MELBOURNE
Orica Limited
ABN 24 004 145 868
1 Nicholson Street East Melbourne VIC 3002 Australia
T +61 3 9665 7111 F +61 3 9665 7937

2 March 2023

Senator Karen Grogan
Chair
Senate Standing Environment and Communications Legislation Committee
Parliament House
Canberra ACT 2600

Submitted via email: ec.sen@aph.gov.au

Dear Chair,

RE: Orica's Supplementary Submission to the Committee's inquiry into the *Safeguard Mechanism (Crediting) Amendment Bill 2022*

Thank you for the opportunity of giving evidence to the Committee on Monday 27 February. We appreciated the opportunity of explaining to the Committee how we are uniquely impacted by the proposed changes to deemed surrender, which will be given effect by the bill before the Committee, together with changes in the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Reforms) Rule 2023 (*which we note Senator Hanson-Young has tabled in its current Exposure Draft form).

The purpose of this supplementary submission is to address some of the information that was made public during the testimony given by officials from the Department of Climate Change, Energy, the Environment and Water (DCCEEW or the Department) during the hearing conducted on Tuesday 28 February 2023. This information is important to the parliament's understanding of what it is being asked to do and the hearings have been instructive for illuminating certain facts that were not previously known and which now provide for a more considered assessment of the legislation by the parliament. For this we thank the Committee.

The bill before the Committee proposes to change the current legislated arrangements (in the *National Greenhouse and Energy Reporting Act 2007*) on deemed surrender; amending this provision so it is grandfathered from 1 July 2023 for a period of two years, to 30 June 2025 and then removed altogether. During the testimony of **DCCEEW, representatives confirmed that while there are currently six projects benefitting from deemed surrender** and that continue into the 2023-24 and 2024-25 financial years, **Orica's two projects are the only ones that have contract delivery periods that go past 30 June 2025**. (Both our contracts go through to 2029.) As such, **DCCEEW's evidence confirms the parliament is being asked to amend existing legislation so that it removes the deemed surrender benefit for just one company, being Orica. This is both punitive and perverse.**

We also learned in the same testimony, that **119.6 million ACCUs are contracted to be sold to the Commonwealth**, with the bulk of these being sold under 'fixed delivery contracts', and **with 24.2 million** of the 119.6 million ACCUs **being scheduled under 'optional delivery contracts**'.

We can **confirm** to the Committee **that Orica's two contracted projects[1] are optional delivery contracts** – meaning we have secured the right to sell our ACCUs to the Commonwealth but can also choose instead to sell those ACCUs on the secondary market. The deemed surrender provision applies only to those ACCUs generated from an Emissions Reduction Fund (ERF) project undertaken at a safeguard facility and sold under a carbon abatement contract to the Commonwealth. We can confirm it was always our intention to exercise our right to sell the majority of our ACCUs under our contract, to the Commonwealth – because deemed surrender means we can have the dual benefit of generating income from the sale of those ACCUs and also use the emissions reduction attached to each of those same ACCUs, to meet our safeguard obligations and our corporate targets (Appendix A in our original submission made this clear). It should be noted that **under an 'optional delivery contract', if Orica elects to exercise that contractual right to sell and deliver ACCUs, the Commonwealth is obligated to honour the contract and to purchase and accept delivery of those ACCUs**. We note that the **testimony given by DCCEEW** did make reference to "optional contract" but **did not make clear the obligation of the Commonwealth.**

In the same evidence, **DCCEEW testified that in respect of the optional delivery contracts, "there's no question of a forced breakage**"[2]. **This is misleading on two fronts**. **Firstly**, as described in the previous paragraph, **if Orica exercises its contractual right to sell its ACCUs to the Commonwealth, then the Commonwealth is obligated to purchase them**. **Secondly**, **unlike the optional delivery contract which is being used for the next ERF auction** (in March 2023) **and which includes new provisions** which effectively give the Commonwealth the right to suspend the seller's right to exercise its option if there are changes to the Legislative Rules which affect certain eligible offset projects, **our Carbon Abatement Contracts with the Commonwealth do not have any equivalent 'change of law' provision and therefore delivered ACCUs must be accepted**. **This recent change for the next ERF auction reinforces the fact that the Department is clearly conscious** that the changes contemplated by the safeguard mechanism reforms may result in scenarios where **the Commonwealth might not be able to purchase ACCUs from particular projects and therefore needs a mechanism to "break" an optional contract** (through the exercise of suspension and termination).

