



environmental defender's office new south wales

Submission to the Independent Pricing and Regulatory Tribunal (IPART) on the Review of NSW Climate Change Mitigation Measures - Other Industries Issues Paper

20th February 2009

The EDO Mission Statement

*To empower the community to protect the
environment through law, recognising:*

- ◆ *the importance of public participation in
environmental decision making in achieving
environmental protection*
- ◆ *the importance of fostering close links with the
community*
- ◆ *the fundamental role of early engagement in
achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in
protection of the environment*
- ◆ *the importance of providing equitable access to
EDO services around NSW*

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Introduction

The Environmental Defender's Office of NSW (*EDO*) welcomes the opportunity to provide comments to the Independent Pricing and Regulatory Tribunal (*IPART*) on its Review of NSW Climate Change Mitigation Measures Other Industries - Issues Paper (*Issues Paper*). The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law.

Through its collaboration with the Australian Network of Environmental Defender's Offices (*ANEDO*)¹, the EDO has commented extensively on the proposed design for an emissions trading scheme (*ETS*) in Australia. This includes a submission on the Carbon Pollution Reduction Scheme (*CPRS*) Green Paper, as well as submissions on other greenhouse gas mitigation policy measures such as mandatory renewable energy targets, carbon capture and storage, and greenhouse gas and energy reporting legislation. The EDO has also commented on NSW specific measures, such as proposed renewable energy legislation.²

ANEDO has consistently advocated for an ETS with the widest possible coverage, combined with a suite of complementary measures, to ensure that Australia can reduce its greenhouse gas (*GHG*) emissions to adequately contribute to the international measures necessary to avoid dangerous climate change. A number of areas for law reform and complementary policies have previously been identified in its Model Climate Law Project Discussion Paper.³

In this submission, the EDO responds to questions 1, 2 and 10 in the Issues Paper. These questions address IPART's proposed approach to, and assessment framework for, considering NSW climate change mitigation measures. Given the nature of the EDO's expertise, our comments are directed to the fundamental assumptions behind the proposed assessment framework discussed in the Issues Paper.

We do not provide comment in this submission on the various complementary measures that we consider appropriate alongside the CPRS, nor the EDO's opinions regarding the coverage of the CPRS. Please refer to ANEDO's submissions on the Green Paper and the Model Climate Law Project Discussion Paper noted above, which address these matters.

Finally, the EDO acknowledges that the scope of IPART's review is not designed to extend to an analysis of the rationale for the CPRS or the GHG targets set by the Federal Government. However, we submit that the flaws with the CPRS and

¹ 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.

² Please refer to the EDO's website for copies of these various submissions on climate change and energy: <http://www.edo.org.au/edonsw/site/policy.php#1>

³ http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf

the targets proposed by the CPRS White Paper (*White Paper*) will necessarily have significant impact on how other mitigation measures should be approached. Therefore, we provide a brief summary of the CPRS's shortcomings which must be borne in mind by IPART when establishing a framework to assess the utility of NSW mitigation measures.

Summary of Recommendations

- The Issues Paper is heavily focused on matters of cost-effectiveness, which guides IPART's approach to its proposed assessment methodology. The EDO is concerned that this emphasis will lead to a failure to focus on the ultimate environmental objectives and effectiveness of the relevant NSW mitigation measures, which should form the key focus of IPART's approach;
- A cautious approach should guide IPART's preliminary views, given the uncertainty and risks of climate change, combined with uncertainty about the success of the CPRS. The threshold for justifying the retention of NSW mitigation measures should not be 'high'. Moreover, IPART should not make the broad assumption that the CPRS will generally be capable of reducing emissions in the long term;
- IPART's proposed criteria for assessing whether a measure may be warranted should focus on environmental integrity and effectiveness, rather than cost-effectiveness; and
- In developing its framework for assessing NSW climate change mitigation measures, IPART must be informed and bounded by the principles of ecologically sustainable development.

