



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

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1. Clean Energy Legislation package



The Australian Government released the Clean Energy Legislation Package in July for public consultation. The package aims to secure a clean energy future for Australia by following four key elements:

- putting a price on carbon pollution;
- promoting innovation and investment in renewable energy;
- improving energy efficiency; and
- creating opportunities in the land sector to cut pollution.

The Australian Network of Environmental Defender's Offices (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); and the Clean Energy Legislation package – with the benefit of certain amendments. For our recent summary of the Climate Change Plan, [click here](#).

ANEDO is pleased that the Climate Change Plan not only proposes to place a price on carbon, but also provides for a number of forward-thinking funds that have the potential to bring about positive environmental outcomes.

ANEDO's central concern is that many of these initiatives have either been left out of the Legislation Package or have been referred to in the broadest terms only – leaving important parameters to future instruments or mechanisms.

ANEDO strongly recommends that the Legislation Package give more substantive effect to these 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 environmental protection initiatives will be properly delivered.

ANEDO also recommends other measures to improve accountability, certainty and transparency in the Legislation Package. These measures aim to promote good public policy that will help to

reduce Australia's emissions, and safeguard our environment for present and future generations.

Specifically, ANEDO identified the following top 10 priority areas where the Legislation Package (primarily the *Clean Energy Bill 2011*) could be improved:

1. **The Minister must be required to consider all international commitments (not just legal obligations) when setting carbon pollution caps.** Presently the definition of International Climate Change Agreements excludes the non-binding Copenhagen and Cancun climate change agreements;
2. **The process for setting pollution caps must be tied more closely to Australia's 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 that are not in good faith;
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;
4. **It is too easy for liable entities to dispute their obligations, and too hard for the public to uphold them.** Discretionary draft clauses pose 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, not allowing anyone to speak for the environment in the public interest;
5. **The definition of 'low emissions generation' must be revised.** The present definition would allow coal-fired power stations that are far from best practice (about the equivalent of black coal) to be built with government support — indeed, it would encourage them;
6. **Clean Energy Investment Plans need to have minimum criteria and less discretion.** At the very least, the legislation must set out some key minimum requirements for these plans. In addition, generators should be required to *implement* efficiency improvements, not simply *identify* them.
7. **High-polluting power station closures must be guaranteed.** The commitment to fund the closure of high-polluting generators should be set in legislation — even if in very general terms — so that future Governments can't abandon it completely without amending the law;
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;
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 gap in ensuring consistency between the policy and the exposure bills; and
10. **Stricter criteria should be applied to International Emissions Units.** More prescriptive criteria would help to safeguard the environmental integrity of Australia's pollution efforts.

While the Government's policy may not optimally address some broader policy matters ANEDO has consistently raised in its climate change submissions (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), ANEDO nonetheless strongly endorses the policy as a big step forward for Australia to meet its obligations.

To read ANEDO's submission on the Clean Energy Legislation Package, [click here](#).

The Clean Energy Legislation Package has been introduced to Parliament.

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National Update

Law

2. EDO Case Update: *Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited*



The EDO, on behalf of Barrington-Gloucester-Stroud Preservation Alliance Inc, has commenced judicial review proceedings against two decisions of the Planning Assessment Commission (PAC) to approve a concept plan and stage one of the Gloucester Gas Project. The concept plan involves extraction of coal seam gas within a 210km area between Barrington and Great Lakes, transporting the gas from the processing facility to the existing gas supply network via a 95-100 km pipeline traversing several Local Government areas and a gas delivery station at Hexham. The stage one project approval is for 110 gas wells and gas and water pipelines between Gloucester and Stratford, a central processing facility, gas transmission pipeline 95-100 km in length and the Hexham gas delivery station. Our client is concerned about the risks of surface and groundwater contamination as a result of the fracking process used to extract the gas from the coal seam, and the lack of data about groundwater impacts in the context of the geological receiving environment, which contains numerous cracks and fissures in the coal seams. The grounds of appeal contend that certain conditions of approval, relating to groundwater and waste water disposal/reuse, leave open the possibility of a significantly different development with significantly different impacts from that approved. The grounds also contend a failure to consider the precautionary principle in the context of scientific uncertainty and lack of information on the threat of environmental damage. The hearing is listed for 17, 19 and 20 October 2011. Richard Lancaster, senior counsel, and Nick Eastman, counsel, are briefed to appear in the proceedings.

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3. EDO Case Update: *Macquarie Generation v Gray & Hodgson*

The EDO is acting on behalf of Peter Gray and Naomi Hodgson in defending Macquarie Generation's appeal to the Court of Appeal in respect of the judgment of Pain J in the Land and Environment Court on 1 February 2011 (see [Gray and Anor v Macquarie Generation \[2011\] NSWLEC 3 \(Gray No 3\)](#)).

Macquarie Generation argued that Pain J was wrong in finding that Macquarie Generation's licence to pollute contains an implied limitation on how much carbon dioxide can be released. The matter was heard on 13 September 2011 and judgment has been reserved. We will keep you informed of any updates in this matter.

