

## **Comments on the Exposure Draft of the *Carbon Pollution Reduction Bill 2009***

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### **Summary**

The Carbon Pollution Reduction Scheme exposure Draft Bill is an important initiative in addressing address climate change by the Australian federal government as it demonstrates Australia’s commitment to introduce concrete legislative measures for mitigation. We support the adoption of a Carbon Pollution Reduction Scheme (CPRS) and its implementation in general terms as an important commitment by the federal government to its international obligations to reduce greenhouse gas emissions. However, such regulatory measures need careful evaluation to ensure that they most effectively meet the purpose of a regulatory tool designed to achieve meaningful reductions in global emissions. Central features of the proposed CPRS regime appear contrary to such objectives. In particular, we would highlight the inadequacy of the targets set for emissions reductions and the timeframes in which such trajectories operate. Of similar concern is the process of allocation of emissions permits. While we note such general concerns over the adequacy of the proposed legislative framework, the particular focus of this submission is to consider some discrete aspects of the proposed CPRS Bill including:

- the lack of ecologically sustainable development objectives in the Bill;
- the treatment of the units to be traded under the CPRS as ‘personal property’;
- the role of third party enforcement rights; and
- the need for a CPRS to work in an integrated manner with other legislative and regulatory frameworks to address climate change mitigation and impacts.

Further, the factors contributing to global warming are complex, systemic and pervasive. Accordingly, the policy and regulatory responses to achieve mitigation also need to be comprehensive and integrated, and to occur in concert with effective adaptation measures. While we recognise the necessity of implementing an Emissions Trading System, especially with the future option of linking this scheme to a global system of emissions trading, we suggest that a much wider range of legal and planning measures also need to be considered and evaluated to effectively mitigate and adapt to climate change.

The following sections deal with the four areas outlined above in more detail.

## 1. Objects – s 3

The objects in legislation are significant in several ways; first by indicating the general policy dimensions for the enactment of legislation, but more specifically as a guide to courts, administrators, industry, business and the community, in the implementation and operation of any statutory framework. Given this critical role for objects clauses in identifying the purposes of a statute, the omission of specific environmental goals from the CPRS Bill seems incongruous given that the bill is in broad terms designed to address pervasive environmental problems of global warming. In particular, a glaring omission from the list of legislative objects currently included in clause 3 of the Bill is any mention of ecologically sustainable development (ESD) or its underlying principles. There is included an object of 'giv[ing] effect to Australia's obligations under the ... Climate Change Convention and ... the Kyoto Protocol' (s 3(2)). The Climate Change Convention includes, in article 3, a number of 'principles' such as that of sustainable development, the precautionary principle and inter-generational equity. However, this is an unnecessarily indirect way of incorporating sustainability issues into the Bill as international law is not directly enforceable in the Australian legal system.

Ecologically sustainable development sits at the core of all environmental legislation in Australia.<sup>1</sup> Pursuant to the *Inter-governmental Agreement on the Environment 1992* (IGAE) all Australian governments – including the federal government – committed to integrate environmental considerations into all areas of decision-making as a basis for ensuring ESD (clause 3). Climate change was listed in the IGAE (see sch 5) as a particular area of environmental policy, the 'development and implementation' of which was to be 'guided' by key sustainability considerations and principles such as the precautionary principle (s 3.5.1), inter-generational equity (s 3.5.2), the principle of conservation of biodiversity and ecological integrity (s 3.5.3) and the polluter pays principle (s 3.5.4). These principles, as well as the core goal of ESD are reiterated in the *National Strategy for Ecologically Sustainable Development 1992*.

Climate change is the quintessential area of environmental law that requires an ecologically sustainable approach given the deep inter-linkages between environmental and economic considerations in this field. It is therefore, anomalous, to say the least, that ESD and its underlying principles do not form part of the objects of the Bill. This is especially so given the prominent role played by ESD and principles of ESD in the Commonwealth's primary environmental legislation, the *Environment Biodiversity and Conservation Act 1999* (EPBC Act).

As noted, objects in legislation serve a crucially important function in directing administrative activities under the legislation and in providing a basis for statutory interpretation of ambiguous provisions.<sup>2</sup> Indeed, the objects of legislation – and particularly those relating to matters or principles of ESD – have been a significant driver in the judicial development of environmental law to ensure it

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<sup>1</sup> For discussion see Jacqueline Peel, 'Ecologically Sustainable Development: More than Mere Lip Service?' (2008) 12(1) *Australasian Journal of Natural Resources Law and Policy* 1.