Response to Questions

1. Please provide comments on IPART's preliminary views that:

- *The threshold for justifying additional mitigation measures should be high. That is, measures should reduce the costs of meeting the national emissions reduction target by either: 1) cost-effectively meeting a gap in the CPRS' coverage; or 2) cost-effectively correcting a market failure that prevents the CPRS from reducing emissions at least cost.*
- *The review should assume the CPRS will be generally capable of reducing emissions in the long term.*
- *Should there be design flaws in the CPRS that compromise its ability to reduce emissions efficiently, these would be better addressed by adjusting the scheme rather than introducing additional measures.*

The EDO is concerned with the fundamental assumptions of these preliminary views.

Threshold should be high (Issues Paper 4.1.1)

The EDO submits that the threshold for justifying additional mitigation measures should not be stated as 'high'. This preliminary view focuses heavily on the

importance of complementary measures being ‘cost effective,’ and is too limited to enable a flexible assessment approach to be taken. The focus on economic efficiency fails to acknowledge the environmental imperatives behind mitigation responses to climate change.

The EDO submits that a precautionary approach should guide IPART’s preliminary views in the climate change context. Indeed, there remains considerable uncertainty regarding the exact future impacts of climate change, with the general accepted position being that projected impacts are expected to have mostly adverse effects on natural and human systems.⁴

Additionally, there is no certainty that the CPRS will function as intended and reduce GHG emissions to levels required to avoid dangerous climate change, in accordance with the latest climate science. In this regard, Professor Garnaut, in his Final Report, recognised that there is a risk that a proposed ETS could become so heavily compromised that it would not effectively reduce emissions, such that a carbon tax would be more appropriate.⁵ Serious concerns have now been raised about the proposed CPRS, with some groups who had previously supported an ETS in principle now withdrawing their support of the CPRS because they view it as being compromised.⁶

The EDO therefore strongly submits that a cautious approach must be taken when considering whether NSW climate change mitigation measures should be retained or removed. The precautionary principle applies in circumstances where there is a lack of full scientific certainty about the impact an action will have, and provides that this uncertainty must not be used to postpone measures to prevent environmental damage.⁷ The precautionary principle is a fundamental tenet of ecologically sustainable development. In the current context of the CPRS and NSW mitigation measures, the precautionary principle would stipulate that the removal of NSW climate change mitigation measures should be delayed until it can be

⁴ See the IPCC’s latest Assessment Report (Summary for Policymakers) http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf

⁵ Garnaut final report, chapter 13.

⁶ See ‘Approved Policy Recommendations on Climate Change’, Australia’s Climate Action Summit (draft 2 February 2009), <http://www.climatesummit.org.au/policyprocesssummit> [

⁷ The precautionary principle is established in international instruments including the UNFCCC, as well as domestic Australian environmental legislation. In NSW, environmental legislation (as well as the *IPART Act 1992*) utilises the definition contained within the *Protection of the Environment Administration Act 1991* section 6(2)(a):

The precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*
- (ii) an assessment of the risk-weighted consequences of various options.*

unequivocally demonstrated that additional mitigation measures are no longer required. The EDO submits that a precautionary approach is appropriate, in the very least during the transition to the low carbon economy that is intended to be created by the CPRS.

The EDO proposes that there should be greater breadth in IPART's approach to justifying additional mitigation measures to permit more flexibility in assessing these measures. This is necessary because additional mitigation measures can be required:

- to avoid any delay in transitioning to a low carbon society;
- to ensure that there remains a form of 'insurance' for GHG mitigation; and
- until a point in time when the CPRS (with the GHG targets) has demonstrated itself as being capable of functioning to achieve the necessary emissions reductions.

As a result, it is submitted that the view taken by IPART in the Issues Paper is too narrow in its assumption that measures should only be justified if they reduce the costs of meeting the national emissions reduction target, by cost-effectively meeting a gap in the CPRS' coverage, or cost-effectively correcting a market failure that prevents the CPRS from reducing emissions at least cost. Any consideration of mitigation measures must focus primarily on environmental performance in assessing the utility and effectiveness of measures. We discuss this in more detail below.

