SUBMISSION ON THE EXPOSURE DRAFT OF THE CARBON POLLUTION REDUCTION SCHEME LEGISLATION

JOINT SUBMISSION ON BEHALF OF:

THE CLIMATE CHANGE LAW AND POLICY INITIATIVE,
FACULTY OF LAW,
UNIVERSITY OF NEW SOUTH WALES
AND

THE CENTRE FOR ENERGY AND ENVIRONMENTAL MARKETS,
UNIVERSITY OF NEW SOUTH WALES,

1. Introduction and scope of this submission.

Thank you for the opportunity to make submissions in relation to the exposure draft of the Carbon Pollution Reduction Scheme ('CPRS') legislation. In this submission we will first comment on some broad structural issues associated with the design of the CPRS and Federal government policy with respect to climate change, before moving on to provide some specific comments on individual sections of the exposure draft of the *Carbon Pollution Reduction Scheme Bill* 2009 in particular.

This submission is a joint submission on behalf of the Climate Change Law and Policy Initiative ('CCLPI') of the Faculty of Law at the University of New South Wales ('UNSW') and the Centre for Energy and Environmental Markets ('CEEM') at UNSW.

The CCLPI is a joint initiative of the International Law and Policy Group of the Law School and the Australian Human Rights Centre which aims to develop and coordinate inter- and cross-disciplinary collaborative research on legal and policy issues related to climate change. For further information see the CCPLI web site www.law.unsw.edu.au/centres/icclp/

CEEM undertakes interdisciplinary research in the design, analysis and performance of energy and environmental markets and their associated policy frameworks. CEEM brings together UNSW researchers from the Australian School of Business, the Faculty of Engineering, the Institute of Environmental Studies, and the Faculty of Arts and Social Sciences. For more information see the CEEM website www.ceem.unsw.edu.au

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Any questions in relation to this submission may be directed to Dr Leary at dleary@unsw.edu.au

We have no objections to this submission being made available to the public.

2. Broad structural issues associated with government policy on climate change.

While we are supportive of the general thrust of the Federal government's policy in relation to climate change, and in particular the desirability of the CPRS as one of a suite of policy tools to address climate change, we have serious reservations about some aspects of this policy including the structure of the CPRS.

We wish to highlight several broad weaknesses in current government policy and the design of the CPRS.

2.1 The science now supports higher longer term emissions reduction targets.

In our opinion the stated government policy goal of a 60 per cent reduction in Australian emissions from 2000 levels by 2050 is now at the bottom end of the scale of national reductions that will likely be required to respond to climate change. There is now considerable scientific uncertainty as to whether a reduction on that scale will be sufficient to avoid serious irreversible effects from climate change. As one of the world' wealthiest and highest per-capita emission countries, any equitable global action will require far greater reduction efforts from Australia.

In that regard we highlight that a number of developed industrialized countries have now adopted long term targets that exceed those proposed for Australia.

For example in the United Kingdom ('UK') the *Climate Change Act 2008* commits the UK to a long term target of 80 per cent below 1990 levels by 2050.[1]

Similarly in December 2008 the European Parliament's Temporary Committee on Climate Change in its Final Report called for an 80 per cent reduction in greenhouse gas emissions by 2050.[2]

In the US President Obama has also committed to an emissions trading regime to bring about an 80 per cent reduction in emissions by 2050.[3]

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1 *Climate Change Act 2008 (UK)*, section 1.

2 European Parliament, 'Greenhouse gases should be cut 80% by 2050, climate committee', at http://www.europarl.europa.eu/news/public/story_page/064-43310-336-12-49-911-20081201STO43286-2008-01-12-2008/default_en.htm

3 See http://www.whitehouse.gov/agenda/energy_and_environment/

2.2 The medium term targets are also below an appropriate level.

Long term targets on their own though will not suffice; they are a necessary component of an effective response to climate change but they should not be viewed as the defining element.

Indeed pausing for just one moment to contemplate how old you will be in 2050 (the authors of this submission will be between 70 and 85 years old in 2050) is useful to give perspective on how far into the future 2050 is. In terms of governance, the 41 years to 2050 represents perhaps 14 Federal election cycles. It is therefore impossible to hold present governments to account.

