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(Attention: Ariane Wilkinson)

### Re Australian Conservation Foundation re Clean Energy Finance Corporation ("CEFC")

#### Scope of Advice

I am asked to consider the following questions and provide advice:

1. Can the CEFC's activities, including the operation of the funding mechanism of the CEFC, be terminated by executive action?
2. If so, what would the requirements of the executive action be in order for the termination to be lawful?
3. Should the current government provide any direction to the CEFC to cease operations, what would the legal options of the CEFC be?

#### Executive Summary

The CEFC is created under the **Clean Energy Finance Corporation Act 2012** (Commonwealth) ("the CEFC Act"). It is established as a Corporation, given its own statutory functions which include the investment function, and given independent decision making capacity by the authority given to its Board and its CEO. The extent and limitations of the discretion of the responsible or nominated minister(s) to issue directions to the Board of the CEFC turn on the legislation by which the CEFC operates, principally, the CEFC Act. An analysis of the legislation and the intended operation of the CEFC reveals that the CEFC is intended to have both administrative and financial independence.

Administrative law principles clearly dictate that, to be lawful, any exercise of discretion by the responsible ministers should be exercised in good faith for the purposes of the CEFC Act, and not designed to frustrate or prevent the achievement of the purposes of the CEFC Act. A reading of the CEFC Act indicates strongly that, if ministerial direction to the Board were permitted, it would not be in accord with the CEFC Act if it were directed to preventing or impeding the 'proper, efficient and effective performance'<sup>1</sup> of the CEFC's functions.

The financial arrangements for the CEFC's operations reflect the legislative intention that the CEFC operate independently. The responsible ministers have only a supervisory role in the process by

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<sup>1</sup> Section 14(1)(b) CEFC Act

which the appropriations of funds into the Clean Energy Finance Corporation Special Account are made and this role is essentially mechanical rather than policy oriented or strategic. The nominated minister could not lawfully avoid her duty under the CEFC Act to come to an agreement with the CEFC on requests for payments to the Corporation and to the Australian Renewable Energy Agency. Such an action would be susceptible to judicial intervention.

The responsible ministers are authorised to give the board directions about the performance of its investment function but, in giving any direction, the responsible ministers must have regard to the object of the CEFC Act, and any direction which has the purpose or effect of directing the board to make a particular investment or is inconsistent with the CEFC Act, including its objects, is expressly prohibited. A direction to cease activities or cease investments, or to cease payments, would frustrate the legislative purpose of the CEFC Act, would be inconsistent with the CEFC Act and would not be authorised by s 64(1) of the CEFC Act.

The CEFC's activities cannot be terminated by executive action. Although the responsible and nominated minister(s) are given certain administrative roles by the CEFC Act, these are, for the most part, essentially supervisory clerical in nature. A wider discretion and a more strategic role are given when it comes to investment policy. However, this power must be exercised to achieve the objects of the CEFC Act. Termination or prohibition directions would be inimical to the objects of the CEFC Act, not authorised by the CEFC Act and would have no legal effect.

If given some unlawful direction by the responsible ministers (or anyone else) to cease operations or some aspect of its operations, the board would be obliged to ignore that direction.

#### A Short Introduction to Administrative Law Principles

In *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, Mason J. discussed at some length the grounds on which a decision maker (in that case, the *Minister for Aboriginal Affairs*) might have a decision set aside. In particular, His Honour looked at the ground of a failure to take into account a relevant consideration.

His Honour held that such a failure is one instance of an abuse of an administrative discretion which would entitle an affected party to have the decision set aside.<sup>2</sup> The ground is only made out if a decision maker fails to take into account a consideration that she is bound to take into account. In determining whether a ground is made out, one looks to the legislation that bestows the discretion. If the matters which are relevant are not spelled out, expressly, in the legislation, one looks to the subject matter, scope and purpose of the Act to determine what matters are determined by implication as necessary to consider.<sup>3</sup> The same approach is taken to determine what matters are not permitted to be taken into account in exercising a statutory discretion.<sup>4</sup>

It follows that, in considering the extent and limitations of the discretion of the treasurer to issue directions to the Board of the CEFC, one must look at the legislation by which the CEFC operates. That legislation is principally the *Clean Energy Finance Corporation Act 2012* (Commonwealth) ("the CEFC Act").

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<sup>2</sup> For a summary of the sorts of grounds by which the exercise of an administrative discretion may be set aside, see s. 5 *Judicial Review (Administrative Decisions) Act 1977* (Commonwealth)

<sup>3</sup> *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 37-38

<sup>4</sup> *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-41

### The CEFC Act – an Introduction

The long title of the CEFC Act is “an Act to establish [the CEFC] and for related purposes”.

