australian network of environmental defender's offices

Submission on the
Carbon Pollution Reduction Scheme
Green Paper

10th September 2008

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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Executive Summary

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 Green Paper* ('Green Paper'). ANEDO has commented extensively on the design of an Australian Emissions Trading Scheme (ETS). Please refer to our previous submissions when considering this response.[1]

ANEDO has consistently advocated for the widest possible coverage of an emissions trading scheme, as well as the full auctioning of permits, sufficiently high penalties to deter non-compliance, and make-good provisions.

ANEDO supports the scheme set out in the Green Paper in principle, particularly in regard to its introduction in 2010 independent of the status of a global ETS, and the aim of having broad scheme coverage. However, we note that in important respects the CPRS retreats from elements of the initial Garnaut approach, and is based on economic compromises rather than the latest scientific findings.

Our key comments are summarised below.

- The overarching objective of the scheme must be an environmental one – to assist in reducing Australia's greenhouse gas emissions by imposing a series of emissions reduction targets from 2010 to 2050.
- The Government's commitment to a 60 per cent reduction target in emissions by 2050 is inadequate based on latest available projections. Short-term and long-term targets are needed that effectively progress Australia towards at least an 80-90% reduction in GHG emissions on 1990 levels by 2050. Progressively stricter trajectories that correspond to levels of international action are supported. The legislation must include a mechanism to increase targets consistent with best available scientific projections. In view of the threat posed by climate change, in order for Australia to fulfil its international responsibilities as one of the world's largest per capita emitters, and to strengthen our ability to play a leading role in negotiations towards a post-Kyoto global framework, it is critical that the scheme produce real cuts in the short term.
- ANEDO does not support the giving of five years notice given to industry when Australia adopts a stricter emissions trajectory based on international

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[1] *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/policy/net_anedosub061221.php**

Submission regarding abatement incentives prior to the commencement of the Australian Emissions Trading Scheme - 3 December 2007 - **http://www.edo.org.au/edonsw/site/policy/ets_abatement_incentive071207.php**

developments or improved science. If immediate adjustment is needed this should happen accordingly.

- ANEDO supports a scheme with the broadest possible coverage. We therefore support the inclusion of all greenhouse gases, and the inclusion of stationary energy, industrial processes, fugitive emissions, transport and waste from the schemes outset. However, forestry and agriculture must be added to the scheme as soon as possible. Given that the three largest emissions-producing sectors of the economy are stationary energy, agriculture and transport, the intention to exclude agriculture until 2015 at least, and to offer compensation to coal-fired electricity generators and motorists — as well as the intention to allocate up to 30 per cent of permits to emissions-intensive trade-exposed industries — will greatly reduce the effectiveness of the scheme, unless permits are very expensive for those sectors unlucky enough not to receive the benefit of Government assistance.
- Offsets should only be allowed after on-site mitigation has occurred. Offsets should be limited to projects for which there is a high level of certainty as to the accuracy of measurement methodologies, and those that are additional, permanent and ecologically sustainable.
- ANEDO submits that in determining the point of obligation under an ETS this should ideally be the source of emissions, where practicable. For transport, the point of obligation should be placed on fuel suppliers.
- ANEDO strongly supports 100% auctioning. Auctioning is the most efficient and environmentally effective means of permit allocation.
- International linkages are supported but only with markets built around sound objectives and design features.
- ANEDO does <u>not</u> support the unlimited banking of permits. We also oppose the lending of permits, due to the potential of this to undermine actual emissions reductions in a year.
- ANEDO recognises that there are limited special circumstances justifying compensation to some trade-exposed, energy-intensive industries. However, this should be strictly a transitional measure phased out over time.
- An independent regulator should be established to administer the ETS, with clearly defined roles set out in legislation. This is important to the integrity and credibility of scheme.
- ANEDO supports the setting of high penalties to deter non-compliance and ensure infringements are not seen merely as a 'cost of business'. We also support a 'make good' provision to ensure that the environmental integrity of the scheme remains intact.
- Permit revenue should be spent on a range of measures and allocated in a transparent manner. ANEDO supports revenue being used to address impacts of low-income households, for structural adjustment programs for affected communities, and R & D funding for renewable energy projects as priority areas.

- An emissions trading scheme should be supplemented by complementary measures that also address climate change. These include: removing perverse tax incentives to pollute (for example, the FBT rebate for company cars), introducing mandatory fuel efficiency standards for motor vehicles, investing heavily in public transport (instead of simply investing in road construction and maintenance) and rail freight infrastructure, and supporting the renewable energy sector, as well as encouraging state and territory governments to implement changes to their urban planning policies to reduce reliance on cars.

This submission addresses the 13 areas of preferred positions as set out in the Green Paper:

1. **Framework for the CPRS**
2. **Coverage**
3. **Carbon market**
4. **Emissions targets and scheme caps**
5. **Reporting and compliance**
6. **Linking the scheme to international markets**
7. **Auctioning of Australian carbon pollution permits**
8. **Household assistance measures**
9. **Assistance to emissions-intensive trade-exposed industries**
10. **Strongly affected industries**
11. **Tax and accounting issues**
12. **Transitional issues**
13. **Governance issues and implementation**

1. Framework for the CPRS

Objectives

The Green Paper states that:

> "The objective of the CPRS is to meet Australia's emissions reduction targets in the most flexible and cost effective way; to support an effective global response to climate change; and to provide for transitional assistance for the most affected households and firms" (Preferred Position 1.1)

ANEDO submits that the objects as they will appear in legislation need to be expanded. In addition to the 3 objects identified in the Preferred Position, the objects clause of the legislation should explicitly state that an object of the scheme is to reduce Australia's greenhouse gas emissions. As ANEDO has previously submitted, the key objective of an ETS must be its long term environmental performance. We believe that the overarching objective of the scheme must be an

environmental one – a reduction in Australia's GHG emissions to a minimum of at least 80-90% of 1990 levels by 2050. ANEDO submits that the emissions reduction objective should be the primary overarching objective. It is of limited value if an efficient market is created while the GHG targets are not being met. It is likey that the environmental imperative for the scheme would be lost in the quest for "economic efficiency" if it is not explicitly stated as the overarching policy objective of the scheme. We note however, that a reference to targets in the objects clause is not sufficient alone. ANEDO submits that targets should be addressed in the Act itself and simply including "non-binding targets in the objectives" is insufficient (Preferred Position 13.2 – discussed below).

In addition, there should be an explicit object that the Act will be implemented in accordance with the principles of Ecologically Sustainable Development (ESD).[2]

Assessment criteria for assessing design options are identified (Preferred Position 1.2) as:

- Environmental integrity
- Economic efficiency
- Minimization of implementation of risk
- Policy flexibility
- Promotion of international objectives
- Implications of for the competitiveness of traded and non-traded industries
- Accountability and transparency
- Fairness

The Green Paper indicates that "some criteria are more relevant to particular design issues than others.... Some design decisions may require a trade-off between two or more of these criteria" (p86). ANEDO is concerned that as the majority of criteria relate to economic industry concerns, that these could override environmental integrity. We submit that environmental integrity must be the overarching consideration.

Complementary measures

In relation to the framework of the CPRS more generally, we note that the Green Paper states "the introduction of the CPRS is an opportunity to assess whether

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[2] A definition of ecologically sustainable development should be adopted in the Act consistent with the definition of the principles of ESD under s3A of the *EPBC Act:* The following principles are ***principles of ecologically sustainable development***: (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations; (b) 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; (c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; (e) improved valuation, pricing and incentive mechanisms should be promoted.

other policy measures are needed" (p82). These include transitional measures, and parallel mitigation measures that "address market failure."

While ANEDO supports the development of an ETS as the centerpiece of Australia's domestic emissions reduction policy, we note that there are a range of other complementary mechanisms that are needed to support emissions reduction processes. In advice to the Climate Action Network of Australia, the EDO in NSW identified 20 preliminary areas of law reform needed to comprehensively address the climate change challenge.[3] Recommendations included amendments to the *Environment Protection and Biodiversity Conservation Act 1999*, energy efficiency legislation, coal export permits, GHG reporting requirements (we note that this has subsequently been done[4]), director's duties, financial products disclosure, electricity bill regulations, feed-in laws, public transport regulations, and environmental management plans. Accordingly, an ETS should not be treated as a solution to climate change in and of itself.

