by including a ‘readily predictable’ requirement. Clause 172(1)(e) requires that the replacement generation unit must have output that “is readily predictable” and “is not significantly dependent on factors beyond the control of the operator”. This could be interpreted to mean that intermittent generation does not qualify, excluding most renewable energy – especially wind and solar. Whilst ANEDO understands the importance of replacement capacity being reliable, we also stress the importance of removing obstacles for coal-fired electricity generators to shift to renewable energy. This clause should therefore be amended to a simpler requirement that the generation unit be ‘reliable’ in its output (or otherwise clarify that such requirements should not act to exclude renewable energy sources).

6. Clean Energy Investment Plans need minimum criteria and less discretion

ANEDO welcomed the requirement in the Climate Change Plan (p 95) that, if generators were to receive financial assistance, they would need to provide a Clean Energy Investment Plan. Unfortunately the CE Bill does not give sufficient effect to this important requirement. Under the current CE Bill, a Clean Energy Investment Plan is a plan that:

*(a) deals with such matters as are specified in a legislative instrument made by the Resources and Energy Minister for the purposes of this section...*²²

Therefore, the content of the Clean Energy Investment Plans is left entirely to the discretion of the Resources and Energy Minister. ANEDO submits that the legislation must be amended to include some key minimum requirements. These should begin with the content set out in the Government’s Climate Change Plan. It provided that such Plans:

*[need] to identify their proposals to reduce pollution from existing facilities and to invest in research and development and new capacity. Information on possible projects identified under the Energy Efficiency Opportunities program will also be included in these plans.*²³

None of this detail has been transferred from the Australian Government’s Climate Change Plan to the Legislative Package. As a start, these details need to be incorporated.

Furthermore, ANEDO submits that the CE Bill should require that liable entities not only “identify” proposals to reduce pollution (etc), but that they be required to actually *implement* such proposals. Identifying proposals is a positive step, however without a requirement to implement these plans, there is little point in identifying them in a plan.

Victoria’s Environment and Resource Efficiency Plan scheme provides a good example of how the Clean Energy Investment Plans could operate. Under that scheme, liable entities are required to *prepare and implement* resource efficiency plans, and *report on* their performance. The CE Bill should require a similar three stage process of preparation, implementation and preparation for Clean Energy Investment Plans. If further details

²² Clause 178(a) of the *Clean Energy Bill 2011*.

²³ See pp 95 and 117 of the Australian Government’s Climate Change Plan.

need to be specified in regulations, the Resources and Energy Minister should be obliged to seek and take into account the advice of the CCA or the Climate Change Minister.

Finally, ANEDO submits that the legislation should require all Clean Energy Investment Plans to be consistent with the need to reduce the overall emissions intensity of the electricity generation sector, in a manner that reflects Australia's long-term emission reduction targets.

7. The power station closure program must be guaranteed

The Government's Climate Change Plan stated that:

The Government will seek to negotiate a managed and orderly closure of around 2000 megawatts of highly polluting generation capacity by 2020.²⁴

Furthermore, it provided that:

This will be done in an orderly and planned way with realistic timeframes.²⁵

It is important that this commitment is set in legislation, even if in very general terms, with further detail provided on the timeframe for when such closures are expected to take place. In addition, the primary legislation needs to provide for the availability of funding to ensure these closures take place. The Climate Change Plan provided that under the Energy Security Fund:

there will be scope for payments for the closure of around 2000 megawatts (MW) of very highly emissions-intensive coal-fired generation capacity by 2020.²⁶

ANEDO understands that the legislation cannot include this obligation in too much detail. Including requirements for minimum megawatts or maximum funding would limit the Government's ability to negotiate with generators and secure a fair deal for the Australian public. If the Government cannot secure a good deal on these closures, then it will have less money to spend on closing down other high-polluting generators in the public interest.