<sup>2</sup> See s 15AA, *Acts Interpretation Act 1901* (Cth).

achieves goals of environmental protection and broader sustainability.<sup>3</sup> Specifically in the field of climate change, ESD principles such as the inter-generational equity principle and the precautionary principle have been relied upon by courts in seeking to ensure environmental legislation adequately takes account of climate change impacts.<sup>4</sup>

Given the general importance of ESD to environmental law, and its particular relevance in the area of climate change, the objects of the Bill should be amended to include sustainability considerations. The EPBC Act provides one model of the form such amendments might take. In s 3(1)(b) of the EPBC Act, one of the objects of the Act is declared to be 'to promote ecologically sustainable development'. This is supplemented in s 3A by a list of the principles of ESD (including the precautionary principle and inter-generational equity), which are matters to be taken into account in decision-making under the Act (e.g. s 136).

### **Emission units as property rights**

As foreshadowed in the Green Paper and White Paper, clause 94 of the Draft Bill provides that Australian Emissions Units ('**AEUs**') are personal property. With respect to the designation of AEUs as property for the purpose of emissions trading, the following points should be noted.

#### *(1) What is the basis or foundation of the proposed property right?*

Property rights hold a particular function in western legal systems with very specific legal consequences (such as potential access to compensation for acquisition of property) that may be imported by the use of proprietary language in a statute.<sup>5</sup> Many consequences will only become apparent when the interpretations to be given to any such statutory terms are tested in a litigation context. Thus extreme caution should be exercised before any designation of property is ascribed to the rights associated with a permit to emit greenhouse gas emissions, i.e. an AEU. Potentially, what is created by the use of proprietary language for such AEU entities is the creation of valuable assets arising in the public sector through regulatory intervention and then such assets being transferred to private entities as the holders of AEUs. While it is clear that some incentives are required for trade to operate under any CPRS scheme, the focus should remain upon reductions in greenhouse gases, and any potential for speculative gains should be avoided.

Further, caution should be exercised in adopting the property rights analogy in the proposed CPRS scheme that draws on similar terminology from the land market and natural resource contexts. In such contexts there is a discrete and already valuable resource e.g. land or water. Presumably what is being regulated under a cap-and-trade type system, such as the carbon pollution reduction scheme, is air pollution which is being given a numerical equivalence through the

<sup>3</sup> See Justice Paul L. Stein, 'Are Decision-Makers Too Cautious with the Precautionary Principle?' (2000) 17(6) *Environmental & Planning Law Journal* 3.

<sup>4</sup> See, e.g., *Walker v Minister for Planning* [2007] NSWLEC 741.

<sup>5</sup> See Kelly Casey, 'Water Entitlements: Across the Property Spectrum' (2008) 27 *Australian Energy and Resources Law Journal* 294.

scheme as a unit of emission. In this context, it would seem highly undesirable to designate this highly noxious material that is exchanged or traded as property, with all the legal and political consequences that this terminology entails. On closer inspection what is really being traded is a government dispensation to polluting industries and activities to continue to pollute so long as they are prepared to pay. While Australian environmental law endorses a 'polluter pays principle', we need to be careful in examining other consequences, such as whether polluting activities ought to be rewarded through the ascription of property rights especially as these rights constitute a right 'in rem' at common law that continues indefinitely.

*(2) Property rights are 'strong' legal rights*

Once 'personal property rights are assigned to an entity such as air pollution, (and if courts were to find them equivalent to property in a compensable manner) then attempts by governments to acquire the rights (or even regulate them heavily such as to effectively 'sterilise' the rights) raise the likelihood that compensation will need to be paid according to the 'just terms' acquisition provisions of the Australian Constitution. On its face, clause 94 appears to bring AEU's clearly within this constitutional definition of 'property'.

This requirement for compensation has two main consequences. First, it severely hampers the capacity for governments to manage adaptively due to financial stringencies, and/or the political unwillingness of governments of all persuasions to compulsorily acquire in controversial arenas.