In our opinion what matters more is the medium term target. The medium term target sends a clear signal as to what needs to be done now (not at some time into the distant future) and it provides a benchmark against which to measure the effectiveness of our response to climate change.

In essence the climate science suggests that out efforts over the coming decade will determine whether we successfully respond to the challenge of climate change, or not.

In that respect the policy position articulated in the *White Paper* and as contemplated by the enactment of the suite of CPRS legislation sets a target that is too low for what must be achieved by 2020 if Australia is to achieve emissions reductions consistent with global action that avoids dangerous climate change.

On this point we draw your attention to the recent series of messages issued by the International Scientific Congress Climate Change: Global Risks, Challenges & Decisions held in Copenhagen in March 2009 which was attended by more than 2,500 scientists from nearly 80 countries. In particular we note that Message 3 from this congress highlights, and we quote:

> "*Weaker targets for 2020 increase the risk of crossing tipping points and make the task of meeting 2050 targets more difficult. Delay in initiating effective mitigation actions increases significantly the long-term social and economic costs of both adaptation and mitigation.*"[4]

The current target commitment for Australia of a 5 per cent reduction in emissions below 2000 levels by 2020, with any larger commitment up to maximum of 15 per cent dependent on an international agreement, in our view falls way below the medium term targets that are necessary to avoid serious impacts of climate change.

It also falls way below medium term targets set by a number of other developed countries. The European Union for example has already committed to cutting emissions to 20% of 1990 levels by 2020 and is prepared to increase that to 30% if other comparable developed countries commit to comparable cuts.

[4] See International Scientific Congress Climate Change: Global Risks, Challenges & Decisions-Key Messages, available from http://climatecongress.ku.dk/newsroom/congress_key_messages/

While the medium term target is very low when compared to other developed countries, one positive aspect of government policy set out in the *White Paper* and Section 15 (4) (d) of the *Carbon Pollution Reduction Scheme Bill* 2009 we note is the announced goal of stabilising atmospheric concentrations of greenhouse gases at 450 ppm CO_2-e or lower. As analysis in the *Garnaut Review* showed there will be significant differences in the impact of climate change on Australia depending on whether atmospheric concentrations of greenhouse gases are stabilized at 450ppm or 550ppm.

The 450 ppm target contained in the *White Paper* is consistent with Garnaut's conclusion that such a target is in Australia and the world's interests.[5] We accordingly support the government's position on the 450 ppm target.

But we stress achieving 450ppm is made much harder by the low medium term target for overall Australian emissions reductions.

2.3 The low proposed medium term emissions targets undermine negotiations towards an effective outcome at Copenhagen.

The Poznań climate change conference was the mid way point on the path from Bali to Copenhagen. Perhaps the most significant outcome from the Poznań meeting was the so called 'Assembly document' which essentially contains in one document all the main positions of parties on many of the key issues up for negotiation in the lead up to the UN Climate Change Conference in Copenhagen in December 2009.

After reviewing the 'Assembly document' we have concluded that there are significant differences between the Federal government's position on Australia's medium term emissions reduction targets and the positions articulated by other significant players in the negotiations.

For example, on the contribution to the achievement of the long-term goal by different groups of countries the Alliance of Small Island States (AOSIS) has proposed that Annex 1 Parties, as a group, would need to reduce their greenhouse gas emissions by more than 40 per cent of 1990 levels by 2020 and more than 95 per cent by 2050.[6] Whereas the European Commission and its member states, together with Madagascar and China have suggested emission reduction commitments for developed countries as a group in the range of 25-40 per cent below 1990 levels by 2020.[7]

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5 See Garnaut, R, *The Garnaut Climate Change Review: Final Report* (2008) p 596.

6 Ad Hoc Working Group on Long-Term Co-operative Action Under the Convention, *Ideas and proposals on paragraph 1 of the Bali Action Plan*, FCCC/AWGLA/2008/16/Rev 1 (15 January 2009) at http://unfccc.int/resource/docs/2008/awglca4/eng/16r01.pdf, , p 23.

7 Ibid.

A similar range expressed as a "[m]id-term goal" is also supported by Brazil.[8] While New Zealand supports an "indicative range of emissions for Annex 1 Parties as a group of 25-40 per cent below 1990 levels by 2020, in the context of a global goal and agreement that has comparable effort from all developed countries and [nationally appropriate mitigation actions] from developing countries that reduces their aggregate emissions in the range of 15-30 per cent below baseline".[9]

While the final commitments of Annex 1 parties as a group and individual national targets may vary it is clear that many countries (including some Annex 1 countries) have an expectation that the final emission reduction targets for 2020 will be considerably higher than the range of 5 to 15 per cent over 2000 levels outlined in the *White paper*.

