



australian network of environmental defender's offices

Submission on the Carbon Pollution Reduction 14 April 2009 Scheme - draft exposure legislation

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the Carbon Pollution Reduction Scheme Exposure Draft Bill ('Bill'). ANEDO has commented extensively on the design of an Australian Emissions Trading Scheme. Please refer to our previous submissions when considering this response.¹

While ANEDO generally supports the Scheme set out in the draft Bill, we have a number of concerns with respect to some key provisions of the Bill.

Our key comments are summarised below:

- the inclusion of short-term and long-term targets in the objects clause of the draft Bill is not supported;
- greenhouse gas stabilisation levels in line with the most recent science reported by the Intergovernmental Panel of Climate Change should be a mandatory consideration in setting national scheme caps and gateways;
- voluntary action should not be taken into account by the Minister when setting national scheme caps and gateways;
- the introduction of an upstream liability for importers, producers and suppliers of eligible upstream fuels is strongly supported;
- the inclusion of section 94 in the draft Bill which unequivocally establishes that Australian Emissions Units (AEUs) are proprietary in nature is opposed;
- the number of international units that liable entities can use to meet their compliance obligations under the Scheme should be limited to a maximum percentage of each entity's obligations;
- the inclusion of a transitional price cap in the form of access to an unlimited store of additional AEUs is not supported. The Government should instead give consideration to introducing a price floor;
- the inclusion of a 'make-good' provision under section 125 of the draft bill which attaches any emissions shortfall to an entity's liability of the next financial year is supported;
- the 5% limit on borrowing by liable entities is supported. However loans should only be given to credit-worthy borrowers with adequate security;
- the financial penalty for non-compliance under section 133 is insufficient. A penalty of at least 25% above the permit auction price should be imposed to facilitate compliance and prevent entities from 'gaming' the system. The inclusion of non-financial measures to encourage compliance is also supported;
- the inclusion of section 165 of the draft Bill which foreshadows that emissions-intensive trade-exposed (EITE) assistance is a transitional measure is supported;
- a windfall gain mechanism for EITE assistance similar to that for coal-fired electricity generators should be included;

¹ *Submission on the draft National Carbon Offset Standard* – March 2009 - http://www.edo.org.au/policy/090311carbon_offset.pdf; *Submission on Carbon Pollution Reduction Scheme Green Paper* – 10 September 2008 - http://www.edo.org.au/policy/080910carbon_greenpaper.pdf; *Submission on Prime Minister's Task Group on Emissions Trading* – 7 March 2007 – http://www.edo.org.au/edonsw/site/policy/ets_anedo070307.php; *Submission regarding the Possible Design for a National Greenhouse Gas Emissions Trading Scheme* – 22 December 2006 – http://www.edo.org.au/edonsw/site/pdf/subs06/nets_anedosub061221.pdf; *Submission regarding abatement incentives prior to commencement of the Australian Emissions Trading Scheme* – 3 December 2007 – http://www.edo.org.au/edonsw/site/policy/ets_abatement_incentive071207.php

- the exclusion of a provision in the draft Bill requiring 5 years notice to EITE entities of changes to the EITE assistance program is supported;
- direct assistance to coal-fired electricity generators is not supported. However if the Government remains committed to assistance, limited transitional assistance (for the first five years of the Scheme) and the windfall gain provisions are strongly supported;
- the inclusion of provisions attaching liability for carbon loss from reforestation projects to forest owners and requiring relinquishment of AEU's where units have been issued in excess of the unit limit or of forest owners opt out of the Scheme are strongly supported;
- the number of reforestation units that liable entities can use to meet their compliance obligations under the Scheme should be limited to a maximum percentage of each entity's obligations;
- the public notification and publication requirements to be provided in the Liable Entities Information Database and through other provisions in the draft Bill are strongly supported;
- the ability for a court to order relinquishment of permits if a person has acted fraudulently and this conduct is related to the issuance of permits is supported;
- ANEDO supports the provisions in the draft Bill allowing voluntary cancellation of AEU's and subsequent cancellation of Kyoto units. However, the Bill should also include a mechanism to directly account for additional voluntary action;
- the personal liability provisions for executive officers are supported;
- the strict liability nature of the civil penalty provisions is supported;
- the strong penalty for those who intentionally enter into a scheme to avoid paying a penalty issued under the Scheme is supported;
- ANEDO submits that where a decision under the CPRS has potentially significant consequences and is accompanied by a broad discretion, merits appeal rights for third parties should attach to provide a 'check' on decision making and to improve accountability and transparency;
- the requirement for an expert advisory committee to review the key elements of the Scheme every 5 years, and the requirement for public consultation by the committee in conducting its review is strongly supported; and
- the inclusion of a provision allowing the Minister to order a 'special review' at any time on any issue outside the mandated 5 year periodic review is supported.

Part 1 - Preliminary

Objects

ANEDO does not support the inclusion of short-term and long-term targets in the objects clause of the Bill.

ANEDO has consistently submitted that a target of reducing greenhouse gas emissions to 60% below 2000 levels by 2050 and reducing greenhouse gas emissions to between 5% and 15% below 2000 levels by 2020 is inadequate and inconsistent with the latest scientific projections. As previously submitted, ANEDO supports emissions targets that are based on the best available scientific knowledge, and that accord with international developments. ANEDO reiterates that the most recent science requires Australia's anthropogenic greenhouse gas emissions to peak during 2010, reduce by at least 60% below 1990 levels by 2020 and by at least 80-90% below 1990 levels by 2050.

