Chapter 24
Australia: From "No Regrets" to a Clean Energy Future?

Sharon Mascher and David Hodgkinson

Abstract In September 2011 Australia passed the Clean Energy Act 2011 (Cth), a piece of legislation that will for the first time introduce a carbon price into the Australian economy. The passage of this Act marks a momentous step forward for Australia, a country that until now has been dominated by a domestic climate change policy of 'no-regrets'. This Chapter explores the evolution of climate change policy in Australia from the late 1980s through to the passage of the Clean Energy Act 2011 (Cth).

Sharon Masher is a Professor in the Faculty of Law, University of Calgary and on Honorary Research Fellow in the Faculty of Law, University of Western Australia. David Hodgkinson is an Associate Professor in the Faculty of Law, University of Western Australia and Special Counsel with Clayton Utz, a national Australian law firm.

S. Mascher (✉)
Faculty of Law, University of Calgary, 2500 University Drive,
NW, Calgary AB, Canada
e-mail: smascher@ucalgary.ca

D. Hodgkinson
Faculty of Law, University of Western Australia,
35 Stirling Highway, WA, Crawley, Australia
e-mail: david.hodgkinson@uwa.edu.au

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24.1 Introduction

> Australia is said to be more vulnerable to the effects of climate change than other developed countries.[1] The reasons for this are two-fold. First, the country's already hot, dry climate makes it highly vulnerable to predicted changes in the climate system.[2] Second, Australia's terms of trade and geographical location leave it exposed indirectly to the impacts of climate change on its trading partners and regional neighbors. In particular, climate change related impacts on countries such as China, India and Indonesia could result in a decline in demand for Australia's mineral and energy resources and agricultural products.[3] In addition, as Australia is physically situated in a region of developing countries which are in both highly vulnerable to climate change and in a weaker position to adapt, climate change related impacts such as human displacement due to rising sea-levels and geopolitical and food security issues will be magnified in the region.[4] As a result, it is in Australia's national interest that effective action be taken to mitigate the effects of climate change.

At the same time, Australia has a very emission intensive economy. While the country's contribution to overall global greenhouse gas emissions is small, accounting for only 1.5% of global emissions in 2005,[5] its per capita emissions are the highest in the Organization for Economic Cooperation and Development (OECD) and amongst the highest in the world.[6] The country's high emission levels are largely a consequence of its ready access to low-cost fossil fuel reserves, around which a very energy-intensive economy has developed.[7] Indeed, Australia derives more than 40% of its total primary energy supply from brown and black coal, with coal accounting for 84% of its total electricity generation in 2007–2008.[8] With primary energy consumption on an upward trajectory,[9] absent a change in climate change governance Australia's greenhouse gas emissions will also continue to rise. Not surprisingly, given its abundance of fossil fuel reserves, Australia is also net energy exporter. Indeed, energy exports accounted for 33% of Australia's total exports in 2008–2009,

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[1] Ross Garnaut, *Garnaut Climate Change Review* (Melbourne: Cambridge University Press, 2008), at xix.

[2] Intergovernmental Panel on Climate Change, "Technical Summary" in: M.L. Parry et al. (eds), Climate Change 2007, Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge: Cambridge University Press, 2007), 25, at 50.

[3] Garnaut, *Garnaut Climate Change Review*, supra, note 1, at 145.

[4] Ibid., at 145–150.

[5] Ibid., at 65, Table 3.2.

[6] Ibid., at 153; Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group on Emissions Trading* (Canberra: Commonwealth of Australia, 2007), at 20–22.

[7] Department of Prime Minister and Cabinet, *Energy White Paper, Securing Australia's Energy Future* (Canberra: Commonwealth of Australia, 2004), at 1.

[8] Garnaut, *Garnaut Climate Change Review*, supra, note 1, at 158; Australian Bureau of Agriculture and Resource Economics, *Energy in Australia* 2010 (Canberra: Department of Resources, Energy and Tourism, 2010), at 12–13 and 21.

[9] Clara Cuevas-Cubria and Damien Riwoe, *Australian Energy: National and State Projections to 2029–2030* (Canberra: Australian Bureau of Agriculture and Resource Economics, 2006), at 27.

at a value of AUD $78 billion.[10] Of its energy resources, coal is by far the country's largest export earner,[11] with the export value of this single resource increasing from $11 billion in 2000–2001 to $43 billion in 2010–2011.[12]

Australia is therefore both highly vulnerable to the effects of climate change and economically privileged by virtue of its consumption and export of emission intensive fossil fuels. For these reasons, successive Australian governments have struggled with the competing tensions associated with protecting the country's economic interests and moving beyond "no-regrets" measures to achieve climate change mitigation objectives. The result has been decades of intensive debate around Australia's domestic climate policy. With the passage of Clean Energy Act 2011 (Cth)[13] on 8 November 2011 and the mandated introduction of a carbon price into the economy from 1 July 2012, Australia's domestic climate policy took a momentous step forward. The tensions, however, remain.