The object of the CEFC Act is uncomplicated. It is “to establish [the CEFC] to facilitate increased flows of finance into the clean energy sector”.<sup>5</sup>

Among the definitions in the Act is that of the term “responsible ministers”. These are defined as the treasurer and the finance minister. “Finance minister” is, itself, defined as “the minister administering the *Commonwealth Authorities and Companies Act 1997* (Commonwealth) (“the CAC Act”). I am not briefed as to the details of the ministerial arrangements put in place by the Governor-General for the new government. However, it is theoretically possible that the treasurer and the finance minister could be the same person.

Most ministerial discretions bestowed by the CEFC Act are bestowed upon the responsible ministers.<sup>6</sup>

### The CEFC Act – the CEFC

It is very noticeable from perusing the CEFC Act that the CEFC is given its own statutory functions and its structure would appear intended to give it a great deal of space in which it is to make its decisions independently.

First, the Act is expressly binding on the Crown.<sup>7</sup>

Second, the CEFC is established as a Corporation (to which the CAC Act applies for matters of accountability, banking, investment and conduct of officers). The CEFC may sue and be sued in its own right and has its own seal which must be acknowledged by the judicial system.<sup>8</sup>

The CEFC is given its own statutory functions which include the investment function and the function of liaising with various bodies including governments, ARENA<sup>9</sup> and the Clean Energy Regulator.<sup>10</sup> The functions are tied to a number of Constitutional functions including the external affairs power and the Climate Change Convention to which Australia is a party.<sup>11</sup> The CEFC has broad powers to perform its functions<sup>12</sup> but does not have the privileges and immunities of the Commonwealth.<sup>13</sup>

### The CEFC Act – the Board and CEO

The independent decision making capacity of the CEFC is also indicated by the authority given to its Board and its CEO.

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<sup>5</sup> Section 3 CEFC Act

<sup>6</sup> Some are bestowed on “the nominated minister”.

<sup>7</sup> Section 5(1) CEFC Act

<sup>8</sup> Section 8 CEFC Act

<sup>9</sup> The Australian Renewable Energy Agency (see s. 4 CEFC Act)

<sup>10</sup> Section 9 CEFC Act

<sup>11</sup> Section 10 CEFC Act

<sup>12</sup> Section 11 CEFC Act

<sup>13</sup> Section 12 CEFC Act

The Board's functions include the deciding of the strategies and policies of the organisation and function of ensuring the proper, efficient and effective performance of the CEFC's functions.<sup>14</sup> This indicates that ministerial discretion is unlikely to be intended to intrude on the policy and strategic functions of the Board. It also indicates strongly that a ministerial direction to the Board, if permitted in general terms, would not be in accord with the CEFC Act if it were directed to preventing or impeding the proper, efficient and effective performance of the CEFC's statutory functions.

The responsible ministers have a number of functions in respect of appointing board members for terms<sup>15</sup> not to exceed five years<sup>16</sup> and for appointing the chair from within the board of the CEFC.<sup>17</sup> The responsible ministers may even terminate board members on any of a number of specified grounds including that the ministers are satisfied that the board member's performance has been unsatisfactory for some time.<sup>18</sup> However, if the ministers formed that opinion on the basis that the sacked board members acted to achieve the statutory functions of the CEFC when the ministers were seeking to frustrate them, such a decision would clearly be set aside as, itself, taking into account a clearly impermissible consideration.

The CEO is to be appointed by the board after consultation with the responsible ministers.<sup>19</sup> Again, any input by the responsible ministers, to be lawful, would have to be provided in good faith for the purposes of the CEFC Act and not designed to frustrate or prevent the achievement of those purposes.

The CEO has responsibility for the day to day operation of the CEFC; has wide powers to achieve what needs to be done to carry out her duties; and is subject to policies and written directions of the board.<sup>20</sup>

#### The CEFC Act – Financial Arrangements

The legislative intention that the CEFC operate independently to achieve the legislative purposes of the CEFC Act is particularly evident in the financial arrangements for its operations. The responsible ministers are given a supervisory role but it involves very little discretion and that discretion must be exercised for the purposes of the CEFC Act.

