Our Ref: ALP
Your Ref:

PiperAlderman

14 April 2009

By email: climate.sen@aph.gov.au

The Committee Secretary
Senate Select Committee on Climate Policy
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir

SUBMISSION TO THE SENATE SELECT COMMITTEE ON CLIMATE POLICY

1. This submission is made by Andrew Price, partner at Piper Alderman. Piper Alderman is a national commercial law firm, with a significant resources and energy practice.

2. On 11 March 2009, the Senate established the Select Committee on Climate Policy to inquire into policies relating to climate change.

3. This submission refers to terms of reference 1(f) ("any related matter") and notes from the outset that an expedited assessment and approval process for major resource projects is fundamental to the realisation of cost-effective emission reductions.

4. The increased costs faced by major resource projects as a result of current development/planning approval regulatory regimes implies that emissions abatement will not be achieved at the lowest possible cost, and may represent a non-price barrier to the effective implementation of the proposed Carbon Pollution Reduction Scheme (CPRS).

5. It is thus crucial that the development/planning approval processes for major resource projects promotes efficiency and expediency whilst providing environmental safeguards; the approvals generated must be bankable to ensure investment stability and certainty, and desirably should be co-ordinated and controlled by one, rather than many, relevant consent authorities. The National Partnership Agreement has identified the attainment of a consistent and efficient system of environmental assessment and approval as a priority area for deregulation.[1]

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[1] Council of Australian Governments, "National Partnership Agreement to Deliver a Seamless National Economy", January, 2009, Implementation Plan – Attachment A.

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6. I submit that to achieve such aspirations, the various processes administered by the three levels of government need to be integrated and centralised. This could be achieved by a legislative amendment to Part 3 of the *Environmental Protection and Biodiversity Conservation Act* 1999 (EPBC), which would be complementary to the CPRS.

A. The Current Regulatory Regime

7. At the Commonwealth level the EPBC aims to regulate all environmentally significant "actions". Such actions comprise projects and developments, that could adversely and significantly impact on those matters of national environmental significance that are listed under Part 3 of the EPBC (climate change and greenhouse gas emissions are presently not listed).

8. All listed actions are prohibited under Part 3 unless (1) their impacts have been assessed under either Part 8 of the EPBC or by relevant State or Territory legislation (where there is a bilateral agreement between the Commonwealth and the respective State or Territory), and (2) approval has been granted by the Commonwealth Minister under Part 9 of the EPBC. In this regard:

   (a) An "action", although being regulated under the EPBC, will also still need to be approved under all applicable State laws.

   (b) In the absence of a bilateral agreement between the Commonwealth and the respective State or Territory, the assessment and/or approval process will be duplicated. This may result in increased costs and delays to projects, with a deterrent effect on investment.

   (c) Such duplication may be reduced by the Commonwealth entering into bilateral agreements with the States and Territories. This may allow the Commonwealth to delegate the task of performing environmental assessments and/or granting environmental approvals under the EPBC to the relevant State or Territory.

9. Currently, at State and Territory levels, there are many similarities in planning legislation, but there are significant divergences between each respective approval regime. These include, amongst others, divergences in:

   (a) procedures, including the levels of assessment and public consultation required;

   (b) timing of approval processes and certainty of approvals when granted;

   (c) involvement of specific agencies in consultation for approvals;

   (d) reliance on Government co-ordination and assistance, such as State Agreements (which have been frequently used in Western Australia and Queensland); and

(e) residual powers in local Government to control certain types of development (in addition to those controlled at the State or Territory level).

10. These divergences lead to considerable complexity and uncertainty. For example, under the WA regime a number of discrete approvals are required to be obtained under separate legislation for different elements of a major project. The Queensland regime is also very complicated despite attempts to simplify it. The New South Wales regime is currently under major review after several piecemeal attempts at reform have not fully succeeded.

11. The variability of these regulatory regimes hinders investor confidence in major resource projects. Not only do these issues lead to unnecessary costs and delays but they also encourage forum-shopping. The decision of Inpex Corporation to pipe its offshore gas resources to the Northern Territory instead of a nearer location in Western Australia is a recent instance. Thus, there is a concern that the development of resources in some States and Territories may not be realised.