Nevertheless, it is also in the public interest that the obligation to make these closures is firm and legislative. We understand that this program could be implemented without any legislation, as a purely administrative measure. However, to ensure that the legislation is truly consistent with the Climate Change Plan, it should include a requirement (however broad) to implement this part of the policy. The public cannot be asked to put faith in future governments to keep their word on the key environmental positives in the policy. This program needs a firm legislative guarantee to ensure an effective transition to a low carbon economy.

We therefore propose that the legislation require the Minister to initiate a reverse tender process²⁷ by a certain date (for example, July 2015) for making payments to close power

²⁴ See p 71 of the the Australian Government's Climate Change Plan.

²⁵ See p 74 of the the Australian Government's Climate Change Plan.

²⁶ See p 94 of the the Australian Government's Climate Change Plan.

²⁷ Similar to a tender, except offers are made by the seller. So, in this case, the power stations owners will make offers to the Government for the sale of their asset.

stations with emissions intensity of 1.2 CO₂-e/MWh or more, without putting numbers on megawatt capacity or the amount of funding available. This is already Government policy. Putting it in legislation will help ensure that it is not abandoned at a later date.

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

The Climate Change Plan outlined that around 40% of carbon price revenue will go into a Jobs and Competitiveness Program.²⁸ It proposed that \$9.2 billion of the carbon price revenue will go to providing free carbon units to energy-intensive trade-exposed industries (EITEs) such as aluminium smelters and cement factories, which face a competitive disadvantage on world markets. We understand the importance of limited and reasonable assistance to EITEs to prevent carbon leakage.²⁹

Apportioning assistance

The provisions dealing with this Program³⁰ therefore deal with those industries that have the most substantial impact on Australia's greenhouse gas emissions, and we note that \$9.2 billion is a very large amount of financial assistance being made available for these industries.³¹ For these reasons, ANEDO believes that the CE Bill should set out further detail on how such funds will be apportioned, rather than leaving this to the regulations. Even if the Government has resolved to rely primarily on regulations to implement this Program, the broad parameters should be legislated to ensure consistency with the Climate Change Plan.

Carbon productivity contribution

The Government's Climate Change Plan provided that:

The assistance rates will be reduced by a 'carbon productivity contribution' of 1.3 per cent a year to provide additional incentives over time for these industries to reduce pollution.³²

The CE Bill currently makes no reference to either the 'carbon productivity contribution' or the 1.3% reduction figure. ANEDO believes that CE Bill needs to be amended to include both a reference to the 'carbon productivity contribution' and that the amount of assistance will reduce by *at least* 1.3% per year. If the Government is unable to include more detail of the Jobs and Competitiveness Program in the legislation, it should at the very least include this key component.

²⁸ See page 52 of the The Australian Government's Climate Change Plan.

²⁹ Carbon leakage, in broad terms, refers to the increase of greenhouse emissions in other countries when a country takes domestic mitigation actions to reduce its own emissions.

³⁰ Part 7 and 8 of the *Clean Energy Bill 2011*.

³¹ To put the quantum in perspective, it is nearly 10 times the allocation to the Biodiversity Fund noted below. (The Biodiversity Fund will provide \$946 million over a six year period, whereas the \$9.2 billion promised to EITE assistance is for the 2014-15 period alone.)

³² See page 55 of the The Australian Government's Climate Change Plan.

Decisions and information gathering on assistance and administration

It is also crucial that decisions as to how the scheme is administered are made by the Regulator, not the Minister. An assistance scheme of this size and value is constantly vulnerable to abuse and rent-seeking by some entities involved. There are a range of day-to-day operational decisions that will need to be made under the scheme – such as who is eligible for assistance, whether eligibility requirements have been met (etc). To preserve the scheme’s integrity it is crucial that these decisions be made by the Regulator, not the Minister. To do otherwise would invite rent-seeking, rather than compliance. The *Clean Energy Plan* needs to clearly identify who the decision-maker under the Jobs and Competitiveness Program will be.

The draft legislation shows some indication that the Minister will play a role in this day-to-day administration. It gives powers to gather information from companies under the scheme to the Minister, not the Regulator,³³ and gives the Minister the decision as to whether non-compliance is significant enough to warrant the withdrawal of assistance.³⁴ These sections – and the Jobs and Competitiveness Program as a whole – should be changed to ensure that these powers and decisions are given to an independent authority that is apolitical and beyond the reach of lobbyists.