A Clean Energy Finance Corporation Special Account ("the special account") is established as a special account for the purposes of the *Financial Management and Accountability Act 1997* (Commonwealth) ("the FMA Act").<sup>21</sup> The FMA Act provides that the establishment of a special account and the identification of the purposes of that account by legislation other than the FMA Act have the effect of appropriating monies from the consolidated revenue fund ("the CRF") up to the balance for the time being of the special account.<sup>22</sup> The process of a special account then is intended to free the body having the benefit of the special account from the exigencies of yearly appropriations by Parliament. The CEFC then is not only intended to have administrative independence but also financial independence.

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<sup>14</sup> Section 14 CEFC Act

<sup>15</sup> Section 16 CEFC Act

<sup>16</sup> Section 18 CEFC Act

<sup>17</sup> Section 17 CEFC Act

<sup>18</sup> Paragraph 23(f) CEFC Act

<sup>19</sup> Section 34 CEFC Act

<sup>20</sup> Section 33 CEFC Act

<sup>21</sup> Section 45 CEFC Act

<sup>22</sup> Section 21 FMA Act

The appropriation from the CRF (for which s. 21 FMA Act provides) is achieved on a graduated basis over a number of years. The special account is to be credited with \$2 billion in each of the five years from 2013 to 2017.<sup>23</sup> There is also a provision by which moneys not immediately required by the CEFC may be paid back to the Commonwealth at the behest of the responsible ministers. However, those funds go straight back to the special account and so become again available to the CEFC.<sup>24</sup>

#### The CEFC Act – the Mechanics

As mentioned above, the responsible ministers have a supervisory role in the process by which the appropriations provided for in the CEFC Act and the FMA Act take effect. The role is essentially mechanical rather than policy oriented or strategic.

The purposes of the special account are twofold.<sup>25</sup> The first is to make payments to the CEFC. The second is to make payments to ARENA. In each case, the purpose (of making payments) is subject to authorisation by the nominated minister.<sup>26</sup> The authorisation is pursuant to a specified subsection of the CEFC Act in each case.<sup>27</sup>

The nominated minister's involvement with authorisation of moneys for the CEFC starts with s. 48 CEFC Act. Section 48, essentially, permits the CEFC to make a request in writing for the moneys that are needed by its operations<sup>28</sup> in such a way that the special account retains sufficient moneys to meet the long term and outstanding commitments of the CEFC.<sup>29</sup> The request must be in writing and must be in accord with the agreement under s. 52 CEFC Act.<sup>30</sup>

Section 52 CEFC Act imposes a duty on the CEFC and the nominated minister to come to an agreement concerning four things. These are the form of a request, the person to whom the request should be given, the period of expected obligations to be covered by a request and the CEFC's operating balance or basic level of money that it should normally have in its bank accounts. Clearly, the nominated minister could not lawfully avoid coming to an agreement in order to frustrate the CEFC's operations or the purposes of the CEFC Act. Tactics of that kind would, I would expect, be readily discernible and would be susceptible to judicial intervention.

Once a s. 52 agreement is entered into, the nominated minister's function in terms of a s. 48 request is simply to determine whether the request is in accord with the agreement. That determination is an obligation and, once she is satisfied in the affirmative, the nominated minister must authorise the payment and the Commonwealth must make the payment as soon as possible.<sup>31</sup>

Essentially, the nominated minister's role is similar to an accounts clerk, checking that the invoice is in the right form and payable and then certifying for the payment.

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<sup>23</sup> Section 46 CEFC Act

<sup>24</sup> See s. 54 and paragraph 46(f) CEFC Act

<sup>25</sup> These are the legislative purposes which triggers the appropriation from the CRF pursuant to s. 24 FMA Act.

<sup>26</sup> Section 47 CEFC Act: the nominated minister is one of the two responsible ministers. Section 76 CEFC Act imposes an obligation on the responsible ministers to nominate in writing one of their number to be the nominated minister. A number of sections assign duties and powers to the nominated minister rather than the responsible ministers as a group.

<sup>27</sup> Section 47 CEFC Act

<sup>28</sup> Section 48(1) CEFC Act

<sup>29</sup> Section 48(3) CEFC Act

<sup>30</sup> Paragraph 48(2)(a) and (c)

<sup>31</sup> Section 49 CEFC Act

The role of the minister for the purpose of making payments to ARENA is effectively the same.<sup>32</sup>

The CEFC is not subject to any ministerial supervision in respect of its borrowing.<sup>33</sup>

#### The CEFC Act – Broader Ministerial Discretions

The responsible ministers are given authority to direct the board of the CEFC to take specified action to ensure that all of the CEFC's investments are complying investments.<sup>34</sup> However, such a direction is premised upon the responsible ministers being satisfied that certain existing investments were not complying investments.<sup>35</sup>

