Chapter 12

Governance Issues

12.1 The scheme will be administered by the Australian Climate Change Regulatory Authority, which will be established by the Australian Climate Change Regulatory Authority Bill.

12.2 Few submitters commented directly on the governance arrangements for the scheme, including the establishment or role of the Authority, and it received little discussion at hearings. Issues which attracted some attention were the need to ensure the independence of the scheme regulator; the qualifications of members of the Authority; and the need for review of decisions.

The Australian Climate Change Regulatory Authority

Establishment and powers

12.3 The ACCRA Bill exposure draft establishes the Authority as consisting of a Chair and two to four other members. The Chair of the Authority is a full-time position. Members are to be appointed by the Minister, with either 'substantial experience and knowledge' or 'significant standing' in one of the following fields:

- economics
- industry
- energy production and supply
- energy measurement and reporting
- greenhouse gas emissions measurement and reporting
- greenhouse gas abatement measures
- financial markets
- trading or environmental instruments.[1]

12.4 The Authority will have the ability to engage public service staff and consultants, and to undertake a number of functions similar to other Government agencies, including entering into contracts on behalf of the Commonwealth. ACCRA will be subject to the *Financial Management and Accountability Act 1997.*

12.5 The ACCRA Bill exposure draft also outlines other processes, including decision making, provisions relating to the appointment of the Chair and members of the Authority by the Minister, secrecy and disclosure provisions, and annual reporting requirements.

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1 ACCRA Bill Exposure Draft, clause 18

12.6 The Authority's principal function is to administer the Carbon Pollution Reduction Scheme. It will also to take on functions related to the *National Greenhouse and Energy Reporting Act 2007* and the *Renewable Energy (Electricity) Act 2000*. The Consequential Amendments Bill will amend those acts to transfer statutory decisions and other functions (currently held by the Greenhouse and Energy Data Officer and the Renewable Energy Regulator, respectively) to the Authority. The Authority will assume these functions 28 days after Royal Assent to the CPRS Bills package.

12.7 The Government has decided to combine the functions of administering the scheme with administration of the other acts on the basis that it will improve regulatory outcomes, reduce the likelihood of conflicts or gaps between different regulators, to streamline reporting and surrender procedures, and to achieve economies of scale in administration.[2]

12.8 Part 3 of the ACCRA Bill sets out the Authority's powers and obligations in relation to secrecy. The Authority will have powers related to secrecy and imposes penalties for the inappropriate disclosure or use of protected information by an official of the Authority (clause 43 of the ACCRA Bill). 'Protected information' is defined as 'information obtained by a person in the person's capacity as an official of the Authority' and which 'relates to the affairs of a person other than the official of the Authority' (clause 4), and therefore after commencement of the Act will include information obtained by the Authority under the CPRS Bill and any other law administered by the Authority (i.e. the *National Greenhouse and Energy Reporting Act 2007* and the *Renewable Energy (Electricity) Act 2000*). However, existing disclosure provisions under the *National Greenhouse and Energy Reporting Act 2007* and *Renewable Energy (Electricity) Act 2000* continue in place in relation to information reported under those acts.

12.9 The Consequential Amendments Bill will repeal existing secrecy provisions in those Acts at the time of commencement (Schedule 1, Items 32 and 80), meaning all three Acts will be governed by a single set of secrecy provisions, those in the ACCRA Bill exposure draft.

12.10 Part 3 also sets provisions relating to disclosure of protected information. The Authority will have the power to provide information under certain circumstances to the Minister and Secretary, to Royal Commission, to nominated Commonwealth, state and territory government agencies, foreign governments and international climate change bodies and foreign governments, to certain financial bodies, or with the consent of the person to whom the information relates.

12.11 The Authority's information gathering and compliance monitoring powers in relation to the Scheme are set out in the CPRS Bill exposure draft (Parts 17 and 19).

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2 *White Paper*, p. 16-8.