ANEDO strongly supports a range of complementary measures being developed, that all work towards achieving the national emissions reduction targets in uncovered sectors. We strongly support measures to drive research and development of genuine renewable energy sources, and reform current perverse incentives. For example,

- We support the continuation of the Mandatory Renewable Energy Target of 20%.[5]
- We do not support the current investment over-emphasis on carbon capture and storage, as this is an end-of-pipe solution allowing business as usual, with no guarantees of permanent emissions storage.[6] Instead, investment focus and complementary measures should drive research and development of genuine renewable energy sources.
- We strongly support complementary measures to halt broadscale clearing of native forests, as this will yield both carbon sequestration befits and broader ecosystem benefits for biodiversity, water quality, soil quality etc.
- We submit that any measures to encourage plantations strictly adhere to best-practice standards.[7]

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[3] CANA, 'Turning Down The Heat – A Climate Change Action Agenda for Australia', p50-51.

[4] National Greenhouse and Energy Reporting Act (Cth) (2007).

[5] See ANEDO *Submission to the COAG Working Group on Climate Change and Water – Design Options for the Expanded National Renewable Energy Target Scheme,* available at: www.edo.org.au/policy/080730nrets.pdf.

[6] See ANEDO *Submission to the Senate Inquiry into the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008,* available at: www.edo.org.au/policy/080812greenhouse_gas_storage_senate.pdf

[7] See ANEDO *Submission to the Inquiry into the implementation, operation and administration of the Legislation underpinning carbon sink forests.* 31 July 2008, available at: http://www.edo.org.au/policy/080731carbon_sink_forests.pdf.

We understand that the Wilkins Review has assessed existing policies to assess their compatibility with the CPRS, and recommended that a number of programs (particularly state-based programs) be phased out so as to not undermine the carbon price set by the ETS.[8] We are concerned with this approach and the potential it has for schemes such as rebates for the installation and use of solar panels, to disappear. ANEDO submits that the Wilkins Review immediately be made publicly available so that recommendations may be considered more broadly.

2. Coverage

Greenhouse gases

ANEDO supports coverage of all greenhouse gases under the Kyoto Protocol from CPRS commencement (Preferred Position 2.1)

Point of obligation

ANEDO submits that in determining the point of obligation under an ETS, this should be the emission source, where possible. If this is not feasible, then moving upstream or downstream is recommended, depending on the reliability of measurement at that level.

For stationary energy, ANEDO agrees that the source of emissions is the best point of obligation. Similarly, industrial process emissions and waste emissions should also be covered at the point where emissions are generated.

It is obvious for example, that emissions relating to transport cannot be measured at the point of emissions as this is impractical and would involve tens of millions of vehicles. An upstream liability in this case is appropriate. Fuel producers should therefore bear the obligation to comply with the ETS.

Sector coverage

ANEDO has consistently called for a broad-ranging scheme applicable to all major emissions sectors and covering all greenhouse gases. The World Resources Institute (WRI) agrees. WRI recommend that an ETS should strive to incorporate a broad and diverse set of emissions sources. The rationale for this is that it serves to lower costs, achieve environmental objectives, accelerate innovation, and spur deeper engagement with the private sector.[9] We have previously submitted that coverage should be as broad as possible and should extend beyond the stationary energy sector. ANEDO welcomed the much broader coverage proposed by the Garnaut review, with all GHG and sectors to be eventually included in the scheme.

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[8] Sydney Morning Herald, 3rd September 2008.

[9] World Resources Institute, *Greenhouse Gas Emissions Trading in US States – Observations and lessons from the OTC Nox Budget Program,* (2005) www.wri.org, accessed on 9 April 2008, p.32.

Stationary energy

We support stationary energy emissions being covered from commencement. We support the recommendation of the Climate Action Network of Australia 9CANA) that the scheme should cover at least 70% of Australian emissions.[10]

Transport

The Green Paper states that "transport emissions would be covered from scheme commencement with obligations applied to upstream fuel suppliers" (Preferred position 2.4). ANEDO supports this approach, as noted above.

Transport is the third largest emissions-producing sector in the Australian economy (14 per cent), so its early and full inclusion in the scheme is important. The Green Paper observes that there is some price elasticity of demand in response to rising petrol prices, thereby justifying the inclusion of transport in the scheme, but then goes on to propose that fuel excise be cut on a cent for cent basis to offset the impact of the scheme on motorists for at least three years. This appears to be a political rather than an economic or environmental response. The Green Paper does not attempt to discern what impact a CPRS impact of around 5 cents per litre would have on demand, but ANEDO contends that it would be minor compared with the much larger fluctuations in pump prices over the last two years brought about by changes in the crude oil spot market price. It is not logical to introduce a scheme aimed at changing consumer behaviour and then introduce a mechanism that cushions consumers from the need to change their behaviour. It would be better for the scheme if the full impact was passed on and for consumers to be informed about how that money is being used to provide less polluting alternatives — especially better public transport. If necessary, the full cost of permits could be passed on gradually, in order to reduce its impact.

However, rural Australians often have no viable alternative to fossil fuels-powered private cars to meet many of their transport needs at present. It is therefore important that they be targeted with incentives to take up more fuel-efficient and non-petrol fuelled cars. Such measures could include reducing the excise on LPG and diesel for rural consumers, or instituting a rebate on the most fuel-efficient new LPG and diesel cars for people in rural areas.

Freight — road, rail, air and sea, each of which uses fossil fuels — accounts for about 6 per cent of Australia's emissions. Road freight is the largest category.[11] It is therefore important for this sector to become more energy efficient. The National Transport Council (NTC) recently published a discussion paper on Freight Transport in a Carbon Constrained Economy. ANEDO supports the range of potential complementary measures recommended in that report to reduce freight transport emissions, and suggests that some of these measures could be funded from permit auctions. We note, however, that the discussion paper states that 15 per cent

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[10] CANA, CPRS Green Paper Submission, September 9, 2008.

[11] Commercial vehicles contribute about 38 per cent of transport sector emissions: National Transport Council, Freight Transport in a Carbon Constrained Economy, July 2008: http://www.ntc.gov.au/RFCList2004.aspx.

of intercity freight is "contestable" — that is, could shift from road to rail.[12] In view of the significantly lower emissions per unit of cargo from rail freight,[13] the Government could also take steps to encourage this shift, with positive social impacts for urban and regional communities from improved safety and air quality reduced noise.

Other regulatory changes are needed to reduce transport emissions at minimal cost to consumers or the economy, such as:

- Abolishing the FBT rebate for company cars, or at least overhauling it to remove the perverse incentive to buy large cars and travel more than 15,000 kms pa.
- Introducing mandatory fuel and greenhouse efficiency standards for motor vehicles — for example, Euro 5 (by 2010) and Euro 6 (by 2014).

The airline industry accounts for about 2 per cent of Australia's emissions, but these emissions have a much greater effect on greenhouse warming because they are released at altitude.[14] While the introduction of the CPRS will result in higher air travel costs, and the Green Paper does not propose to shield users from this increase, more could be done under the scheme to reduce emissions — for example, by offering incentives for airlines to improve fuel efficiency and to introduce non-carbon based fuels, and a compulsory verifiable offset scheme.

ANEDO therefore recommends that:

- the full impact of the scheme be passed on to motorists, if necessary at the rate of 1 cent per year, escalating for up to five years. Motorists should be informed that every cent of this increase (and more) will be spent directly on public transport initiatives;
- the Government earmark sufficient funding from permit auctioning to improve rail freight infrastructure to bring about a substantial shift from road to rail freight; and
- the Government offer incentives to airline operators to invest in low emission fuels.

ANEDO is also concerned that the exemptions outlined in Preferred Position 2.4 be tightly monitored and not open to abuse.

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[12] *Ibid.*, 42.