The Department's rationale for selecting a two year grandfathering timeframe for deemed surrender has never been clear to us – until now. We learnt from the Department's testimony that **the government is intending to hold the 119.6 million ACCUs contracted to be sold to the Commonwealth in reserve, in case the cost containment measure is needed by safeguard facilities**. **This includes the 24.2 million ACCUs** being scheduled **under 'optional delivery contracts'.** We would draw the Committee's attention to this extract from page 57 of the proof Hansard for 28 February:

[1] one for the delivery of ACCUs generated from our onsite decarbonisation of our three ammonium nitrate plants at Kooragang Island near Newcastle and the second for the delivery of ACCUs from our decarbonisation of our ammonium nitrate plants at Yarwun near Gladstone..

[2] Page 58 of the proof Hansard of proceedings for the hearing held Tuesday 28 February 2023 by the Environment and Communications Legislation Committee's inquiry into the Safeguard Mechanism (Crediting) Amendment Bill 2022.

> **Senator HANSON-YOUNG:** So you're saying the total of 119.6 million ACCUs currently contracted will be used and made available to the entities under the safeguard mechanism?
>
> **Ms Johnson:** This goes to the line of discussion from earlier. We do anticipate that they will feed into the cost containment measure. It is an aspect of the policy that we'll look very closely at. We do have the 2026-27 review. It's something that we will monitor very closely and, as Ms Evans said, particularly focus on in terms of that review, following two years of operation and the accumulation from 12 January.
>
> **Ms Evans:** I just want to make sure we are making one point clear. We would only use these ACCUs if needed. They won't be sold to the safeguard facilities unless we get to the point where the cost containment mechanism is actually needed. At this stage, we're not really anticipating that it will in fact be needed. The government has had these contracts in place and growing since 2015. In the past, all of those ACCUs would simply have been held by the government and then retired as a contribution towards our emissions reduction goals overall. That's the amount that we're saying, as a part of the design of the safeguard, there's a new ability to use as a cost containment mechanism. But there are a lot of other abatement opportunities that are able to be generated through the methods that can create additional ACCUs that can also be used by safeguard facilities.

When Senator Hanson-Young subsequently asked the Department if the intention was to also hold and potentially sell ACCUs with deemed surrender, this was the exchange:

> **Senator HANSON-YOUNG:** Could I ask Ms Johnson: is the government going to be able to sell the ACCUs that it's acquired under the deemed surrender provisions for $75?
>
> **Ms Johnson:** That is a piece of detail that's yet to be determined. As we heard before, there are currently six projects that will continue into the next two financial years, four of which total just under 400,000, and then the two we spoke about earlier are in the order of four million tonnes. That's why the government is proposing only two more years of grandfathering deemed surrender arrangements, to ensure that those ACCUs are not used twice beyond that two-year period. That is an important part of our design. We have heard feedback from different stakeholders about the benefits and costs of full grandfathering and not, but really, that's been part of that consideration of providing firms sufficient time to re-establish their arrangements but to ensure that we're not looking to use those ACCUs twice.

Orica's two contracts in fact represent an order of nearly 4.7m ACCUs (not the four million referenced above) – **which represents approximately 4% of the market for contracted ACCUs through to 2030, and is therefore not insignificant**. The reference above to ensuring those "ACCUs are not used twice beyond that two-year period" is interesting and we suggest needs to be examined further. Deemed surrender allows the entity who generated those ACCUs (only from an ERF project at a safeguard facility) to retain the associated emissions reductions to meet their safeguard obligations (only when sold under contract to the Commonwealth). **If ACCUs with deemed surrender were to be on-sold by the Commonwealth that would have constituted the emissions reductions being counted twice**. However, on 11 January 2023 a new amendment to existing regulation came into force (the *Carbon Credits (Carbon Farming Initiative) Amendment (No. 1) Rules 2023*), and its significance is only now apparent to Orica. **Orica had understood that the ACCUs it sold to the Commonwealth under the deemed surrender provision, would be retired. Orica's understanding was that retiring these particular ACCUs would ensure the emissions were not counted twice.** This was in fact the situation, as per the version of the rule, pre-amendment, which read at 11A(2) as follows (highlighted):

> 11A Australian carbon credit units purchased by the Commonwealth under carbon abatement contracts
>
> (1) For paragraph 20H(1)(a) of the Act, Australian carbon credit units purchased by the Commonwealth under a carbon abatement contract must be transferred to the Commonwealth registry account designated as the Commonwealth Emissions Reduction Fund Delivery Account.