From a legal perspective, while the inclusion of the current short-term and long-term targets in the objects clause of the legislation may not necessarily require strict adherence to these targets when setting national scheme caps or national scheme gateways, the inclusion of these targets in the legislation is a clear expression of a political commitment to establish an emissions trading framework that is built on the basis of this long-term target. Therefore, on a practical level, this could potentially constrain Australia from moving to stricter targets (in line with improved scientific evidence or future international climate change commitments) that are inconsistent with the targets identified in the objects clause of the legislation.

Whilst reducing Australia's greenhouse gas emissions should be one of the primary overarching objectives of the legislation, ANEDO submits that in order to provide greater scope for Australia to move to stricter targets due to improved scientific evidence or future international climate change commitments it is more prudent for the long-term targets to be removed from the objects clause. The setting of overall national carbon targets and trajectories are policy decisions that should be determined outside the CPRS framework.

Part 2 - National Scheme Cap and National Scheme Gateway

The draft bill provides that the Minister must have regard to Australia's international obligations and the most recent expert advisory committee report (to the extent that it deals with national scheme caps and gateways) in making recommendation to the Governor-General about regulations to be made for the purposes of setting the national scheme cap and gateway.²

In addition, the draft bill lists further considerations that the Minister *may* have regard to when setting caps and gateways, including the principle that the 'stabilisation of atmospheric concentrations of greenhouse gases at around 450 parts per million of carbon dioxide equivalence or lower is in Australia's national interest'.

ANEDO submits that the draft Bill should be amended to elevate this item to a mandatory consideration in setting the national scheme cap and gateway. One of the main drivers in setting the national scheme cap and gateway must be an agreed global stabilisation level of atmospheric concentrations of greenhouse gases. ANEDO however submits that the provision should be framed so that stabilisation levels can be decreased to a level consistent with updated scientific evidence reported by the Intergovernmental Panel on Climate Change.

In addition, we submit that the provision allowing the Minister to take into account voluntary action in setting the caps and gateways should be removed. This provides the Minister with the power to introduce less stringent caps under the CPRS by taking into account the abatement from voluntary actions. This will facilitate a situation where there is a disincentive for undertaking voluntary action, as big polluters will be rewarded. We therefore submit that the voluntary action should not be considered when setting caps and gateways in sections 14 and 15.

We discuss voluntary action in further detail below.

² Sections 14(5) & 15(4), draft Bill.

Part 3 – Liable Entities

Upstream liability for fossil fuels

Although ANEDO is generally of the view that scheme liability should be placed on direct emitters where practicable (since they are carrying out the activity that directly leads to greenhouse gas emissions), ANEDO strongly supports the introduction of an upstream liability for importers, producers and suppliers of eligible upstream fuels (which include brown and black coal, LPG and natural gas). This would capture more of Australia's emissions - including emissions from downstream facilities that do not meet the 25K threshold. This will ensure that a greater percentage of greenhouse gas emissions arising from fossil fuels in Australia will be covered by the scheme.

Part 4 – Emissions Units

Property Rights

As we have submitted on numerous occasions, ANEDO does not support the attribution of property rights to emitters. We therefore oppose the inclusion of s94 in the draft Bill which unequivocally establishes that Australian emissions units are proprietary in nature. Although this is a policy issue outside the terms of the draft Bill, we seek to reiterate our key concerns relating to what we consider a critical issue.

The attribution of property rights in emissions permits is contrary to early assertions by the Australian Government that emissions will not be proprietary, and is inconsistent with other emissions trading schemes established in the EU and the United States such as the Regional Greenhouse Gas Initiative (RGGI). Furthermore, compensation to emitters for actions that affect these 'property rights' violates the polluter pays principle. Lastly, ANEDO has public policy and equity concerns about the characterisation of emissions permits as property rights and the right to compensation.

ANEDO submits that the proper characterisation of an emissions permit is as a licence to emit, with no proprietary character. Licensing is an efficient, accountable and equitable means of emissions regulation and should be adopted for the Carbon Pollution Reduction Scheme.

Government assertions

In 1998, the Australia Greenhouse Office (which was the precursor to the Department of Climate Change) indicated that emission permits would be characterised as a:

licence or equivalent control document issued by government authorising the permit holder to emit a defined quantity of greenhouse gas.³

Also in 1998 a Standing Committee on Environment, Recreation and the Arts made the following recommendation:

³ Australian Greenhouse Office, "National emissions trading: designing the market". Discussion Paper 4 at 54.

The Committee recommends that emissions permits be licences to emit, which are issued on terms that are clear, understandable and known. Permits should not confer property rights.⁴

Therefore, the attribution of property rights is contrary to previous Government assertions.

Other emissions trading schemes

There is an argument that creating property rights is a necessary precursor to the establishment of a workable emissions trading scheme.⁵ However, several trading schemes have operated successfully without the attribution of property rights. These schemes expressly stipulate that tradeable permits do not constitute property rights and consequently, no right to compensation arises for alteration of these rights. One example is the US Acid Rain Programme that established a Sulfur Dioxide trading scheme. Under section 7651b(f) of US Code Title 42 it states;

An allowance allocated under this subchapter is a limited authorisation to emit sulphur dioxide in accordance with the provision of this subchapter. Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorisation.