[13] Articulated trucks use, on average, about 3.5 X, and rigid trucks more than 10 X, more energy per tonne-km than "hire and reward" rail: see Apelbaum Consulting Group (2007), Australian Transport Facts 2006, Table 10.

[14] This is the radiative forcing effect, and is typically estimated at 2.7 times: IPCC (1999) Aviation and the Global Atmosphere. Available online at http://www.ipcc.ch/ipccreports/sres/aviation/index.htm

Waste

ANEDO supports emissions from waste being included in the scheme (Preferred Position 2.8), with appropriate development of accounting methodologies established as a priority.

Carbon Capture and Storage

As noted above, ANEDO has serious concerns about the long-term viability and security of carbon capture and storage. We are therefore concerned about Preferred Position 2.9 that states "carbon that is transferred to CCS facilities would be netted out of the originating entity's gross emissions." This is not appropriate until the legislation regulating CCS is significantly strengthened to include environmental safeguards, and more comprehensive independent environmental assessment etc. ANEDO has outlined necessary amendments in recent submissions to both the House of Representatives and Senate Inquiries and presented evidence at those Inquiry hearings.[15]

Biomass and biofuels

Preferred Position 2.17 states that "scheme obligations would not apply to emissions from combustion of biofuels and biomass for energy; they would receive a 'zero rating.' ANEDO is concerned at this approach. As noted in previous submissions, we do not support burning of certain biomass and wood waste, such as from native forests as being an appropriate renewable energy option due to the broader environmental detriment.[16]

Similarly, we are concerned about the development of the biofuels industry, both in Australia and in developing countries. While we support R&D into alternate fuels, there are a number of broader negative consequences that can arise from biofuel plantations, such as biodiversity impacts, water diversion, and displacement of rural farming activities. ANEDO submits that any biofuel use must be strictly regulated and meet clear sustainability criteria established by legislation. Furthermore, claiming a 'zero rating' for combustion of biofuels and biomass is both misleading and an overly simplistic approach that does not for example, take into account a full life-cycle analysis of emissions.

Agriculture

The Green Paper indicates that agricultural emissions will be included by 2015 (Preferred Position 2.19), but that the scheme would not include domestic offsets from agriculture emissions in the period prior to coverage of these emissions (Preferred Position 2.22).

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[15] See recommendations for amendment in ANEDO *Submission to the Senate Inquiry into the Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008*, available at: www.edo.org.au/policy/080812greenhouse_gas_storage_senate.pdf

[16] See *Submission to the COAG Working Group on Climate Change and Water – Design Options for the Expanded National Renewable Energy Target Scheme*, 30 July 2008, available at http://www.edo.org.au/policy/080730nrets.pdf.

ANEDO notes that agriculture is the second largest emissions-producing sector in the Australian economy, and that livestock produces the most emissions in this sector.[17] The important contribution of this sector highlights the need for scientific research to both account for emissions and establish effective abatement measures within the sector to enable their inclusion in the scheme.

ANEDO believes that by setting a firm commencement date of 2015, the Australian Government will encourage research investment in this area. It is noted that there is currently some research being undertaken, particularly on the Best Management Practices (BMPs) for reducing emissions associated with enteric fermentation,[18] and that industry support for this research has been secured, largely as a result of production co-benefits for example, by the Beef CRC. A firm date for inclusion of the sector in the scheme would promote further industrial investment in research, in addition to Government funding.

The point of obligation for agricultural activities will need to be further considered. ANEDO prefers that the point of obligation be the source of emissions, however accepts that this will be difficult in the agricultural sector as a result of the large number of small enterprises. It is our preference that the point of obligation be downstream, as a result of the large impact that management actions have on the GHG emissions of a particular enterprise. It would be much more difficult to monitor the application of these management actions if the point of obligation was upstream, and therefore payment for produce could not be linked to undertaking these actions. It may be a decision of the abattoir or processing facility to pay a market premium to producers who implement BMPs for reducing GHG emissions on their properties, in order to reduce their permit liabilities, or a condition of supplying to the processing facility.

Prior to the inclusion of the scheme, and in order to facilitate uptake of BMPs for reducing GHG emissions in the sector, complementary measures such as incentive programs, extension and education programs are encouraged,.

ANEDO therefore recommends that 2015 be confirmed as the year in which the agricultural sector will be included in the scheme, thereby increasing the scheme's coverage, giving certainty to this sector, and encouraging research into accounting and abatement measures for this sector.

Forestry

The Green Paper states:

> **2.20** All reforestation (as defined for the first commitment period of the Kyoto Protocol) would be included, on a voluntary basis, from scheme commencement in 2010, with design details to be determined.

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[17] Green Paper, Section 2.7, pg 123.

[18] Hegarty, R. (2001) Greenhouse Gas Emissions from the Australian Livestock Sector. *Australian Greenhouse Office;* Beauchemin, K.A., Kreuzer, M., O'Mara, F. and McAllister, T.A. (2008) Nutritional management for enteric methane abatement: a review. *Australian Journal of Experimental Agriculture* 48: 21-27

2.21 After careful deliberation the Government does not propose to include deforestation in the CPRS. Australian deforestation emissions have reduced markedly since 1990, largely due to increased protections against land clearing.

As Australia has chosen not to include the management of native forests under its international commitments, and the Government is preferring only to include in the scheme those sources and sinks that are recognised internationally, the discussion of forestry in the Green Paper focuses mainly on reforestation i.e. the establishment of forests on lands that were clear of forests in 1990, and not native forest management. If an international mechanism is introduced for reduced emissions from deforestation and degradation, ANEDO supports the inclusion of native forest management in the scheme, however until then, complementary measures are necessary to improve native forest management, regardless of whether this is included in Australia's international obligations, given their importance in carbon storage.[19]

Reforestation

ANEDO submits that reforestation should be included in the scheme to ensure that it is properly regulated and accounted for.

There are a number of factors influencing the sequestration potential of established forests (plantation forests) including: the climate where forests are established, age of the forest, species planted, and the management of forests, including rotation time and woody debris management.[20] The Green Paper states 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

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[19] Mackey, B., Keith, H., Berry, S. and Lindenmayer, D. (2008) Part 1. A green carbon account of Australia's South-Eastern eucalypt forests, and policy implications. *ANU Press*

[20] Forrester, Barhus and Cowie (2006) 'Carbon allocation in a mixed-species plantation of *Eucalyptus globules* and *Acacia mearnsii*' *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, pg 127.

[22] Chen, Xu, and Mathers (2004) 'Soil carbon pools in adjacent natural and 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 of 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.

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]. The rules for forests included in the scheme need to reflect this so that established forests do not receive additional permits for carbon that they have not sequestered and that operators will be fully liable for their carbon emissions and reduction in soil carbon as a result of their operations and management

The proposed voluntary inclusion of forestry within the scheme will mean that those most likely to opt-in are large commercially managed plantation forests, which are able to manage risk and harvesting over a large area, or forest owners who are establishing forests, not intended for harvest, who are prepared to accept the risk of fire, drought or pest impacts. It appears unlikely that many forest owners will opt-in to the scheme as a result of these large potential liabilities.

Opt-in coverage is unlikely to dramatically increase the number of forests established due to the liability issues for permits when the forest is damaged, or harvested. It would however provide a source of income for forest owners who do not harvest their forests, as they could effectively be paid, through provision of permits, for maintaining forest on their property, like an ecosystem service payment.

If the scheme coverage is to be voluntary, then it is important to establish clear rules for forest owners who initially choose to opt-in, but then decide to opt-out because either a) the carbon price is rising and they think it will rise further before they harvest or b) the price of harvested trees rises, and so a forest manager who initially did not intend to harvest the forest now wants to, and wants to minimize their future obligations under the scheme. It is essential that these forest owners have to fulfill their total obligations i.e. surrender permits as if the forest is harvested on the day they opt-out of the scheme, including any potential loss of soil carbon up until that time.