This chapter will explore the evolution of climate policy in Australia from the late 1980s through to the passage of the Clean Energy Act 2011 (Cth). The discussion is organized into three parts. The first part examines the era of "no-regrets", an approach that dominated Australian domestic climate policy for over two decades. The second part explores the post-2007 era, and the attempts to move from a policy of "no-regrets" through the introduction of emissions trading legislation. The third part of this chapter focuses on the Clean Energy Act 2011 (Cth), describing the central features of the legislation and exploring whether it will afford an effective mechanism to transition Australia to a clean energy future.

24.2 The Era of "No-Regrets" in Domestic Climate Change Policy

Climate change policy has been on the agenda of successive Australian governments for over two decades. While pro-active in some respects, the dominant policy in the years preceding 2007 can best be described as one of voluntary "no-regrets" measures constrained by overriding concerns for the economy.

[10] Australian Bureau of Agriculture and Resource Economics, *Energy in Australia* 2010, supra, note 8, at 2.

[11] Ibid., at 2.

[12] Department of Resources, Energy and Tourism, *Draft Energy White Paper 2011 – Strengthening the Foundation for Australia's Energy Future* (Canberra: Commonwealth of Australia, 2011), at 82.

[13] The Clean Energy Act 2011 (Cth) is the central piece of legislation in a legislative package, which also includes: the Clean Energy (Consequential Amendments) Act 2011 (Cth); the Climate Change Authority Act 2011 (Cth); and, the Clean Energy Regulator Act 2011 (Cth). For information about each of these pieces of legislation, available at: http://www.climatechange.gov.au/government/clean-energy-future/legislation.aspx (last accessed on 22 February 2012).

24.2.1 The Origins of 'No-Regrets'

When the climate change issue began attracting international attention in the late 1980s, the Australian Government, led by Australian Labor Party (Labor) Prime Minister Bob Hawke, took a leadership role, strongly supporting international action.[14] Accepting that developed countries should take the lead, and implicitly recognizing Australia's obligation to act, in 1990 the Hawke Labor Government adopted a domestic Interim Planning Target to stabilize greenhouse gas emission at 1988 levels by 2000 and to reduce these emissions by 20% by the year 2005.[15] While one of the most stringent national targets through to the mid-1990s,[16] this commitment was subject to the caveat that the measures taken would not "have net adverse economic impacts nationally or on Australia's trade competitiveness, in the absence of similar action by major ghg producers".[17] Failing from the start to consider the benefits of taking the lead in climate change mitigation and focusing instead on the costs, the caveat meant that early action came in the form of a 'no-regrets' strategy, directed at those activities where the economic benefits outweighed the costs.

The 'no-regrets' approach was further entrenched when the Australian Government, now led by the Labor Prime Minister Paul Keating, released its National Greenhouse Response Strategy (NGRS). While the Strategy contained measures directed towards achieving the qualified Interim Planning Target, they were largely voluntary and designed to cause minimal disturbance to the community as a whole or to any single industry sector or particular geographical region.[18] Criticized for "prioritization of economic and industry concerns over environmental ones", this approach laid the foundation for the country's subsequent approach to climate change policy.[19]

During this time the Keating Labor Government also became increasingly concerned that taking "similar action" to that of other developed countries would cost the Australian economy more. As a result, the Australian Government began to emphasize at the international level the principle of "common but differentiated responsibilities", the need to share equitably the burden of taking action, and the need to take account of the special needs of fossil-fuel dependent economies.[20]

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[14] Roslyn Taplin, "International Cooperation on Climate Change and Australia's Role", 26 *Australian Geographer* (1995), 16, at 16; Matt McDonald, "Fair Weather Friend? Ethics and Australia's Approach to Global Climate Change", 51 *Australian Journal of Politics and History* (2005), 216, at 221.

[15] Matt McDonald, "Fair Weather Friend? Ethics and Australia's Approach to Global Climate Change", 51 *Australian Journal of Politics and History* (2005), 216, at 221–222.

[16] Ibid., at 221.

[17] Ian Rowlands, "Explaining National Climate Change Policies", 5 *Global Environmental Change* (1995), 235, at 245; see also, Paul Kay, *Australia and Greenhouse Policy – A Chronology 1997–1999,* Background Paper 4 (1997), available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98bp04 (last accessed on 22 February, 2012).

[18] Commonwealth of Australia, *National Greenhouse Response Strategy* (Canberra: Australian Government Public Service, 1992), at 12.

[19] McDonald, "Fair Weather Friend?", supra, note 15, at 222–223.

[20] Ibid., at 223.

Paradoxically, while arguing that a differentiated approach was required to accommodate its resource rich and emission intensive economy, Australia joined countries such as the United States in calling for a greater commitment to mitigation from developing countries.

24.2.2 The Howard Government Era – "No-Regrets" Entrenched

In March 1996, Prime Minister John Howard was elected as leader of a Liberal-National Coalition Government. Holding power from 1996 through to late 2007, the Howard Liberal Government played a central role in determining Australia's domestic and international position on climate change during the crucial time surrounding the Kyoto Protocol negotiations and the decade that followed.