The US scheme makes it clear that emission licences do not represent a property right and this means that they can be rescinded without the need for compensation. Nevertheless, the allowances were able to be bought, sold or banked.⁶ Other trading schemes have adopted a similar approach.⁷ Under these schemes there is no guarantee that the allowances, licences or permits in such schemes would not be revoked at any time. This is consistent with the traditional approach taken towards licences and other statutory authorisations (such as permits) by the common law. This approach has also been adopted by the RGGI emissions trading scheme which states:

No provision of this rule shall be construed to limit the authority of the regulatory agency to terminate or limit such authorization to emit. This limited authorization does not constitute a property right.⁸

The ongoing viability of such schemes demonstrates that a workable emissions trading scheme can be achieved without the need to characterise permits as property.

Polluter-pays principle

It is consistent with the polluter-pays principle that permit-holders bear the cost associated with a reduction in their number of permits. Any suggestion that compensation should be payable to emitters is therefore inconsistent with Ecologically

⁴ Standing Committee on Environment and Heritage, Inquiry into the regulatory arrangements for trading in greenhouse gas emissions - Interim Report (1998). Found at: <http://www.aph.gov.au/house/committee/enviro/greenhse/gasrpt/rec.htm> (6 September 2007)

⁵ Brad Wylynko, 'On the road to greenhouse gas emissions trading' *AMPLA Yearbook 2000*, 359-376 at p367.

⁶ *Ibid* at 368.

⁷ For example the New South Wales Hunter River Salinity Trading Scheme, the old Victorian water trading scheme under the *Water Act 1989*, the New Zealand commercial fisheries programme.

⁸ www.rggi.org/home (30 March 2009).

Sustainable Development. If there arises a need to tighten the levels of emissions, then the polluter-pays principle dictates that the permit-holders have to bear the costs associated with compliance since they are conducting the very activity that has necessitated the need for regulation.

Policy and equity issues with compensation

ANEDO has public policy and equity concerns about the characterisation of emissions permits as property rights and the right to compensation. These concerns include:

- The bestowal of property rights to emit has the potential to interfere with rights of the general community relating to common property (the air);⁹
- The use of Government resources to cover costs of adjustments to permits will lead to a shift of government resources to the energy sector, with a ‘commensurate reduction in the provision of other government services.’¹⁰ Essentially, such compensation facilitates the transfer of resources from the broader community to emitters and this decreases social welfare because these resources are no longer available for other purposes¹¹; and
- Any mandated right to compensation for regulatory action by Government may lead to a stagnation of environmentally beneficial action. Compensation in this context creates a climate “whereby governments are hesitant to regulate property for fear of the financial repercussions”.¹² Gray also notes that “the progress of civilised society would effectively grind to a halt” if every regulatory action by the government would activate an entitlement to compensation.¹³ Putting the compensation provision in s383 will engender a climate where the Commonwealth body administering the scheme will be reluctant to adjust emission levels for fear of the monetary consequences, even where the latest scientific information or an international agreement calls for a re-adjustment of the cap.

International Units

As expressed in previous submissions, ANEDO recognises the importance of ensuring the CPRS links to other international trading schemes. International linkages potentially offer low-cost compliance options for liable entities and support concerted global efforts to address climate change. It also provides incentives for developing countries to undertake activities that reduce emissions. However, to ensure the integrity of the CPRS is retained and the achievement of environmental objectives are not compromised, it is imperative that linkages only occur with markets underpinned by sound objectives and design features. Accordingly, ANEDO reiterates its support for restrictions in the draft Bill excluding acceptance of long-term and temporary CERs generated from

⁹ T. H. Tietenberg, (2006) *Emissions Trading- Principles and Practices*, Resources for the Future at 193.

¹⁰ Andrew Macintosh and Richard Denniss, ‘Property Rights and the Environment: should farmers have a right to compensation?’ (2004)- The Australia Institute at 29; and Martin, P and Verbeek, M, ‘Property rights and property responsibility’ in *Property: Rights and Responsibilities- current Australian thinking*, Land and Water Australia (2002) at 6.

¹¹ Andrew Macintosh and Richard Denniss, ‘Property Rights and the Environment: should farmers have a right to compensation?’ (2004)- The Australia Institute at 23.

¹² EDO (NSW) submission, Jeff Smith, *Water Property Rights* (2003) at 17.

http://www.edo.org.au/edonsw/site/pdf/water_prop_rights.pdf (8 December 2006).

¹³ Kevin Gray, ‘Can environmental regulation constitute a taking of property at common law?’ (2007) 24(3) *EPLJ* pp 161-182 at 168.

afforestation and reforestation CDM activities under the Scheme. ANEDO shares the Government's concerns about the additional risk and contingent liability inherent in these credits at this stage.

While ANEDO supports the use of eligible international emissions units for surrender in Australia's CPRS, ANEDO has concerns regarding the unlimited use of eligible international units for compliance under the Scheme. As a result, liable entities will be able to use credits generated from projects overseas to meet all their domestic emissions obligations under the CPRS, if desired. This potentially creates a risk of diverting the focus from domestic emissions abatement efforts and delays the shift of the Australian economy to a low emissions economy.

ANEDO therefore submits that the number of eligible international units that liable entities can use to meet their compliance obligations under the Scheme should be limited to a maximum percentage of each entity's obligations. This would enable a genuine focus on domestic abatement and the transition of the Australian economy to a low emissions economy sooner.

Price Cap

ANEDO has significant reservations about the inclusion of a transitional price cap in the form of access to an unlimited store of additional AEU's, issued at a fixed charge.