From the terms of the 'Assembly document' it is quite clear that many countries advocate early and deep emissions reductions by developed countries in particular.

The government has tried to emphasize that when framed in terms of population growth the targets of 5 to 15 per cent reductions seem reasonable against the other targets already mentioned above. However, determining comparability of effort is shaped by a number of different considerations.[10] Against most of the criteria, apart from population growth, Australia's effort does not seem so strong. For example, the European Commission's discussion document *Towards a Comprehensive Climate Change Agreement in Copenhagen*, published in January this year, considers four metrics: GDP per capita; emissions per GDP; early action, and; population growth. For an overall 30% emissions reduction in 2020 for developed nations, Australia's (combined with New Zealand) reductions using these indicators would be 34%, 37%, 48% and 6%; the last being the population growth adjusted reduction. On an evenly weighted average of these four indicators, Australia and New Zealand comes out as -38%.

Another report by EcoFys (2007) *Factors Underpinning Future Action, 2007 Update*, examines a number of other different approaches and also shows Australia's reduction targets are weaker than is suggested by the population-adjusted figure.

Thus in terms of reaching a global agreement it is likely against our interests to be locked into such targets as we approach Copenhagen. Having the option of a 25% reduction on the table, as suggested by Garnaut and others, would facilitate a more ambitious global target in which Australia would more clearly be doing its fair share.

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8 Ibid.

9 Ibid.

10 Some of the factors that have been considered in the large literature on this issue include: (i) GDP per capita, recognizing ability to pay. (ii) Emissions per unit of GDP, recognizing different carbon intensities and potential to reduce emissions. (iii) Cumulative emissions, recognizing past responsibility for the contribution to the total stock of atmospheric CO2. (iv) Population growth, recognizing that increases in population involve increases in emissions. (v) Population level, as part of an end-point target of equalising global per capita emissions allowances. (vi) Baselines, comparing reduction efforts against business-as-usual projections. (vii) Credit for early action, recognizing that some countries have already made efforts to reduce their emissions. (viii) Marginal costs of reduction, as measured by a carbon tax or carbon permit price. (ix) Total costs of reduction.

In particular, it appears inconsistent for the draft legislation to state that a global 450ppm stabilisation would be in Australia's interests, yet not have the option of an Australian 2020 target consistent with achieving this on the table for Copenhagen.

Locking Australia into a maximum medium term target of 15 per cent for 2020 as current policy does is a risky scenario for Australia to adopt at this stage of the international negotiations.

A number of possible outcomes can be foreseen as a direct result of this decision. Firstly the rest of the international community might only be prepared to move towards national targets consistent with the modest effort that Australia is prepared to commit to.

In which case Australia (perhaps not acting alone) will have succeeded in scoring a spectacular 'own goal' so to speak, by undermining the effectiveness of the post 2012 regime and its ability to bring about global reductions in greenhouse gas emissions on the scale science is now telling us are required.

Alternately, if no agreement can be reached by Copenhagen (due in part or in whole to Australia's unwillingness to commit to more significant medium term targets) the future of the climate change regime beyond 2012 would remain unclear; certainly an undesirable alternative.

In another scenario Australia might be forced to accept higher targets in which case it would be forced to make further significant adjustments to the CPRS, impost additional strong reductions on areas outside CPRS coverage or purchase international emission reductions.

We therefore strongly urge the Federal Government to consider more significant targets for emissions reduction in the medium term in the vicinity of 20-30 per cent by 2020.

Note that it is questionable whether broad-based emissions trading is an appropriate policy if only very modest targets are set. Schemes such as the CPRS impose very significant transaction costs on participants. Broad coverage in an ETS only makes sense if targets are stringent, otherwise the transaction costs of coverage are higher than the benefits of inclusion[11].

Proposed change: Strengthen the minimum 5% target and, allow the option of more stringent targets than 15% should an appropriate international agreement be achieved.

