Leighton Holdings Limited
ABN 57 004 482 982
472 Pacific Highway
St Leonards NSW 2065, Australia
PO Box 1002
Crows Nest NSW 1585, Australia
www.leighton.com.au
T (02) 9925 6666
F (02) 9925 6005

4 June 2009

Mr John Hawkins
Secretary, Senate Standing Committee on Economics
Via email: economics.sen@aph.gov.au

Dear Mr Hawkins

INQUIRY INTO CARBON POLLUTION REDUCTION SCHEME BILL 2009

Leighton Holdings supports the introduction of the emissions trading scheme. However, as we have pointed out in previous submissions, it is important to get the scheme right.

We welcome the delay in the Carbon Pollution Reduction Scheme (CPRS) commencement date and the soft start with a low permit price cap as this will give us more time to prepare for and comply with such a major regulatory reform. We trust it will also allow further refinement of the package of CPRS Bills to ensure the scheme meets its objective to reduce Australia's carbon pollution while building long-term economic prosperity in a lower carbon economy.

However, Leighton Holdings is extremely concerned that the 'operational control' and Liability Transfer Certificate provisions in the CPRS Bills do not create business certainty for companies attempting to comply with the National Greenhouse and Energy Reporting Act (NGERS) by 31 October 2009. This is primarily due to a flaw in NGERS which is mirrored and exacerbated by the CPRS legislation.

Urgent measures are required to give business certainty to the reporting scheme under NGERS which will in turn provide certainty for liability under the CPRS. These measures should **not** be dependent upon the passage of the CPRS legislation. Rather they must be implemented now.

Leighton Holdings also suggests further changes to the CPRS Bills to improve the efficiency of reporting, to reduce the regulatory burden on industry and to avoid unintended consequences. Please find our submission and supporting materials attached.

Kind regards

CATHERINE FITZPATRICK
External Affairs Manager
Direct line (02) 9925 6026 Email catherine.fitzpatrick@leighton.com.au

Attach Submission to Senate Standing Committee on Economics
Submission to Department of Climate Change

Submission to the Senate Standing Committee on Economics

Inquiry into the

Carbon Pollution Reduction Scheme Bills 2009

4 June 2009

Leighton Holdings Limited
ABN 57 004 482 982

472 Pacific Highway
St Leonards NSW 2065, Australia
www.leighton.com.au
T (02) 9925 6666
F (02) 9925 6005
E leighton@leighton.com.au

Contents

1.0 Contract mining and 'operational control'

1.1 The problem

Leighton Holdings has made a number of submissions to the Minister for Climate Change, Senate committees and the Department of Climate Change requesting that the definition of operational control under NGERS be amended as it applies to contract mining. These are attached for the Committee's reference.

In short, Leighton Holdings believes mine owners should be deemed to have operational control because, unlike contractors on site, the mine owner:

- Is best placed to report on energy use and greenhouse emissions and to have CPRS liability.
- Initiates the mine development, decides who will work on the project and is a constant for the life of the mine.
- Has greatest influence on energy use and emissions, owns and markets the product, and is best placed to collect data from multiple contractors.
- Approves the mine plan, determining where the minerals will be mined, where waste will be dumped and the rate of extraction – and ultimately energy usage and carbon pollution.
- Is best placed to report on fugitive emissions from open cut coal mines.
- Has financial control and ownership responsibility over the resource before, during and after contractors have been on site.
- Derives a commercial benefit from sale of the resource.
- Is potentially able to access compensation and industry assistance arrangements, from which contractors are excluded.

The current definition of operational control in NGERS – which is mirrored in the CPRS Bills – does not apply logically or effectively to the mining sector and has the potential to draw service providers into the trading scheme and make them liable for emissions not of their own making, such as fugitive emissions from coal, with limited potential for recovering the costs of carbon permits and additional administration. Obligations to reduce emissions should properly rest with those best able to do so and those benefiting most from the mining industry – the mine owners.

If the problem is not fixed, the CPRS will be potentially underpinned by flawed data – and therefore impact on the associated emissions reductions targets.

1.2 CPRS Bills not an adequate solution

The mechanism to address the contract mining issue in the CPRS Bills, the Liability Transfer Certificate (LTC), is a second-best solution because parties need to

resolve the 'operational control' issue under NGERS before registering under the Act by 31 August 2009 and not under the CPRS in 2011.