Relying on economic modeling to demonstrate the disproportionate costs Australia's resource intensive economy would incur to reduce its ghg emissions,[21] the Howard Liberal Government entered the Kyoto Protocol negotiations strongly opposed to uniform emission reduction targets and asserting that Australia was entitled to the benefit of the principle of common but differentiated responsibilities.[22] Threatening to block consensus at COP 3 in Kyoto, the Australian Government finally won late night concessions on its targets and on allowances for changes in land use. As a result, Australia received a Kyoto target of an 8% increase in emissions in 2008–2012 above 1990 levels[23] and a concession in the "Australia clause", which authorized Kyoto signatories to include net carbon emissions from land clearing as part of their targets.[24] With Australia's 1990 unusually high land clearance rates of 675,000 ha having already fallen substantially as a result of restrictions on clearing imposed by the States, the resulting compromise meant that Australia's commitment was even less onerous than its otherwise generous Kyoto target suggested. Despite this, and despite characterizing the Kyoto outcome as a "win for the environment and a win for Australian jobs",[25] the Howard Liberal Government later refused to ratify the Kyoto Protocol on the basis that it would unfairly hurt the Australian economy, heavily reli-

[21] Brian Fisher, *International Climate Change Policy Economic Implications for Australia* (Canberra: Australian Bureau of Agricultural and Resource Economics, 1997); Rosemary Lyster, "Common but Differentiated? Australia's Response to Global Climate Change", *16 Georgetown International Environmental Law Review* (2003–2004), 561, at 564.

[22] Ibid., at 563–564.

[23] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998), 22, Art. 3(a) and Annex B.

[24] Ibid., Art. 3.7.

[25] Prime Minister John Howard, AM Radio Program, 19 December 1997.

ant as it is on coal for both domestic energy and export income, while countries like India, China and the United States were not bound by targets.[26]

Having adopted this stance internationally, the Howard Liberal Government maintained the policy of 'no-regrets' at home. While responsible for creating the world's first government agency focused solely on ghg emissions, the Australian Greenhouse Office, and for passing legislation which put in place a mandatory renewable energy target, the Howard Liberal Government's "no-regrets" policy agenda became the subject of growing criticism[27] as Australia's direct emissions continued to rise. While still on track to meet its Kyoto target, estimates suggested Australia's direct emissions would increase by approximately 33% between 1990 and 2010[28] and structural changes required to transition to a low carbon economy were not taking place in Australia.

Dissatisfied with the Commonwealth Government's 'no-regrets' stance, the Australian States and Territory governments began to put in place a variety of state-based mitigation measures. In 2003, the State of New South Wales took the significant step of introducing one of the world's first mandatory emissions trading schemes[29] and the following year the State and Territory governments formed a National Emissions Trading Taskforce (NETT) to develop a model for a national emissions trading scheme. The NETT released a discussion paper in 2006 on the design of a national emission trading scheme which "invited" the Commonwealth government to join but also contemplated the possibility of the States and Territories pursuing a national emissions trading scheme "in the absence of Commonwealth support."[30] With the release of the Stern Review, Al Gore's Inconvenient Truth and experience of severe drought in the eastern States of Australia, the public also became increasingly concerned about the adequacy of the Australian Government's response to climate change.[31]

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[26] Prime Minister John Howard, Hansard: Commonwealth Parliamentary Debates, 5 June 2002, at 3163; Prime Minister John Howard, Hansard: Commonwealth Parliamentary Debates, 26 May 2004.

[27] Lyster, "Common but Differentiated?", supra, note 21, at 573–577.

[28] Andrew Macintosh, The National Greenhouse Accounts and Land Clearing: Do the numbers stack up? Research Paper No. 38 (2007), at 3.

[29] Information about the New South Wales Greenhouse Gas Reduction Scheme, a baseline and credit scheme aimed at reducing the ghg emissions associated with the production and use of electricity is available at: http://www.greenhousegas.nsw.gov.au/ (last accessed on 22 February 2012).

[30] National Emissions Trading Taskforce, "Possible Design for a National Greenhouse Gas Emissions Trading Scheme", 2006, available at: http://www.climatechange.gov.au/en/government/initiatives/cprs/~/media/publications/cprs/nett-discussion-paper.ashx (last accessed on 22 February, 2012), at ii and 13.

[31] Andrew Macintosh, "The Garnaut Review's Targets and Trajectories: A Critique", 26 *Environmental and Planning Law Journal* (2009), 88, at 88.

Bowing to the pressure, on 10 December 2006 then Prime Minister Howard announced the establishment of a joint government-business Task Group on Emissions Trading. An important emphasis however remained the protection of the economy, with the Task Group's terms of reference indicating that in assessing Australia's further contribution to reducing greenhouse gas emissions, the competitive advantages Australia enjoyed through the possession of large reserves of fossil fuels and uranium must be preserved.[32] When the final report by the Prime Ministerial Task Group on Emissions Trading recommended the adoption of an emissions trading scheme, it seemed at the time to mark a "critical turning point in the climate debate in Australia".[33]

While still opposed to the ratification of the Kyoto Protocol, on 17 July 2007 the Howard Government committed to establishing a national emissions trading scheme in Australia by 2011.[34] With the official opposition strongly supporting both the ratification of the Kyoto Protocol and the introduction of an emissions trading scheme, Australia seemed poised to finally move beyond a 'no-regrets' approach as it headed into a federal election in November 2007.