Moreover, provision in the Draft Bill for the relinquishment and surrender of AEU's could be unintentionally complicated by their proprietary character. For example, where AEU's have been issued for free to the holder of a carbon sequestration right for an eligible reforestation project under clause 191, and the reforestation unit limit is reduced under clause 222, it is hard to see how the Authority can require the relinquishment of those AEU's without 'acquiring property' under section 51(xxxi) of the Constitution (albeit property that was given as a gift). Moreover, that the obligation to surrender eligible emissions units in clause 132 is directed to AEU's as property might make it an 'acquisition' under the same constitutional provision, complicating the operation of this key component of the scheme.

A comparable situation is evident in the water sector where reforms in the 1990s introduced a market-based water trading system designed to address water use efficiency and environmental degradation. Institution of property rights in this situation exacerbated existing over-allocation problems by providing value to what were otherwise 'sleeping' entitlements to water. The federal government is now seeking to deal with the 'market failure' of a water trading regime unequal to the task of ensuring both efficiency and environmental outcomes. Further, the Commonwealth has had to provide massive sums in a 'quasi compensation' context to enable 'buy-back' of water rights for environmental purposes. It is imperative that a similar 'market failure' be avoided in the climate change context.

*(3) Property rights are not essential*

It is not necessary to invoke property rights to legislate for, regulate and manage an emissions trading scheme effectively. Resource economics, based primarily on Coase's social cost theorem, suggests that where common pool resources exist, then the way to avoid a 'Tragedy of the Commons' is to institute individual property rights and for an exchange relation to prevail. Empirical research now questions whether individual property does achieve the efficiencies and resolution of conflict over common pool 'resources' that are claimed by the theorem, especially where there are significant externalities and third party effects. Further, caution is required if resource economic theories are adopted without due cognisance of the legal implications of adopting property rights to regulate in cap and trade and similar mechanisms. Most tellingly, to adopt a property rights mechanism is to suggest that rights subsist over resources – but should air pollution be treated as a resource? Accordingly, we suggest that consideration be given to a range of legal models to structure the exchange process. These could include consideration of contractual and administrative dispositions to constitute the legal form that can form the basis of any secure and legally enforceable 'exchange' process.<sup>6</sup> If a more flexible legal model is adopted, the legislation should provide clear directions to courts on the manner in which the rights are to be interpreted – not simply to leave interpretation to a default situation where courts typically tend to revert to common law understandings regarding the designation of rights'.

Further, we would point out that neither the EU emissions trading scheme, nor the recently commenced Regional Greenhouse Gas Initiative (RGGI) in the North-East of the US, have opted to make emission allowances property rights.<sup>7</sup> Both schemes found it unnecessary to create a property right in the entity traded to produce a robust and efficient carbon market. Indeed, linkage between Australia's carbon pollution reduction scheme and other schemes in overseas jurisdictions may be compromised by the creation of a permit so different from that in existing international schemes. Typically, market-based systems require comparability between the units traded.

#### *(4) Assumptions of market-based property regime questioned*

Many of the prevailing assumptions of a market-based property regime are now being questioned. One of the most successful mitigation and adaptation responses to climate change has been that of the world's fourth largest economy – the State of California, US. That success rests on strong regulation based on scientific knowledge; it was not left just to a 'market solution'. Outlining California's response to climate change in its Climate Change Scoping Plan, the California Air Resources Board cited these words from the Economic and Technology Advancement Advisory Committee:

Additional market barriers and co-benefits would not be addressed if a cap and trade system were the only state policy employed to implement AB 32 [California's *Global Warming Solutions Act 2006*]. Complementary policies will be needed to spur innovation, overcome traditional market barriers (e.g., lack of information available to energy consumers, different incentives for landlords and

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<sup>6</sup> D.E. Fisher, 'Rights of Property in Water: Confusion or Clarity' (2004) 21 *Environmental & Planning Law Journal* 200.

<sup>7</sup> Article 3(a), Directive 2003/87/EC; RGGI Model Rules, Definitions, xx-1.2(q).

tenants to conserve energy, different costs of investment financing between individuals, corporations and the state government, etc.) and address distributional impacts from possible higher prices for goods and services in a carbon-constrained world.<sup>8</sup>

We would stress that sole reliance on a market-based property regime, as demonstrated by experience across many common pool resources, is fraught with difficulties. Any scheme needs to operate within a range of regulatory tools designed to address the complex and integrated problems that climate change brings (see further below).]

