

Submission to the Senate Select Committee Inquiry on Climate Policy

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Summary

This submission focuses on the policy issues raised by the federal government's proposed climate change mitigation measure - the Carbon Pollution Reduction Scheme; (emissions trading scheme). We argue that the government's response to climate change should be based on a wider range of legal and regulatory mechanisms than the carbon pollution reduction scheme alone. In addition, we emphasize that the proposed carbon pollution reduction scheme currently lacks integration with existing laws and policies. Such integration will be required to address the pervasive and systemic effects of climate change.

The specific detail of how such a range of mitigation measures and effective integration might be achieved within an overarching legal framework is dealt with in a parallel submission on the *Carbon Pollution Reduction Bill* (the exposure draft of the legislation), that will be submitted to the federal department of Climate Change. Accordingly, in this submission we focus discussion on more general principles and policy directions in Climate Change policy.

Introduction

First, we welcome the initiatives to address climate change by the federal government as demonstrating Australia's commitment to introduce concrete measures to mitigate climate change. While 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, such regulatory measures need to be carefully assessed.

Overall, we recognise the urgency of mitigating climate change in view of the mounting scientific evidence that anthropogenic induced global warming is leading to 'dangerous climate change.' 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 need to be considered and evaluated to effectively mitigate climate

change. In particular, we urge consideration of more comprehensive incentives for renewable energy, the evaluation of the potential of taxation measures or other pricing mechanisms relating to carbon pollution reduction (and indeed other GHG emissions), and the need to introduce broad structural reforms in a progressive manner to ensure effective adaptation to climate change across the Australian community.

National policy debates converged on the CPRS as the singular option; with a rather uncritical reliance emerging that a trading system of this nature will be sufficient on its own to reduce emissions to levels that will stabilise concentrations of greenhouse gas emissions in the atmosphere. We suggest this reliance on the CPRS as potentially 'covering the field' of mitigation responses may be misplaced. If not managed stringently, and in the absence of other measures, the CPRS may well facilitate a 'business as usual' approach with only minor variations in current patterns of production and consumption, especially in resource dependent spheres and energy production areas especially in light of the global financial crisis. A more thorough revision of systemic factors inducing global warming, together with a holistic approach across a variety of sectors and mitigation measures to provide a fine grained response is required if Australia, and indeed the international community, is to adequately respond to the challenge of climate change.

Any comprehensive policy and legal framework should, in our opinion, endorse a number of coordinated and linked regulatory tools and policy options. The positing of the CPRS as the major mitigation mechanism, and the pressures that have been brought to bear on the 'design' and operation of the scheme; especially the question of the allocation of permits, indicate the vulnerability of this mechanism to political, social and economic pressures. Accordingly, we consider it inadvisable to lessen the attention directed to other policies and legal measures for combating climate change, such as the promotion of renewable energy technologies and incentives for their development and adoption. We suggest that only a policy mix and wide range of strategies can ensure that policy failure (as well as market failure) will be addressed.

Sustainability objectives

A glaring omission from the policy documents issued by the government, as well as in its exposure draft legislation for the carbon pollution reduction scheme, is any mention of ecologically sustainable development (ESD) or its underlying principles.

Ecologically sustainable development sits at the core of all environmental legislation in Australia.¹ 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 (section 3). Climate change was listed in the IGAE (see sch 5) as a particular area of environmental policy, the

¹ 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.

‘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 law and regulation 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 feature in the government’s climate policy or draft legislation. 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).

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.² 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 achieves goals of environmental protection and broader sustainability.³ 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.⁴

Given the general importance of ESD to environmental law, and its particular relevance in the area of climate change, sustainability should be a key element of the government’s climate policy. This could be given effect by including sustainability considerations in the objects of the *Carbon Pollution Reduction Bill*, along the lines of the provisions currently found in the EPBC Act.⁵

Further we question the viability of a carbon trading/offset scheme, such as the CPRS, to achieve the broadly-based environmental objectives required to address the systemic and pervasive effects of climate change. If we consider water law reform as the other major area of public policy and economic structural reform that has utilised market mechanism then it seems the prospects for a trading scheme to address sustainability goals beyond the relatively narrow view of ‘efficiency’ will be limited. The widespread ‘market failure’ in the water trading arena where the federal government has been required to step in to meet even basic ecological integrity levels through water buyback processes does not inspire confidence. Arguably, market-based schemes in the climate change field may require similar ‘state intervention’.