2.4 Heavy reliance on the unproven technology of Carbon Capture and Storage and clean coal technology.

While we acknowledge that Australia has significant reasons for placing a heavy reliance on carbon capture and storage and so called clean coal technology, we are concerned that

[11] Betz, R., Sanderson, T. and Ancev, T. (2008) "Optimal Coverage of Installations in a Carbon Emissions Trading Scheme (ETS)," paper presented at the Annual Conference of the Australian Agricultural and Resource Economics Society February 5-8, 2008, Canberra, Australia .

Australia's climate change policy places heavy reliance on what is still a largely unproven technology.

No one yet knows when CCS and related clean coal technology might become commercially viable. We note recent media reports that at a recent NSW Minerals Council Meeting the CSIRO's chief of energy technology David Brockway has explained bluntly "that we are unlikely to see a commercial-scale clean coal plant operating within 15 years - or at least 2024."[12] But some scenarios suggest that it will not be at least until 2055 before CCS plays a meaningful role in mitigating all greenhouse gas emissions from coal powered electricity generation and transport in Australia.[13] Furthermore, Australia has excellent opportunities to deploy baseload gas-fired generation over the next decade to displace some of the current coal-fired generation fleet. The latest Combined Cycle Gas Turbine (CCGT) plants have less than half the emissions intensity of these existing coal plants.

The International Energy Agency scenarios for major global emission reductions by 2050 suggest that energy efficiency might contribute over three times the abatement that CCS in the power sector does, and renewable energy over two times. Indeed, their scenarios see Coal with CCS contributing little more to global electricity production than wind energy alone, and only around 15% more than solar energy alone. A high reliance on CCS to deliver the necessary emissions reductions in the longer-term therefore looks to be high risk.[14]

In our opinion greater energy efficiency, gas generation and significant increases in the use of renewable energy are likely to offer greater potential for savings in greenhouse gas emissions than CCS in the medium term. They therefore represent a policy priority and the appropriateness of the CPRS should be assessed on how well it will drive greater use of these options.

A recent study by the International Energy Agency (IEA) and the Organisation for Economic Co-operation and Development (OECD) submitted to the G8 meeting in Japan in 2008 highlights that buildings account for some 40% of the energy used in OECD countries and suggests that greater energy efficiency in buildings alone could lead to "enormous" reductions in energy consumption and hence greenhouse gas emissions.[15]

If a package of measures (including building codes that promote energy efficiency in new buildings; mandatory energy efficiency standards to promote construction of passive energy houses and zero energy buildings; measures to improve energy efficiency of existing buildings

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12 See "Clean coal remains a faraway dream", Sydney Morning Herald, 6 April 2009, available at http://www.smh.com.au/opinion/clean-coal-remains-a-faraway-dream-20090405-9t6o.html?page=-1

13 Scläpfer, A. 'Hidden biases in Australian energy policy' (2009) 34 *Renewable Energy* 456, at p 457.

14 See the 'Blue' scenario in International Energy Agency, *Energy Technology Perspectives: scenarios & strategies to 2050*, Paris, 2008.

15 International Energy Agency and Organisation for Economic Co-operation and Development, *In support of the G8 Plan of Action: Energy Efficiency Policy Recommendations,* (International Energy Agency, 2008), p 12.

and simple measures such as window glazing) were adopted then it is estimated that this could cut global greenhouse gas emissions by 1.4 Gt per year by 2030.[16] This is more than the CO_2 emissions in 2005 of France, Germany and Belgium combined.[17]

We acknowledge that in 2008 the Federal government took some steps on energy efficiency through measures such as grants and rebates to encourage insulation and installation of solar hot water heaters in homes, and is currently working on measures such as a new nationally consistent mandatory disclosure scheme for commercial office building energy efficiency as part of a national energy efficiency strategy. But in our considered opinion so far Australia's policy initiatives in the area go nowhere near the scale of the measures that have been recommended by the IEA.

Australian government policy on promoting energy efficiency is currently poorly developed. An urgent government priority should therefore be to focus on enhanced energy efficiency as well as creating the legislative and policy framework for displacing coal-fired generation with gas-fired plant, and the roll out of the already existing and proven suite of renewable energy technologies such as wind and solar power and emerging pre-commercial technology such as ocean energy.

In that respect, we strongly urge the Federal government to use part of the auction revenue from sale of permits under the CPRS to support technological developments to address market failure in the innovation stage.