9. The biodiversity measures need legislative underpinning

ANEDO welcomes the inclusion of strong biodiversity components, including a Biodiversity Fund, in the Government’s Climate Change Plan.³⁵ However, it appears the many of the initiatives raised in that original policy document have not made the transition across to the Legislative Package. As the Government has sought comments on whether the drafting of the bills accurately reflect the policy, it is important to note that the Legislative Package hardly mentions the biodiversity components of the Climate Change Plan at all.

Firstly, the functions of the Land Sector Carbon and Biodiversity Board (**the Board**)³⁶ give it a strong focus on ways to ensure carbon sequestration and farm productivity improvements. These functions fall short, as they do not refer to the need to restore the natural environment, or consider biodiversity adaptation plans or biodiversity conservation planning at a state or regional level.³⁷ The functions of the Board need to be amended to take account of this.

Secondly, the CCA Bill does not require the Board to perform its key function outlined in the Government’s Climate Change 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.

³³ Clean Energy Bill 2011 cl 152.

³⁴ Clean Energy Bill cl 153 (1)(d).

³⁵ The Climate Change Plan included a \$946 million Biodiversity Fund over six years to assist landholders with projects to establish, restore, protect or manage biodiverse carbon stores. See page 91 of the Australian Government’s Climate Change Plan.

³⁶ As defined in the *Climate Change Authority Bill 2011 (CCA Bill)*.

³⁷ Clause 62 of the *CCA Bill 2011*.

Therefore the legislation must be amended to:

- set the parameters for the Biodiversity Fund by fleshing out the Land Sector Carbon and Biodiversity Board’s functions;
- require the Board to prepare guidelines for the Biodiversity Fund as noted above; and
- require the Government to table these guidelines in Parliament and respond to issues raised by the Board.

We understand that another option to give effect to the Biodiversity Fund and related funds could be to set these out in separate, dedicated legislation. ANEDO would also be open to investigating the viability of such proposals.

10. Stricter criteria should be applied to International Emissions Units

The Government’s Climate Change Plan discusses both quantitative and qualitative restrictions on eligible international emissions units for offsetting domestic emissions. These are to “help safeguard the environmental integrity of Australia’s pollution efforts.”³⁸ The CE Bill currently provides that the eligible international emissions units (a term defined in the *Australian National Registry of Emissions Units Bill 2011*) are:

- certified emission reductions (CERs), other than long-term or temporary CERs;
- emission reduction units (ERUs);
- removal units (RMUs);
- any further prescribed units issued in accordance with the Kyoto rules; and
- any other international unit (which is prescribed in regulations).

There are well-developed sets of criteria that are applied to CERs, ERUs and RMUs.³⁹ However, ANEDO has concerns that the regulations may prescribe “any other international unit” as an eligible emission unit, without specifying the relevant criteria that must apply when deciding on units to prescribe. The CE Bill only provides that:

*The regulations may make provision for, or in relation to, prohibiting the surrender of specified eligible international emissions units.*⁴⁰

The CE Bill then goes on to provide a series of elements that the Minister *may* have regard to when making a recommendation for the content of the regulations to address the eligibility of international units.⁴¹

Firstly, ANEDO submits that those elements at clause 123(2)(a-f) should not be optional considerations. They should be mandatory requirements. Clause 123(2) should therefore be amended to read:

³⁸ See page 108 of the Commentary on the Clean Energy Bill 2011.

³⁹ Under international and domestic carbon pricing mechanisms.

⁴⁰ Clause 123(1) of the *Clean Energy Bill 2011*.

⁴¹ Clause 123(2)(a)-(f) of the *Clean Energy Bill 2011*. In brief, these elements include Australia’s international objectives and obligations, the “environmental integrity” of the Act and provisions, relevant reports by the CCA, eligibility of units in New Zealand and the EU, and other factors the Minister considers relevant.