24.3 The Post-2007 Era – Beyond "No-Regrets"?

On 24 November 2007, Australia elected Prime Minister Kevin Rudd and his Labor Government on a platform that included the promise to effect change in domestic climate change governance. Describing climate change as "the great moral challenge of our generation",[35] the promise of the Rudd Government was action on climate change. This promise had the support of a high proportion of Australians, even if it meant paying higher prices.[36] Indeed, Ross Garnaut, commissioned by the Rudd Labor Government and the State and Territory governments to conduct an independent review on impacts of climate change on the Australian economy, concluded in 2008 that there was "a much stronger base of support for reform and change on this issue than on any other big question of structural change in recent decades, including trade, tax and public business ownership reform."[37]

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[32] Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group*, supra, note 6, at 8–9.

[33] Warwick McKibbin, "The Prime Ministerial Task Group on Emissions Trading", 14 *Agenda* (2007), 13, at 13.

[34] Prime Minister John Howard, Speech Transcript, "Address to the Melbourne Press Club", 2007, available at: www.pm.gov.au/media/Speech/2007/Speech24445.cfm (last accessed on 22 February 2012).

[35] Hon. Kevin Rudd MP, Opening Remarks to the National Climate Change Summit, Parliament House, Canberra, 31 March 2007.

[36] Garnaut, *Garnaut Climate Change Review*, supra, note 1, at xviii.

[37] Ibid., at xviii–xvix.

Signaling its intention to move quickly on its climate change commitment, the new Rudd Government ratified the Kyoto Protocol and set about putting in place the central piece of its climate change strategy, the Carbon Pollution Reduction Scheme (CPRS). The fate of the CPRS Bill (together with several associated Bills), introduced into Parliament on 14 May 2009, exposed the ongoing struggle in Australia between protecting economic interests, often associated with emission intensive activities, and moving beyond "no-regrets" measures to meet climate change mitigation objectives.

24.3.1 The CPRS in Broad Overview

In very broad overview, the CPRS proposed a market-based cap and trade approach to put a price on carbon.[38] Including all six greenhouse gas listed in Annex A of the Kyoto Protocol, the CPRS covered the stationary energy, transport, fugitive emissions, industrial processes and waste sectors. Of the covered sectors, the CPRS obligations applied to operators of facilities within these sectors with annual direct emissions of greater than 25,000 tonnes or more of carbon dioxide equivalent (CO_2-e). The transport sector was to be captured by applying obligations to upstream fuel suppliers resulting from the combustion of the fuel supplied. The Scheme was anticipated to capture approximately 1,000 liable entities, totaling 75% of Australia's total greenhouse gas emissions.

The CPRS required each liable entity in a covered sector to acquire and surrender a permit for each tonne CO2-e emitted. Permits up to the limit of the annual cap were to be allocated by a scheme Regulator by way of auction or free allocation to eligible emissions intensive, trade-exposed (EITE) entities, until such time as it was not longer warranted, and to strongly affected industries (being coal-fired electricity generators) on a limited transitional basis. It was also to be possible for liable entities to purchase international permits and permits generated by reforestation projects that "opted into" the Scheme. As a transitional measure, the CPRS also included a "safety valve", allowing liable entities to purchase permits for a fixed charge. Failure to surrender the requisite permits attracted both a penalty and an obligation to make good the following financial year.

24.3.2 Progress of the CPRS Bill in the Australian Parliament

Following its initial introduction and passage by the House of Representatives, on 13 August 2009 the CPRS Bill was rejected by the Senate, with all non-government Senators voting against it. That all non-government Senators voted against

[38] The text of the original Carbon Pollution Reduction Scheme Bill 2009 (Cth), together with Explanatory memoranda, is available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation/billhome/R4127 (last accessed on 22 February, 2012).

the CPRS Bill reflects the significance of the division that existed across the political spectrum in relation to key elements of the Bill. The Greens, on the one hand, called for tougher 2020 emission reduction targets and less assistance for large EITE industries. The Liberals, on the other hand, sought increased levels of protection for EITE industries, concerned to ensure that protection compared favorably to jurisdictions such as the United States. The Nationals, indicated they would not support the CPRS Bill until after the Copenhagen Conference on Climate Change.

The CPRS Bill was re-introduced into the Australian Parliament on 22 October 2009 and again passed by the House of Representatives before moving into the Senate on 17 November 2009. To secure the passage of the Bill through the Senate, the Rudd Government turned to the opposition Liberal party to negotiate. On 24 November 2009, the Government released a package of amendments to the CPRS Bill, which it said represented "the culmination of over a month of detailed negotiations between the Government and the Opposition, and over a decade of policy development" and delivered a "deal to the Opposition" aimed at passing the CPRS.[39] Instead, a tumultuous debate on the issue of climate change followed which exposed strong divisions within the Liberal party and culminated in the election of a new Opposition leader. On 2 December 2009, despite the changes put forward in the 24 November package, the Senate again defeated the CPRS Bills by 42 votes to 30. That same day the Liberal party withdrew its support for an emissions trading scheme and announced it would also not implement a carbon tax.[40]

The CPRS Bill was again reintroduced into Parliament on 2 February 2010 and passed the House of Representatives on 11 February 2010. However, rather than putting the legislation to a third vote in the Senate, on the 27 April 2010 Prime Minister Rudd announced the implementation of CPRS would be delayed until after the end of the current commitment period of the Kyoto Protocol.