We also suggest the government needs to consider the need for feed-in tariffs for renewable energy which have proved very effective for ensuring the widespread roll out of carbon neutral renewable energy in several countries including Germany.

2.5 Voluntary measures

We note the exposure draft legislation does not adequately facilitate the potential role of voluntary measures by environmentally minded individuals and organisations, as well as possible policy efforts of other Australian jurisdictions in reducing Australian emissions beyond mandated levels. In particular, the White Paper and draft legislation

- do not formally consider the complex motivations of voluntary action within the community or the complementary roles that mandatory and voluntary action can play in achieving the societal transformation required to effectively act on climate change;
- fail to appropriately acknowledge the risk that it's proposed national targets for 2020 and CPRS will limit opportunities for voluntary efforts by individuals, organisations and government to reduce Australian and global emissions, and may even see such parties subsidising emitters;

16 Ibid.

17 Ibid.

- suggests that voluntary action can still support stronger targets by reducing the costs and efforts of meeting mandated targets hence enabling greater government ambition for later targets – an unconvincing argument given the government's record to date on target setting,
- proposes options for voluntary action limited to the voluntary retirement of CPRS permits or accepted international credits that unduly restrict the ability of the public to support real tangible actions to reduce emissions. These proposed options would also force such parties to rely on an unproven and uncertain scheme that cannot be assured of delivering effective abatement[18]

The Federal Government must therefore establish procedures by which appropriate voluntary efforts by individuals and organisations as well as policy efforts by other levels of Government can strengthen Australia's contribution to effective global action.

We suggest one possible way that these efforts outside the CPRS might be recognised would be to set aside an Additional Action Reserve for which units (AAUs linked with AEUs) can be cancelled. The actions that would give rise to cancellation would be based on specific voluntary or policy actions which are part of a positive list.

The potential advantages of such a reserve proposal are that it establishes the opportunity to achieve a more stringent target not only by retiring units, but through voluntary support for tangible emission reductions actions in Australia. This gives room for complementary measures and voluntary action by individuals, the community and other levels of government.

2.6 Emissions Intensive and Trade exposed industries

As noted in the Treasury modeling, the proposed arrangements cannot be justified on the basis of carbon leakage and represent, instead, a significant wealth transfer from the public to a small number of large, politically well connected, industries responsible for significant emissions. Beyond subsidizing large polluters, the proposed arrangements may provide significant windfall profits, particularly to new entrants. At the very least, we would like to see a windfall profit test for those sectors included along the lines of that proposed for strongly affected industries.

2.7 Free permits

The basic principle that should underlie the CPRS is that the polluter pays, with revenue from the CPRS to be used to achieve equity objectives and support economic transition rather than establishing a compensation 'victim' mindset for large emitters.

In our opinion, the European Union experience shows, all free allocation rules will introduce distortions. Similarly allocation based on average industry emissions intensity and output as proposed for the CPRS weakens incentives to reduce output (a relevant abatement option for the economy). Companies which have excess permits become less likely to be active in the market although they may have cheap abatement costs.

[18] See, for example, the *CEEM Submission to the National Offsets Discussion Paper*, March 2008.

Also the potential increase of free allocation of permits over time as currently proposed for the CPRS works against the restructuring process needed for transition to a low emissions economy.

Proposed change: No or low cap on free allocation for EITE industries. For any free allocation we recommend the inclusion of a windfall profit test.

2.8 Unlimited use of CDM and JI credits

These provisions appear inconsistent with principles of Supplementarity within the Kyoto Protocol. This may in turn be interpreted by other countries as a lack of willingness on Australia's part to do its fair share of emissions reductions domestically.

In our view, the CDM will not provide an appropriate tool for addressing climate change in the longer term, as key developing countries will have to move beyond project based emissions reductions from business as usual towards some form of emissions caps. Of more pressing concern, the future of the CDM post-2012 is still unclear.

In our opinion, therefore, the failure to limit use of some Kyoto units introduces a significant design flaw into the CPRS as it puts CPRS outcomes at risk because they will be dependent on uncertain future developments with the CDM and supplementarity within the international regime.

Proposed change: Allow not only for restriction of types of units but also quantity as seen in the European Union ETS.

