



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

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1. EDO Overview of the Australian Government's Climate Change Scheme



The Australian Government has outlined its path to “securing a clean energy future for Australia” based around the 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 EDO is pleased to present the following brief overview of how the scheme will work, what's covered, complementary environmental measures, transitional assistance and next steps.

1) Carbon pricing framework – How does it work?

Until now, Australia's largest greenhouse polluters have been able to emit carbon into the atmosphere at no charge. The Government's proposal will change this. As of 1 July 2012, 500 of the country's biggest carbon polluters will have to buy a \$23 permit for each tonne of carbon pollution they release into the atmosphere. The revenue raised will be used to provide tax cuts, assist industries and households in the transition, and help develop what the Government has called a “new clean energy future”.

Although the Government's proposal is widely referred to as a “carbon tax”, it's really a “fixed price emissions trading scheme” that will transition to a “standard emissions trading scheme”.

This is how the scheme is planned to work:

- Under the fixed price ETS, the Government caps the total emissions and issues permits to emit up to that amount. Those permits can be traded between businesses.
 - These fixed price permits cannot be borrowed or banked for use in the next year, as permits on issue will automatically be surrendered to the Government at the end of each compliance year.
 - The price for each tonne of pollution will begin at \$23 and rise by 2.5% on top of inflation each year until 2015.
 - In July 2015 the fixed price ETS is planned to move to the standard ETS, where the price
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of each permit will be set by the market. A price floor (\$15) and ceiling (\$20 above the expected international price for 2015) will confine market fluctuations.

- Also from July 2015, large polluters will have access to international carbon markets to buy permits.

The proposal includes the creation of a new independent statutory body, the Climate Change Authority (CCA) to be chaired by former Reserve Bank Governor, Bernie Fraser. The CCA will propose carbon reduction targets to the Government; advise on pollution caps; and undertake regular public reviews of the carbon pricing mechanism. It will be made up of nine experts on climate science, economics, climate change mitigation, emissions trading, investment and business. Similar to the UK's Committee on Climate Change, the CCA is only an advisory body, and the Government will make all final decisions.

2) What will the carbon price cover?

The Government's package intends to cover about 60% of Australia's carbon pollution, extending to four of the six greenhouse gases counted under the Kyoto Protocol. It aims to cover any facility that produces at least 25,000 tonnes of CO₂ equivalent per year (unless it falls into an exempt category) including stationary energy* and industrial processes. It will also cover large suppliers of natural gas as well as carbon pollution from waste, fugitive emissions, rail, domestic aviation and shipping. From 1 July 2014, the Government intends to apply a carbon price (reducing diesel fuel excise) to heavy on-road transport (but this does not have the support of the Multi Party Climate Change Committee). For other petrol transport the Government has stated that agriculture, forestry and fishing industries will not face a carbon price nor will households and light commercial vehicles.

* stationary energy includes emissions from fuel consumption for electricity generation, fuels consumed in the manufacturing, construction and commercial sectors, and other sources like domestic heating.

3) What are some of the major complementary environmental measures?

The Government's announcement has outlined a number of environmental measures agreed by the Multi Party Climate Change Committee. These include:

- An **emission reduction target of 80%** under 2000 levels by 2050 (was previously proposed to be 60% under the former CPRS proposal).
 - Maintaining a **2020 emission reduction target of at least 5%** under 2000 levels (note the 2008 Garnaut Review proposed a 25% reduction for Australia to play its part in a "450 parts per million/2 degree warming" scenario).
 - A **\$946 million Biodiversity Fund** over six years to assist landholders with projects to establish, restore, protect or manage biodiverse carbon stores.
 - The Renewable Energy Target regulations will be amended to exclude biomass from native forest as an eligible energy resource. Therefore, energy generated from burning native forests will no longer be included as part of the Government's renewable energy scheme.
 - **\$13 billion investment in clean energy programs** overseen by two independent authorities:
 - The Clean Energy Finance Corporation:
 - An independent body in charge of a \$10 billion fund to support research and development (R&D), demonstration and commercialisation of
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- renewable energy; to be run by a board of directors.
- The Australian Renewable Energy Agency (ARENA):
 - An independent body to administer and consolidate the \$3.2 billion in existing Government support for R&D in renewable energy technologies.
- **Clean Technology Investment for industry:**
 - \$800 million Clean Technology Investment Program to support manufacturers to invest in energy-efficient and low-pollution technology.
 - \$200 million over six years to food processing, metal forging and foundry industries for similar investments.
 - \$200 million over five years for R&D grants for renewable energy, low-pollution technology and energy efficiency.
- Government will look at introducing an **energy efficiency White Certificate Scheme** (subject to negotiations) to require energy retailers to find and implement energy efficiency savings in households and the business sector.
- **Mandatory Carbon Dioxide emissions standards** for all new light vehicles sold in Australia (average 2010 emissions were 213g/km; aim is for 190g by 2015 and 155g in 2024).
- **\$1 billion tax breaks for Green Buildings Program** to improve energy efficiency in existing buildings.
- The **Carbon Farming Initiative** will allow farmers and land managers to generate credits that can be sold to businesses wanting to offset their own carbon pollution (ANEDO submission [available here](#)).