12.12 The Department of Climate Change has indicated the Authority will have approximately 300 staff.[3] The Government has indicated that planning for the establishment of the Authority, including its educative role, is well underway:

> The authority cannot be formally established until after the legislation has been passed, but we are already within the department effectively setting up a protoregulator so that it can be immediately established and hit the ground running. It will have a substantial information role with businesses. Certainly the model that we have in mind is that the regulator will take a constructive role with businesses and will help them through the needs of their compliance… The regulatory force at the start will very much be education and assistance to make sure that people understand the obligations of the scheme.[4]

12.13 Few submitters raised concerns about the proposed establishment or powers of the Authority.

Independence of the Authority

12.14 The Government states that its intention is to establish an independent regulator to administer the scheme 'within a limited and legislatively prescribed discretion':

> Such an arrangement is expected to reduce the risk that the regulator's decisions are based on factors other than the Scheme's objectives, and should also contribute to efficient and effective administration.
>
> This intent to establish an independent regulator is reflected in a number of elements in the draft bill, including the limited scope for Ministerial directions to the Authority and the limited grounds on which a member of the Authority may be removed from office.[5]

12.15 The Government has explained the divide between decisions be made at ministerial level and by the authority in the following terms:

> Elected representatives (the parliament and the Government, minister) will be given responsibility for policy decisions with implications, and an independent regulator will be responsible essentially administrative or that involve individual cases.[6]

12.16 Under the draft ACCRA Bill, the Minister will have the power to give directions to the Authority 'in relation to the performance of its functions and the exercise of its powers (subclause 41(1)), but such directions 'must be of a general nature only' (subclause 41(2)). The Government states that this is consistent with

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3 Mr Blair Comley, *Proof Committee Hansard*, 30 March 2009, p. 20.

4 Mr Blair Comley, Acting Secretary, Department of Climate Change, *Proof Committee Hansard*, 30 March 2009, p. 6.

5 Australian Climate Change Regulatory Authority Bill 2009 Exposure Draft, Commentary, p. 11

6 Department of Climate Change, *White Paper*, p. 16-3.

powers held in relation to other regulators, such as the Australian Securities and Investment Commission:

> The policy intent of this provision is to ensure that the Authority is accountable to the Minister and acts consistently with Commonwealth Government policy, whilst not empowering the Minister to intervene in particular cases, for example the issue of Australian emissions units to a particular person.[7]

12.17 The ACCRA Bill will also provide that the Chair and members of the Authority may not be Commonwealth employees (clause 360) and may only have their appointment terminated by the Minister for reasons such as misbehaviour or physical or mental incapacity (clause 370). The ACCRA Bill also provides disclosure of interest provisions for members of the Authority (clauses 22-23).

12.18 Professor Warwick McKibbin stressed the need for an independent decision maker in relation to the scheme, calling for the establishment of a 'central bank of carbon':

> …this system should be run by an independent central bank of carbon not by a climate change department or by an Australian Treasury. An independent central bank of carbon should run a policy in a very similar way to the way the Reserve Bank runs monetary policy, where government sets the long-term goals and independent experts implement the policy.[8]

12.19 However, the Government has opposed this suggestion, favouring instead that particular decisions relating to carbon price must remain within the purview of elected governments:

> If you had a central Australian bank of carbon or something equivalent to it, you would have a genuine issue associated with what powers you would want to delegate to that bank. I think the analogy here is: when you set quantity targets in a cap and trade scheme or you set a carbon tax rate explicitly, that is very much akin to setting a tax rate in the rest of the political discussion. It would be very unusual to delegate that power to an independent body. To delegate that to a new institution would be a significant leap to take. That is a judgment you could make, but it is not typically the sort of decision that would be allocated to such a body. In the same way that a number of people have advocated an independent body to run fiscal policy and countercyclical policy, typically the decision is that that should rest with parliaments.[9]

12.20 The committee notes that the operation of the Authority will be a matter for independent review by expert advisory committees.