If mining contractors, such as Leighton Holdings' subsidiary companies, have operational control of a facility under NGERS they will therefore be the liable entity under the CPRS. Leighton Holdings will be in the invidious position of having to spend millions of dollars to set up systems, review and renegotiate contracts and collect data to meet NGERS obligations for three reporting years until there is a possibility of transferring these responsibilities using the LTC mechanism. There appears to be little gain to the Government and a significant burden to our business with this approach.

A more effective solution is to change the NGER legislation to give operational control to mine owners. In November 2008, we proposed an amendment which has the support of the Australian Industry Group, Australian Constructors Association and Minerals Council of Australia. This would give practical effect to the flexibility intended by the Government in the CPRS.

An amendment will:

- Allow entities to commercially negotiate emissions reporting and acquittal liabilities ahead of the first reporting period on 31 October 2009, therefore ensuring accurate data underpins the CPRS.
- Provide more certainty for business and reduce compliance costs as we prepare to meet our obligations under NGERS and any resulting obligations under the CPRS.
- Limit the number of applications to the Greenhouse and Energy Data Officer for determinations of the entity with operational control.
- Reduce the regulatory burden on industry and improve the reporting effectiveness of NGERS.

1.3 Urgent amendments required

There is now a real urgency to fix the problem. We need certainty to complete contractual negotiations to ensure we meet our obligations under NGERS – preferably before the requirement to register under the Act by 31 August 2009 and to report by 31 October 2009. The continued uncertainty has stalled these commercial negotiations and there is a real risk we may not be able to resolve these issues ahead of reports falling due. This means the Government will not have the complete emissions picture on which to base its trading scheme caps.

The Senate Administration and Public Finance Committee agreed NGERS "needs to be amended to provide flexibility and certainty for the mining industry" and "it

would be preferable to have the bill amended prior to passage"[1]. However the Committee accepted "that the Department is undertaking continued consultation with industry stakeholders on this issue, with views to making further amendments in light of the finalisation of mining industry treatment in the proposed CPRS legislation"[2].

These amendments are not currently included in the package of CPRS Bills.

The Minister has also indicated the Government did not intend "to make any significant amendments to the definition of operational control contained in the NGER Act … prior to the introduction of legislation to establish the Carbon Pollution Reduction Scheme"[3].

In the absence of a separate urgent amendment to NGERS, Leighton Holdings urges the Committee to include an amendment in the CPRS (Consequential Amendments) Bill 2009 to:

- Explicitly recognise mine owners as the facility operator on mine sites, with responsibility for reporting on energy use, energy production and greenhouse emissions and for acquitting carbon permit liabilities; or
- Allow parties on a mine or major construction project to transfer operational control to the entity with financial control ahead of the due date for the first NGERS reports.

At the very least, the NGER Act should differentiate between mine owner liabilities for emissions directly associated with the resource (ie: fugitive emissions) and operator liabilities for emissions produced during extraction and haulage of the resource.

1.4 Timing of proposed changes too late

The CPRS (Consequential Amendments) Bill tries to address the case when the 'operational control' test is evenly divided and no entity can be determined which has greatest authority to make decisions for a facility. In that case, the liability will be divided equally amongst the parties. The Government considers this measure

[1] Senate Standing Committee on Finance and Public Administration, report into the National Greenhouse and Energy Reporting Amendment Bill 2009 [Provisions], May 2009

[2] Senate Standing Committee on Finance and Public Administration, report into the National Greenhouse and Energy Reporting Amendment Bill 2009 [Provisions], May 2009

[3] Letter from the Minister for Climate Change and Water to the Australian Constructors Association, April 2009

only as a stop gap measure which requires that a single party will be nominated as soon as possible.

However, the issue of 'operational control' commences with reporting obligations under the NGER Act which has been in effect since 1 July 2008. The parties need to agree on a single party with reporting obligations at the latest by 31 October 2009. The reporting party under the NGER Act will be the party with permit liability under the future CPRS unless the liability can be transferred to the financial controller. Since this transfer requires the financial controller's consent it does not address cases of dispute.

2.0 Fugitive emissions from coal mines and landfills

2.1 Open cut coal mines

The revisions to the CPRS exposure drafts did not address the difficulties of measuring fugitive emissions from open cut coal mines. This issue still exists for all parties, but particularly for contract miners as fugitive emissions verification is not within the ambit of the contractor's agreement with the client nor is it within the feasible scope of their activities.