ANEDO's preferred option is that reforestation is covered by the scheme. Many issues surrounding the use of forestry as offsets in the voluntary carbon market, (such as permanence, additionality, forward selling and liability for re-establishment[26] in the case of damage by fire, drought or pests) would be more easily dealt with if forestry was covered by the scheme. The liability for re-establishment, and the surrender of permits clearly lies with the forest owner and permanence is encouraged by the rule requiring full surrender of permits for carbon sequestered when trees are harvested. Additionality is not an issue if forestry were covered by the scheme, as carbon sequestered and emitted by the forest are both accounted for. The current practice in forestry of forward selling carbon that will not be sequestered for 100 years is also eliminated by inclusion of forestry in the scheme, as permits would only be given for carbon sequestered by the forest in that year.

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

[26] ANEDO submission to the ACCC on the Trade Practices Act and carbon offset claims. (2008) Available online at http://www.edo.org.au/edonsw/site/pdf/subs08/carbon_offset080218.pdf

Including forestry in the scheme will also remove forestry credits from the voluntary carbon market, which is poorly regulated. This will encourage businesses or individuals who are voluntarily offsetting emissions to buy and surrender permits under the CPRS, effectively reducing total GHG emissions under the scheme. This provides a much more accountable environmental outcome than the currently poorly regulated voluntary carbon market. If the final decision is not to include forestry in the scheme, then proper regulation of the voluntary carbon market is essential.[27]

We note a potential risk of including forestry in the scheme that should be considered, namely that it will only be beneficial to those forests in their early rotational stages as they still have the most sequestration potential with which to earn credits. This may create the perverse incentive of forest managers harvesting up to 20 year old trees immediately before the scheme commences in order to gain the maximum credits. This would however actually decrease the real amount of carbon sequestered in Australia for the Kyoto commitment period as the soil carbon would be decreased and biomass minimal by the end of the first commitment period. In order to eliminate this possibility, the baseline data for forestry should be collected before a final decision is made on whether to cover the sector or not, and only carbon sequestered additional to this be eligible to earn permits. The scheme rules should adequately reflect the sequestration of carbon in forest biomass, as well as the soil under these forests, as discussed earlier. ANEDO submits that the rule from the Marrakesh Accords that 'reported emissions from any given area of forested land cannot exceed sequestration over the commitment period' should not apply to the scheme after the first commitment period, given the scientific evidence that this is not an accurate reflection of carbon cycles within forests.[28]

ANEDO therefore recommends that the scheme covers all reforestation activities. We note that the New Zealand ETS, which commences in 2008, includes forestry as a liable industry from the scheme's inception.[29] Australia should follow this example and include forestry as a liable sector by the ETS's commencement in 2010, or as soon as possible.

Furthermore, ANEDO supports the use of complementary measures to encourage the establishment of native forests for their carbon sequestration benefits, however recent amendments to the *Income Tax Amendment Act 1997* relating to carbon sink

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[27] See: *Submission regarding abatement incentives prior to the commencement of the Australian Emissions Trading Scheme*, 7 December 2007, available at: http://www.edo.org.au/edonsw/site/pdf/subs07/ets_abatement_incentives071207.pdf.

[28] Chen, Xu, and Mathers (2004) 'Soil carbon pools in adjacent natural and plantation forests of subtropical Australia' *Soil Science Society of America Journal* 68:282-291; Laclau (2003) 'Biomass and carbon sequestration of 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

[29] See *The Framework for a New Zealand Emissions Trading Scheme – Executive Summary.* Available at www.mfe.govt.nz (11 April 2008).

forests do not provide adequate safeguards to ensure that carbon is actually sequestered before financial benefits are received.[30] Any establishment of native forests must meet rigorous sustainability criteria as set out in legislation.

It is acknowledged that there may be co-benefits of establishing additional forests, particularly if they are established on currently degraded land with a mix of local species. However, there is also potential for the establishment of plantations to have ancillary environmental harm, such as biodiversity impact if established in currently forested areas, or through interception of groundwater or surface water. Current state and territory legislation and regulation is not strong enough to ensure that forests established as carbon sinks fulfil their intended purpose, i.e. are net carbon sinks, and do not cause ancillary environmental harm in the pursuit of carbon sequestration.[31] However the Green Paper suggests that the scheme regulator should not be required to take into account the ancillary environmental benefits or impacts of newly established forests. It is suggested that separate frameworks for natural resource management can assess these benefits or impacts. However there is no current regulatory regime in place in many states that provides a mechanism for this to be taken into account.

The National Water Initiative provides the requirement for states to consider the impact of plantations on water resources, however there is no equivalent agreement on biodiversity, requiring states to consider the biodiversity impacts of plantation establishment. ANEDO submits that either through the scheme or under a legislative complementary measure, environmental benefits or impacts are into account by the application of comprehensive environmental impact assessment and sustainability criteria.

Deforestation

The importance of natural forests for carbon storage, as well as their role in protection of biodiversity and catchments is widely recognized.[32] The relative importance of natural forests compared with plantations, or reforested areas is highlighted by a recent research report by Mackey *et al* with plantation forests, or forests which are commercially logged storing 40-60% less carbon than natural, undisturbed forests.[33] This highlights the need to protect existing natural forests for their carbon benefits.

Ceasing deforestation is an important step towards the protection of existing natural forests, and despite decreases in land clearing in rural areas as a result of regulation in many states (for example, the *Native Vegetation Act 2003* in NSW),

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[30] See ANEDO, Submission to the Inquiry into the implementation, operation and administration of the Legislation underpinning carbon sink forests - 31 July 2008, esp. 3. Sustainability Criteria. Available online at http://www.edo.org.au/policy/080731carbon_sink_forests.pdf

[31] Green Paper, Section 2.8.1, pg 128.

[32] Mackey, B., Keith, H., Berry, S. and Lindenmayer, D. (2008) Part 1. A green carbon account of Australia's South-Eastern eucalypt forests, and policy implications. *ANU Press*

[33] *Ibid*.

there are still significant areas being cleared for development.[34] By including deforestation in the scheme, development would be encouraged in brownfield areas, and the full carbon cost of greenfield development would be paid by the surrender of permits by developers who wished to clear forest vegetation. Thresholds for inclusion in the scheme could be based on the carbon storage capacity of different vegetation types, for example, the threshold could be set at a carbon emissions level per event such as 5,000 tonnes, which could equate to a relatively small area in carbon rich forests such as 3-5 ha of the Mountain Ash forest of Victoria, but much larger areas of vegetation with a lower carbon storage capacity such as over 50ha of arid shrublands in Western NSW.

It is acknowledged that the scientific information on carbon storage is not currently available for all vegetation types in Australia. However, due to the importance of natural forests in carbon storage it is recommended that the Australian Government prioritises this research. It is our view that as soon as there is sufficient scientific information on this, deforestation should be included in the scheme.

Current regulatory controls have reduced deforestation as much as possible, and a market-based mechanism is now required to put further downward pressure on land clearing. Inclusion in the scheme is the most straightforward way to do this, in accordance with the polluter pays principle.

A range of complementary measures should also be used while adequate data is being collected to enable the inclusion of deforestation in the scheme, and also once it is within the scheme. These could include using income from permit auctions to expand areas of native forest that are protected in order to eliminate the potential for deforestation, as well as strengthening the regulatory regime in jurisdictions where this is not currently in place.

ANEDO recommends that reforestation be covered by the scheme from commencement and that deforestation be included in the scheme as soon as scientific knowledge is sufficient to adequately account for carbon stored in natural forests. It is acknowledged that there is a lack of scientific knowledge relating to the carbon storage potential of different natural forest types and encourages the Australian Government to support research in this area.

Offsets

Consideration of what sectors and activities will be covered by the CPRS, raises the issue of how uncovered sectors might be able to provide offsets.

In view of the variety of issues surrounding offsets (such as verifying additionality), ANEDO agrees with the Government's proposal not to allow offsets as part of the scheme, especially from the agricultural sector as this will be included in the scheme

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[34] For example, 3566 ha of native vegetation were approved for clearing in NSW under the *Native Vegetation Act 2003* between July and December 2007. NSW Native Vegetation Report Card 1 July – 31 December 2007. Available online at http://www.nativevegetation.nsw.gov.au/p/nv_report_card_jul_dec_07.pdf. 8000 ha of native vegetation were approved for clearing in WA in 2006. State of the Environment Report WA (2007) Available online at http://www.soe.wa.gov.au/report/biodiversity/loss-or-degradation-of-native-vegetation.html.

in the near future, therefore any offsets generated from this sector would not be additional.