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7 Australian Climate Change Regulatory Authority Bill 2009 Exposure Draft, Commentary, p. 13

8 Prof. Warwick McKibbon, *Proof Committee Hansard* , 25 March 2009, p. 97

9 Mr Blair Comley, Department of Climate Change, *Proof Committee Hansard*, 30 March 2009, p. 10.

Review of Decisions

12.21 The Australian Workers Union noted the need for some level of oversight of decisions made by ACCRA:

> The Minister should, ultimately also retain powers to defer or suspend the application of the Scheme if circumstances warrant it on advice from the Australian Climate Change Regulatory Authority (ACCRA) or other relevant body such as the independent expert advisory group, or appeals panel referred to above. There may also be a role for the stakeholder committee charged with the oversight of ACCRA and for an independent Ombudsman.[10]

12.22 Part 25 of the CPRS Bill establishes provisions for independent review of the scheme by an expert advisory committee. The bill provides for the first review to be completed by 20 June 2014, with reviews to be conducted every five years after that. Review reports are to be tabled in Parliament. The Bill also provides powers for specific reviews to be undertaken on matters identified by the Minister.

12.23 The expert advisory committees are to be independent and make provision for public consultation. Committee members may have qualifications from a range of fields, including climate change science. Neither the Chair nor a majority of members of the committee may be employees of the Commonwealth. Governments will be required to respond to any recommendations made by an expert advisory panel within 6 months of receipt of a report.

12.24 A significant number of decisions of an administrative nature made by the Authority will be subject to review by the Administrative Appeals Tribunal (AAT). These are identified in clause 346 of the CPRS Bill. The CPRS Bill establishes that decisions made by delegates of the Authority may be subject to internal review, but that this step may be bypassed in the case of direct decisions by the Authority. Ministerial decisions are not subject to review by the AAT. The CPRS Bill does not exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

12.25 In addition, a number of decisions made under the *National Greenhouse and Energy Reporting Act 2007* and the *Renewable Energy (Electricity) Act 2000* are subject to existing merits review provisions. These provisions will be amended by the Consequential Amendments Bill so that decisions made by the Authority under those Acts will continue to be subject to the existing merits review provisions.

12.26 The question of third party review rights was raised in at least one submission.

> This table appears to ensure that most decisions against polluting entities are reviewable, but decisions in favour of them are not. This is an outrageous proposal, as is the exclusion of third parties from being able to

10 Australian Workers Union, *Submission 27*, p.10.

> take civil or administrative action for breaches of the CPRS Act or against decisions made under the Act.
>
> Third party prosecutions have made a significant contribution to environmental and social law in Australia, and given the immense importance of this Bill for the future of Australian society, it is vital that third party rights be established under any CPRS Act.[11]

12.27 It is true that many environmental or social laws allow standing to third parties for judicial review (see for example 487 of the *Environmental Protection and Heritage Conservation Act 1999*). However, it is not clear to the committee which decisions under the CPRS bills would appropriately be covered by such an extension of third party appeal rights. The committee also notes that extension of appeal rights on judicial or merits grounds could have the consequence of introducing delays in the administration of the Act. This would appear to run counter to the government's goal to increase business certainty.

Qualification of members

12.28 The Commentary on the ACCRA Bill Exposure Draft noted the following in relation to qualification of members:

> This list is similar to that for expert advisory committees established under the draft Carbon Pollution Reduction Scheme Bill 2009. In contrast to expert advisory committees, however, 'climate science' is not listed as a relevant field of knowledge for the Authority. This is because the Authority's focus in on administration and enforcement of the Scheme, rather than advising on emission reduction trajectories.[12]

12.29 Given the focus of the Authority on administrative, rather than policy, matters, the committee regards the qualifications of board members as appropriate.

Other Governance issues

Tax issues

12.30 The question of whether or not the CPRS was, in itself, a tax was raised at hearings. It appears that the status of the CPRS as a tax is not clear. The committee notes that the view of the government that it is not a tax:

> The question of whether it is a tax is one that the government views as not a tax. There are a number of bills for an abundance of caution in case it is viewed as a tax. If that hypothetical situation were to occur then the government would have to look at the policy.[13]

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11 Rising Tide Newcastle, *Submission 86*, p. 4.