As previously submitted, ANEDO is of the view that the price of permits should be determined by the market. Fixing a maximum permit price could diminish the efficiency of the market because it will interfere with the market's response to conditions that would otherwise result in high prices (i.e. where the demand for AEU's exceeds the supply of AEU's). A price cap therefore has the potential to slow the necessary transition of the Australian economy to a low emissions economy. We therefore caution the use of a price cap under the CPRS.

Although the Government considers a price cap of the level set out in the draft bill sufficiently high to ensure that the probability of accessing its use is low, while providing protection against major price shocks, the actual existence of a cap may itself encourage AEU's to be sold around the capped price. Further, the ability of liable entities to import unlimited international emissions units under the Scheme will assist entities to manage permit costs (where the price of international permits is less than the price of Australian permits), thus limiting the degree of major price shocks in the market.

In addition, if the price cap for a year is heavily accessed it will loosen the national scheme cap for that year. Furthermore, although AEU's accessed under the price cap will neither be tradable or bankable, as the provisions for the issue of fixed price units are currently framed¹⁴ it is possible for liable entities to bank ordinary AEU's and instead access the price cap to discharge their obligations for a particular compliance year (which is feasible where the future price of AEU's is expected to exceed the cap). The resultant increase of AEU's available to cover future emissions may loosen the emissions cap in future years.

¹⁴ Section 89(2), draft Bill.

However, should access to an unlimited store of additional Australian emissions units, issued at a fixed charge for the first five financial years be retained in the CPRS legislation, ANEDO submits that it is necessary for the level of the price cap in section 89 to be set sufficiently high to avoid it being accessed in response to all but major pricing incidents. In addition, access to the price cap mechanism should be subject to liable entities surrendering all AEU's held in their registry account for that particular compliance year.

It is also important to note that a price cap does not guarantee a minimum price. ANEDO submits that what is more important in terms of assuring an effective market that will achieve the environmental goals of the CPRS is a price floor (setting a minimum permit price) to ensure that the price is high enough to encourage the transition to a low carbon economy. The Government should therefore give consideration to introducing a minimum permit price.

Part 5 - Emissions Number

Make good requirement

ANEDO supports the inclusion of a 'make-good' provision under s125 of the draft Bill which attaches any emissions shortfall to an entity's liability for the next financial year. Requiring liable entities to account for any shortfall in future years is essential to the integrity of the CPRS as it ensures that the emissions limit remains on track despite non-compliance in particular years.

Part 6 – Surrender of eligible emissions units

Obligation to ensure surrender

ANEDO supports the explicit obligation in the draft Bill (section 132) that requires liable entities to ensure that they do not have a shortfall at the end of a financial year. This will ensure that entities do not deliberately incur a shortfall.

Borrowing

ANEDO supports the 5% limit on borrowing by liable entities to make up for a shortfall in a financial year. However, given the risk that this poses should an entity default, there is a need to ensure that 'loans' are only given to credit-worthy borrowers with adequate security. This is consistent with the position adopted by Professor Garnaut. Any default has the potential to compromise the national cap if the liable entity is not able to make up the shortfall in future compliance years so borrowing needs to be subject to strict restrictions and comprehensive checks on parties.

Scheme penalty

ANEDO submits that financial penalties for non-compliance with the CPRS scheme need to be high enough to discourage non-compliance and to avoid the penalty becoming merely a price cap whereby emitters merely "write off" the penalty as a cost of doing business. That is, the financial penalty needs to provide a significant deterrent to entities. We therefore oppose section 133 which indicates that a penalty cannot exceed 110% of the auction price for a year. A penalty 10% above the auction price is not high

enough. We suggest at least a 25% penalty to facilitate compliance and prevent entities from ‘gaming’ the system.

In addition to the financial penalty ANEDO has previously called for non-financial measures to further encourage compliance. These suggestions included provisions establishing personal liability for company Directors, advertisement of breaches and mandatory training requirements.¹⁵ These have an appropriate deterrent effect, over and above a financial penalty. ANEDO therefore welcomes provisions in the draft Bill requiring public notification of breaches and personal liability for executive officers in certain circumstances (discussed below).

Part 8 – Emissions intensive trade exposed assistance (EITE) program

ANEDO recognises that there may be special circumstances justifying limited assistance to trade-exposed, energy-intensive industries as a **transitional measure**.

Phase out

ANEDO supports s165 of the draft Bill which foreshadows that EITE assistance is a transitional measure. That is, it will be phased out once sufficient measures to reduce emissions have been implemented in international markets. However, there is no specific provision in Part 8 that actually requires the assistance package to be removed once the risk of carbon leakage is alleviated. We submit that such a provision should be introduced.

Furthermore, the commentary attached to the draft Bill foreshadows that an expert advisory committee will be charged with providing advice to the Government on the efficacy and appropriate level of coverage of international measures and whether as a result the EITE assistance program should be withdrawn during their 5 yearly reviews.¹⁶ However, it is also important to note that there is a lack of clarity around this. First, there are no provisions in the draft Bill requiring the committee to conduct an assessment of whether the conditions mentioned have been met. Second, there is no provision that requires the abolition of the EITE program if an expert advisory committee so advises. We request appropriate amendments to the draft Bill to accommodate these requirements.

Lack of international action

Lack of appropriate international action should not be used to justify compensation to EITE entities in perpetuity. It is inevitable that trade-exposed industries will have to reduce their activities in the future in order for Australia to meet tightening emissions targets.

ANEDO therefore strongly opposes the proposed increase in EITE assistance over time. The White Paper indicated that free permits given to EITE entities will constitute 25 per cent on total permits at scheme commencement and 45 per cent by 2020. This is inconsistent with the need for industries to transition to a low carbon economy.