2.2 Landfills

Leighton Holdings welcomes the Government's decision not to cover emissions from waste deposited in landfill facilities before 1 July 2011 (legacy emissions). We also welcome a threshold of 10,000 tonnes for facilities in a prescribed distance of another facility accepting a similar classification of waste that exceeds 25,000 tonnes threshold.

However we still believe the waste sector should not be included in the CPRS until measurement of CO_2-e emissions from organic waste can be determined by modelling. The lack of accurate and repeatable measurement techniques may penalize the cutting-edge, environmentally efficient landfills whilst benefiting the poor performers.

3.0 Specific drafting comments on the CPRS Bills

Leighton Holdings notes our concerns raised in our submission to the Department of Climate Change on the exposure draft legislation in relation to the Category B Test and the Authority Alteration of Commercial Agreement have largely been addressed.

However, the following issues remain outstanding.

3.1 Declaration of operational control

Section 55A(1) – replace non-group entity with "person".

Section 55A(1)(a) – replace "the non-group entity" with "any person" or "interested party'.

Section 55A(6) – delete (1)(b)" and replace with "(1)" and after "non-group entity" insert "and the applicant".

3.2 Extended meaning of "supply"

A person should only be considered a "supplier" under sections 4, 5A and 33 of the CPRS Bill if it has legal ownership of the eligible upstream fuel. As presently drafted, the definition of "supply" in clause 4 and the "extended definition of supply" in the new section 5A has the unintended consequence that contract miners who do not own the coal but who deliver the coal to the mine owner are at risk of attracting liability under s 33. The definition of "supply" in s 4 or s 5A should clarify that legal ownership of the fuel is a prerequisite to being considered a "supplier".

3.3 Safety

An Inspector may enter premises by consent or by warrant for the purposes of determining whether the Act is being complied with or substantiating information provided under the Act (s308). We believe the legislation should ensure the Inspector has an obligation to comply with health and safety directions from any contractor on site who is charged with health and safety responsibility.

3.4 Self-incrimination

Under s 311 the Inspector may ask questions or seek the production of documents. This is a similar power to the authorised officer under the NGERs Act in s 61. In the NGERs Act (s 61(4)) a person has the defence that to comply with a requirement to answer questions or produce documents if the answer or document might tend to incriminate the individual or expose the individual to a penalty.

Section 311 should be the same as s 61(3) of NGERs. There is no reason why the right to avoid self-incrimination should be inconsistent between these two Acts.

4.0 Specific drafting comments on the Consequential Amendments to NGERs Act - CPRS

4.1 Moratorium on penalties

Given the delayed start of the CPRS, there should be a moratorium on penalties until the 2nd NGERS reporting period, allowing, in effect a "practice" reporting season for the reports due by 31 October 2009 reports.

4.2 Earlier commencement date for NGERs amendments

The following sections should commence at the same time that the CPRS Bill is passed and should therefore be listed in Schedule 1, Part 1 of the CPRS Consequential Amendments Bill.

- Section 5A – Crown to be bound (s 108 CPRS (Consequential Amendments) Bill 2009)
- Section 7 – definition of "person" (s 134 CPRS (Consequential Amendments) Bill 2009)
- Section 11 – definition of "operational control" (s 172 CPRS (Consequential Amendments) Bill 2009)
- Section 54A-55A – declarations (s 189-191 CPRS (Consequential Amendments) Bill 2009).

4.3 Penalties

Penalties should not be increased to include imprisonment for 6 months (see for example in section 61(3) of NGERs). Delete this change from the CPRS (Consequential Amendments) Bill 2009.

Australian Government
Department of Climate Change

Submission: Exposure draft of the Carbon Pollution Reduction Scheme legislation

Name/s of author/s:	Iain Scoular, General Manager, Project and Group Services Catherine Fitzpatrick, Manager, External Affairs
Address:	472 Pacific Hwy St Leonards NSW 2065
Organisation: (if applicable)	Leighton Holdings
Phone:	02 9925 6627 or 02 9925 6026
Email:	iain.scoular@leighton.com.au or catherine.fitzpatrick@leighton.com.au
Date of submission:	14 April 2009

Please read the confidentiality statement and choose from the options below.