In making a recommendation to the Governor-General about regulation to be made for the purposes of subsection (1), the Minister must act consistently with [those elements (see note 41)]

Secondly, in relation to the elements that the Minister may have regard to under clause 123(2), ANEDO believes the following amendments should be made. In line with our comments under point 1. above, clause 123(2)(b) should be amended to include “Australia’s international obligations *and commitments*”. Again, the policy intent is to ensure consideration of non-binding international climate change agreements to which Australia has subscribed, but that may not impose legal obligations.

Furthermore, clause 123(2)(c) refers to “the environmental integrity of this Act and the associated provisions”. However the CE Bill fails to define what amounts to “environmental integrity”. To clarify this clause, ANEDO submits that either this phrase be more clearly defined, or the CE Bill be amended to include adherence to the more universally understood concept of Ecologically Sustainable Development.⁴²

Reducing Emissions from Deforestation and Forest Degradation (REDD+)⁴³

ANEDO has the following recommendations in relation to international units arising from activities associated with REDD+. It is fundamental that any REDD+ units used during the carbon pricing scheme’s flexible price period are genuine, credible and meet strict biodiversity and social safeguards. The Government has stated its support for such safeguards to avoid “perverse outcomes”.⁴⁴

The safeguards provided in Appendix I to the Cancun Agreements provide a baseline example of the tests that should be applied to establish if REDD+ credits should be declared as eligible international emissions units under the scheme. To give examples, that text provides that all REDD+ activities must:

- ensure actions are consistent with the conservation of natural forests and biological diversity, ensuring that REDD+ actions do not contribute to the conversion of natural forest, but are instead used to incentivize the protection and conservation of natural forest and their ecosystem services, and to enhance other social and environmental benefits;
- complement or [be] consistent with the objectives of national forest programmes and relevant international conventions and agreements; and
- respect the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national

⁴² For example, the principles of ‘ESD’ are set out in s 6 of the *Protection of the Environment Administration Act 1991* (NSW). In brief they include the precautionary principle; inter-generational equity; conservation of biological diversity and ecological integrity; and improved environmental valuation, pricing and incentive mechanisms.

⁴³ REDD+ is an internationally evolving concept, whereby developed countries pay developing countries with tropical forests to protect and conserve them. This can reduce greenhouse emissions while providing opportunities for sustainable development and conserving biodiversity. In addition to funding to stop deforestation and degradation, funding may also be available for extra activities (the ‘+’) like conserving and sustainably managing forests. See EDO NSW, *[REDD]: A Guide for Landowners and Forest Communities in the Pacific*, at <http://www.edo.org.au/edonsw/site/publications.php>.

⁴⁴ See, eg, the Department’s website at www.climatechange.gov.au/government/international/redd.aspx.

circumstances and laws and noting the UN Declaration on the Rights of Indigenous Peoples.⁴⁵

ANEDO submits that the inclusion of such a list in the regulations would assist in navigating the diverse array of standards that exist in regard to the quality of REDD+ units; and serve to prevent any perverse incentives arising from allowing poor quality units⁴⁶ being granted eligibility under the carbon pricing scheme (such as converting natural forests to plantations).

Finally, ANEDO supports the proposition in the Government's Climate Change Plan that certain CERs and ERUs (such as those arising from nuclear projects and large-scale hydro-electric projects not consistent with criteria set out in the World Commission on Dams guidelines) will not be permitted under the scheme. These commitments should be incorporated into the legislation.

For more information on this submission please contact Michael Power (Policy Lawyer, EDO Vic – Michael.power@edo.org.au) or Richard Howarth (Policy Lawyer, EDO NSW – Richard.howarth@edo.org.au).

⁴⁵ For a full list of the matters listed in the Cancun Agreements see “The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention” available at: <http://unfccc.int/documentation/decisions/items/3597.php?dec=j&such=j&cp=/CP#beg>.

⁴⁶ Such as environmentally weak units that may not deliver their declared emissions reductions.