¹⁵ For example, see the NSW *Protection of the Environment Operations Act 1997*.

¹⁶ Carbon Pollution Reduction Scheme Exposure Draft Legislation Commentary 2009, p 126.

Exponentially increasing assistance is also inconsistent with modelling that shows that risks of carbon leakage are minimal. As the White Paper says:

The decision as to where to place investment and undertake production is a complex one, involving judgements about a range of factors including access to resources, skilled labour, infrastructure, security of energy supply, political stability and other more intangible issues. As such, the absence of a carbon constraint on companies producing elsewhere will not automatically lead to carbon leakage from Australia—indeed, the Treasury modelling suggests that this risk is low and work by the IEA suggests there has been little carbon leakage from Europe since the introduction of the EU ETS.¹⁷

Indeed, the 2008 Treasury modelling report mentioned above found that there was ‘little evidence of carbon leakage’ and that the risks of carbon leakage may have been overplayed by industry.¹⁸ Despite these minimal risks the Government proposes a rapidly increasing assistance package. We submit that the lack of empirical evidence of carbon leakage should be reflected in a package that provides minimal transitional assistance that decreases annually. We discuss this further below.

Decay rate

As above, ANEDO does not support indefinite compensation for EITE entities. Free permits to EITEs should be granted in the form of an annual allocation that progressively decreases to an eventual phase-out. We therefore support the Government’s policy position in the White Paper indicating that a decay rate will be applied. However, we suggest that the Government should calculate the annual decay rate by taking into account the expected rate of annual improvement in emissions efficiency on a best practice basis instead of simply adopting an arbitrary figure of 1.3%.

Windfall gain mechanism

ANEDO calls for the introduction of a windfall gain mechanism for EITEs similar to that for coal-fired generators under Part 9 that requires immediate cessation of assistance if the Authority is satisfied that the provision of free permits constitutes a ‘windfall’. Under s187 the Authority may make a windfall gain declaration if it is satisfied that it is likely that the total value of assistance given to a generator will exceed the projected long-term net revenue loss for that generator.

A similar provision applicable to EITEs would allow the Minister to cancel the free permits given to a particular EITE entity if the Minister is satisfied that the value of free permits granted exceeds the increased costs faced as a result of the scheme. This will introduce an accountability mechanism to ensure that the EITE assistance package addresses increased costs due to the imposition of the CPRS rather than prop up the profits of EITE industries.

5 years notice

ANEDO notes the absence of a provision in the draft Bill requiring 5 years notice to EITE entities of changes to the EITE program and supports this exclusion. We urge the

¹⁷ White Paper Summary Report, p19.

¹⁸ Treasury (2008), Australia’s Low Pollution Future: The Economics of Climate Change.

Government not to introduce this requirement into the regulations that will set out the EITE assistance program.

On the other hand, we note that there appears to be no ability in Part 8 of the draft Bill to introduce a notice requirement into the regulations. The provisions in the draft Bill relating to EITE entities stipulate that the regulations may prescribe reporting and record-keeping requirements for EITE entities. Also, there are additional matters that the regulations can address:

- (a) applications for free Australian emissions units;*
- (b) the approval by the Authority of a form for such an application;*
- (c) information that must accompany such an application;*
- (d) documents that must accompany such an application; and*
- (e) the method of calculating the number of free Australian emissions units to be issued to a person in accordance with the program*

Furthermore, section 172 allows the regulations to contain ancillary or incidental provisions. The five year notice requirement does not seem to fall within one of these categories. However, in the event that this construction is incorrect and the Government seeks to include the notice requirement in the regulations we strongly oppose this. If such regulations were enacted it would restrain the Government from altering or removing the EITE package without 5 years' notice, even where it is clear that risks of carbon leakage no longer exist or where an international agreement has been negotiated requiring Australia to adopt deeper cuts. This acts counter to the objective of the CPRS to reduce greenhouse gas emissions.

It is also important to note that industry sectors have known about the need for emissions cuts for some time. Climate change has been on the international agenda for three decades. Since that time, it has been abundantly clear that emissions targets will get stricter over time if Australia is to meet its reduction target of 60% by 2050. There are therefore no compelling equity arguments that support 5 years' notice for EITE entities of any changes to the assistance program. EITE entities should not be given further concessions and allowed to further delay necessary action to reduce emissions. The environmental goals of the scheme must operate to ensure that GHG targets are met in the short and long term.

Part 9 - Coal Fired Electricity Generation Assistance

ANEDO does not support direct assistance to coal-fired electricity generators. While ANEDO recognises that the introduction of the CPRS is likely to significantly impact emissions intensive companies and assets, ANEDO is of the view that coal-fired generation facilities have been aware of the introduction of the Scheme for several years and these impacts should already have been incorporated into investment decisions. Allocation of free permits will delay the inevitable transition to less greenhouse gas polluting forms of energy.

If direct assistance to coal-fired electricity generator is to remain under the CPRS, ANEDO supports limited transitional assistance only to coal-fired electricity generators that will be disproportionately affected by the introduction of the Scheme in the form of a 'once and for all' free allocation. In this regard, ANEDO welcomes the inclusion of provisions under Part 9 Division 4 of the draft bill that require withholding of assistance

if the Authority is satisfied that the provision of free permits constitutes a windfall gain - that is, if it is likely that the total value of assistance given to a generator will exceed the projected long-term net revenue loss for that generator.¹⁹ The ability to withhold assistance under this Division ensures that the policy objectives of providing assistance are not undermined.