If the responsible ministers acted on a wrong legal premise or acted in bad faith in giving such a direction, then it would be liable to be set aside by a court.<sup>36</sup>

The broadest ministerial discretion bestowed upon the responsible ministers by the CEFC Act concerns the investment mandate. The responsible ministers are authorised (in fact, required to do so, on at least one occasion) to give the board, by legislative instrument, directions about the performance of its investment function.<sup>37</sup> The CEFC Act provides an open ended list of subject matter for such directions in the investment mandate.<sup>38</sup> In giving the direction, the responsible ministers must have regard to the object of the CEFC Act<sup>39</sup> and "any other matters the responsible ministers consider relevant".<sup>40</sup>

Any thought that the open ended consideration allowed by s. 64 CEFC Act would permit a direction that the CEFC cease its activities is crushed by s. 65 CEFC Act. Section 65 prohibits any direction pursuant to s. 64 CEFC Act that has the purpose or effect of directing the board to make a particular investment or that is inconsistent with the CEFC Act including the object of the Act.

A direction to cease activities or cease investments or to cease payments would frustrate the legislative purpose of the CEFC Act not only as expressed in s. 3 but as expressed and implied throughout all its provisions. Such a direction would be inconsistent with the CEFC Act and would not be authorised by s. 64(1) of the CEFC Act.

Section 66 of the CEFC Act lays down detailed procedural requirements for a s. 64(1) CEFC Act direction. These include consultation with the board and tabling before Parliament.

No other broad discretion to give directions to the board of the CEFC is contained in the CEFC Act.

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<sup>32</sup> Paragraph 47(b), ss. 50, 51 and 52 CEFC Act

<sup>33</sup> Section 55 CEFC Act

<sup>34</sup> Paragraph 59(4)(b) CEFC Act

<sup>35</sup> Section 59(4) CEFC Act

<sup>36</sup> For examples of ministerial decisions being set aside on the basis of legal misapprehensions by the deciding minister, see *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (the Malaysian Solution case)* [2011] HCA 32 (31 August 2011) and *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.

<sup>37</sup> Section 64 CEFC Act

<sup>38</sup> Section 64(3) CEFC Act

<sup>39</sup> Section 3 CEFC Act: to establish the Clean Energy Finance Corporation to facilitate increased flows of finance into the clean energy sector (see footnote 4, above).

<sup>40</sup> Section 64(2) CEFC Act

## Implications

The CEFC Act is characterised by its clearly stated legislative objectives and the manner in which it deliberately seeks to create the CEFC as a corporation that is independent of executive government both in terms of administrative direction and in terms of financial independence.

Notwithstanding this independence, the CEFC is made accountable and transparent in its actions and use of funds and it is subject to some broad guidance in terms of investment policy. However, it is clearly obliged to follow its legislative mandate and cannot be frustrated in that regard by attempted ministerial interference.

I set out again the questions which I have been asked to address with the answers that flow from the above analysis:

1. Can the CEFC's activities, including the operation of the funding mechanism of the CEFC, be terminated by executive action?

Answer: The CEFC's activities cannot be terminated by executive action. The CEFC Act is marked by the lengths it goes to to provide the CEFC with legislative guidance as to its functions and obligations and to provide the CEFC with independence from the executive, both administratively and financially. Although the responsible ministers are given certain administrative roles by the CEFC Act, these responsibilities are, for the most part, essentially supervisory clerical in nature. The responsible ministers are given a wider discretion and a more strategic role when it comes to investment policy. However, all of these discretionary powers must be exercised to achieve the objects of the CEFC Act. Since a termination or prohibition direction would be inimical to the objects of the Act, it would not be authorised by the CEFC Act and would have no legal effect.

2. If so, what would the requirements of the executive action be in order for the termination to be lawful?

This question does not arise.

3. Should the current government provide any direction to the CEFC to cease operations, what would the legal options of the CEFC be?

The Board has the express function "to ensure the proper, efficient and effective performance of the CEFC's functions" (paragraph 14(1)(b) CEFC Act). If given an unlawful direction by the responsible ministers (or anyone else) to cease operations (or some aspect of its operations), the board would be obliged to ignore that direction. If the existence of the direction (or other actions by the Executive) were such as to interfere with the board's carrying out of its statutory duties, the board, in the name of the CEFC, would have the necessary standing to seek relief in the appropriate forum.

Best regards,



**Stephen Keim**

**Chambers**

**19 September 2013**

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