24.3.3 Obstacles to the Passage of the CPRS Bill

A closer look at two of the most significant obstacles to achieving legislative consensus on the CPRS Bill – the overall emission reduction commitments and the treatment of EITE industries –highlight the ongoing tensions between protecting

[39] Senator Penny Wong, Minister for Climate Change, Energy Efficiency and Water, *A Carbon Pollution Reduction Scheme in the National Interest*, Media Release, 29 November, 2009, available at: http://www.climatechange.gov.au/minister/previous/wong/2009/media-releases/November/mr20091124.aspx (last accessed on 22 February, 2012).

[40] Senator Penny Wong, Minister for Climate Change, Energy Efficiency and Water, *New Opposition Policy – No ETS and No Carbon Tax*, Media Release, 3 December, 2009, available at: http://www.climatechange.gov.au/en/minister/previous/wong/2009/media-releases/December/mr20091203.aspx (last accessed on 22 February, 2012).

Australia's emission intensive economy and taking effective domestic action to mitigate climate change.

24.3.3.1 Overall Emission Reduction Commitments

Rising levels of greenhouse gas emissions associated with industrial and agricultural activities have sustained rising living standards over the past two centuries and the transformation of existing production and consumption patterns to reduce emissions dramatically requires change that reaches deep into current practices.[41] This is undoubtedly the case for the emission intensive economy of Australia, with many years of 'no-regrets' policies demonstrating the need for significant reform in order to bring about structural change to the economy. Nevertheless, a prevailing concern in designing the CPRS, and particularly in setting the overall emission reduction commitments, was to structure a transition which balanced the need to protect the Australian economy with the objective of achieving strong mitigation outcomes.

The original CPRS proposal included a reduction target aimed at reducing greenhouse gas emissions to 60% below 2000 levels by 2050 and a reduction target of 5–15% below 2000 levels by 2020. These targets were said by the Government to be acceptable in that they were expected to impose, in aggregate, a modest cost to the economy while at the same time providing a "credible and constructive contribution to achieving a long-term global solution capable of protecting the planet and promoting our national interest."[42] However, having accepted that "Australia's national interest was best served by a comprehensive global agreement to stabilize atmospheric concentrations of greenhouse gases at around 450 ppm of CO_2-e or lower",[43] the Rudd Government proposed to set post-2020 reduction targets "so as to ensure it plays its full role in achieving the agreed goal" should such an agreement emerge.[44] After sustained criticism that the existing targets were inadequate, the CPRS Bill was amended to contemplate a reduction of 25% below 2000 levels by 2020 conditioned, however, on Australia becoming a party to a comprehensive international agreement capable of stabilizing atmospheric concentrations of greenhouse gases at around 450 ppm CO_2-e or lower.[45]

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[41] James Meadowcroft, *Climate Change Governance*, *Policy Research Working Paper No. 4941* (Washington, DC: World Bank, 2009), at 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407959 (last accessed on 22 February 2012).

[42] Commonwealth Government, *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future* (Canberra: Commonwealth Government, 2008), at 4-16–4-17.

[43] Ibid., at 4-1.

[44] Commonwealth of Australia, *Commentary: Exposure Draft Carbon Pollution Reduction Scheme Bill 2009* (Canberra: Commonwealth Government, 2009), at 87–88.

[45] Carbon Pollution Reduction Scheme Bill (Cth) 2009, cl 3(4)(a).

While the addition of the conditional 25% reduction target by 2020 was viewed as a more credible target and enough to garner the support of some,[46] others viewed both the 2020 and 2050 targets contained in the CPRS Bill as inadequate.[47] However, rather than setting aggressive unconditional targets directed at achieving deep structural changes, the Rudd Government was not prepared to move beyond a modest unconditional 5% reduction target by 2020 absent global action.

24.3.3.2 Assistance Packages for EITE

The CPRS proposed three different types of industry assistance: assistance to new and existing energy intensive and trade exposed (EITE) industry; compensation for loss in asset value to coal-fired electricity generators; and transitional assistance to coal mines with high fugitive emissions. The most contentious form of assistance was that proposed for EITE industries through the allocation of free permits.

The justification for providing assistance to EITE industry was two fold: first to avoid the risk of carbon leakage; and second to "smooth the transition for individual firms, rather than just have them take a hit on their profit."[48] In attempting to determine an appropriate level of assistance, the Rudd Government was again confronted with the extent to which the most emission intensive sectors of the Australia economy were be buffered from the impacts of a carbon price. This necessarily included decisions relating to how to spread the patterns of risk and opportunity across the economy. As Garnaut put it, assisting this type of industry presents "a truly dreadful problem" for policy makers as "it undermines attempts to limit national ghg emissions or increases the adjustment burden elsewhere in the economy".[49]

As the CPRS Bill progressed, the level of assistance available to EITE industry changed substantially. The resulting EITE assistance package was the subject of two main types of criticism. The first argued that EITE should receive more assistance. This position was based on the assertion that trade-exposed industry would otherwise be unable to compete internationally or would be driven offshore inviting resulting risk of carbon leakage or, alternatively, required transitional assistance to adjust to the carbon constrained economy.[50] The second argued that EITE industry should

[46] See for example: Climate Institute, "How will the CPRS carnival end?", 2009, available at: http://www.climateinstitute.org.au/index.php?option=com_content&view=article&id=571:how-will-the-cprs-carnival-end-&catid=112:blogs&Itemid=49 (last accessed on 22 February 2012).