### **Enforcement and third party rights**

The broad range of enforcement options made available to the Australian Climate Change Regulatory Authority ('**the Authority**') in the Draft Bill is a positive inclusion, and an important step towards the 'best practice approaches to compliance and enforcement' aspired to in the Green Paper.<sup>9</sup> However, there is some cause for concern in that the Draft Bill leaves enforcement in the hands of the Authority and the Government. By removing any scope for enforcement by third parties, the Draft Bill leaves the resource burden of enforcement entirely with the Federal Government, and makes the Scheme vulnerable to emasculation by less environmentally governments in the future. Past experience in environmental law suggests that without effective provision for enforcement (including third party enforcement), such legislation is wont to forget its *raison d'être* of protecting the environment, and impose an expensive system of administration for its own sake.

#### *(1) Enforcing the Obligation to Surrender Eligible Emission Units*

The legal fulcrum of the CPRS is the obligation on liable entities to acquit eligible emissions units ('**EEUs**') proportionate to their emissions. It is that obligation which ties EEUs to the carbon price signal. How effectively this obligation is enforced will determine the environmental efficacy of the entire Scheme.

In the Exposure Draft Bill, that obligation is imposed by clause 132, in concert with clause 125 (emissions number) clause 130 (unit shortfall) clause 133 (penalty for unit shortfall) and clause 142 (make-good number). It is our understanding, based on an analysis of these provisions, that when a liable entity fails to surrender as many EEUs as required by their emissions number, that failure to pay on time incurs:

- an administrative penalty under clause 133; *and*
- a continuing and cumulative obligation to surrender those permits the following financial year (clauses 142, 125).

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<sup>8</sup> California Air Resources Board, *Climate Change Proposed Scoping Plan: a Framework for Change* (2008) 18-19.

<sup>9</sup> California Air Resources Board, *Climate Change Proposed Scoping Plan: a Framework for Change* (2008) 216.

It is worth mentioning that this understanding was not easy to reach. In such an important provision as this, clear and succinct statutory language is desirable. The provisions in the draft exposure bill are convoluted and at times cryptic, making them vulnerable to multiple readings and unexpected interpretations.

That this penalty is imposed as a civil penalty is entirely appropriate. It avoids the cumbersome requirements of a criminal prosecution, and imposes the desired economic incentive (that the liable entity purchase and surrender permits) as efficiently as possible. However, there is a danger that the penalty will be set too low, allowing liable entities to flout their obligation to acquire and surrender permits and bear the penalty as an operating cost.

It is therefore of some concern that the penalty is to be set by regulation. That the penalty be flexible enough to respond to unpredictable market conditions is understandable. However, clause 133 provides no minimum amount for the penalty, nor does it specify criteria or even objectives according to which the penalty should be set. This leaves it open to abuse by future governments seeking to remove the 'teeth' from the scheme.

The only limit imposed by clause 133 is a maximum limit. Yet in our submission, setting this penalty too low has far greater consequences for the viability of the CPRS than setting the penalty too high does. It is crucial that liable entities are deterred from avoiding their obligation to surrender EEU's as a matter of routine cost-benefit analysis. Without an effective administrative penalty, the CPRS risks missing its point, and imposing considerable administrative costs on business for no reason.

If the administrative penalty is to be set by regulation, clause 133 should:

- not stipulate a maximum penalty;
- stipulate a minimum penalty instead; *or, at the very least*
- provide statutory criteria according to which the administrative penalty must be set.

(2) *Provision for Merits and Judicial Review is one-sided*

Clause 346 lists 'reviewable decisions' made by the Authority. According to clause 347, a 'person affected by a reviewable decision' may apply to the Authority to have them reconsider the decision. Clause 350 provides for further review of that decision in the Administrative Appeals Tribunal ('AAT'). That provision has been made for merits review of decisions is laudable. It affords a quicker and cheaper remedy than going to court, and allows the aggrieved party to raise their complaints as to the decision itself, rather than its legal validity.

However, it is concerning that the provision for merits review in the Draft Bill is very one-sided. The list of reviewable decisions in clause 346 makes a decision eligible for review only if the Authority decided in a particular party's favour. For example, 'a decision to refuse to issue a certificate of eligibility for coal-fired electricity generation assistance under clause 180 conspicuously omits a decision to *grant* a certificate of eligibility. By limiting standing for review to a 'person affected' by such a decision, clause 347 achieves the same result.

Carbon-emitting companies are entitled to merits review, but environmental stakeholders are not.