As we have noted elsewhere, ANEDO has significant concerns relating to the use of offsets as a means of "reducing" emissions.[35] Our primary view is that offsets should not be relied upon as the predominant means of compliance with an ETS. We believe that offsets fall at the bottom of the climate action hierarchy. First, on-site environmental impacts must be avoided or reduced by using all cost-effective prevention and mitigation measures. 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 any offsets recognised under an ETS should be limited to projects for which there is a high level of certainty as to the accuracy of measurement methodologies, and those that are additional, permanent and ecologically sustainable.[36] We have previously examined these principles in the context of forestry offset projects and as noted, 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. Therefore, forestry offsets under the ETS should be treated with much caution and should be subject to rigorous assessment prior to being accepted as valid offset projects. This is why ANEDO's preference is to have forestry covered and properly regulated by the scheme.

As noted, regulation of the voluntary carbon offsets market is currently poor. There is an urgent need to regulate the voluntary carbon offsets market, in addition to producing guidance materials such as those produced by the ACCC.

3. Carbon market

Property rights and compensation

The Green Paper states that " the carbon pollution permits would be personal property", and that "there would not be power to extinguish permits without compensation, unless there had been a misrepresentation or fraud by the holder against the Australian Government or the scheme regulator in the creation of permits (Preferred Position 3.10)."

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[35] See *ANEDO Submission regarding abatement incentives prior to the commencement of an Australian Emissions Trading Scheme* – 3 December 2007. Located at: http://www.edo.org.au/edonsw/site/pdf/subs07/ets_abatement_incentives071207.pdf (10 April 2008).

[36] This is the approach taken by Gold Standard, which is widely recognised as the international accreditation system for premium quality carbon credits generated by projects that have sustainable development benefits. For more information see www.cdmgoldstandard.org (10 April 2008).

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).[37]
- 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.'[38] 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 purposes.[39]
- 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".[40] 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.[41] Put another way, if a right to compensation is inserted into a federal emissions trading scheme, this 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 and environmental information calls for a re-adjustment of the cap. Such a consequence is inconsistent with the overarching goal of an emissions trading scheme, which is a reduction in greenhouse gas emissions.
- The assumption that granting emitters firm property and compensation rights will facilitate better environmental outcomes as emitters will have a clear financial incentive to reduce their emissions, does not always prove correct. Water management is an example of how secure property rights, or at least the belief that they existed, led in fact to environmental degradation and not better environmental outcomes.

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

[38] 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.

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

[40] 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).

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

- 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 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 generated the need for regulation.

ANEDO submits that the proper characterisation of an emissions permit is as a licence to emit, with no proprietary character. Indeed, existing pollution laws in Australia regulate air and water emissions all use a licensing scheme, with no associated property rights. This regulatory approach has been used in Australian states for the past 30 years in controlling air emissions.[42] These licences give companies a clear right to emit, with no associated property right. Thus, they are essentially permission to do what would otherwise be illegal.[43] As greenhouse gases are also pollutants, there is nothing to justify the elevation of GHG emitters to a unique position when compared to other polluters in Australia by granting them property rights and compensation. Licensing is an efficient, accountable and equitable means of emissions regulation and should be adopted for the Carbon Pollution Reduction Scheme. This is consistent with previous statements by the Australia Government. For example, a *Standing Committee on Environment, Recreation and the Arts* made the following recommendation in 1998:

> "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."[44]

Similarly, the Australia Greenhouse Office (AGO) has also described emission permits as a:

> "...licence or equivalent control document issued by government authorising the permit holder to emit a defined quantity of greenhouse gas."[45]

Hence, a licensing approach with no property rights is preferred.

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

[43] An example is the *Protection of the Environment Operations Act 1997 (NSW).* This Act is the primary piece of NSW legislation that deals with pollution emissions and it codifies laws dealing with the classification, regulation and prosecution of air pollution activities. Air pollution control under the Act operates using a two-pronged approach, utilising licensing and pollution thresholds which are set out in the *Protection of the Environment Operations (Clean Air) Regulation 2002*. Rights to pollute under the Act take the form of licences and may be revoked or suspended at any time.

[44] 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/environ/greenhse/gasrpt/rec.htm (6 September 2007)

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

There is a widely held view that to establish a workable emissions trading scheme, then property rights must be attached to emissions permits. Put another way, the need to create property rights in the form of permits to emit is thought to be a necessary precondition for any workable market in tradeable greenhouse gas emissions. This widely held belief can be challenged. Several trading schemes have operated successfully without the attribution of property rights.[46] These trading regimes have expressly stipulated 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 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.[47] Other trading schemes have adopted a similar approach.[48] 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. Despite no property rights, the US scheme was a great success.[49] The success of such schemes demonstrates that a workable emissions trading scheme can be achieved without the need to characterise permits as property.

ANEDO submits that, despite our comments above, if it is deemed necessary that property rights be granted in order to establish a workable emissions trading scheme, then the "emissions property right" should be characterised as a "share of a pool" similar in nature to property rights under the *National Water Initiative*. This view is supported by several commentators.[50] Indeed, the Australian Greenhouse Office has stated that allocating individual emitters a predetermined share of the national allocations is one means of addressing the uncertainty facing permit holders over continued access to permits.[51] The emissions share may be held in

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

[47] *Ibid* at 368.

[48] 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.

[49] Renee Rico, 'The US allowance trading scheme for sulfur dioxide: an update on market experience' (1995) 5(2) *Environmental and Resource Economics* pp115-129.

[50] Muller and Mestelman, "What have we learned from emissions trading experiments?' *Managerial and Decision Economics* 19 (1998) 225-238 at 233, Sharon Beder, 'Trading the Earth- the politics behind tradeable pollution rights', *Environmental Liability* 9(2) (2001) pp 152-160.

[51] Australian Greenhouse Office, "National Emissions Trading- designing the market: Discussion Paper" (1999) at 22.

perpetuity but the volume of pollution would vary if it was found that the current levels were insufficient for environmental and/or scientific reasons, or because of new international agreements Australia. This approach has already been implemented in certain countries. For example, schemes in Canada have included formal trading in emissions shares.[52] Shares in these schemes are characterised as the right to receive a fixed percentage of the annual allowable emissions in current and all future years. A "share" approach allows government intervention in reducing the volume of emissions allowed without the concomitant need to pay compensation.

Banking and borrowing

Preferred Position 3.4 states that "unlimited banking of permits would be allowed under the scheme." Furthermore, Preferred Position 3.5 states:

> "The scheme would permit a limited amount of short-term borrowing by allowing liable entities to discharge up to a certain percentage (less than 5 per cent) of their obligations by surrendering carbon pollution permits dated from the following year. The exact percentage should be subject to further investigation and should be considered in conjunction with decisions about the level of the initial scheme caps."

ANEDO does not support the unlimited banking of permits. If these permits are used in future periods when there is a tight budget in place, then there is the potential for emissions targets to be breached.

ANEDO also has significant reservations with the Green Paper's recommendation that the borrowing of permits should be permitted. We have previously supported a prohibition on lending/borrowing in relation to the proposed NETS scheme in 2006. Our primary reasoning is that the risk of emitters defaulting on these loans in future periods has the potential to severely undermine the environmental integrity of the scheme, which is an unacceptable risk. Large defaults on 'loans' would inevitably lead to a failure to meet emissions targets. In contrast, emitters have the flexibility to purchase more permits from the market if they anticipate a shortfall of permits as an alternative to borrowing. This has a lower risk and is an equitable approach.

If borrowing is allowed, then it should be strictly limited and subject to rigorous guidelines. The Garnaut Discussion Paper says that the risk of default should be a matter of governance and should not be a reason to prohibit lending of permits. It recommends that loans should only be given to credit-worthy borrowers with adequate security, and that limits be placed on the amount of lending to prevent the risk of the emissions budget being breached. The Green Paper (Preferred position 3.5) acknowledges the need for limitations on borrowing (for example, a 5 per cent limit). Although this may go some way to ameliorating the risk, ANEDO is still opposed to borrowing due to the potential to undermine actual achievement of annual emissions reduction targets.