IPART's assumption that CPRS is capable of reducing emissions in the long term (Issues Paper 4.1.2)

The EDO submits that it is unduly optimistic to assume that 'the CPRS will generally be capable of reducing emissions in the long term'. While we acknowledge that it is not IPART's role to review the rationale behind the CPRS and the GHG emissions targets, in our view these considerations are necessary for determining how NSW mitigation measures should be assessed.

The EDO has serious concerns with the CPRS, combined with the proposed GHG emissions reduction targets. As previously noted, Professor Garnaut acknowledged that an ETS could be so heavily compromised that it will not effectively reduce emissions, and this may well be the case with the Federal Government's CPRS.

The targets proposed by the White Paper are extremely inadequate. As noted in ANEDO's submission on the Green Paper⁸, it has been argued that in order to stabilise global CO₂-e concentrations at 450ppm by the year 2050, Australia will have to reduce its emissions by up to 94%. In this context, targets to reduce Australia's emissions between 5-15% by 2020 and by 60% by 2050 (from 2000 levels) are seriously inadequate, and are the most fundamental problem with the CPRS

⁸ http://www.edo.org.au/policy/080910carbon_greenpaper.pdf at p22-25

itself. The Climate Action Network Australia (CANA), an alliance of over 50 groups, has recommended a more nuanced targets trajectory, supporting:

- By 2010 – emissions to peak and decline thereafter;
- By 2020 – emissions at least 40% below 1990 levels;
- By 2050 – emissions at least 95% below 1990 levels.⁹

Aside from the weak targets proposed by the Federal Government, the EDO's view is that the CPRS is seriously flawed in a number of other aspects, including:

- The excessive levels of assistance provided to 'emissions intensive trade exposed industries' and 'strongly affected industries' through the allocation of free permits;
- The unlimited banking of permits, and capacity to borrow; and
- The current omission of sectors such as forestry (with only reforestation being opt-in) and agriculture.

Given these problems with the CPRS and the inadequacy of the proposed targets, the general assumption that the CPRS is capable of reducing emissions should not be made. While a 'pure' ETS could be assumed to be capable of reducing emissions in the long term, the CPRS may be so seriously compromised that this is not a reasonable assumption to make.

Further, the EDO submits that strong GHG emissions reductions are required in the short and medium term. Therefore, the assumption made by IPART that the CPRS will be capable of reducing emissions in the long term (which is by 2050 according to the White Paper), but not necessarily the short or medium term, is misplaced. The urgency of the risk of dangerous climate change dictates that early and strong action is required.¹⁰ The EDO submits that IPART should instead consider whether the CPRS is capable of reducing emissions not only in the long term, but also in the short and medium term.

CPRS design flaws should be adjusted, rather than additional measures being introduced (Issues Paper 4.1.3)

The EDO agrees that the CPRS should be adjusted when design flaws are identified that may compromise its ability to reduce emissions efficiently. However, the EDO submits there may be circumstances that justify the introduction of additional measures to address design flaws, particularly to smooth the interim period in which the design flaws are being resolved. Moreover, the CPRS may lock in certain design options, and lead to certain outcomes, such that additional mitigation measures may be the only options available politically for addressing flaws in the CPRS. Given the public policy context of the CPRS, in particular the extensive consultation period that informed the Federal Government's policy

⁹ See CANA Position Paper, *Greenhouse Gas Emissions Reduction Targets for Australia*, August 2008, available at: http://www.cana.net.au/Policies_positions/CANA_Emission_Reduction_Targets_PositionPaper_Aug2008v2.pdf.

¹⁰ See discussion in part 4 of ANEDO's submission on the Green Paper, above n8.

choices for the design of the CPRS, it may be unrealistic to assume that the design can be (or would be) easily tweaked or altered. Therefore, it is not appropriate to form the preliminary view that in all circumstances an adjustment to the scheme would be better than the introduction of additional mitigation measures.