[47] Michael Power, "Emissions Trading in Australia: Markets, Law and Justice Under the CPRS", 27 *Environmental Planning and Law Journal* (2010), at 131.

[48] Standing Committee on Economics, Exposure Draft of the Legislation to Implement the Carbon Pollution Reduction Scheme (Canberra: Senate Printing Unit, 2009), at 44.

[49] Garnaut, *Garnaut Climate Change Review*, supra, note 1, at 316.

[50] Standing Committee on Economics, *Exposure Draft*, supra, note 48, at 42–48; Senate Select Committee on Fuel and Energy, *Interim Report: The CPRS: Economic Cost without Environmental Benefit* (Canberra: Senate Printing Unit, 2009), at 151–152; Select Committee on Climate Policy, *Report* (Canberra: Senate Printing Unit, 2009), at 77–78 and 81–86.

receive less assistance. This position was based on the lack of evidence to support the risk of carbon leakage,[51] the fact a significant proportion of the assistance would go to a handful of very large companies,[52] the consequential shifting or burden away from these polluters to the rest of the economy,[53] and, of course, the fact that the assistance "mutes the incentives" for EITE industry to reduce their ghg pollution.[54]

Rather than adopt a vigorous approach to climate change governance, which "cannot avoid disturbing power economic and political interests"[55] the CRPS sought to accommodate them with the result that the assistance available to EITE industries increased at each step in the development of the CPRS. Ultimately the treatment of EITE industries, together with the veracity of the emission reduction commitments, both polarized and dominated the debate and undermined both the validity and acceptability of the overall CPRS Scheme.[56]

24.4 Clean Energy Act 2011 (Cth)

24.4.1 "Carbon Pricing is a Reform We Need to Make to Keep Our Economy Competitive, to Protect Our Environment and to Do the Right Thing for Our Children"[57]

24.4.1.1 Background

On 24 June 2010, for reasons largely unrelated to climate change legislation, Julia Gillard replaced Kevin Rudd as Labor leader and Prime Minister of Australia. Prime Minister Gillard subsequently called a federal election and, during the election

[51] Standing Committee on Economics, *Exposure Draft,* supra, note 50, at 42–44 and 49; Select Committee on Climate Policy, *Report,* supra, note 50, at 78–79; and, Power, "Emission Trading in Australia", supra, note 47, at 156.

[52] RiskMetrics Group, *Research Note: The Impact of Industry Assistance Measures under the CPRS* (2009), at 6–7, available at: http://www.acfonline.org.au/sites/default/files/resources/RiskMetrics_CPRS_Industry_Assistance_May09.pdf (last accessed on 22 February, 2012).

[53] John Daley and Tristan Edis, *Restructuring the Australian Economy to Emit Less Carbon: Main Report* (Victoria: Grattan Institute, 2010), at 11 and 14; and, Power, "Emissions Trading in Australia", supra, note 47.

[54] Daley and Edis, *Restructuring the Australian Economy*, supra, note 53, at 12–13.

[55] Meadowcroft, *Climate Change Governance*, supra, note 41, at 35.

[56] Tim Flannery and Nick Rowley, "Comment: Carbon Omissions", *The Monthly* (2009), available at: http://www.themonthly.com.au/Tim-Flannery-Nick-Rowley (last accessed on 22 February, 2012).

[57] Prime Minister of Australia, The Hon Julia Gillard MP, "Securing a clean energy future for Australia", 10 July 2011, available at: http://www.pm.gov.au/press-office/securing-clean-energy-future-australia (last accessed on 24 February 2012).

campaign, made it clear that an emissions trading scheme would be introduced in (or, rather, delayed until the end of) 2012. The Labor Party was able to form government after the election, but only with the support of a number of independent members of the Commonwealth Parliament.

In September 2010 the establishment of a Multi-Party Climate Change Committee (the CCC) was announced by the Prime Minister, the aim of the CCC being to "consult, negotiate, and report to the Cabinet … on agreed options for the implementation of a carbon price in Australia."[58] Membership included senior members of the Government, including the Prime Minister, together with two members of the Australian Greens and two independent members of parliament (those whose support had enabled the Prime Minister to form government). The CCC was advised by Ross Garnaut, amongst others. It did not include members from the opposition parties; they had declined to participate.