Part 10 - Reforestation

Under the draft Bill, Australian emissions units issued in relation to reforestation activities that opt-in to the Scheme are not within the Scheme cap. They are issued in addition to the Scheme cap. The effect of this is similar to an offsets mechanism, that is, this would allow emissions within the Scheme to exceed the cap to the extent that those emissions have been offset by reforestation activities.

As ANEDO has previously submitted, ANEDO has significant concerns relating to the use of offsets as a means of “reducing” emissions. Our primary view is that offsets should not be relied upon as the predominant means of achieving compliance with the CPRS. We consider offsets to fall at the bottom of the climate action hierarchy. ANEDO submits that environmental impacts must be avoided or reduced first by using all cost-effective prevention and mitigation measures on-site. Offsets can then be used to address remaining loads of pollutants. Moreover, under no circumstances should the overall level of direct emissions from a facility increase as a result of “abatement” through offset projects.

ANEDO further submits that offsets recognised under the CPRS should be limited to projects for which there is a high level of certainty as to accuracy of measurement methodologies, and those that are additional, permanent and ecologically sustainable. We have previously examined these principles in the context of forestry projects and there are real concerns relating to the permanence of forestry offsets, the measurement of carbon actually sequestered, and the ecological sustainability of such projects especially in a drying climate.

Calculation of emissions and removals from reforestation

Given that many of the issues relating to reforestation have not yet been included in the legislation or will be addressed in the regulations, it is difficult to comment on the adequacy of assessment and verification aspects of abatement from reforestation projects under the CPRS. For example, the draft Bill indicates that the number of free permits to be issued in respect of an eligible reforestation project will be calculated on the basis of the net total number of tonnes of greenhouse gas that is taken to be removed by the forests project, however it is unclear how net greenhouse gas removals will be calculated as this is to be specified in the regulations.

ANEDO submits that it is imperative that the regulations for reforestation projects ensure that forests do not receive additional permits for carbon that they have not sequestered. Indeed, there are a number of factors influencing the sequestration potential of established forests (plantation forests). These include the climate where forests are established, age of the forest, species planted, and the management of forests, including

¹⁹ Section 187, draft Bill.

rotation time and woody debris management.²⁰ The approach of the Commonwealth Government to date has been that carbon dioxide emissions from forestry typically match prior carbon sequestration in the forest.²¹ This is not always the case, with soil carbon generally decreasing as a result of forest establishment,²² and biomass sequestration in early years of plantation establishment being slow due to the small size of trees.²³ Therefore, it typically takes 10-20 years for a plantation forest to become a net carbon sink.²⁴ If plantations have short rotations (for example 10-15 years), then soil carbon is expected to continue to decline making these plantations net sources of carbon if carbon in the biomass is assumed to be lost when the forest is harvested.²⁵

As a result of the above, ANEDO submits that the rules for forest included in the regulations need to accurately reflect this so that established forests do not receive additional permits for carbon that they have not sequestered.

Liability for carbon loss

ANEDO supports provisions in the draft Bill which require the relinquishment of units in relation to an eligible reforestation project where units have been issued in excess of the unit limit for the project; or if the recognised reforestation entity withdraws the reforestation project from the Scheme or where the declaration of the project as an eligible reforestation project has been revoked.²⁶ This mechanism encourages permanence.

Limit on reforestation units used for compliance

This draft Bill does not impose a quantitative limit on the reforestation units that liable entities can surrender for the purposes of compliance with the Scheme. As a result, entities are able to make unlimited use of reforestation units to offset their industrial emissions.

ANEDO submits that reforestation units should be supplementary to reduction and mitigation measures (which should constitute a significant part of the compliance efforts under the Scheme). It is imperative that a reliance on reforestation units does not divert the focus of an emissions trading scheme from GHG reductions to the lowest-cost offset options for emitters to achieve compliance. To ensure that substantial abatement

²⁰ Foresster, Barhus and Cowie (2006) 'Carbon allocation in a mixed species plantation of Eucalyptus globules and Acacia meamsii' *Forest Ecology and management* 233:275-284; Johnson (1992) 'Effects of forest management on soil carbon storage', *Water, Air and Soil Pollution* 64:83-120; Turner and Lambert (2000) 'Change in organic carbon in forest plantation soils in eastern Australia' *Forest ecology and management* 133:231-247.

²¹ Green Paper, Section 2.8.1, p127.

²² Chen, Xu, and Mathers (2004) 'Soil carbon pools in adjacent natural plantation forests of subtropical Australia' *Soil Science Society of America Journal* 68:282-291; Turner and Lambert (2000) 'Change in organic carbon in forest plantation soils in eastern Australia' *Forest ecology and management* 133:231-247.

²³ Laclau (2003) 'Biomass and carbon sequestration in ponderosa pine plantations and native cypress forests in northwest Patagonia' *Forest ecology and management* 180:317-333; Turner and Lambert (2000) 'Change in organic carbon in forest plantation soils in eastern Australia' *Forest ecology and management* 133:231-247.

²⁴ Turner and Lambert (2000) 'Change in organic carbon in forest plantation soils in eastern Australia' *Forest ecology and management* 133:231-247.

²⁵ Turner and Lambert (2000) 'Change in organic carbon in forest plantation soils in eastern Australia' *Forest ecology and management* 133:231-247.