12 ACCRA Bill Exposure Draft Commentary, p. 17

13 Mr Blair Comley, *Draft Committee Hansard*, 30 March 2009, p. E19

12.31 The committee notes the potential that the CPRS might be one day held to be a tax by a court, and that this is a rationale for charges being imposed by three separate charges bills.

12.32 A number of issues were raised in regard to the proposed amendments to various tax acts contained in Schedule 2 of the Consequential Amendments Bill. These include the GST treatment of permits under the scheme, the difference in treatment of permits provided to those receiving free permits as EITE assistance rather than as assistance in strongly affected industries, and issues relating to timing of tax liability, among other issues.

12.33 On the issue of GST treatment of permits under the proposed legislation, the Institute of Chartered Accountants (ICA), the Taxation Institute of Australia, Australian Bankers Association (ABA) and Australian Financial Market Association (AFMA) all raised concerns with the Government's proposal to apply normal GST rules on permit transactions. According to the Institute of Chartered Accountants, this approach would lead to uncertainty and complexity for business taxpayers, 'particularly in relation to exports, imports and derivatives trading of registered emissions units'.[14] The ICA pointed out that New Zealand has adopted a zero rated model. The proposal to adopt a GST free model as per New Zealand was shared by the AFMA, which also argued a different approach would recognise that the GST is a consumer tax whilst the CPRS is a business-to-business market.[15] The views of AFMA on the GST approach were supported by the Australian Bankers Association.[16] The Taxation Institute of Australia also raised concerns about the GST treatment of permits.[17]

12.34 Concerns were also raised in relation to the treatment of permits provided to entities deemed to be EITEs or which were to receive them as strongly affected industries. The point was raised that free permits allocated to EITEs would be valued at zero for tax purposes if still held at year end (the 'no disadvantage rule'). However, free permits allocated to strongly affected industries do not attract this concession, so that year end balance will be taxed at market value.[18] The ICA noted:

> We do not believe it is equitable for SAI [strongly affected industries] receiving free permits which, by definition will together with EITE industries be the most exposed and most disadvantaged business taxpayers, to have substantial cash-flow disadvantages imposed on them.[19]

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14 Institute of Chartered Accountants, *Submission 98*, p. 2

15 Australian Financial Markets Association, *Submission 114*, p. 9

16 Australian Bankers Association, *Submission 107*, p. 24

17 Taxation Institute of Australia, *Submission 125*, pp.1-2

18 Institute of Chartered Accountants, *Submission 98*, p. 3; Energy Supply Association of Australia, *Submission 21*, p. 11

19 Institute of Chartered Accountants, *Submission 98*, p. 3

12.35 The Government explained the difference between the tax treatment of the two types of free permit as follows:

> Emissions-intensive trade-exposed industries are different from coal-fired electricity generators as they compete on the world market. The aim of the annual assistance is to minimise the impact of the scheme on EITE entities' decisions on whether to continue to produce in Australia. Coal-fired electricity generators are being provided with transitional assistance which is not expected to influence their production decisions. Free units issued to coal-fired electricity generators, if held at the end of the income year, are included in assessable income for that year, consistent with the approach to taxing industry assistance generally.[20]

12.36 One further issue raised by the ICA was concern about the government's proposed 'claw-back' provisions in relation to deductions. Under this approach, if the cost of a permit is treated as a tax deductions at the time of purchase, and the permit is ultimately disposed of for reasons other than producing assessable income, the amount of the deduction is added to the permit holders income during the year of disposal. (Consequential Amendments Bill, Schedule 2, Item 19). The 'claw-back' approach is proposed by the government 'because of the evidentiary difficulty of determining the purpose of acquiring a unit and because it avoids complexities where a purpose changes before disposal.'[21] However, presumably such difficulties will exist in determining the purpose for which a permit is disposed of.