Confidentiality statement

All submissions will be treated as public documents, unless indicated otherwise below. Public submissions may be published in full on the Department of Climate Change website (www.climatechange.gov.au).

If your submission contains personal information of any third party individuals, please indicate below whether or not these individuals have consented to the publication of their information. If third parties have not consented to the publication of their information but you are happy for your submission to be made public, the Department will delete the personal information of third parties prior to publishing the submission on the Department of Climate Change website.

Any requests made under the Freedom of Information Act 1982 for access which is wholly or partly confidential will be determined in accordance with that Act.

Confidentiality

Please choose **one** of the options below by **deleting the options that are not applicable**.

3. I am/we are happy for this submission to be treated as a public document and understand that the submission may be published on the Department of Climate Change website

Personal Information

Please choose **one** of the options below by **deleting the options that are not applicable**.

1. This submission contains personal information of third party individuals. I/we warrant that the third party individuals consent to the publication of this personal information.

Please return **by 5pm (AEST) on 14 April 2009** to:

The CPRS Exposure Draft Team
Emissions Trading Division
Department of Climate Change
GPO Box 854
Canberra ACT 2601
Email: emissions.trading@climatechange.gov.au

Leighton Holdings

Submission to the Department of Climate Change

Carbon Pollution Reduction Scheme exposure draft legislation

14 April 2009

Leighton Holdings Limited
ABN 57 004 482 982
472 Pacific Highway
St Leonards NSW 2065, Australia
www.leighton.com.au
T (02) 9925 6666
F (02) 9925 6005
E leighton@leighton.com.au

Contents

1.0 Executive Summary

Leighton Holdings supports the introduction of the emissions trading scheme and suggests the following changes to the legislation to improve the efficiency of reporting, to reduce the regulatory burden on industry and to avoid unintended consequences.

The definition of 'operational control' in the NGER Act does not apply logically or effectively to the mining sector where a third of the work is undertaken by contractors.

The proposed mechanism to address the contract mining issue, the Liability Transfer Certificate (LTC), is a second-best solution because of practical and commercial difficulties.

The more effective solution is to change the NGER legislation to give operational control to the mine owners.

This minor but important amendment to NGER has the support of the mining and waste industry.

Other suggested amendments to improve the clarity and consistency of the draft legislation are:

- Under section 74, either transferor or transferee can apply to the Authority for an LTC;
- Section 73 Category B Transfer Test be broader than company to accommodate a local Council or Special Purpose Vehicle which have financial control of a facility;
- Section 156 should limit the capacity of the Authority to alter a commercial agreement;
- Sections 308-321 require an authority inspector to comply with safety directives and to ensure that confidentiality contractual obligations are maintained;
- Section 312 scale back the scope for abrogation of self incrimination.

With regard to fugitive emissions from open cut coal mines, contract miners are not in a position to report these emissions which more correctly are the responsibility of the mine owners.

Moreover for fugitive emissions from open cut mines and landfill, Leighton Holdings is concerned that there is still no accurate measurement methodology for emissions and legacy issues impose an unfair penalty on current customers.

The Leighton Group supports the point of liability for liquid petroleum fuel to remain upstream and large fuel users to voluntarily take up an Obligation Transfer Number for direct permit obligation. If a voluntary OTN is issued by the authority, the supplier should not have the right to reject the OTN.

2.0 Introduction

Leighton Holdings and its subsidiary companies welcome the opportunity to respond to the exposure draft of the Carbon Pollution Reduction Scheme (CPRS) legislation. As a successful Australian-based company, large employer and big energy user, the Leighton Group supports the introduction of an emissions trading scheme as the central policy to reduce the nation's carbon pollution.

It is important to get the scheme right. This is even more critical when the current economic climate is forcing businesses to focus on survival, leaving fewer resources to work on preparation for, and compliance with, such a major new regulatory scheme. We are keen to work with the Government to ensure the design of the CPRS meets Australia's economic and environmental goals.

The White Paper has sought to make the CPRS an effective regulatory scheme with the least burden on industry. The Leighton Group fully supports, for instance, the decision that fuel liabilities are captured upstream and that there is flexibility for large fuel users to voluntarily manage their own permit liabilities through the Obligation Transfer Number (OTN) system.