> Note: Australian carbon credits units cannot be transferred to the Commonwealth Emissions Reduction Fund Delivery Account from another Commonwealth registry account that is used for the purposes of delivering or cancelling Australian carbon credit units.
>
> (2) For paragraph 20H(1)(c) of the Act, Australian carbon credit units transferred to the Commonwealth Emissions Reduction Fund Delivery Account must be cancelled as soon as practicable after the units are transferred to the account.

However, in the current version of the rule, which came into effect 12 January 2023, section 11A(2) has been omitted, with the section now reading as follows:

> 11A Australian carbon credit units purchased by the Commonwealth under carbon abatement contracts
>
> For paragraph 20H(1)(a) of the Act, Australian carbon credit units purchased by the Commonwealth under a carbon abatement contract must be transferred to the Commonwealth registry account designated as the Commonwealth Emissions Reduction Fund Delivery Account.
>
> *Note: Australian carbon credit units cannot be transferred to the Commonwealth Emissions Reduction Fund Delivery Account from another Commonwealth registry account that is used for the purposes of delivering or cancelling Australian carbon credit units*

This change was intended to remove pre-existing limitations on the Government being able to operate the proposed cost containment mechanism and which would make government-held ACCUs available at $75/tCO2-e in 2023-24, increasing with CPI plus 2 percent. However, in order to avoid risks that the emission reductions associated with ACCUs delivered through deemed surrender are effectively used by two safeguard facilities, it is clear the government wants to now remove the deemed surrender provisions and avoid the need for it to have to cancel the ACCUs that may be delivered under CACs with safeguard facilities to mitigate this risk. **In removing the requirement to cancel the delivered ACCUs, the government in fact creates a potential double-counting risk, even outside those Safeguard facilities utilising deemed surrender, as it is possible that ACCUs created and delivered through CACs may also be used towards other voluntary emissions reduction commitments.**

We note that this change, which took effect on 12 January 2023 was announced one day *after* the Government issued its Position Paper on Safeguard Mechanism Reform on 10 January 2023 and several days *before* the Government released the Exposure Draft of the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Reforms) Rule 2023.* **We observe that due process and transparency would have been better served if the *Carbon Credits (Carbon Farming Initiative) Amendment (No. 1) Rules 2023* had been released in its full form as an Exposure Draft in January this year along with the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Reforms) Rule 2023 and the Carbon Credits (Carbon Farming Initiative) Amendment (No. 2) Rules 2023,* given their dual use in bringing about the change the Government is seeking to make on the future used of deemed surrender and the cost containment mechanism**.

While Orica's contracted price for ACCUs sold to the Commonwealth are confidential, we can confirm that the price is in the range of $12-$17 per ACCU – a fact that was stated by the Department in the recent Senate Estimates hearing on 13 February 2023. **If the ACCUs Orica were to sell to the Government for between $12-17 were then on-sold by the Government for $75 or more, this would represent a very significant windfall for the Commonwealth. The removal of deemed surrender prevents Orica from claiming an emissions reduction that we have created, through real-on site decarbonisation, and forces us to "offset" the emissions**

of another Safeguard facility who is not demonstrating actual on-site abatement. Presumably the Government is less concerned about the potential for double-use of emissions for those ACCUs with deemed surrender which the Commonwealth purchases *before* 30 June 2025.

Finally, we note that in the recent Senate Estimates conducted by this Committee on 13 February, **the Department attested that the changes proposed for deemed surrender were "prospective" and not "retrospective". Orica does not agree** with this and notes that the Guidelines relating to "Principle h: Personal rights and liberties" upon which the Senate Standing Committee for the Scrutiny of Delegated Legislation rely, state this:

> **Retrospective commencement or effect**
>
> The common law has long recognised the right to protection against retrospective laws. Such laws undermine legal clarity and certainty. Retrospectivity will arise where an instrument commences retrospectively or commences prospectively but has a retrospective effect. For example, an

We note that the action the Department is recommending the Government to take in respect of deemed surrender, meets the second definition. As such, **we suspect the Senate Standing Committee for the Scrutiny of Delegated Legislation would have grounds to consider recommending disallowance**.