12.37 Effectively, this measure will render the cost of purchasing a permit non-tax deductible if disposed of for non-business reasons. The Government argues that the proposed treatment is 'consistent with the non-deductibility of private or non-commercial liabilities for tax purposes.'[22]

12.38 The ICA argues in relation to this measure:

> The Institute believes it is important for the Government to provide further clarity around this issue to confirm that businesses (including those outside the CPRS) will continue to be entitled to tax deductions for the purchase of emissions units that are surrendered for purposes such as abatement (in respect of being a 'good corporate citizen')…all taxpayers that are carrying on a business (including taxpayers who may not be obliged to acquire permits such as those who voluntarily abate their emission under a carbon neutral strategy) should be allowed a tax deduction for the acquisition of emissions permits. Adopting this approach is considered desirable as it will encourage a broader population of business taxpayers to participate in the community's efforts in reducing Australia's carbon emissions.[23]

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20 Consequential Amendments Bill Commentary, p. 49.

21 Consequential Amendments Bill Commentary, p. 43.

22 *White Paper*, p. 14-16.

23 Institute of Chartered Accountants, *Submission 98*, p. 5

12.39 Clearly, expanding the number of tax payers who may receive a tax deduction would not be revenue neutral. However, there may be benefits in such an approach, including avoiding the need a 'claw back' mechanism.

12.40 Other issues raised in submissions included the suggestion that deductions for the cost of permits should be deductible in the tax year the obligation arises (and not when permits surrendered).[24]

12.41 The various suggestions made in relation to tax provisions are highly technical and require careful evaluation to determine their impact on the scheme. The committee suggests that the Government carefully evaluate such proposals.

12.42 As a general principle, the committee endorses the ICA's view that tax arrangements surrounding the scheme should adhere to the principles of neutrality, fairness and simplicity, and in particular, that tax arrangements should be designed in a way that causes companies to do 'something because of the tax reasons and not because of the policy reasons for climate change abatement.'[25]

Obligation Transfer Numbers

12.43 In the Green Paper, the Government noted that, whilst the logical point at which to impose scheme obligations was the point at which the emissions are physically produced, in some sectors this would not be appropriate. For example, in the case of transport the point of emissions could be many millions of cars.[26] However, the Green Paper also noted that in some sectors, there were advantages in large emitters retaining responsibility for managing their own emissions, in order to provide incentives for abatement.

12.44 The administrative solution proposed in the White Paper was the 'Obligation Transfer Number' (OTN). The CPRS Bill Commentary describes an OTN as allowing 'Scheme obligations to be transferred from upstream suppliers of fuels and synthetic greenhouse gases to intermediate suppliers and end users'.[27]

12.45 The White Paper illustrates the operation of an OTN as follows:

- Entities would apply to the Authority for an OTN
- The entity quotes its OTN to upstream suppliers when it purchases fuel

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24 Institute of Chartered Accountants, *Submission 98*, p. 4; Energy Supply Association of Australia, *Submission 21*, p. 12

25 Mr Roderick Henderson, Institute of Chartered Accountants, *Proof Committee Hansard*, 27 March 2009, p. E56.

26 Green Paper, July 2008, p. 97

27 Commentary on CPRS Bills, p. 29

- The upstream supplier reports to the Authority volumes of fuel supplied to entities that have quoted their OTN. They would only be liable for emissions from combustion of fuels supplied to entities that have not quoted an OTN.
- Entities report to the Authority volumes of fuel supplied to them under the OTN and directly manage permit liabilities associated with the use of this fuel (if any), except if this fuel is then re-supplied to another OTN holder
- OTNs could be used for any fuel that is purchased by the entity.[28]

12.46 The *White Paper* explains that OTNs may be used on a voluntary basis in the following circumstances:

- Entities that use fossil fuels, including synthetic fuels, as feedstock in a chemical transformation or consume fossil fuel other than by combustion
- Entities undertaking solid fuel transformation
- Upstream suppliers of natural gas, liquefied natural gas, compressed natural gas, ethane, coal seam gas, underground coal gas and town gas that acquire gaseous fossil fuels from another entity to manufacture those gases
- Intermediate suppliers of fossil fuels (including coal washeries and distributors) and synthetic greenhouse gases
- Entities using fuel for international voyages or for other purposes that do not result in domestic emissions
- Large users of petroleum liquid fuels.[29]

12.47 The use of OTNs will be mandatory for large users of fossil fuels other than petroleum liquid fuels, retailers of natural gas and other pipeline gases, and marketers of liquefied petroleum gas.