However the Leighton Group considers that the CPRS can be improved to provide more certainty and clarity and by so doing avoid unintended consequences and higher administration costs. This submission recommends amendments to the draft CPRS legislation and separate amendments to the National Greenhouse and Energy Data Act (NGERS) to better recognise the realities of business practices in the resources sector, in particular.

The Leighton Group makes its recommendations mindful that our clients in the resources sector are already facing difficult times with the global financial crisis, increased competition from overseas competitors and rising cost structures. Falling prices and reduced overseas demand for resources are affecting the viability of many of Australia's resource activities. Australia is already losing market share to coal producers such as Indonesia, China, Colombia and South Africa. These competitors are unlikely to face cost penalties for emissions in the near future. Hence it is vital that Australia does not add unnecessary cost burdens through administrative inefficiencies from the CPRS.

3.0 Contract Mining and Operational Control

Contract mining is a unique Australian service industry and the proportion of mining done by contractors is increasing, accounting for about 28 per cent of total mining in 2006/07 and employing around 25,000 people.

As Australia's largest mining and construction contractor, the Leighton Group is concerned that the reporting system which will underpin the CPRS remains flawed as it applies to contract mining. If the anomaly is not corrected, there is a risk of double counting or incomplete emissions data from mine sites. Ultimately this will undermine the integrity of the CPRS.

The Leighton Group urges amendments to the National Greenhouse and Energy Reporting Act (NGERS) to provide a clear, workable and sensible approach to reporting greenhouse gas emissions on mine sites and large infrastructure projects.

NGERS will provide data to underpin the CPRS. The Leighton Group believes that the emissions reporting system can be improved as it applies to contract mining. Our suggested changes to the legislation will improve the efficiency of reporting and reduce the regulatory burden on industry. The result will strengthen the integrity of the CPRS to the benefit of all parties and avoid unintended consequences.

The problem relates to the definition of 'operational control' in the NGER Act which does not apply logically or effectively to the mining sector, where a third of work is undertaken by contractors. The definition has the potential to draw service providers into the trading scheme and make them liable for emissions not of their own making, such as fugitive emissions from coal, with limited potential for recovering the costs of carbon permits and additional administration. Obligations to reduce emissions should properly rest with those best able to do so and those benefiting most from the mining industry – the mine owners.

The White Paper and the CPRS draft legislation recognise that contract mining has special features that do not fit the basic emissions trading model which is primarily designed for owner-operated facilities. It has sought to address the issue through the CPRS with the proposed the Liability Transfer Certificate (LTC) mechanism to allow transfer of CPRS and NGERS obligations from an entity with operational control to an entity with financial control.

However this has practical and commercial difficulties. A commercial difficulty is that at present the facility operator needs to collect information from mine site contractors and sub-contractors with whom no commercial relationship exists. The Leighton Group is already facing difficulties collecting the required data from sub-

contractors we engage, let alone from those who work on the same projects but are engaged by our clients. It is clear the CPRS will impact on many more businesses than the Government's estimated top 1000 carbon emitters. Many small and medium businesses who sub-contract to businesses that have CPRS liabilities will have increased compliance costs due to data collection requirements.

For example, sub-contractors on infrastructure and mining projects will have to supply emissions information to larger contractors or clients. On large infrastructure projects there may be more than 350 sub-contractors, suppliers, plant hire companies and consultants who will have to provide this data. Similarly, some mining projects may involve 140 sub-contractors and other small businesses which will be compelled to emissions data to the liable entity. Levels of understanding about NGER compliance and reporting obligations amongst these groups particularly sub-contractors is still quite low mainly because they are not themselves subject to direct reporting obligations.

The unintended consequences of the proposed arrangements are that the integrity of emissions reporting is at risk, and the contract miner is exposed to a penalty risk for a responsibility beyond its control. More likely than not, the current proposal will add an unnecessary administrative burden to contract miners. At the very least, sub-contractors should have some obligation in the legislation to accurately report their emissions to the entity with operational control. As currently proposed, if an audit found that sub-contractors did not report accurately, then a penalty may be applied to the contract miner. A contract miner with no commercial relationship with this sub-contractor has no capacity to impose a commercial obligation or penalty on them.

Given the problems with data integrity and collection of information from sub-contractors, the Government could also consider an enforcement moratorium for NGERS data until the CPRS provisions are bedded down and operational control issues are resolved with our clients.