The rationale – largely economic – for the introduction of a carbon price by the government was put succinctly by the federal Minister for Climate Change and Energy Efficiency when he said that the costs of carbon pollution had not been borne by its producers but by society as a whole and that this "must now change".[59] He argued that such costs need to be considered when companies and individuals make decisions about what to produce, what to invest in and what to consume. This means that the true cost of carbon pollution needs to be attached to its production and use, that is carbon emissions need to have a price … a carbon price will create the incentive for large emitters to reduce pollution, and stimulate investment in low emissions technologies and processes. It will provide greater certainty for business investment.[60]

The CCC established terms of reference, commissioned a number of studies, and published a set of principles to guide the development of a price on carbon: environmental effectiveness; economic efficiency; budget neutrality; competitiveness of Australian industries; energy security; investment certainty; fairness; flexibility; administrative simplicity; clear accountabilities; and support for Australia's international objectives and obligations.[61] In February 2011, the Prime Minister announced the outline of a "broad architecture" of the Government's plan "to cut pollution, tackle climate change and deliver the economic reform Australia needs to move to

[58] Australian Government, Department of Climate Change and Energy Efficiency, "Carbon pricing", available at: http://www.climatechange.gov.au/government/reduce/carbon-pricing.aspx (last accessed on 24 February 2012).

[59] The Hon Greg Combet AM MP, Minister for Climate Change and Energy Efficiency, "Address to the AIGN/BCA Carbon Pricing Forum", 23 March 2011, available at: http://www.climatechange.gov.au/minister/greg-combet/2011/major-speeches/March/sp20110323.aspx (last accessed on 25 February 2012).

[60] Ibid.

[61] Multi-Party Climate Change Committee, "MPCC Agreed Principles to Guide Development of a Carbon Price Mechanism", 24 February 2011, available at: http://www.climatechange.gov.au/government/initiatives/~/media/publications/mpccc/mpccc-carbon-price-mechanism.pdf (last accessed on 20 March 2012).

a clean energy future".[62] The Government proposed a "carbon price mechanism" (the CPM) which would start on 1 July 2012 with a fixed price period of between 3 and 5 years, with a transition to an emissions trading scheme after that period.[63] The commencement of this CPM, of course, was subject to the government's ability to negotiate agreement with a majority of both houses of Parliament (negotiation made more difficult given the close election result) and to pass the legislation.

24.4.1.2 Starting Price, Flexible Price, Price Floor and Ceiling, Energy Intensive Trade Exposed Industries

On 10 July 2011 the Government announced further details of and refinements to the CPM, the result in part of additional negotiations with the CCC which released its Clean Energy Agreement.[64] The CPM was to commence with a carbon price of AUD 23 per tonne and with a 3-year "fixed price" period (although the price of a permit – or a "carbon unit" under the CPM – would increase each year by 2.5%).[65] A "flexible price" period and an open "cap-and-trade" emissions trading scheme would operate from 1 July 2015 onwards, with a price "floor" and "ceiling" for the first 3 years after that date.[66] Details announced regarding EITE industries were broadly similar to those set out under the CPRS.

24.4.2 Legislation to "Encourage the Use of Clean Energy"[67]: Main Design Features

24.4.2.1 Introduction

Australia's climate change legislation passed by the Senate in 2011 – the main piece of which is the Clean Energy Act 2011 (Cth) (the Act), legislation "to encourage the use of clean energy", and for other purposes[68] – introduces a price on carbon by way

[62] Prime Minister, Minister for Climate Change and Energy Efficiency, "Climate Change Framework Announced", 24 February 2011, available at: http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/February/mr20110224.aspx (last accessed on 25 February 2012).

[63] Ibid.

[64] Australian Government, Multi-Party Climate Change Committee, Clean Energy Agreement, 10 July 2011, available at: http://www.climatechange.gov.au/government/initiatives/~/media/publications/mpccc/mpccc_cleanenergy_agreement-pdf.pdf (last accessed on 25 February, 2012).

[65] Australian Government, *Securing a Clean Energy Future: The Australian Government's Climate Change Plan* (Canberra: Commonwealth of Australia, 2011), at xiii.

[66] Ibid.

[67] Clean Energy Act 2001 (Cth), supra, note 13, Long Title.

[68] Ibid.

of a "carbon price mechanism" (again, a CPM) which commences on 1 July 2012.[69] Liable entities under the CPM (those corporations generating over 25,000 tonnes of CO_2e emissions each year[70]) must purchase and surrender carbon units for each tonne of carbon pollution they emit.

24.4.2.2 Objects

The objects of the Act include giving effect to Australia's obligations under the United Nations Framework Convention on Climate Change (the UNFCCC)[71] and its Kyoto Protocol[72]; supporting "the development of an effective global response to climate change;" taking action directed towards meeting Australia's target of reducing its net greenhouse gas emissions to 80% below 2000 levels by 2050 in "a flexible and cost-effective way": and putting a price on GHG emissions such that investment in clean energy is encouraged, jobs and competitiveness in the economy is supported; and economic growth is supported while pollution is reduced.[73]

24.4.2.3 Sectors Covered

The CPM will cover emissions from about 500 "liable entities" across the stationary energy, industrial processing, waste and resources sectors, covering approximately 60% of Australia's emissions.[74]

24.4.2.4 Carbon Units

The price of carbon units will be fixed in the fixed price period. In the flexible price period, carbon units will be freely tradable. In both periods, units (howsoever described) from offset projects both domestic and international may be used, although with some restrictions. In both the fixed and flexible price periods, liable entities under the CPM must acquire and surrender carbon units that are equal to their annual emissions from activities covered by the CPM.[75]

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[69] Ibid., Section 4.