Further, as noted earlier, there are currently flaws in the CPRS and the Federal Government's targets that are likely to compromise its ability to reduce emissions to the necessary levels. Therefore, NSW mitigation measures should be retained and there should be scope to create new additional measures, to provide a form of insurance against the impacts of potential design flaws, especially as such flaws give rise to the potential to delay the reduction of emissions.

2. Please provide comments on IPART's proposed criteria for assessing whether a measure may be warranted in the presence of the CPRS

Proposed Criteria (Issues Paper 4.2.1)

Currently, IPART's proposed criteria for assessing whether a measure may be warranted are:

Mitigation measures

1. *Either the measure*
 - a. *Reduces emissions in a sector not covered by the scheme at a cost equal to or less than the carbon price and/or facilitates coverage of an uncovered sector in future*
 - b. *Reduces mitigation costs by correcting a market failure other than the lack of a carbon price, and the measure is tightly targeted to the market failure.*
2. *The measure is best undertaken at the state or local level.*

Non-mitigation measures

1. *The measure assists transition by targeting areas where prices may not be a significant driver of decision making or by managing the costs and distributional consequences of reform.*
2. *The measure is best undertaken at the state or local level.*

Measures with multiple policy objectives

1. *The measure has policy objectives other than mitigation and remains a cost-effective way of meeting those objectives.*

The EDO supports IPART's recognition that additional measures may be warranted where they:

- reduce emissions in sectors not covered by the CPRS;
- facilitate coverage of an uncovered sector in the future;
- reduce mitigation costs by correcting a market failure; and

- assist transition or manage the costs and distributional consequences of reform.

However, as noted earlier, the EDO submits that IPART should retain a degree of flexibility in its approach to assessing NSW mitigation measures to be retained, due to the potentially diverse range of mitigation measures that will be assessed, which should be recognised in these criteria.

Moreover, the EDO is concerned with the emphasis placed by IPART on cost-effectiveness. We accept that it would not be prudent to proceed with additional mitigation measures that are excessively costly without providing requisite environmental benefits, or that would impede the operation of the CPRS. Further, we acknowledge that the aim of the ETS is to achieve GHG emissions targets at the least cost to the economy. However, we stress that there is no utility or value in creating an efficient ETS, if it does not achieve the requisite environmental goals. Therefore, cost-effectiveness can not be the overarching consideration for the assessment criteria.

It is our understanding that IPART intends to use these criteria as a preliminary ‘first hurdle’, beyond which particular measures will be subject to more rigorous and in-depth assessment (which is discussed later in Part 4.2.2 of the Issues Paper). We acknowledge that IPART, at this later stage, will consider best practice regulatory principles such as efficiency, effectiveness, equity and administrative simplicity. However, we stress that the emphasis on cost-effectiveness as a ‘first hurdle’ is inappropriate, and that environmental objectives must be paramount.

A particular concern with the criteria in Part 4.2.1 of the Issues Paper is the proposition that the mitigation measures that are likely to be justified include those that reduce emissions in a sector not covered by the scheme ‘at a cost equal to or less than the carbon price’. The EDO submits that the carbon price is not an appropriate benchmark for considering mitigation measures that are directed at sectors not covered by the CPRS, as doing so places unnecessary limitations on these measures. Instead, the relevant criteria should consider whether the scheme is effective in reducing emissions, regardless of how the cost compares to the carbon price. While we acknowledge that the cost-efficiency of each measure will be a relevant factor to consider, such measures are separate from the CPRS and so the carbon price should not govern whether or not they are warranted.

Similarly, in relation to ‘measures with multiple policy objectives’, the EDO submits that the focus should not be so tightly targeted to the cost-effectiveness of these measures, but should focus on whether the measures achieve their environmental objectives, which would include abating GHG emissions.