Fugitive emissions present particular difficulties as this information often lies beyond the control of the contractor. Open cut coal mines, which represent more than three quarters of Australia's coal production, have real measurement difficulties for all parties but particularly for contract miners. Fugitive emission verification measurement is usually not within the ambit of the contractors' agreement with the client or the feasible scope of their activities. A contract may for instance be to only remove the overburden.

There are also commercial difficulties as negotiations to confirm who has operational control under NGERS have stalled without the final CPRS legislation and regulations. If the parties cannot agree, the Greenhouse and Energy Data

Officer (GEDO) or new Australian Climate Change Regulatory Authority will be required to determine the liable party. The current uncertainty means there is the potential for a flood of applications to the GEDO over the coming months and a lack of emissions and energy data from FY 08/09.

A more effective solution is to change the NGER legislation. The Leighton Group believes the National Greenhouse and Energy (Amendment) Bill 2009 should include a further minor but important amendment of the National Greenhouse and Energy Reporting Act 2007 to ensure the design of the emissions reporting system is workable and that it provides robust data on which to establish the CPRS. If this legislation is not amended, then the Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009 should include our suggested provision.

Our proposed amendment would impose no burdens on industry beyond those intended by the Act. Indeed, it would ensure the Act applies to the mining industry in a clear, workable and sensible way.

An amendment will give practical effect to the flexibility to transfer operational control from contractors to mine owners intended by the Government in the CPRS White Paper and draft CPRS Bills. An amendment will:

- Allow entities to commercially negotiate emissions reporting and acquittal liabilities ahead of the first reporting period on 31 October 2009, therefore ensuring accurate data underpins the CPRS.
- Provide more certainty for business and reduce compliance costs as we prepare to meet our obligations under NGERS and any resulting obligations under the CPRS.
- Limit the number of applications to the Greenhouse and Energy Data Officer for determinations of the entity with operational control.
- Reduce the regulatory burden on industry and improve the reporting effectiveness of NGERS.

While there is still discussion about free permit allocations for Emission Intensive Trade Exposed (EITE) industries or compensation to strongly affected industries, the Leighton Group considers that any free permits for the coal industry should be linked to the entity with the emission obligation under the CPRS. It would be inappropriate for the obligations to be imposed on one entity and any free permits given to another. Mine owners should have responsibility for the obligations and the benefit of any free permits.

We urge that our amendment be incorporated into the Bill currently before the Parliament because of the urgent need to correct the problem and provide certainty ahead of the requirement to register for NGERS on 31 August 2009 and to report on 31 October 2009. Otherwise the early years of the NGERS could be fraught

with transitional problems which could be avoided by mine owners being recognised in the legislation as the liable parties.

The Leighton Group's initial proposal for a new regulation under the NGER Act is supported by the Australian Industry Group, Australian Constructors Association, and Minerals Council of Australia (attached). The Department of Climate Change has advised (orally) that it may not be feasible to proceed by way of regulation due to inconsistency with the Act (NGERS), which is why corresponding amendment to the Act is needed as a matter of priority.

4.0 Liability Transfer Certificates

The Liability Transfer Certificates (LTCs) as currently set out in the draft legislation have unintended consequences. The legislation is drafted to permit transfer to a company which has financial control. However for the Leighton Group the commercial reality is that financial control of a project on which we work may not be with a company. In the case of a landfill the owner may be a local council. In the case of major infrastructure projects a special purpose vehicle may be created which will exercise financial control for the first 30 years of the life of the infrastructure. Elsewhere in the legislation it has been broadened with the use of the term person. Some broader definition around LTCs is required to avoid unintended consequences.

5.0 Fugitive Emissions from Coal Mines and Landfill

The Leighton Group is particularly interested in fugitive emissions from coal mines and landfills. As stated above a contract miner is often not in a position to manage and measure fugitive emissions. But even if it were, there is a fundamental problem in that there is no recognised accurate method to measure fugitive emissions from open cut mines. There is a high degree of variability as the CSIRO has shown in its research work. Yet the White Paper proposes that an average emission factor should be applied. This will penalise 'non-gassy' open cut mines and the customer will be asked to accept an invalid cost.