12. The degree of complexity has been heightened by some State courts proactively interpreting their respective planning instruments in line with the principles of "ecologically sustainable development" in considering the validity of development/planning approvals.[2] The lack of a conclusive decision by the High Court of Australia on the matter[3] has deprived consent authorities of a clear set of guidelines to assess the implications of climate change and greenhouse gas emissions on development/planning applications.

B. Australia's Obligations under the United Nations Framework Convention On Climate Change

13. In ratifying the United Nations Framework Convention on Climate Change (UNFCCC) in December 1992, Australia became legally bound under international law to fulfil its commitments therein:

(a) Under Article 4(1)(f) of the UNFCCC, Australia is obliged to "Take climate change considerations into account, to the extent feasible, in...relevant...environmental policies and actions".

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[2] *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720 (27 November 2006); *Walker v Minister for Planning* [2007] NSWLEC 741 (27 November 2007); *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200; *Northscape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57; and *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545.

[3] The High Court of Australia recently refused an application for special leave to appeal the decision of the New South Wales Court of Appeal In *Minister for Planning v Walker* [2008] NSWCA 224 (24 September 2008), which reversed the finding of the Land & Environment Court in *Walker v Minister for Planning* [2007] that ESD was an implied mandatory consideration for the Minister to consider in approving a concept plan under Part 3A of the *Environmental Planning and Assessment Act* 1979 (NSW).

(b) Under Article 4(2)(a) of the UNFCCC, Australia has committed to "[adopting] national policies and [taking] corresponding measures on the mitigation of climate change, by limiting its anthropogenic emission of greenhouse gases...".

14. The CPRS proposes to uphold these commitments using a cap-and-trade approach. However, as recognised by both the Green Paper and the White Paper to the CPRS, complementary measures, in accordance with the Council of Australian Governments (COAG) principles identified in Policy Position 19.1 of the White Paper, are required to circumvent issues such as those illustrated in section A, that are not adequately addressed by the CPRS.

C. Proposal to Amend Part 3 of the EPBC – A Complementary Measure

15. It is important that measures be pursued to integrate the assessment and approval processes for major resource projects in Australia.

16. This could be achieved by centralising the process via a legislative amendment to Part 3 of the EPBC. This amendment should provide that any proposed '"action" relating to a major resource project' must be assessed and approved by the Commonwealth Minister under the EPBC. To avoid multiple regulation, and establish a one-stop-shop concept, this amendment must, pursuant to section 10 of the EPBC, express that the Commonwealth Minister's power is exclusive and that State and Territory laws do not operate concurrently.

17. The amendment could define an '"action" relating to a major resource project' as a proposed "action" that will emit a quantified amount of greenhouse gas into the atmosphere (scope 1 and 2 emissions) above a certain threshold. Such a measure, enacted in reliance of the external affairs power under section 51(xxix) of the Constitution, would be complementary to the CPRS and would implement Australia's commitments under the UNFCCC, in particular Article 4(1)(f).

18. Such an amendment should not impose a dual regulatory burden on major resource projects (i.e. regulation by the CPRS and EPBC). It should, rather, provide a method of identifying projects that are caught by the CPRS and ensure that they are dealt with by a uniform and consistent approval regime.

19. To further streamline the approval process and promote efficiency and expediency, the Commonwealth Minister's exclusive power could be delegated to the States and Territories through bilateral agreements under section 45 of the EPBC. It may be desirable to frame an amendment to the EPBC so that the States and Territories, in exercising powers on behalf of the Commonwealth, may apply *only* Commonwealth laws. This would facilitate an Australia-wide integration of agencies and resources, and support a single approval process in which the Commonwealth sets the decision-making regulatory framework, which the States and Territories are able to use in assessing and approving development/planning applications in relation to major resource projects.

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20. In accordance with the CPRS policy decisions, the above suggested amendment would be complementary to the CPRS as it would:

(a) promote efficiency, effectiveness, and administrative simplicity (Policy Position 19.1(2));

(b) be targeted at sectors of the economy where price signals may not be as significant a driver of decision-making (Policy Position 19.1(2)(b)); and

(c) be implemented by the level of government that is best able to deliver the measure (Policy Position 19.1(5)).

I am willing to appear before the Select Committee to answer any questions that may arise from this submission.

Yours faithfully
Piper Alderman

Andrew Price
Partner