2.9 Price Cap

The implementation of a price cap introduces a significant risk to the environmental integrity of the scheme. When the cap is reached, new permits are released at the cap price level and thus reduce the emission reductions of the covered sectors of the scheme. Given a national target, this therefore requires the government to impose stronger reductions on the non-covered sectors or purchase overseas credits such as CERs.

The latter involves a budget risk which does not seem to have been accounted for in the planning of the CPRS.

With banking, the existence of a price cap could also make more difficult the implementation of future significant target reductions (even with a concurrent rise in the price cap). In the lead up to the implementation of a stronger target, permits could be bought at the price cap and banked for future use, thus reducing the effectiveness of the scheme.

There is a significant chance that at $40 the price cap could be triggered given that international prices have been as high as $60.

The price cap will also likely have a dampening effect on investment and innovation in low emission technologies (thus reducing the dynamic efficiency of the scheme) by reducing the upside profit potential of such technologies. At present, however there is no provision to limit the downside of the carbon price.

A price cap would also introduce an additional difficulty in attempting to link the CPRS to other emission trading schemes. International bilateral links will enhance efficiency. Therefore the government should proactively seek linking opportunities and include some flexibility of cancelling the fixed charge issuance (price cap) as soon as international links have been established.

Proposed change: Set cap higher or at least enforce a higher increase of level over time or require make-good provisions as with the European ETS. Some consideration is also required of how to provide some level of investment assurance against low carbon prices to reduce risks for parties wishing to invest in low-abatement technologies. Options include use of derivative 'put' options sold by the government or minimum (reserve) auction prices. Allow for early cancelling of price cap when international links are established.

2.10 Reviews of the CPRS

The proposed governance arrangements appear inadequate. The governance framework for Australia's most significant 'designer' market - the Australian National Electricity Market - provides an example of the type of framework required. General policy directions are set by the Ministerial Council on Energy (MCE) under COAG, the Australian Energy Market Commission (AEMC) is responsible for making and maintaining the rules, market enforcement is undertaken by the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER) while market operation is under the direction of the Australian Energy Market Operator (AEMO). There is clear separation of powers and roles.

Furthermore, a highly transparent process permits ongoing rule changes as market conditions and policy directions evolve. Any party may put forward a proposed rule change at any time, triggering a formal process by the AEMC that must deliberate on the basis of whether the rule change supports the ultimate objective of the National Electricity Law.

The proposed administrative and review arrangements in the draft CPRS legislation do not provide a coherent and comprehensive framework of this type.

Proposed change: Develop a review process similar to the National Electricity Market process which sets clear separation of powers and roles and allows any party to put forward proposed rule changes at any time, which trigger a formal amendment process.

3. Comments on specific provisions of the exposure draft of the Carbon Pollution Reduction Scheme Bill 2009.

The following discussion considers a number concerns and suggestions for amendment we have with respect to the provisions of the *Carbon Pollution Reduction Scheme Bill* 2009 ('the Bill').

3.1 Section 94*:*

Section 94 of the Bill provides

"An Australian emissions unit is personal property

> An Australian emissions unit is personal property and, subject to sections 96 and 97, is transmissible by assignment, by will and by devolution by operation of law."

In our opinion there are significant risks to the Commonwealth which may result from recognition of property rights in an Australian emissions unit.

Most significantly at a subsequent date if there were changes to the CPRS and these changes had the effect of either reducing the value of existing issued Australian emissions units, or such change could be regarded in law as constituting an appropriation of property by the Commonwealth, the Commonwealth could potentially be exposed to claims for compensation under section 51 (XXI) of the Commonwealth Constitution.

While the validity of such claims would ultimately be for the courts to determine, from a policy perspective it would be undesirable for the Commonwealth's ability to make future changes to the CPRS to be subject to potential liability to pay compensation.

It would be undesirable for the government to have to factor the possibility of costs associated with compensation into the decision making process with respect to future changes or reform of the CPRS.

We note that other international and Australian experts, including a lawyer from the law firm Baker & McKenzie's Global Environment and Environmental Markets Group share our opinion with respect to risks to government revenue by creating private property rights. In a recent article in the *Australian Resources and Energy Law Journal* quoting from Canadian experts the authors comment:

> *"if carbon units are in fact property rights, the resulting risk of compensation claims for taking those rights away would be a real risk to Governments. In this sense, the certainty that comes with making carbon a property right can be a two edged sword. If adjustments*

to an ineffective trading scheme could lead to an obligation to compensate, Governments might fetter the evolution of the scheme by granting property rights"[19]

We highlight that no other emissions trading regime in the world (including in Europe and New Zealand) recognizes property rights in the same way as that proposed for the Australian CPRS.