As an owner and operator of landfills, Leighton Holdings subsidiary Thiess Services is not only concerned that the proposed CPRS includes waste when there is still no accurate measurement of CO2-e emissions. It is also concerned that legacy emissions will be included in the scheme from 2018, effectively imposing a retrospective tax on landfill owners and their customers.

Our submission provides specific suggestions for changes to the CPRS and NGER legislation to ensure that it is workable for contract mining. Thiess Services is making separate submissions about waste through the Australian Landfill Owners Association.

6.0 Specific Draft Comments

6.1 Operational Control (ss 11(1)(a) and 77)

The mine owner be given operational control obligation

Suggested amendment:

Insert Division 2.6 Operational control: section 11, Section 2.24

Meaning of Operational Control for Mining Industry
(1) For paragraph 11(1)(a) of the Act, this regulation establishes further requirements for determining if a controlling corporation or another member of the controlling corporation's group has operational control over a facility.

(2) If:
(a) the relevant facility is a mine (the mine): and
(b) the mine owner or mining lease holder in respect of the mine, or a manager or operator acting on behalf of the mine owner or mining lease holder (collectively, the mine owner) engages another entity (the contract miner) to carry out mining activities at the mine.
then, for the purposes of the definition of operational control in section 11 of the Act:
(c) where the mine owner and the contract miner expressly agree in writing:
(i) That the contract miner is to be taken to have operational control over a facility for the purposes of section 11 of the Act; and
(ii) The period during which the contract miner is to be taken to have operational control over a facility (provided the period does not exceed the term of the contract miner's engagement to carry out mining activities at the facility), then the contract miner will be taken to have operational control over the facility for the agreed period, whether or not the contract miner satisfies any or all of sub paragraphs s11(1)(a)(i),(ii) or (iii) of the Act during the agreed period;
(d) where subparagraph (c) does apply:
(i) The mine owner will be taken to have operational control over the facility for the purposes of section 11 of the Act, whether or not the mine owner satisfies any or all of the subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act; and
(ii) The contract miner will be taken not to have operational control over the facility for the purposes of section 11 of the Act, even if the contract miner satisfies any or all of subparagraphs s11(1)(a)(i), 9ii) or(iii) of the Act; and

(e) subsection 11(4) of the Act will not apply as between the mine owner and the contract miner.

(3) If the mine owner is more than one entity, this regulation does not affect the operation of section11 of the Act as between those entities.

6.2 Financial Control Test (ss17(6), 18(6) and 73-81

The Liability Transfer Certificates should provide maximum flexibility and extend the categories of persons who satisfy the tests and to allow for a potential transferor to apply to the authority for a declaration allowing the issue of a certificate.

Suggested amendment:

Section 74(2) – Insert "or the person with operational control" after "member".

6.3 Category B Transfer Test (s73)

The Leighton Group is concerned that Section 73 has not provided for the transfer of obligations to clients with financial control of a facility. A Leighton company may under contract operate a landfill for a Council or a toll road or desalination plant for a special purpose vehicle which holds a concession for 30 years.
A local governing body or council would not be able to satisfy the Category B Transfer Test because sections 73 (d) and (e) require the entity to whom the liability is transferred is a "company" and a "member of a controlling corporation". A special purpose vehicle set up for a 30 year concession (such as AquaSure on the Melbourne Desalination Plant or Brisconnections of Brisbane Airport Link) would be unlikely to satisfy the threshold requirements.

Suggested amendments:

- Section 73 – Replace "a member of a controlling corporation's group (the first group)" with "A person"
- Section 73 (d) – Replace "company" with "person".
- If "person" is too wide, consider using consistent language with section 18: replace with "non group entity"
- Consequential amendments may be required to ensure consistency of drafting in sections 74-76.

6.4 Authority Alteration of Commercial Agreement (s156)

Where parties have come to a commercial agreement, and obligations are being complied with, the Authority should not be able to open up the commercial agreement unless there are special circumstances (such as fraud or a sham).

Suggested amendment:

Insert "provided that such a power shall not be exercised where the parties have agreed on who has operational control and that party is fully discharging its obligations under the Act" at the end of s156(2).

6.5 Powers to enter premises and operate equipment (ss308-321)

The Bill allows for inspectors to enter premises that may not even qualify as a "facility", to operate equipment and seek production of any documents whatsoever (sections 308-321). On many facilities, Leighton Group entities will have health and safety obligations because they are appointed the Principal Contractor.