That one-sidedness raises natural justice concerns: business interests will make their case heard in these reviews, but environmental interests will not. By denying environmental interests a fair hearing, the Authority will be exposed to lop-sided accounts of how the CPRS is working as a whole, which could impact adversely on their enforcement philosophy. Moreover, this lop-sided provision for review is likely to skew the nature of the decisions themselves. There is evidence to suggest that where decisions are made subject to merits review, administrators make their decisions with an eye to future disputes. Since merits review under the CPRS is lop-sided, decision-makers in the Authority need only worry about an application from liable entities — a decision adverse to the interest of the environment has no consequences.

In a less conspicuous way, the Exposure Draft Bill makes similarly one-sided provision for judicial review. The nature of key decisions made under the Scheme is likely to be such that public interest environmental litigation will be frustrated by the 'person aggrieved' test for standing. Such a situation would facilitate better representation of the views of liable entities and private interests, than environmental groups and the public interest. Such one-sided provision for review is liable to skew the way decisions are made under the Scheme.

### *(3) The Need for Open Standing to Provide Equal Rights of Review*

The Commonwealth EPBC Act provides an excellent alternative model. Recognising the need to balance public environmental interests with private economic interests, section 487 expands the definition of 'person aggrieved' for the purposes of judicial review to include individuals or organisations with a demonstrated interest in the environment. Another instructive alternative is the New South Wales *Environmental Planning and Assessment Act 1979* (NSW) ('**EPA Act**'), section 123 of which gives standing to 'any person' to bring proceedings to 'remedy or restrain' a breach of its provisions.

Such a provision would ensure that the environment is spoken for in merits review, whether by the Authority itself or in the AAT. Experience suggests that these provisions would not impede administrative efficiency by 'swamping' the Scheme in applications for review. Public environmental groups are typically poorly resourced — at least in comparison to the liable entities that will be able to challenge decisions under the current clause 347. That is the case regarding both judicial and merits review, as the experience of both the EPBC Act and the EPA Act shows.

For the same reasons, a broad and liberal standing provision is warranted for judicial review of decisions made under the Bill. The experience of public interest environmental litigation in this country to date suggests that such a provision can help provide effective law enforcement, particularly where the

relevant enforcement agency is over-worked under-resourced.<sup>10</sup> It has also proven instrumental in the development of important principles of environmental law.<sup>11</sup>

The need for third party enforcement provisions of this kind is a key feature of 'best practice' enforcement mechanisms in environmental law, as distinct from best practice enforcement mechanisms in corporate law and other areas of law. Accordingly, Part 24 of the Bill should:

- make the decisions listed in clause 346 reviewable, regardless of which way the Authority decides;
- expand the 'person aggrieved' requirement of standing for merits and judicial review, along the lines of s 487 of the EPBC Act or s 123 of the EPA Act.

### **Integration with other regulatory tools**

Climate change is quintessentially an 'integrated' environmental problem as it encompasses not only carbon pollution and mitigation efforts, but also energy policy, water management, land management and biodiversity conservation. Clearly a carbon pollution reduction scheme will be a key element of new national climate change laws but it would be unwise to regard the scheme as operating in isolation from other measures. While there is no mention of integrated environmental management in the Draft legislation, the importance of such an approach in responding to complex environmental problems, like climate change, has been recognised in the environmental literature for some time.<sup>12</sup> Consequently, we would draw to attention the crucial need to consider not just the design of a carbon pollution reduction scheme, but how that scheme will interact and coordinate with other aspects of the environmental regulatory framework in the overall task of responding to climate change.

Two significant areas where issues of integration arise are in respect of indirect climate change impacts and coordination with State environmental laws. Indirect climate change impacts refer to the downstream impacts of activities that are not caught by reporting or emissions trading requirements. For instance, if a new coal mine is established it may need to account for emissions produced during the construction and operation of the mine. However, the majority of greenhouse gas emissions associated with the mine crystallise at a later stage when coal from the mine is burned for power generation, whether in an Australian plant or overseas. It would seem incongruous for the carbon pollution reduction scheme

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<sup>10</sup> Neil Gunningham and Darren Sinclair, 'New Generation Environmental Policy: Environmental Management Systems and Regulatory Reform' (1998) 22 *Melbourne University Law Review* 592.

<sup>11</sup> See Brian Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23(5) *Environmental and Planning Law Journal* 337.