²⁶ Sections 232 and 233, draft Bill.

still occurs by liable entities within the Scheme, ANEDO therefore submits that the legislation should impose a limit on the use of reforestation units ,by requiring that reforestation units may only be used up to a specified limit, which is set as a percentage of an entity’s compliance obligations under the Scheme. In setting this limit, it may be appropriate to consider benchmarks that reflect the emissions reductions possible with implementation of best practice abatement technologies.

Clearing of native vegetation

ANEDO strongly opposes any perverse incentives present in the CPRS that allow native vegetation to be cleared in order to establish a reforestation project for the purpose of generating credits. Although we have received assurances from the Department that this is not the case, there is no explicit expression of this in the bill.

We ask for the definition of ‘forest stand’ to be broadened to include shrubs and grasslands to ensure that these areas cannot be cleared to generate credits if they were vegetated prior to 1990. Currently, the definition applies only to trees that have attained a crown cover of at least 20% and have the potential to reach a height of 2m.

Part 12 – Publication of information

ANEDO strongly supports the public notification and publication requirements to be provided in the Liable Entities Public Information Database and through other provisions of the draft Bill. These include information about the annual emissions by liable entities,²⁷ names of account holders,²⁸ unit shortfalls,²⁹ unpaid penalties,³⁰ amounts borrowed and banked,³¹ auction results,³² and issuance of free permits.³³ In addition, the Australian Climate Change Authority is required to publish a quarterly report which must contain the total number of free permits for each activity under the EITE assistance program, coal-fired generators and reforestation.³⁴ Broad publication of this information will help ensure that the CPRS is a transparent and accountable system.

However, we reiterate earlier criticisms relating to the fact that emissions information will only be provided for the total emissions of a corporate group rather than individual facility information. The community ‘right to know’ principle requires accurate information at a facility level. The public should be able to determine the greenhouse gas emissions attributable to individual facilities. There is no means by which the public can find out the level of emissions that are due to particular operations if only corporate totals are made publicly available. A corporate-wide total or an aggregated total for small facilities obscures the true emissions profile of a company. We therefore call for facility level emissions information for corporate groups to be made public.

Part 13 - Fraudulent conduct

²⁷ Section 263, draft Bill.

²⁸ Section 262, draft Bill.

²⁹ Section 264, draft Bill.

³⁰ Section 265, draft Bill.

³¹ Section 275, draft Bill.

³² Section 270-271, draft Bill.

³³ Section 273, draft Bill.

³⁴ Section 274, draft Bill.

ANEDO supports the ability for a court to order relinquishment of permits if a person has acted fraudulently and this conduct is related to the issuance of permits. This is important to the integrity of the scheme and will deter such action.

We also support the retrospective nature of this provision as the CPRS has been proposed for a while now so there is potential that fraudulent conduct has occurred in anticipation of the future allocation of permits.

Part 14 – Voluntary Cancellation of Units

ANEDO supports provisions in the draft Bill³⁵ to allow voluntary cancellation of AEU's and subsequent cancellation of an equivalent number of Kyoto units, thus enabling reduction of greenhouse gas emissions beyond Australia's scheme cap and Kyoto target.

However, as noted in previous submissions, ANEDO submits that the inclusion of a mechanism to directly account for additional voluntary action is imperative to recognise and promote additional voluntary abatement, which plays an important role in emissions reductions. ANEDO reiterates that the reduction that the voluntary carbon market makes in terms of Australia's contribution to global GHG emissions should not be underestimated. In a recent article it was noted that,

(V)oluntary action is already responsible for around 0.5% of our emissions reductions, which is a hefty increase relative to the meagre 5% cap. If the voluntary market was given proper support, some argue that it could double Australia's reductions at 10%.”³⁶

Furthermore, voluntary abatement is critical in terms of creating demand for low carbon technologies, goods and services and thus driving the development and growth of clean energy industries in Australia.

The proposed design of the CPRS, as contained in the exposure draft Bill, however, discourages additional reductions of Australia's greenhouse gas emissions beyond the level set by the Scheme.

In allowing voluntary action to be taken into account when setting the Scheme cap, as well as contributing to Australia meeting its obligations under the Kyoto Protocol, large polluters are effectively allowed to benefit from the emission abatement measures undertaken by others. This cost shifting is inconsistent with the polluter pays principle and the use of the market to provide positive environmental outcomes.

A possible framework for recognition and accounting of additional voluntary domestic abatement could be to separate voluntary actions for emissions reductions from actions taken to meet compliance under the CPRS and the Kyoto Protocol. This could be done if the Australian Government formally recognised and recorded voluntary actions, possibly through a national registry for voluntary abatement. These recorded emissions reductions could then be deducted from accounting to meet emissions targets, such as the Kyoto target and the CPRS cap. In relation to voluntary abatement in covered

³⁵ Section 282, draft Bill.

³⁶ Castle, J. 2009, 'Federal Government the Missing Link in Voluntary Offset Market.' Available at: <http://www.environmentalmanagementnews.net/storyview.asp?storyid=892413§ionsourc=s253>.

sectors both AEU and Kyoto units would be cancelled and in respect of uncovered sectors only Kyoto units would be cancelled.

In terms of identifying which activities should qualify as voluntary, ANEDO endorses a proposal by the Total Environment Centre (TEC). TEC has identified three major classes of voluntary activities:³⁷

1. Pure cost activities – activities to reduce emissions which cost households and businesses money but yield no financial benefit. For example, the purchase of greenpower and voluntary carbon offsets.