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[52] See Muller and Mestelman, "What have we learned from emissions trading experiments?' *Managerial and Decision Economics* 19 (1998) 225-238 at 233.

4. Emissions targets and scheme caps

We note that the Government intends to "announce a medium-term national target range for 2020 that provides upper and lower bounds to give investors and market participants information on directions and retains sufficient flexibility for the Government" (Preferred Position 4.1). The Government will also announce a 5 year indicative national emissions trajectory to provide broad guidance on the pathway towards the medium-term target, reviewed annually (Preferred positions 4.2 and 4.3). Similarly, scheme caps will be announced 5 years in advance and reviewed annually (Preferred Positions 4.5 and 4.6).

The emissions target is the most crucial aspect of an emissions trading scheme. The short-term and long-term targets set must therefore be meaningful and assist Australia in achieving real reductions in GHG emissions. This will be the ultimate indicator of the success of the Australian ETS.

The Green Paper recognises the "severe impacts" that are likely to occur in the second half of the century if emissions continue to increase at the current rate. In fact, the common target atmospheric CO2-e concentration of 450 ppm[53] has not occurred for some millions of years,[54] suggesting that the Earth is already likely to experience severe impacts, even without an increase in emissions. While recognising that "the main risk from climate change will be an increase in damage from specific events" rather than from incremental changes, the Green Paper does not mention the likelihood of passing one or more of a number of potential tipping points (such as the complete melting of summer Arctic ice, which could happen as early as 2013, or the cessation of the Thermohaline Circulation in the North Atlantic), beyond which impacts are likely to be rapid and cumulative, with unforeseeable but potentially catastrophic consequences.[55]

Despite acknowledgement of the serious threat posed by climate change, the Green Paper indicates that the government is only committed "to reduce emissions by 60

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[53] 450 ppm is, for instance, one of the targets to be modelled by the Garnaut Review according to its terms of reference: see below, n. 5. The frequent linking of 450 ppm with a rise in average atmospheric temperature of 2 degrees over pre-industrial levels is a simplification of the scenarios modelled in Table 5.1 of the Intergovernmental Panel on climate change's (IPC's) 2007 Assessment Report 4 (AR4), according to which stabilising the CO2-e concentration at 445-490 ppm would equate to a global average temperature increase of 2.0-2.4 degrees: see IPCC, AR4, Synthesis Report, 67: http://www.ipcc.ch/ipccreports/ar4-syr.htm.

[54] While the interpretation of paleoclimatic data is contentious, a recent paper by James Hansen and colleagues refers to "Our CO2 estimate of ~450 ppm at 35 [million years BP]": James Hansen, Makiko Sato, Pushker Kharecha, David Beerling, Valerie Masson-Delmotte, Mark Pagani, Maureen Raymo, Dana L. Royer and James C. Zachos, Target Atmospheric CO2: Where Should Humanity Aim?, 1: www.columbia.edu/~jeh1/2008/TargetCO2_20080407.pdf

[55] On tipping points, see: Dupont and Pearman, *Heating Up The Planet: Climate Change And Security,* Lowy Institute Paper 12, 2006, Chapter 4. Also, IPCC AR4 states that "Anthropogenic warming could lead to some impacts that are abrupt or irreversible, depending upon the rate and magnitude of the climate change": Climate Change 2007: *Synthesis Report: Summary for Policymakers*, Intergovernmental Panel on Climate Change, 13.

per cent from 2000 levels by 2050." Any scientific basis for this target, which repeats the pre-2007 election ALP policy platform, is unstated. As the Green Paper (following the Garnaut Review) acknowledges, "emissions are tracking at the upper bounds of the scenarios modelled by the IPCC. Recent research suggests that the rate and magnitude of climate change over the next century may be at the high end of the range estimated by the IPCC".[56]

Indeed, a 2007 CSIRO paper published in the Proceedings of the National Academy of Sciences observed that:

> Carbon dioxide emissions from fossil fuels — the principal driver of climate change — have accelerated globally at a far greater rate than expected over recent years... The average growth rate of carbon dioxide emissions increased from 1.1 per cent a year in the 1990s to a three per cent increase per year in the 2000s.[57]

Early and strong action is therefore crucial, in Australia and globally. ANEDO therefore regards the Green Paper target of a 60 per cent reduction by 2050 as inadequate. As an indication of more recent thinking, a recent paper by the renowned NASA climate scientist James Hansen and colleagues reported that the sensitivity of the world's climate to higher CO2 levels was twice that previously estimated when "slower surface albedo feedbacks" are included. They also observed that "Equilibrium sea level rise for today's 385 ppm CO2 is at least several meters, judging from paleoclimate history." The authors therefore argue that

> "If humanity wishes to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted, paleoclimate evidence and ongoing climate change suggest that CO2 will need to be reduced from its current 385 ppm to at most 350 ppm... If the present overshoot of this target CO2 is not brief, there is a possibility of seeding irreversible catastrophic effects."[58]

Australian climate scientists have also recently warned of the increasing risk of runaway or dangerous climate change with even 2 degrees of warming.[59] The Wentworth Group of Concerned Scientists to the Garnaut Review states that "According to the best available science, Australia will have to reduce its

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[56] Summary Report, p2.

[57] See CSIRO media release, CO2 emissions increasing faster than expected, 22 May 2007: http://www.csiro.au/news/GlobalCarbonProject-PNAS.html#1.

[58] See Hansen et al, n. 2 supra. By contrast, the Garnaut Review's terms of reference required it "to analyse the degree of Australian mitigation effort that would be necessary to support a global agreement to hold greenhouse gas concentrations to 550 ppm, and separately to 450 ppm": Garnaut Climate Change Review, Draft Report, ch 2, 39. Hansen's work was cited with the following quote: "If you leave us at 450ppm for long enough it will probably melt all the ice - that's a sea rise of 75 metres. What we have found is that the target we have all been aiming for is a disaster - a guaranteed disaster": http://www.guardian.co.uk/environment/2008/apr/07/climatechange.carbonemissions.

[59] See, eg, the report of papers by Professor Barry Brook (Adelaide University), Dr Janette Lindesay (ANU) and Dr Barry Pittock (CSIRO) at the ANU conference Imagining the Real: Life on a Greenhouse Earth: http://www.anu.edu.au/anuie/index.php?pid=332.

greenhouse gas emissions in 2050 by 94 percent."[60] That is merely to stabilise atmospheric CO2-e at 450 ppm.

In view of the current rise in Australian and global emissions, and the urgent need to stabilize emissions as quickly as possible, more important than a 2050 target is a series of targets for the decades in between.[61] The adoption of strong targets, in line with those the EU has already adopted and others put to the Bali climate change conference, will put Australia in a strong position to argue for a global ETS with mandatory emissions caps in UNFCCC negotiations.

ANEDO does not support the short term targets recently proposed in the Garnaut Supplementary Report. We submit that a 5-10% reduction by 2020 (depending on the degree of international action) is seriously inadequate and inconsistent with the latest scientific projections.

The Climate Action Network Australia (CANA) alliance of over 50 groups has recommended the following targets:

- **By 2010, emissions to peak and decline thereafter.**
- **By 2020, at least 40 percent below 1990 levels.**
- **By 2050, at least 95 percent below 1990 levels.**

The rationale for these targets includes that: global warming above or exceeding 2 degrees C will create dangerous climate change; and that climate impacts have been revised upwards since the 2007 IPCC report.[62]

ANEDO supports the push for higher statutory targets to be established for the CPRS. for each decade leading up to 2050, with legislation designed so that targets can be increased (but not decreased) consistent with updated scientific evidence. As noted, we support a long-term target of at least 80-90 % of 1990 levels by 2050; and would support a higher target such as proposed by CANA and the Wentworth Group. Australian emissions budgets should aim to reduce levels to levels *significantly below* the internationally recognised estimate to limit global GHG levels between 450 and 550 ppm in the atmosphere.[63] Australia should adopt best

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[60] Peter Cosier, Science based emissions targets will require far deeper cuts, submission by Wentworth Group of Concerned Scientists to Garnaut Review, 2: http://www.garnautreview.org.au/CA25734E0016A131/pages/submissions.