<sup>12</sup> See Nicholas Brunton, 'Environmental Regulation: The Challenge Ahead' (1999) 24(3) *Alternative Law Journal* 137; David Farrier, 'Fragmented Law in Fragmented Landscapes: the Slow Evolution of Integrated Natural Resource Management Legislation in NSW' (2002) 19(2) *Environmental And Planning Law Journal* 89; Lakshman Guruswamy, 'The Case for Integrated Pollution Control' (1991) 54 *Law and Contemporary Problems* 41; David Jones, 'The Kyoto Protocol, Carbon Sinks and Integrated Environmental Regulation: An Australian Perspective' (2002) 19(2) *Environmental & Planning Law Journal* 109.

to make oil companies responsible for downstream emissions from the fuel that they produce but yet not to impose the same constraints on coal mines in respect of the downstream impacts of burning coal as a fuel for electricity.

Currently, the principal way in which the indirect climate change impacts of coal mining are addressed is via the environmental assessment and approval provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (C'th). However, indirect impacts of an activity are only assessable under this legislation if they affect a protected 'matter of national environmental significance' such as the Great Barrier Reef. This rather convoluted approach is not ideal.<sup>13</sup> It also raises the broader issue of the need to re-evaluate Commonwealth environmental laws as part of an integrated approach to the management of climate change. The result of such review might be the inclusion of a new assessment trigger in the *Environment Protection and Biodiversity Conservation Act 1999* applicable to projects with substantial direct or indirect greenhouse emissions, or to activities which seek to sequester carbon such as carbon capture and storage projects.<sup>14</sup>

Another area that is absent from the Draft legislation is the issue of interaction with State environmental laws. The CPRS contemplates unitary Commonwealth legislation to implement a carbon pollution reduction scheme, limiting the role of the States and Territories to policy contributions and assistance with coordinated implementation. However, the fact that the scheme is directed to 'carbon pollution' raises important questions about the applicability of, and coordination with, State regulatory regimes. As others have pointed out, greenhouse gases viewed as a *pollutant* readily fit within the existing pollution control laws of States and Territories.<sup>15</sup> These laws apply to individuals and businesses carrying out polluting activities, generally requiring licensing with the capacity to impose conditions on the operation of the activities.

The level of integration in the CPRS Exposure Draft Bill appears limited in its scope in terms of integration of federal and state environmental and planning law regimes. However, one aspect that could provide a model is the consideration given to the integration of the scheme with existing legislation for carbon forestry rights. For example, some of the forestry provisions integrate with State and Territory carbon sequestration legislation.<sup>16</sup> There is also provision for entering eligible reforestation projects on the Torrens register in each State and Territory<sup>17</sup> to be complemented by an administrative system for making those

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<sup>13</sup> For discussion see Lee Godden and Jacqueline Peel, 'The Environment Protection and Biodiversity Conservation Act 1999 (C'th): Dark Sides of Virtue' (2007) 31(1) *Melb. Uni. L. Rev.* 106.

<sup>14</sup> As is currently considered by the Senate's Standing Committee on Environment, communications and the Art into "The operation of the *Environment Protection and Biodiversity Conservation Act 1999*", see First Report (March 2009).

<sup>15</sup> D.E. Fisher, 'The Statutory Relevance of Greenhouse Gas Emissions in Environmental Regulation' (2007) 24 *Environmental & Planning Law Journal* 210.

<sup>16</sup> See, e.g. the definition of 'forestry right' in cl 241 and of 'carbon sequestration right' in cl 240, which includes forestry rights and carbon sequestration rights only insofar as they are deemed by State and Territory law to be an interest in the land.

<sup>17</sup> See (cll 236-7),

registrations.<sup>18</sup> There are also transitional provisions which will outline how forestry rights under the NSW GGAS and the Greenhouse Friendly scheme will be rolled into the CPRS. Similar recognition of the need to mesh aspects of the CPRS regime with broader environmental and planning legislation should be considered. This model for integration could be adopted more broadly.

At the very least, the federal government may need to consider how its legislation will interact with State laws (e.g. exclusion or concurrent operation as is the case for the *Environment Protection and Biodiversity Conservation Act 1999*). Concurrent operation of federal and State laws could allow the latter to deal with some of the planning and operational aspects of polluting activities that are outside the scope of Commonwealth laws. For instance, the carbon pollution reduction scheme will regulate the issue of emissions permits to polluting entities, but State laws could regulate the ongoing operation of facilities, including the mitigation or offset measures they adopt.