4) How much assistance will be provided to industry and households?

The Government intends to provide financial assistance to both industry and households to assist in the transition to a low carbon economy.

a) Industry

Two major proposals will assist industry in this transition period:

- i) Jobs and Competiveness Program
 - The Government proposes \$9.2 billion of the carbon price revenue will go to assisting energy-intensive trade-exposed industries (EITEs) such as aluminium smelters and cement factories, which may face a competitive disadvantage on world markets.
 - This assistance will be in the form of free carbon permits which will cover:
 - 94.5% of emissions from the most emissions-intensive EITEs, and
 - 66% of emissions from a second category of less emissions-intensive industries (eg LNG production).
 - This assistance will be reduced by a 'carbon productivity contribution' of 1.33% a year.
- ii) Energy Security Fund
 - Assistance for emissions-intensive coal-fired generators** will qualify for a share of \$5.5 billion of permits and cash over five years to compensate them for reduced asset values. This will include a tender process for early closure of highly polluting generators.

** (i.e. producing more than 1.2t CO₂ equivalent per Megawatt Hour)

b) Households

- Reform of tax thresholds aimed at low and middle income earners.
- Increases to Family Tax Benefit through:
 - Clean Energy Advance – a lump sum payment;
 - Clean Energy Supplement – from March 2013 a fortnightly supplement to pensioners and allowees (1.7% pension increase); and
 - Single Income Family Supplement – \$300 for families with a primary earner between \$68,000 and \$150,000.

5) What are the next steps?

The Government will introduce legislation into Parliament in the second half of 2011 (possibly August/September) to underpin the scheme. It's understood there will be opportunity to comment on draft legislation by the end of July. Unlike the former CPRS, the Gillard Government seems to have the numbers to pass the Bills, with the support of the Greens in the Senate and a Green and Independents in the House of Representatives. However, elements not supported by the Multi Party Climate Change Committee will need to be further negotiated to pass (including assistance to EITs and the coal sector, and the 2014 excise reduction for heavy transport).

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National Update

Law

2. EDO Case Update: *Hunter Environment Lobby Inc v Minister for Planning and Ulan Coal Mines Ltd*



The EDO is acting for the Hunter Environment Lobby in its Land and Environment Court challenge to the Minister for Planning's approval of certain coal mining activities proposed by Ulan Coal Mines Ltd at the Ulan Coal Mine, located 40 kilometres north of Mudgee.

The approvals being challenged allow for the consolidation of Ulan's 24 existing development consents into a single planning approval, expansion of its existing underground longwall mining operations and a new open cut mining operation. These approvals will see a doubling of Ulan's existing approved production rate to up to 20 million tonnes of coal per year.

This is a merits appeal which focuses on groundwater, biodiversity offsets and greenhouse gas emissions. With regards to greenhouse gases, the applicant is proposing an offset condition be attached to any approval. Such an offset condition would be the first of its kind in Australia. Imposing a GHG offset would be consistent with conventional environmental assessment which requires impacts to be mitigated if they cannot be avoided or minimised.

For more information on this matter, [click here](#).

For related coverage, please [click here](#).

The EDO thanks Philip Clay who appeared on behalf of Hunter Environment Lobby Inc at the hearing.

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3. EDO Case Update: Climate Camp 2010 Protest Appeals

The EDO has been acting for 49 protestors who were charged with various offences related to the 2010 Climate Camp for Action, a national event to raise awareness of climate change and call for stronger action to address the impacts. The 2010 Climate Camp challenged the NSW Government's proposal to build a new coal-fired power station next to the existing Bayswater power station site.