The EDO agrees in principle that additional mitigation measures for NSW should be retained where ‘the measure is best undertaken at the state or local level.’ However, we submit that IPART should clarify when a measure will be ‘best undertaken at the state or local level’. The Complementarity Principles prepared

by COAG establish appropriate factors to consider in this regard.¹¹ We also note that there may be circumstances where a measure would be most appropriately undertaken at the national level (and so would be rejected, according to IPART's criteria), but there is no equivalent mitigation measure at that level, or there are such measures but these are inadequate or not functioning effectively. In these circumstances, we submit that the NSW measure should be retained, until such time as this situation changes. Furthermore, any existing national measures must be carefully analysed to confirm that they are adequate, before determining that the NSW mitigation measure should be removed. IPART's criteria should be amended to reflect this flexibility.

10. *What matters should be taken into account in developing the framework for assessing the nominated existing NSW climate change mitigation measures and proposed new measures, to ensure their ongoing efficiency, effectiveness and complementarity to the CPRS?*

Issues Paper 4.2.2 and 4.3

The EDO supports the utilisation of best practice regulatory principles (discussed in Part 4.2.2 of the Issues Paper) in developing IPART's framework for assessing NSW climate change mitigation measures.

However, the EDO stresses that IPART's framework for assessing NSW mitigation measures must be informed, and bounded by, the principles of ecologically sustainable development (*ESD*). These principles are well-regarded under international law, and widely reflected in and adopted by Australian law and policy, including the *Environment Protection and Biodiversity Act 1999 (Cth)*¹² and the *National Strategy for Ecologically Sustainable Development 1992*.¹³

As the relevant NSW definition of ESD states,¹⁴ the utilisation of ESD in decision-making requires the *integration* of economic concerns with environmental concerns. This is to be achieved through implementation of principles and programs including:

- the precautionary principle;
- inter-generational equity;
- conservation of biological and ecological integrity; and
- improved valuation, pricing and incentive mechanisms, including the polluter pays principle.

¹¹ Published in COAG communiqué of 29 November 2008, see:

http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm

¹² See sections 3 and 3A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*,

[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/F9A0A154F06FE8CECA25751600184FB6/\\$file/EnvProtBioDivCons99Vol1WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/F9A0A154F06FE8CECA25751600184FB6/$file/EnvProtBioDivCons99Vol1WD02.pdf)

¹³ <http://www.environment.gov.au/esd/national/nsesd/strategy/index.html>

¹⁴ See section 6, *Protection of the Environment Administration Act 1991 (NSW)* for the complete definition.

Section 15 of the *Independent Pricing and Regulatory Tribunal Act 1992 (NSW)* stipulates that IPART is to have regard to various matters in making recommendations under the Act, one of which is ‘the need to maintain ecologically sustainable development...by appropriate pricing policies that take account of all the feasible options available to protect the environment’. In spite of this requirement to take ESD into account, the EDO’s view is that IPART’s approach to preparing its assessment framework only considers one aspect of ESD, being:

*environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.*¹⁵

While cost-effectiveness and economic considerations are a necessary component of the concept of ESD, they cannot be the only principles that are considered.

For example, principles such as the ‘polluter pays’ principle and inter-generational equity are fundamental concerns in the context of climate change because these principles assist in analysing who is responsible for GHG emissions, and recognise that decision-making processes must be made taking into account the well-being of future generations. For example, as noted previously in this submission, the precautionary principle is a particularly critical consideration in the context of uncertainties and risks associated with climate change.

Therefore, the EDO’s view is that all principles of ESD are a central matter that must inform IPART in developing its assessment framework for NSW climate change mitigation measures. This will ensure that IPART takes into account the wider environmental and social implications of the decisions it makes in addition to economic matters.

The EDO appreciates the opportunity to provide the above comments to IPART. We confirm that we are interested in continuing our involvement in IPART’s review of NSW climate change mitigation measures.

For further information about this submission or to discuss any matters related to the submission, please contact Robert Ghanem, EDO Acting Policy Director on (02) 9262 6989 or by email at robert.ghanem@edo.org.au

¹⁵ Section 6(d)(iii) *Protection of the Environment Administration Act 1991 (NSW)*