In terms of accounting, voluntary Green Power purchases are tracked by the Government RECs registry and future voluntary offset purchases should be tracked by the National Carbon Offset Standard registry. The securities on these registries could be converted to a proportionate level of AEU and Kyoto units for cancellation.

2. Sub-economic activities – activities which save households and businesses money but involve significant investment. For example, installation of solar panels. The simplest method of accounting for these types of activities would be for the Government to identify a list of standard emission reduction activities and use a pre-determined rate to cancel a proportionate number of AEU and Kyoto units.
3. Economic activities – activities which yield a financial benefit to households and businesses regardless of emissions benefits. For example, energy efficiency measures and public transport use. These activities should not be recognised as voluntary.

In light of the above, ANEDO supports the suggestion that the Government should retire equivalent permits to ensure that voluntary efforts are recognised in the first two categories above. It is critical that the legislation incorporates a mechanism to allow additional measures and voluntary action to further reduce Australia's greenhouse gas emissions beyond those delivered under the CPRS and the Kyoto Protocol.

Part 20 - Liability of executive officers

ANEDO strongly supports personal liability being placed on executive officers if they are reckless or negligent in relation to breaches of CPRS or if they knew a contravention of the scheme would occur. As indicated above, this is important in deterring breaches of the CPRS and will ensure that executive officers of corporations undertake due diligence in carrying out their duties.

Part 21 - Civil penalties

ANEDO supports the provision allowing the Federal Court to order a person to pay a penalty for civil breaches and the requirement that the Court take into account the nature and extent of the contravention, any loss or damage suffered, the circumstances of the contravention and the person's prior breaches in determining the penalty payable,

³⁷ Personal Communication from Total Environment Centre, dated 30 March 2009.

We also support the strict liability nature of the civil penalty provisions in that it is not necessary to provide intent or recklessness.

Part 22 - Administrative penalties

ANEDO supports the strong penalty (10 years imprisonment and/or 10,000 penalty units) for those who intentionally enter into a scheme to avoid paying a penalty issued under the Scheme. This will dissuade executive officers and others from restructuring subsidiaries and setting up trusts with the intention of ensuring that the body corporate is unable to pay any penalties due.

It is important that those who partake in such schemes are heavily punished to deter such activities and to ensure that the Scheme works properly and that legitimate players are not disadvantaged.

Part 24 - Review of decisions

We note that liable entities have appeal rights in relation to 50 listed decisions under section 346 of the draft Bill. However, there is no ability for third party appeal rights in relation to these decisions.

Whilst we acknowledge that some decisions involve the application of technical criteria and are therefore inappropriate for third party rights, there are some important decisions that should be subject to third party merits appeals.

We submit that where a decision under the CPRS has potentially significant consequences and is accompanied by a broad discretion, merits appeal rights for third parties should attach to provide a 'check' on decision-making and to improve accountability and transparency. Indeed, scrutiny under merits review has the effect of legitimising government decisions where a decision-maker has exercised their discretion appropriately,³⁸ whilst improving the decision process by varying or setting aside decisions that are inappropriate.³⁹ Moreover, merits review seeks to ensure that all administrative decisions of government are not only legal, but "correct and preferable".⁴⁰

For example, we submit that there should be merits appeal rights for third appeals in relation to the following decisions:

- Item 29 of section 346 allows a coal-fired electricity generator to challenge a refusal to issue it a certificate of eligibility for free permits. We submit that this decision should also allow a third party to challenge the issuance of free permits under this decision. The Authority has significant discretion which includes deciding whether a power station was 'fully committed' as at 3 June 2007. As this decision is a significant one, third party rights of appeal should attach.
- Item 32 of section 346 allows a person affected to challenge a decision to refuse to issue a certificate of reforestation under section 195. In making a decision the

³⁸ Cabarrus J, "Merits review of Commonwealth environmental decision making" (2009) 26 Environmental Planning Law Journal 113 at 125.

³⁹ Administrative Review Council (ARC), *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) pg 11 at [2.2].

⁴⁰ *Ibid* at pg 11 [2.9].

Authority has to be satisfied that the person is a recognised reforestation entity. However, under section 201, the Authority must not recognise an applicant as a reforestation entity unless the Applicant is a ‘fit and proper person’. As this is a subjective decision with significant consequences, third party merits appeal rights should attach to a decision under section 195.

Part 25 - Independent Reviews

Period Reviews

ANEDO strongly supports the requirement for an expert advisory committee to review the key elements of the scheme every 5 years, including reviews of caps and gateways, coverage of the scheme and the EITE assistance program. We also support the requirement that the Minister must table the committee report and recommendations in parliament within 15 sitting days and prepare a statement setting out the government’s response to the recommendations as soon as practicable after receiving the report.⁴¹

ANEDO supports the requirement for public consultation by committee in conducting its review. The draft Bill stipulates that ‘in conducting a review, an expert advisory committee must make provision for public consultation’.⁴² This will allow the community to make submissions on the operation of the scheme, key concerns, deficiencies in the legislation, any gaps in coverage, unforeseen pitfalls, etc.

Special reviews

ANEDO supports the provisions allowing for ‘special reviews’ allowing the Minister to order a ‘special review’ at any time on any issue outside the mandated 5 year periodic reviews. This allows the Minister to receive advice on any issue and provides the Minister with the capacity and information to respond for example to international developments, unworkability of aspects of the scheme or unforeseen consequences without being constrained by the 5 year gap between reviews.

⁴¹ Section 354(6), draft Bill.

⁴² Section 353(5), draft Bill.