The protestors were appealing against convictions and fines imposed by the Muswellbrook Local Court in January 2011. The appeals were heard in the East Maitland District Court on 16 June. His Honour, District Court Judge Zahra allowed the appeals of 47 of the 49 appellants. The Court found that the individuals are "impressive and remarkable individuals". The Court noted that the individuals were genuinely motivated to protect the community from the impacts of climate change. The Court took into account the appellants' good character and community spirit, their commitment to social justice and the environment evidenced by their volunteer hours and the fact that their actions were peaceful as part of a non-violent direct action.

His Honour dismissed the charges against the protestors under s. 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The EDO is very grateful to Ms Angela Ketas of Counsel for her very able assistance in the matter.

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4. EDO Victoria Case Update: *Environment Victoria Inc v Latrobe City Council & Environment Protection Agency*



EDO Victoria has filed 2 sets of proceedings in the Victorian Civil and Administrative Tribunal (VCAT) on behalf of its clients, challenging an Environment Protection Authority (EPA) works approval to allow for the construction and use of an integrated drying, gasification combined cycle power station. The site for the proposed power station is at Commercial Road in Morwell.

EDO Victoria is arguing that electricity generated from brown coal does not meet Victoria's Environment Protection Act air quality state environment protection policy (SEPP) requirement that greenhouse gases be managed according to "best practice". That's despite EPA CEO John Merritt's claim that the EPA's project assessment was "the outcome of a rigorous process in applying the law to a unique demonstration project" and accorded with the SEPP.

EDO Victoria's Principal Solicitor said the approval was "not consistent with national measures to reduce GHG emissions adopted by the Victorian Government and contained in the *Climate Change Act 2010* (Victoria)".

For more information about this case and to read the application, [please click](#).

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5. Climate Change Act comes into effect in Victoria

The *Climate Change Act 2010* (Victoria) came into operation on 1 July 2011 and represents a significant step towards fulfilling the Victorian Government's climate change agenda. The Act

aims to:

- reduce greenhouse gas emissions by 20% by 2020. This target will be achieved through energy efficiency and increased reliance on renewable energy sources and carbon sequestration;
- regulate greenhouse gas emissions by increasing the regulatory powers of the Environment Protection Authority to regulate carbon emissions and to prescribe greenhouse gas emissions standards;
- establish a new framework for property rights and management agreements in relation to the ownership, registration and transfer of forestry and carbon sequestration rights in Victoria. Landowners will be able to enter into Forestry and Carbon Management Agreements for the ongoing management of vegetation and soil in perpetuity.

To view the Act, [please click](#)

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Policy

6. New climate change fact sheets

The Department of Climate Change & Energy Efficiency has released new fact sheets that outline the impacts that climate change is having on each State and Territory as well as on agriculture, fisheries and water resources. To visit the fact sheets, [please click](#).

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7. Productivity Commission recommends emissions trading



The Federal Government's Multi-Party Climate Change Committee was formed to reach agreement on a carbon pricing mechanism. Recently it considered the Productivity Commission's report entitled [Carbon Emission Policies in Key Economies](#). The report examined greenhouse gas abatement action taken in seven of Australia's top 10 trading partners – China, Germany, Japan, New Zealand, South Korea, the United Kingdom and the United States. It identified over a thousand different policy measures that reduce pollution, ranging from (limited) emissions trading schemes to policies supporting particular types of abatement technology. The report particularly focussed on those policies targeted at electricity generation and road transport emissions.

The Commission found that emissions trading schemes were relatively cost effective, while policies encouraging small-scale renewable generation and biofuels generated little abatement for substantially higher cost. The Commission found that in the UK the emissions trading scheme has led to switching from coal to gas-fired power generation, "yielding substantial abatement". The report indicates that Australia is placed in the middle of the pack regarding carbon policy and abatement efficiency.

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International update

Law

8. Case Update: *American Electric Power v. Connecticut*

The United States Supreme Court recently ruled that individual States cannot invoke federal common law in an attempt to limit greenhouse gas emissions. In this case, a coalition of State Attorneys General sued several electric power producers, seeking to compel them to cap and then reduce their carbon emissions. The coalition asked the judge to order reductions in the emissions of plants in 20 US States and sought to examine whether the electric utility industry may be held accountable for its alleged contributions to damages arising from climate change. The Court held that the *Clean Air Act* pre-empts a claim that carbon emissions from fossil fuel-fired power plants constitute a nuisance under federal common law.