For more information, [please click](#).

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4. Indigenous Carbon Farming Fund



The experience and expertise of Indigenous Australians in monitoring and cultivating Australia's diverse landscape will come to the forefront under the Australian Government's new Carbon Farming Initiative. The Carbon Farming Initiative includes a \$22 million Indigenous Carbon Farming Fund creating economic opportunities for Indigenous landowners and managers in carbon storage and carbon offsets.

The ongoing Indigenous Carbon Farming Fund will provide support for Indigenous Australians to implement projects under the [Carbon Farming Initiative](#).

Funding will be provided for:

- specialists to work with Indigenous communities to develop carbon farming projects; and
- development of low-cost estimation and reporting tools for abatement activities likely to have high Indigenous participation, such as savanna fire management.

Funding of \$22 million over five years will be available from 2012-13. For more information, [please click](#).

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Policy

5. NSW Local Councils implement climate change policies



[Eurobodalla Shire Council](#), [Gosford Council](#), [Greater Taree City Council](#), [Port Macquarie Hastings Council](#) and [Wyang Councils](#) have all implemented strategic responses to sea level rise caused by climate change.

Eurobodalla Shire Council's *Interim Sea Level Rise Adaptation Policy* provides a framework that allows Council to make a strategic response to the projected impacts of sea level rise in the Eurobodalla region. The intention of this Policy is to provide Council with guidance on how to consider and manage a Sea Level Rise threat.

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6. NSW Planning Review – have your say about climate change

www.planningreview.nsw.gov.au

The NSW Government has launched a comprehensive review of the *Environmental Planning & Assessment Act 1979* (EP&A Act) and the State planning system. The aim is to create a new planning system that meets today's needs and priorities.

A new Act should require a comprehensive assessment of the climate change implications of all development, the incorporation of climate change considerations into strategic planning, and the introduction of best practice criteria and standards with which all proposed development must comply in order to proceed. These provisions must apply to all categories of development. Climate change (and the cumulative impacts thereof) must be a mandatory consideration under a new Act.

An independent panel has been established to undertake the review. As part of the first 'listening

and scoping' phase, the chairs of the review, Mr Tim Moore and Mr Ron Dyer, are consulting on the philosophy, aims and principles of the planning system. The panel will undertake a **broad community listening process throughout NSW from September to November.**

Information on regional tour dates is now [available here](#), or through the site above – go along and voice your opinion that a new planning system must include the above climate change recommendations.

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International update

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7. USA Case Update: *Damascus Citizens for Sustainability, Inc. v. U.S. Army Corps of Engineers et al*



In August, a citizens' group took on the government seeking to compel the completion of environmental impact statements (EISs) prior to the issuing of licences for coal seam gas wells in the Delaware River Basin. The green-house gas emissions impacts of natural gas as a “transition” fuel to ease us into a carbon-free world is also being examined in the case. To focus on just one aspect of the allegations outlined in the complaint, it is worth looking at greenhouse gas emissions. The

conventional wisdom is that because natural gas is composed of lighter, less complex hydrocarbons, and therefore when combusted, emits less carbon dioxide than other fossil fuels, it is to be preferred over oil and coal. Methane, an even more potent greenhouse gas than carbon dioxide, and a significant component of natural gas, likewise is reported to have better characteristics in natural gas. Accordingly, many believe that if natural gas substitutes coal and oil, the economy can continue to grow at the same time that greenhouse gas emissions are reduced.

This proposition is under attack. [University of Cornell researchers](#) concluded that coal seam gas has a greenhouse gas footprint substantially larger than previously thought and that, depending on circumstances, the footprint of coal can be smaller than that of coal seam gas. This finding undermines the logic of its use as a bridging fuel over coming decades, if the goal is to reduce climate change.

If the case is successful, the drilling of hundreds if not thousands of wells will be delayed.

To view the Complaint, [please click](#).

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8. Insurance doesn't cover climate change in the US



A US state appeals court has ruled, in the first case of its type, that an insurance company does not have to foot the bill for a company facing damages over climate change. The Virginia Supreme Court ruled that Steadfast Insurance does not have a duty to defend AES Corp., a utility which is a defendant in a major climate case, [Kivalina v. Exxon Mobil Corp., et al.](#), currently before the

San Francisco-based 9th U.S. Circuit Court of Appeals.

Litigation over insurance coverage relating to climate change is likely to grow in coming years, lawyers predict, so the ruling could help shape the legal landscape.

When AES faced the Kivalina lawsuit in 2008, it asked its insurer, Steadfast, to defend it against the claims that emissions had contributed to rising sea levels that are endangering the village. Steadfast refused and instead asked an Arlington County, Va., judge to decide the question of whether it had a duty to defend. "Steadfast's policies broadly obligate it to indemnify AES for property damage claims involving 'accidents,'" the AES brief states.