[61] For instance, the Australian Conservation Foundation is campaigning for "Legally binding national targets to cut greenhouse pollution by at least 30% by 2020 (from 1990 levels)": http://www.acfonline.org.au/default.asp?section_id=6. Likewise, WWF Australia calls for "targets to stabilise emissions by 2010, and then reduce emissions by 20-30% by 2020": http://wwf.org.au/ourwork/climatechange.

[62] The rationale is set out in the 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.

[63] Royal Commission on Environmental Pollution (2000) *Energy- The Changing* Climate, RCEP, London; O'Neill, B. and Oppenheimer, M, (2002) 'Dangerous climate impacts and the Kyoto Protocol' *Science* 296 1971-1972.

practice targets that are consistent with (or better than) those in other developed countries such as the EU, in the absence of international agreement. However, in the context of a global scheme, Australia should adopt even stricter targets. We note that if generously low targets are put in place in the short term, then more drastic cuts will be needed later, which will most likely have more significant economic impacts.

In terms of adjusting the scheme cap, we note that Preferred Position 4.11 states:

> "The scheme cap would not be adjusted in the event that it is incompatible with internationally negotiated national targets and, if necessary, the Government would make up any shortfall in internationally agreed targets by purchasing international emissions units."

This position seems inconsistent with both the "environmental integrity" and the "policy flexibility" design principles.

Furthermore, ANEDO questions the recommendation that 5 years' notice should be given to liable parties under the ETS before a movement to a stricter trajectory is made. Where international commitments demand a more immediate change, the independent authority to be established would purchase international permits during that 5 year period with taxpayers' money.

ANEDO has consistently supported emissions targets that are based on the best available scientific knowledge, and that accord with international developments. Where changes to targets or a move to a new trajectory is needed to meet international targets or due to improved science, this must happen as soon as possible. Industry sectors have known about the need for emissions cuts for some time. Climate change has been on the international agenda since the 1980's. Since that time, it has been abundantly clear that emissions targets will get stricter over time if Australia is to meet an ambitious but necessary reduction target by 2050. There are therefore no compelling equity arguments that support 5 years' notice for industry. Moreover, there is no reason why taxpayers should foot the bill where the Government has to buy international permits to fill the shortfall during the 5 year notice period. This is inconsistent with the polluter-pays principle. GHG emitting industries are responsible for the need to regulate in the first place, and they should not be given further concessions and allowed to further delay necessary action to reduce emissions. The primary goal of the scheme must be to ensure that GHG reduction targets are met in the short and long term.

5. Reporting and compliance

Reporting

We understand that the NGERS would be the starting framework for monitoring, reporting and assurance (Preferred Position 5.1).

There are a number of areas where the NGERS needs to be strengthened in order to ensure that appropriate data is reported. Amendments are needed to ensure:

- *Meaningful public information* - The public information/disclosure should not be limited to aggregated totals of corporate groups. Accurate information at the facility level and data on offsets should be mandatory.
- *Transparent compliance and enforcement* - Monitoring reports of the GEDO and the authorized officers should be made available to the public; infringement notices or civil penalties should be reported and published to ensure transparency of the scheme; and external auditors should be accredited by the GEDO to ensure accountability and independence.
- *Improved coverage* - Change the three year staged commencement to immediate reporting for all corporations and facilities that emit above the minimum threshold (currently the third year thresholds).
- *Limited exemptions* - The privacy clauses of the Act may operate to undermine the transparency and accountability of the scheme, and there need to be clear guidelines on how the exemptions will be applied.
- *Clear method of assessment* - The reporting methodology should be included in detailed regulations to assure transparency and uniformity in the method of assessment.

For further ANEDO comment on strengthening the NGERS, please see our previous submission and Inquiry Hansard.[64]

We support the development of additional methodologies and standards for emissions estimations for non-electricity emissions from coal use, waste sector emissions, non-electricity natural gas combustion emissions and fugitive emissions from open cut mines (as suggested in Preferred Position 5.4). These methodologies should be developed as soon as possible and not delayed for 2 years.

We are concerned with the current proposal that 5 years notice must be given of changes to methodologies (Preferred Position 5.6) – this is a very long time and would mean several years of inaccurate reporting would occur.

We strongly support Preferred Position 5.10 which indicates that large emitters will need to have their annual reports assured by an independent accredited third party. We support a transparent accreditation process for third party assurance providers.

Penalties

Preferred position 5.15 states:

> "The regulator would be given a range of compliance, investigative and enforcement powers, and a broad range of mechanisms to respond proportionately to non-compliance under the scheme... Compliance and enforcement provisions, including penalties, would be finalised over the remainder of 2008."

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[64] See Australian Network of Environmental Defenders Offices Inc (ANEDO) *Submission on the National Greenhouse and Energy Reporting Bill 2007* - 27 August 2007; available at: http://www.edo.org.au/policy/ghg_reporting_bill070827.pdf and *Submission on the National Greenhouse and Energy Reporting System Regulations Discussion Paper 2007* – 23 November 2007; available at: http://www.edo.org.au/edonsw/site/policy/greenhouse071123.php.

ANEDO submits that financial penalties for non-compliance need to be high enough to discourage non-compliance and to avoid it becoming merely a price cap. This would avoid the problem of emitters merely "writing off" the penalty as a cost of doing business. Penalties need to provide a significant deterrent. This could include provisions establishing personal liability for company Directors. There are also precedents in legislation for a range of innovative orders to be used for compliance purposes, such as advertisement of breaches and mandatory training requirements.[65] These have an appropriate deterrent effect, over and above a financial penalty.

The range of enforcement provisions should be made publicly available in an exposure draft of the legislation.

It has also come to our attention that certain business and industry stakeholders are lobbying for penalties under the CPRS to be tax deductible.[66] We strongly oppose this as it has no legal precedent and would greatly undermine the deterrence value of penalty provisions

Make good provision

ANEDO also strongly supports the Garnaut recommendation that high penalties should be accompanied by a 'make-good' provision, which requires that defaulting emitters make up for their failure to account for all their emissions. This is crucial to the integrity of the scheme as it ensures that the emissions limit remains on track despite the non-compliance.

6. Linking the scheme to international markets

ANEDO agrees that a wide-ranging international trading scheme is preferable and necessary in ensuring that a concerted cooperative effort is taken to address climate change. Only a coordinated global effort can truly arrest the projected consequences of climate change. It is therefore crucial that any Australian scheme be able to link effectively with other schemes as a precursor to establishing a global scheme. This will make transition to a broader international market easier. It will also reduce costs of compliance and facilitate the development of abatement and modification technologies in the most cost-effective manner. Moreover, it will provide financial incentives for developing countries to conduct activities that generate carbon credits. However, caution should be exercised in determining which international markets are appropriate for linkage. The Government must ensure that linkage only occurs with markets built around sound objectives and design features to ensure the integrity of the Australian CPRS is retained and the achievement of environmental objectives are not compromised. Additionally,

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[65] For example, see the NSW Protection of the Environment Operations Act 1997.

[66] Graeme Dennis, Calyton Utz, "Legal Implications of an Emissions Trading Scheme – Regulation and Enforcement" Legalwise Conference, Sydney, August 2008

Australia should strive to establish a best practice ETS, and not settle for a 'lowest common denominator' approach.

The Green Paper notes that the CPRS will be designed so it can link with international markets in the future, with imported units counting towards Australia's national target and exported units excluded from the national target (Preferred position 6.1). Restrictions on linking are noted in relation to: stability and ongoing credibility of the scheme, the environmental integrity and effectiveness of the scheme, and the scheme's consistency with international objectives and obligations (Preferred Position 6.1). We understand that the Government will set quantitative limits on the use of Kyoto units by liable entities for the period 2010-11 to 2012-13, and then set 5 year limits (Preferred position 6.13).