To read case summaries and further commentary, [please click](#).

For related coverage, [please click](#).

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9. Case Update: English High Court permits American airlines legal challenge to EU ETS



The English High Court recently heard a legal challenge by the Air Transportation Association of America (ATA) challenging the EU emissions trading scheme, which forces US airlines, as of January 1 2012, to buy emission certificates not only for flights that depart from Europe, but also for those which land there. The case was referred to the European Court of Justice in Luxembourg for a ruling on the validity of the EU law. ECJ

Advocate General Eleanor Sharpston vowed to deliver her (non-binding) opinion by 6 October 2011. The final decision of the ECJ is expected at a later date.

The US airlines argue that by including international flights in its emissions trading scheme, the EU is breaching US sovereignty, and is contrary to provisions to regulate greenhouse gas emissions globally under the Kyoto Protocol.

The American airlines are opposed by a coalition of UK and US environmental groups, who are fighting to retain the right of the EU to impose environmental taxes. The case is an important one of principle.

The Obama administration has asked that US airlines be exempted, and China has blocked a multi-billion dollar order by Hong Kong Airlines for ten new aircraft to be manufactured in Europe in retaliation.

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10. Case Update: *Barhaugh v The State of Montana*

In a precedent-making decision, the Montana Supreme Court dismissed a lawsuit by Our Children's Trust saying unsettled factual issues related to limiting emissions of greenhouse gases must first be addressed in a lower court. To read more about the Our Children's Trust cases, please [click here](#). The suit asked the court to declare that the state of Montana "holds the atmosphere in trust," and that the state has a duty to protect and preserve the atmosphere, including "establishing and enforcing" greenhouse gas emissions in order to mitigate "human-caused climate change".

The justices held that the case raised too many questions about Montana's contribution to a global problem for a ruling on purely legal questions as sought by the plaintiffs.

To read the Order in this case, [please click](#).

Policy

11. UNFCCC Climate talks in Bonn



Two weeks of talks that were held in Bonn, Germany, ended with countries insisting they had made progress on technical issues but accepting they were still nowhere near agreement in the three key areas of finance, greenhouse gas emission cuts and the future of the Kyoto Protocol.

Christiana Figueres, executive secretary of the UN climate secretariat, defended the UN against charges by non-government groups that the talks were painfully slow and convoluted, saying the economic crisis in Europe and elsewhere was making it harder to make progress. However, the Kyoto Protocol treaty's future remains uncertain, a situation that the Bonn meeting did little to change. It is now generally acknowledged that even if agreement could be reached in time, a post-2012 Protocol is almost certain to be a watered-down version of the current model, missing Canada, Japan and Russia. The two-week negotiations did help pave the way for COP17 later this year in Durban, South Africa.

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

Media, reports and other news

12. Climate Change impacts on Kakadu

The Federal Government has released a report examining the potential impacts of climate change and sea level rise on the South Alligator River system, one of Australia's most valued natural and cultural landscapes in the Kakadu National Park. The report [Kakadu: Vulnerability to climate change impacts](#) uses modelling to assess the risk of saltwater intrusion and extreme rainfall events on low-lying coastal wetlands under climate change scenarios for 2030 and 2070. It discusses adaptation options, potential barriers to adaptation and opportunities to improve future planning, management and policy responses.

Kakadu is one of Australia's valued natural ecosystems and is highly vulnerable to the impacts of climate change. The report shows the potential for increasing intrusion of saltwater which poses a serious risk to Kakadu's freshwater wetland systems, and is likely to impact on the abundance of freshwater flora and fauna. Cultural values likely to be affected include a decrease in the number of culturally significant species and an impact on significant sites. Other impacts include reduced recreational opportunities for local people and tourists, which has the potential to affect the regional economy.

13. Electric car pilot moves forward



ACT electricity supplier ActewAGL has signed a \$60m 10-year deal to power a Canberra 'electric car charging' network with renewable energy. Better Place is working to have one of Australia's first electric car networks set up by the end of this year. CEO Evan Thornley said: "Electric cars are the missing piece of the puzzle that can support renewables and help to de-carbonise the grid". "The cars on our network will provide distributed storage, which is the key missing ingredient particularly for intermittent renewables like wind."

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14. 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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15. 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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