In summary, Orica urges the Committee to consider the Government's request for the parliament to remove deemed surrender, in reference to these facts, many of which have only become clear in the two days of hearings conducted by the Committee.

- **Orica is doing real decarbonisation on site**; reducing its scope 1 industrial emissions on site using tertiary abatement technology that produces real-time quantifiable data on reductions and which early readings show is more than 99% effective. **The dual benefit legitimately provided for by deemed surrender**, whereby we can forgo higher ACCU prices on the secondary market in exchange for the certainty of a fixed price over seven years plus the ability to retain the associated emissions reductions to use to meet our Safeguard compliance and our corporate targets, **was fundamental to providing investment confidence**. **We are now being penalised for taking the investment signal which the deemed surrender provision was intended to give**. We have in effect been given a "go/stop" message.
- **The parliament is being asked to amend legislation to retrospectively remove a legislated benefit for just one company, being Orica. This is perverse and punitive**.
- The Department's assertion that changing the rules does not amount to a breach of contract is a misrepresentation of the facts – noting the conditions of Orica's 'optional delivery contract' are such, that **if Orica elects to exercise its contractual right to sell its ACCUs to the Commonwealth, the Commonwealth is obligated to purchase them**.
- The Department's testimony is that **the Government is intending to hold the 119.6 million ACCUs contracted to be sold to the Commonwealth in reserve, in case the cost containment measure is needed**. This potentially includes the nearly 5 million ACCUs which Orica's two projects combined, are scheduled to deliver the Commonwealth between 2024 and 2029.
- **The Government's recent registration** (11 January 2023) **of the *Carbon Credits (Carbon Farming Initiative) Amendment (No. 1) Rules 2023***, and which came into effect on 12 January 2023, **makes it possible for the Government to on-sell ACCUs it has purchased through contracts, instead of being forced to retire them as was the case prior to 11 January 2023**. **This creates the ability for the Commonwealth to sell ACCUs at a much higher price than their contracted purchase price** of between $12-17/ACCU **and make a sizable gain, as well as possibly introducing a significant double-counting risk both within and outside the Safeguard Mechanism facilities**.

- It appears the Government's motivation for removing deemed surrender, is so that it can utilise those ACCUs in the cost containment measure. **Orica's two contracts cover the optional delivery of over 4.7 million ACCUs – with the bulk of these being scheduled for delivery after 30 June 2025 until end-October 2029**. (The delivery schedule for Orica's two Carbon Abatement Contracts is attached.)
- **It would appear the parliament is being asked to help the Government secure the optionality of having Orica's ACCUs, and aiding the circumvention and retrospective removal of Orica's contractual rights and access to legislated benefits of deemed surrender**.

We urge the Committee to consider recommending that the Government withdraw this aspect of the Bill – which is punitive, targeted and without merit. We would also urge the Committee to consider the suggested wording for a possible amendment, which we tabled at the conclusion of our evidence. This amendment would provide another means for preventing the course of action the Government is currently being advised to take by the Department in respect to deemed surrender.

Yours sincerely,

Paul Evans
Global Vice President Corporate Affairs

Attachment A – Orica's delivery schedule for ACCUs to the Commonwealth.

ATTACHMENT A

Orica's delivery schedule for ACCUs to the Commonwealth

Orica Yarwun Nitrates Decarbonisation Project **Orica Kooragang Island Decarbonisation Project**

Contract type (i.e fixed delivery or option)	Option with a deferred delivery period		Option with a deferred delivery period	
Delivery Schedule	Scheduled delivery date	ACCUs to be delivered	Scheduled delivery ate	ACCU's to be delivers
	13 May 2025	263,384	31/03/2024	473,198
	13 May 2026	263,365	31/03/2025	480,327
	13 May 2027	263,528	31/03/2026	480,327
	13 May 2028	263,504	31/03/2027	495,092
	1 May 2029	256,333	31/03/2028	481,689
			31 March 2029	481,689
			31 October 2029	48,0328
	Total over life of the contract	1,317,114	*Total over life of the contract*	3,372,650