12.48 The incentive for voluntary quotation of an OTN is that it gives the opportunity to entities to directly manage their scheme liabilities. In other words, they will receive fuels without an additional cost passed on by suppliers to cover scheme liabilities, but will be able to seek alternative means of meeting their scheme obligations.

12.49 A significant amount of the bill will be devoted to the operation of OTNs. Establishment and use of OTNs are dealt with in Division 3 of Part 3 of the exposure draft of the CPRS Bill. Provisions relating to the effect of OTNs (for example, outlining the effect of quoting an OTN will have on determining an entity's liability) are outlined in several parts of the CPRS Bill, including discussion of determining emission liabilities and liable entities (e.g. Division 2 of Part 3).

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28 *White Paper*, Box 6.5, p. 6-15

29 *White Paper*, p. 6-14

12.50 Those submissions which focussed on OTNs (e.g. the Plastics and Chemicals Industries Association (PACIA), Australian Institute of Petroleum (AIP), BP Australia, the Australian Petroleum Production and Exploration Association (APPEA) and Caltex) supported the mechanism. The committee heard opinions that that administrative solutions such as OTNs were 'innovative' which other governments could learn from,[30] would be a 'powerful way' to ensure pass through of carbon costs to the final cost of goods.[31] However, in its submission CSR Limited recorded concerns about how the provisions on OTNs have been drafted, describing the provisions relating to OTNs as 'confusing and in some cases unworkable.'[32]

12.51 Some submissions made some comments of a technical nature or requests for clarification in relation to the draft provisions. For example, PACIA called for mandatory quotation of OTNs in all cases where purchases of fuel occurs for feedstock purposes, reflecting their view that use of fuels for feedstock purposes can sequester rather than combust hydrocarbons.[33] BP noted its concern that a civil penalty applied in cases where a supplier provides fuel to a customer which has quoted an incorrect OTN (subclause 68(2)), suggesting instead that liability for the quotation of correct number lie with customer.[34] AIP noted that mandatory quotation of OTNs should become mandatory for large users of liquid fuels once necessary administrative arrangements are in place.[35] APPEA requested the bill should make clear that in the case of direct export of a fuel (such as LNG) to an overseas customer, that the overseas customer does not need to obtain and quote an OTN (reflecting that in some sectors exports may not occur via an intermediary).[36] Caltex also proposed refinements.[37]

12.52 In addition, other detailed suggestions for improvement of particular provisions relating to OTNs were made in submissions. The committee notes that these comments are mostly technical in nature and do not detract from general support for the concept. These technical comments should not be an obstacle for supporting the proposal.

12.53 Comments such as those provided in submissions demonstrate the usefulness of releasing an exposure draft prior to introduction of the bills. The committee urges the government to examine closely suggestions regarding the OTN provisions with a view to clarifying the final bills where possible.

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30 Mr Paul Curnow, *Proof Committee Hansard*, 27 March 2009, p 18

31 Mr Gregg Rowley, Santos Ltd, *Proof Committee Hansard*, 24 March 2009, p 23

32 CSR Limited, *Submission 65,* p. 4

33 Plastics and Chemicals Industries Association, *Submission 85*, p. 7.

34 BP Australia, *Submission 103*, p. 3

35 Australian Institute of Petroleum, *Submission 115*, p. 20

36 Australian Petroleum Production and Exploration Association, *Submission 111*, p. 14

37 Caltex Australia, *Submission 128*, p 3.