² See s 15AA, *Acts Interpretation Act 1901* (C’t).

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

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

⁵ See ss 3(1)(b) and 3A, EPBC Act.

Thus we suggest attention needs to be given to the strong possibility that a comparable issue may arise with the CPRS – will governments have to address market failures of the scheme in relation to the environment as a public good, but yet be constrained by the competing demands on tax-payer funds. In light of the relatively limited spending by governments on public goods such as biodiversity protection in market based systems over the last decades in Australia the prognosis is not encouraging. It highlights the need for a wide range of measures beyond singular reliance on the CPRS and further it requires stringent safeguards in the design and implementation of the CPRS.

Moreover, the entrenchment of existing production and consumption patterns may well occur with a singular reliance on the CPRS, as it explicitly creates a market in 'valuable rights'. A market presumes an exchange relation through trade. The valuable entity being traded is a right to emit carbon based waste. Thus it needs to be recognised that any carbon emissions trading scheme is predicated upon the *retention of carbon use* to produce waste, even if the effects of that use are ameliorated in various ways. It does not necessarily signal a strong move away from the reliance on fossil fuel use and other forms of resource and land use that produce GHG emissions.⁶ Therefore, without the continuing fossil fuel use which produces carbon waste, the scheme is not viable. Yet what is being created is a market designed supposedly to shut itself down over time as increasingly more stringent targets take effect. One may question whether a philosophy of the market, predicated upon the exchange of valuable rights, especially given the development of derivative markets, will want to forego the basis of exchange value that has provided value for what was once only waste. Accordingly, we return to the view that the CPRS should not be the only regulatory tool to ameliorate climate change and that it needs to operate in conjunction with a comprehensive range of measures. Stringent safeguards are also required in the design of the CPRS itself.

Moreover, we regard it as undesirable to attenuate an emissions trading as a regulatory tool designed to achieve public policy outcomes, from its guiding objectives. This goal remains that of combating the impact of climate change on our environment, social system **and** economy. The lack of explicit sustainability objectives points to the potential for attenuation. The CPRS may become an 'end' in itself while the broader issue of effectively addressing global warming is progressively eclipsed.

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

⁶ An example is the Chicago Climate Exchange. This exchange is the largest voluntary carbon trading exchange in the world. Members come from a very broad range of industries and sectors and market participants include offset providers offering a range of mitigation options (e.g. reforestation and agricultural soil sequestration), available at <<http://www.chicagoclimatex.com>>.

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.⁷ 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 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.⁸ 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.⁹

Another area that is absent from the Draft legislation is the issue of interaction with State environmental laws. The CPRS contemplates unitary Commonwealth

⁷ 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.

⁸ 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.

⁹ 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).

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.¹⁰ 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.

At the very least then, the federal government needs 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'¹¹ 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;

¹⁰ D.E. Fisher, 'The Statutory Relevance of Greenhouse Gas Emissions in Environmental Regulation' (2007) 24 *Environmental & Planning Law Journal* 210.

¹¹ Carbon Pollution Reduction Scheme Bill 2009 – Exposure Draft Commentary, 8.

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.

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.¹² In another pertinent example, California pursues its emissions targets through an ambitious draft plan that strongly features renewable energies.¹³ 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

In conclusion, the CPRS draft legislation represents a significant legal instrument for mitigation of many of the impacts associated with climate change. It provides a clear recognition by the Federal Government of the urgent need to legislate in this vital arena. However the CPRS must be situated within a wider spectrum of regulatory 'mechanisms' to ensure that any legal and policy response to climate change takes into account the integrated nature of the climate change problem itself. Finally, the overarching objectives of ecologically sustainable development must be included in any legal framework to highlight that the purpose of the legislation and associated regulatory measures is to achieve these critical long-term goals.

This submission is made by Professor Lee Godden, Associate Professor Jacqueline Peel, and Ms Anne Kallies, Melbourne Law School, The University of Melbourne on 8 April 2009.

¹² 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.

¹³ California Air Resources Board, *Climate Change Draft Scoping Plan* (June 2008) <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.pdf>