With respect to New Zealand we take note of the Minister for Climate Change and Water's recent announcement that the Federal Government and the New Zealand government have agreed to work together towards harmonization of the Australian and New Zealand emissions trading regimes. Given the New Zealand scheme does not recognize emissions units as private property it would be desirable in light of the stated policy goal of harmonization between Australia and New Zealand if the Australian CPRS does not create private property rights with respect to Australian emissions units.

3.2 Section 167(3):

Section 167(3) requires that the regulations on the EITE program must be in place by 1 July 2010. In our opinion this would not give industry adequate time to prepare for the schemes introduction.

We recommend that the regulations on the EITE program be issued at a much earlier date.

3.3 Section 181(2)(ii):

Section 181(2) of the Bill provides:

"(2) For the purposes of subsection (1), a generation complex passes the ***generation asset assistance eligibility test*** if:

(a) each generation unit in the generation complex satisfies at least one of the following conditions:

(i) it was in operation at any time during June 2007;

(ii) it was not in operation at any time during June 2007, but as at the end of June 2007 there was a plan to return the generation unit to operation before the end of 2007;

We would recommend that sections 181(1)(ii) be amended by adding the words:

"and the generation unit was returned to operation before the end of 2007".

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[19] R. Betz and Ashley Stafford, 'The policy issues arising with the linking of international emissions trading schemes" (2008) 27(1) *Australian Resources & Energy Law Journal* 86, at 96. These authors cite the Canadian authority t. Allan and K. Bayliss, Who Owns Carbon? Property Rights Issues in a Market for Green House Gasses (sic), University of British Columbia, July 2005 p 4.

This amendment would ensure that the test would not be satisfied if a "plan" was not actually carried through.

3.4 Division 14:

The Torrens system and crown lands are not the only systems of land title that exist in Australia. However, other systems of title do not have the sophisticated registry systems associated with Torrens and crown lands and are therefore not suitable for the inclusion of notification of carbon sequestration rights. As such we support the idea that such rights should only attach to Torrens system and Crown lands

For the removal of doubt we recommend that the legislation clearly state that carbon sequestration rights will not be possible where other systems of title are involved.

3.5 Capital gains tax implications

The Bill in its current form does not promote certainty in relation to the capital gains treatment of Registered Emissions Units.

The definition provided to amend the *A New Tax System (Goods & Services Tax) Act 1999* and the definition of a Capital Gains Tax ('CGT') asset as provided in s108-5 of the *Income Tax Assessment Act 1997* gives rise to the conclusion that the registered emissions unit is a CGT asset. However, there is a substantial line of authority handed down by the High Court from which it is arguable that the registered emissions unit will not possess sufficient characteristics to categorise it as being of a capital nature.

The potentially inappropriate conclusion that the registered emission unit is a CGT asset is then supported by the introduction of the CGT Event K1 which deals with only incoming international transfer of emissions units.

The Bill is silent in relation to the CGT event in relation to acquisition, transfer or disposal of the registered emissions unit. However, it is acknowledged that CGT Event A1 is sufficiently broad enough to address this deficiency. Given the *sui generis* nature of the Registered Emissions Unit, it would have been appropriate to introduce a distinct CGT Event dealing with these transactions or, alternatively, specifically exclude the registered emissions unit from the definition of a CGT Asset.

To avoid the inevitable uncertainty, it would be preferable that the Bill amended s108-5 to specifically exclude the Registered Emissions Unit from the definition of a CGT asset.

3.6 Transparency of information: Sections 276 and 277

The Bill is not specific on the extent to which information will be publicly available. For example, in Section 277 it is not clear if the unit shortfalls will be published for each liable entity separately or as an aggregate figure.

In addition, specific information on which information is published according to provisions in Kyoto rules is left for future regulations (section 276).

This makes it difficult to assess whether the transparency of the scheme is sufficient and in line with Kyoto rules.

We urge maximum transparency to ensure the integrity of the CPRS.

END OF SUBMISSSION.