With its new laws on climate change, the federal government has an opportunity to put in place a best practice integrated management regime that will respond to the integrated environmental problem that is climate change. While all aspects of integration need not be addressed in the one piece of legislation, laws should be drafted bearing in mind the imperative of coordination with other elements of the regulatory framework. Ultimately, better regulatory coordination to address the long-term challenge of climate change may necessitate new institutional structures that have a capacity for strategic planning and environmental assessment.

While the CPRS draft legislation commentary mentions some other policy instruments, such as expanded Mandatory Renewable Energy Targets (MRET), investment in renewable energy technologies and action on energy efficiency the possible efficacy of alternative instruments is not considered in depth. The CPRS is 'the primary tool for driving reductions in greenhouse gas emissions'<sup>19</sup> and the other instruments are designed to assist only for a limited time. The implementation of the renewable energy target of 20% by 2020 through the *Renewable Energy (Electricity) Amendment Bill 2008* is scheduled for mid 2009. Yet after 2020 the RET will be phased out with a final phase to end in 2030. It is envisaged that by then the CPRS will have matured sufficiently to ensure a high percentage of renewable energy in the energy mix. Similarly, the Climate Change Action Fund will only operate up to 2015, as presumably then the CPRS will be sufficient to ensure a low emission economy.

Thus these measures will run in parallel with the CPRS for some time. Yet, there is little detailed examination of the integration of CPRS with other accompanying policy instruments, that could be closely linked and complement the CPRS; possibly under some form of umbrella legislation and indeed in the draft CPRS itself there is no mention of the way the system could be integrated with other existing and planned climate change policy responses.

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<sup>18</sup> See commentary, and cll [6.147]-[6.150].

<sup>19</sup> Carbon Pollution Reduction Scheme Bill 2009 – Exposure Draft Commentary, 8.

In this context, we would like to draw attention to the new draft bill recently released by Congressional Democrats in the US, the *American Clean Energy and Security Act of 2009*. Even though the draft bill is likely to be revised in the US Senate process, it is notable that the bill provides a framework not only for a cap and trade emissions trading program, but also a comprehensive package of additional initiatives, such as a renewable energy scheme, new transportation emissions standards, energy efficiency programs, carbon capture and storage, as well as an adaptation program.

Likewise, the German Integrated Energy and Climate Program 2007 includes (in addition to the EU emissions trading scheme) a package of Acts, regulations and reports under the guiding principles of energy security, economic efficiency and low environmental impact.<sup>20</sup> In another pertinent example, California pursues its emissions targets through an ambitious draft plan that strongly features renewable energies.<sup>21</sup> Across all these examples, an emissions trading is seen as only one regulatory tool among several measures that are required to reduce green house gas emissions and to ameliorate global warming impacts.

## Conclusion

The CPRS Exposure Draft Bill could benefit from the application of many features that are considered to be routine inclusions in most environmental legislation; primary among such inclusions is the need for ESD as a guiding objective, clear third party enforcement rights and an integrated approach. In this way, the proposed legislation could benefit from the experience gained in environmental regulation over many years. The focus on climate change as a discrete phenomenon has detracted from the situation that global warming has resulted from cumulative, long term impacts and thus requires in response a multifaceted legislative regime. The other major area for consideration is the need to re-examine whether property constitutes the optimal manner for dealing with the entity that is traded within the proposed CPRS scheme. Past experience with similar trading regimes suggests the need to allow for an adaptive management regime.

This submission is made by Professor Lee Godden, Associate Professor Jacqueline Peel, Ms Anne Kallies, and Mr Michael Power, Melbourne Law School, The University of Melbourne on 14 April 2009.

## References:

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<sup>20</sup> See Bundesministerien fuer Wissenschaft und Technologie and fuer Umwelt, Naturschutz und Reaktorsicherheit, *Report on Implementation of the key elements of an integrated energy and climate programme adopted in the closed meeting of the cabinet on 23/24 August 2007 in Meseberg*, available in English at [http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/gesamtbericht\\_iekp\\_en.pdf](http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/gesamtbericht_iekp_en.pdf).

<sup>21</sup> California Air Resources Board, *Climate Change Draft Scoping Plan* (June 2008) <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.pdf>

California Air Resources Board, *Climate Change Proposed Scoping Plan: a Framework for Change* (2008)

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