There should be an obligation for the Inspector to comply with safety directives from the Principal Contractor. Furthermore, many contracts have strict confidentiality provisions in them which might be breached in the event of access by an inspector.

The exercise of powers should be subject to compliance with safety directives from the Principal Contractor and subject to maintenance of confidentiality obligations.

Suggested amendments:

Insert new s308(2)(c): " … the inspector complies with safety directives from the occupier of the premises and maintains confidentiality so as to ensure that there is no breach of contractual obligations as a result or arising out of the inspector's exercise of its powers pursuant of this Act". An indemnity in respect of a failure to comply with this clause should be offered to the relevant occupier of the premises.

6.6 Abrogation of Self-incrimination

The abrogation of self incrimination should be scaled back.

Suggested amendment:

Section 312(2)(d) and (e) – delete all words in brackets.

AUSTRALIAN CONSTRUCTORS ASSOCIATION

Minerals Council of Australia

AUSTRALIAN INDUSTRY GROUP

14 November 2008

Senator the Hon Penny Wong
Minister for Climate Change
Parliament House
Canberra ACT 2600

Dear Minister

Proposal for mining industry NGERS regulation

We seek a further regulation under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) to provide certainty and flexibility to the mining industry in relation to carbon pollution reporting and acquittal liabilities.

As we have discussed with your office and the Department of Climate Change, we are concerned about implementation problems and potential emissions liabilities under the Carbon Pollution Reduction Scheme (CPRS) for contract miners arising from the definition of 'operational control' under the National Greenhouse and Energy Reporting Scheme (NGERS).

For a sector of the Australian economy as important as the mining industry, it is crucial that there be a clear, workable and sensible definition of 'operational control' under the NGERS - a definition that takes into account the commercial realities of contract mining operations. In our view the current definition is unworkable in the case of mining facilities involving contract miners.

We believe a revised definition of 'operational control' under s11 of the NGER Act would better accommodate the full range of functional relationships on mine sites and reduce compliance costs for industry, while still providing certainty for regulators and achieving the aims of the NGER Act. It would also provide flexibility for mine owners to arrive at the most efficient allocation of the full range of regulatory responsibilities at a mine.

We strongly urge the Government to make a further regulation under the NGER Act to achieve the certainty and flexibility that is required ahead of the first reports falling due next September. This would avoid the need to amend the Act. It would also resolve potential inconsistencies with the NGER Act and the proposed CPRS emissions obligations in relation to mining activities and facilities.

We attach a draft regulation and further background material for your consideration.

Yours sincerely,

Wal King, ACA

Mitchell H. Hooke, MCA

Heather Ridout , AIG

Attch.

ATTACHMENT

Draft regulation 2.24 (made under s11(1)(a) and s77 of the NGER Act)

Division 2.6 Operational control: section 11

2.24 Meaning of *operational control* for mining industry

(1) For paragraph 11(1)(a) of the Act, this regulation establishes further requirements for determining if a controlling corporation or another member of the controlling corporation's group has operational control over a facility.

(2) If:

(a) the relevant facility is a mine (the ***mine***); and

(b) the mine owner or mining lease holder in respect of the mine, or a manager or operator acting on behalf of the mine owner or mining lease holder, (collectively, the ***mine owner***) engages another entity (the ***contract miner***) to carry out mining activities at the mine,

then, for the purposes of the definition of ***operational control*** in section 11 of the Act:

(c) where the mine owner and the contract miner expressly agree in writing:

(i) that the contract miner is to be taken to have operational control over the facility for the purposes of section 11 of the Act; and

(ii) the period during which the contract miner is to be taken to have operational control over the facility (provided the period does not exceed the term of the contract miner's engagement to carry out mining activities at the facility),

then the contract miner will be taken to have operational control over the facility for the agreed period, whether or not the contract miner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act during the agreed period;

(d) where subparagraph (c) does not apply:

(i) the mine owner will be taken to have operational control over the facility for the purposes of section 11 of the Act, whether or not the mine owner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act; and

(ii) the contract miner will be taken not to have operational control over the facility for the purposes of section 11 of the Act, even if the contract miner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act; and

(e) subsection 11(4) of the Act will not apply as between the mine owner and the contract miner.

(3) If the mine owner is more than one entity, this regulation does not affect the operation of section 11 of the Act as between those entities.