The Virginia Supreme Court rejected that argument. Justice Bernard Goodwyn wrote that under the terms of the various insurance policies in question, the acts relating to climate change that are the basis of Kivalina are not covered.

To read more about this story, [please click](#).

To view the judgment, [please click](#).

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9. Canada moves to reduce emissions in the electricity sector

Canada recently released long-awaited regulations that analysts said could phase out most of the country's coal by midcentury.

The new rules apply a stringent performance standard to new plants, requiring them to emit roughly the same greenhouse gases as natural gas generators. That means that new coal plants won't be able to be built in Canada without carbon capture technology, since coal typically releases twice as much carbon dioxide as natural gas does in the burning process.

Considering that carbon capture has never been proven at commercial scale to control coal's emissions, the fate of the fuel in Canada is uncertain.

At a ceremony in Saskatchewan, Environment Minister Peter Kent said the regulations would help Canada meet its goal of slashing emissions to 17 percent below 2005 levels by 2020. Coal currently fires about 17 percent of Canada's electricity and releases about 13 percent of the country's greenhouse gases.

For more information, [please click](#).

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Policy

10. Bill Passed for Sea Walls to combat climate change



The *Torres Strait Islands Sea Wall Bill* passed through the House of Representatives last month, with support from both sides of parliament.

The bill will ensure that the federal government provides \$22 million for sea wall construction in the Torres Strait. The Torres Strait Islands are particularly vulnerable to sea level rise from climate change. The [Torres Strait Regional Authority's Torres Strait Climate Change Strategy 2010-2013](#) identified the need for upgrades to sea walls on

specific islands to address immediate flooding issues.

For more information, [please click](#).

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Media, reports and other news

11. Palau seeks Advisory Opinion from the International Court of Justice



The Pacific Island State of Palau recently [announced](#) it will seek an Advisory Opinion from the International Court of Justice (ICJ), asking whether countries have a responsibility to avoid their emissions causing climate change damage elsewhere. This will be the world's first international climate change case. Many Pacific Islands are extremely vulnerable to the impacts of climate change and sea level rise is predicted to eventually make some islands uninhabitable. The highest point on the

island nation of Tuvalu is just 4.6 metres above sea level.

Tuvalu, Palau and other Pacific Islands had focused their efforts on the international climate negotiations because the [Kyoto Protocol](#) runs out in 2012. But their attempts (and those of other States) to secure a new international agreement with strong cuts to greenhouse gas emissions have been [unsuccessful](#).

Tuvalu is instead now relying on the “[no harm rule](#)” which is a rule of customary international law that declares a State has a duty to prevent, reduce and control the risk of environmental harm to other States. For more information about the formal legal basis for the Advisory Opinion, [please click](#).

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12. Mandatory CO2 standards for 'light vehicles'

The federal government is inviting industry and the public to comment on emissions targets and a regulatory framework for light vehicle CO2 emissions standards. Light vehicles comprise passenger vehicles, SUVs and light commercial vehicles.

Transport contributes approximately 15% of Australia's CO2-e emissions. Light vehicles comprise 64% of transport emissions and between 9% and 10% of total emissions in Australia.

Mandatory CO2 standards are recognised as a cost-effective strategy in reducing transport emissions and are expected to achieve far greater reductions in CO2 emissions than unregulated reductions by industry.

Light vehicle CO2 emissions standards for Australia, Key Issues — Discussion Paper — 2011 proposes scenarios for targets and suggests regulatory models. The submissions received will contribute to the development of an implementation Regulatory Impact Statement, which will be released for public comment.

Mandatory standards for light vehicle CO2 emissions will come into effect from 2015. The standards will apply to new vehicles.

Light vehicle CO2 emissions standards for Australia, Key Issues — Discussion Paper — 2011 can be downloaded by clicking [here](#).

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13. Invitation to Join the EDO's Scientific Expert Register



The EDO is seeking scientific and technical experts with 10 or more years' experience in a range of fields to join our Expert Register. PhD students are also encouraged to apply.

The Expert Register is a list of scientific experts who are willing to assist the EDO with public interest environmental matters on a pro bono basis. A key aim of the service is to increase the public's capacity to participate effectively in the environmental planning and development assessment process.

The EDO is also seeking to develop relationships with research organisations and environmental consultancies interested in doing pro bono work.

If you would like more information on how to be involved in the scientific work of the EDO, and have expertise in climate science or a relevant environmental field, please contact the EDO on (02) 9262 6989.

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14. EDO's Coastal Law and Climate Change project

The EDO has been funded by the Federal Government through its Caring for Our Country program to produce a guide to coastal law and climate change. To order a free copy of *Caring for the Coast: A guide to environmental law for coastal communities in NSW*, please email education@edo.org.au with your details and we'll send you a copy.

If you would like the EDO to come to your area to present a workshop on coastal law and climate change, please contact our Education Director at education@edo.org.au, or call 9262 6989.

Requests from rural and regional groups in NSW will be given priority.

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