[70] Ibid., Part 3, Division 2.

[71] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992), 849.

[72] Kyoto Protocol, supra, note 23.

[73] Ibid., Section 3.

[74] Australian Government, Securing a Clean Energy Future: The Australian Government's Climate Change Plan, supra, note 65, at xii, xiii.

[75] Clean Energy Act 2001 (Cth), supra, note 13, Part 4, Division 2.

International carbon units, including Certified Emission Reductions (CERs) from Clean Development Mechanism (CDM) projects and Emission Reduction Units (ERUs) from Joint Implementation (JI) projects under the Kyoto Protocol can be used to meet CPM liabilities up to 50% of the relevant entity's carbon unit surrender obligation. Other permitted international carbon units include removal units issued by a Kyoto Protocol state on the basis of land use, land-use change and forestry (LULUCF) activities and other international units permitted by Government regulation.[76]

24.4.2.5 EITE Assistance Units

EITE industries (together with coal-fired power generators[77]) will receive assistance in the form of free carbon units.

24.4.2.6 Liability Transfer

Liability under the CPM can be transferred from one corporate facility to another member of the corporate group or another person who has financial control of the facility. Corporate members of unincorporated joint ventures may make application to transfer emissions liability to joint venture participants in proportion to their interest in the facility.[78]

24.4.2.7 Agriculture, the Land Sector and the Carbon Farming Initiative

The CPM excludes the agricultural sector. As a result, farmers, forestry operators and other land managers will not be liable entities under the CPM. However, under the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (the CFI), which sets up a scheme for the issue of Australian carbon credit units (ACCUs) in relation to certain eligible offsets projects,[79] farmers and other entities can generate credits from a sector not covered by the CPM which can be used by liable entities to meet obligations under the CPM.

Although the CFI can work independently of the carbon price mechanism, "compliance" ACCUs can be used under the CPM to meet up to 5% of compliance obligations in the 3 years, fixed price period,[80] with no restrictions as to use after that period.

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[76] Ibid., Part 6, Division 1.

[77] Ibid., Part 8.

[78] Ibid., Part 3, Division 6.

[79] Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth), Parts 2 and 3.

[80] Clean Energy Act 2001 (Cth), supra, note 13, Section 125(7).

24.4.3 An Effective Mechanism to Transition Australia to a Clean Energy Future?

The objects of the Act include putting a price on greenhouse gas emissions such that "investment in clean energy" is simply encouraged, and taking action which is merely "directed towards meeting" Australia's long-term target of reducing its net greenhouse gas emissions to 80% below 2000 levels by 2050 – a target just less than 40 years away.[81] While the mechanisms which the Act puts in place *may* encourage the *use* of clean energy (as the Act's long title suggests), it seems clear that transitioning Australia to a clean energy future is not one of its objectives.

This becomes clearer when one considers what the Act does not do. For example, it would not appear (given its relatively narrow scope and its generous levels of industry compensation) to deliver 'least cost' emissions reductions, and it does not remove subsidies for fossil fuel use.

The Act is also concerned to give effect to Australia's obligations under the UNFCCC and its Kyoto Protocol.[82] However, the first commitment period under the Kyoto Protocol ends in 2012, with no formal targets negotiated beyond a decision on a second commitment period to begin on 1 January 2013 and end either in 2017 or 2020.[83]

COP-17 at Durban also launched a Platform for Enhanced Action, a non-binding agreement "to develop a protocol, another legal instrument or an agreed outcome with legal force" under the UNFCCC.[84] Any such protocol, legal instrument or "agreed outcome with legal force" is to be concluded by 2015, with "pledges" from developed and developing state parties to reduce emissions, and ostensibly to come into effect and be implemented from 2020.[85] These parties would also, of course, need to ratify such agreement. The Durban Platform is, however, simply an agreement to reach agreement. Additionally, then, it is also possible to argue that giving effect to Australia's obligations under the UNFCCC and Kyoto Protocol, such as they are, does not assist Australia – or the world – to transition to a clean energy future.

24.5 Conclusions

With the passage of the Clean Energy Act 2011 (Cth), Australia has finally stepped beyond the 'no-regrets' approach that for decades has dominated it domestic climate change mitigation policy. However, it seems unlikely that this Act, alone, will

[81] Ibid., Section 3.

[82] Ibid.

[83] See Decision 1/CMP.7, Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session, FCCC/KP/CMP/2011/10/Add.1, 15 March 2011, para. 1.

[84] Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UN. Doc. FCCC/CP/2011/9/Add.1, 15 March 2012, para. 2.

[85] Ibid., para. 4.

provide a mechanism to transition the country to a clean energy future. Rather, in putting a price on carbon, this legislation seeks only to "encourage" investment in clean energy while at the same time supporting jobs and competitiveness in the economy. Until these objectives are seen as one and the same, the tensions between adopting effective measures to mitigate climate change in Australia and protecting the country's economic interests remain an obstacle to a full transition to a clean energy economy.