We support Preferred Position 6.10, that Australia will support development of robust methodologies for reductions from deforestation and degradation in developing countries (REDD).

We note that the Green Paper indicates that Joint implementation (JI) projects will not be permitted in covered sectors, and that JI projects in uncovered sectors "would be aligned with decisions made on domestic offsets, and the Government will consider JI offsets in uncovered sectors in 2013 (Preferred position 6.12). Our concern, as noted elsewhere, is that there are not strict standards and regulation of domestic offsets in place.

Similarly, we are concerned about involving certain CDM projects in the CPRS, and for example, would support exclusion of forestry CERs at this stage until more reliable methodologies are available to verify and account for the activities.

Preferred Position 6.13 indicates that the Government will announce any relevant restrictions on using units from other countries in 2010. ANEDO submits that there should be clear sustainability criteria applied when assessing units from other schemes.

ANEDO supports the Garnaut Discussion Paper's recommendation that linkages between an Australian ETS and the EU scheme should be explored in establishing an ETS. Further, we also support integration with the New Zealand market.

7. Auctioning of Australian carbon pollution permits

ANEDO has consistently called for 100 per cent auctioning of permits as opposed to a grandfathering approach. Auctioning is the more efficient and environmentally effective means of permit allocation. This is for four main reasons.
First, despite assertions of 'disproportionate loss' and economic disadvantage, it has been shown by the Review that the method of permit allocation makes no difference in terms of the price of goods and services. That is, in either case electricity prices will rise. A grandfathering approach therefore constitutes a vast wealth transfer to emitters with no discernible benefit in terms of public impact through electricity prices. Indeed, economic modelling has shown that a

grandfathering approach will make electricity generators better off under an ETS, but leave consumers substantially worse off.[67]

Second, studies have shown that auctioning is dramatically more cost-effective than a grandfathering approach – roughly 50 per cent cheaper.[68]

Third, there are significant advantages of an auctioning approach in terms of abatement. That is, if liable emitters are made to buy their permits at auction, then there will be a significant financial incentive to reduce emissions or invest in abatement technologies in order to reduce the number of permits they must acquire. On the other hand, if permits are allocated free, emitters will not be spurred into abatement action, and may even increase their emissions by buying additional permits, since they have not paid for their initial allocations. ANEDO believes that without the significant abatement action that an auctioning approach would facilitate, the proposed ETS may be largely ineffectual in achieving greenhouse emissions reductions, which is its overarching environmental objective.

Finally, full auctioning ensures that the ETS is simpler, with less administrative rules and it would prevent wrangling over appropriate exemptions, exceptions, and other issues. For example, the auctioning of permits would easily solve the problems associated with measuring allocations and developing a methodology to determine who is entitled to free permits, and how many. As Garnaut initially noted "free allocation would be highly complex, generate high transaction costs, and require value-based judgments". Full auctioning avoids these problems.
In contrast, the Green Paper suggests a hybrid option. The Green Paper indicates that permit allocations

> "...would, over the longer term, progressively move towards 100 per cent auctioning as the scheme matures, subject to the provision of transitional assistance for emissions intensive trade exposed industries and strongly affected industries." (Preferred Position 7.1).

It is suggested that initially the "relevant Minister" would have discretion to direct the regulator regarding transitional allocations, and eventually the scheme regulator would "assume all auction policy responsibilities" (Preferred position 7.2), subject to a five year review.

While we would prefer 100 per cent auctioning of permits from the outset, ANEDO submits that it is absolutely essential that any allocation of free permits as suggested by the Green Paper be done in a transparent and accountable manner, and that any arrangement is transitional and phased out over time.

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[67] Dallas Burtraw, "Carbon Emission Trading Cost and Allowance Allocations: Evaluating the Options (2001), *Resources* 13-16 at 15.

[68] *Ibid* at 14.

8. Household assistance measures

The commitment of the Government to spend "every cent" raised by the CPRS to help Australian households and businesses adjust to the scheme and invest in clean energy (Preferred Position 8.1) options is admirable, but somewhat simplistic.

Consistent with our previous submissions, we support assistance being directed to low-income households (and therefore support Preferred Position 8.2), and we strongly support additional assistance directed at introducing energy efficiency measures and consumer information. This will address some of the social equity issues that arise with the rise in energy costs that an ETS is projected to cause. We also support structural adjustment for communities that will require assistance through the retraining of workers and towards establishing new industries for communities that are reliant on emissions-intensive activities.[69]

Moreover, revenue should also be used to support research and development into renewable energy, as well as providing tax breaks and other incentives to that industry. The Green Paper makes no mention of using income from the auctioning of permits to assist the development and uptake of renewable energy industries. In view of the relative fledgling nature of these industries, Australia's natural advantages in this area (especially with regard to solar, wind and geothermal energy), the importance of renewables to reducing emissions, and the stop-start history of government incentives in this area, it is critical that the government gives a strong message in support of the renewables sector. Developing renewable energy and zero-emission technology should be prioritized over the development of certain 'low-emission' technologies, such as CCS.[70] A rapid transition towards renewable energies is crucial to meeting emissions targets so this should be a particular focus of assistance.

Furthermore, ANEDO believes that assistance funded from the auctioning of emissions permits should support existing carbon positive activities such as the protection of old growth forests.

9. Assistance for emissions-intensive trade-exposed industries

The Green Paper indicates that the Government intends to provide assistance to EITEs in the form of free permit allocations at the beginning of each compliance

[69] However, please see our separate submission on Issues paper 4 regarding concerns relating to over-reliance on Australia's CCS potential: available at http://www.edo.org.au/edonsw/site/policy.php.

[70] See our separate submission on Issues paper 4 for further detail: available at http://www.edo.org.au/edonsw/site/policy.php.

period (Preferred Position 9.2). All industries, other than where there is a physical barrier to trade, would be considered for EITEs assistance (Preferred Position 9.5), and around 20 per cent of permits would be allocated free (30 per cent if agriculture is included) (Preferred Position 9.6). Initial assistance would cover 90 per cent of emissions for EITE activities that have emissions intensities above 2000 tonnes of CO2e per million dollars of revenue (Preferred Position 9.6).

While we recognise the economic vulnerability of EITEs, it should be recognised that they are vulnerable precisely because they are heavy greenhouse polluters. Although ANEDO is opposed to 'compensation for regulation' as a general rule, we recognise that there may be special circumstances justifying limited compensation to trade-exposed, energy-intensive industries as a transitional measure. There are compelling economic and environmental arguments that support limited transitional assistance to trade-exposed, energy-intensive industries, for example to prevent carbon leakage.

However, alongside the exclusion of agriculture, compensation for coal-fired electricity generators and reduction in fuel excise, the proposed free permit allocation virtually guarantees that the scheme as currently proposed in the Green Paper will not, in fact, lead to a reduction in the Australia's overall emissions. Rather than support them to continue current practices, the scheme should encourage their transition to lower emission technologies.

ANEDO does not support indefinite compensation. Compensation should be granted in the form of an annual allocation that progressively decreases to an eventual phase-out. We would support a discount factor on compensation that is calculated by taking into account the expected rate of annual improvement in emissions efficiency. It is also consistent with the view that lack of international action should not be used to justify compensation 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.

Preferred Position 9.8 states that:

> "The EITE assistance rate would be reduced over time with the intent that the share of assistance provided to the EITE sector does not increase significantly over time."

This statement is confusing and inconsistent with the intended eventual move to 100 per cent auctioning of permits. The statement suggests that the share of assistance may increase over time. ANEDO submits that the legislation must contain a clear phase-out objective. ANEDO submits that assistance should be withdrawn by 2020 regardless of whether comparable carbon constraints have been introduced in competing economies, and not continued indefinitely as foreshadowed as an option in Preferred Position 9.9.

Any transitional arrangements must be environmentally and economically efficient, equitable and built on sound governance principles.[71]

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[71] See: *ANEDO Submission on the Garnaut Climate Change review – Emissions Trading Scheme Discussion Paper*, 18 April 2008, available at http://www.edo.org.au/policy/garnaut_ets080418.pdf.

10. Assistance for strongly affected industries

Coal-fired electricity generators are the most likely to benefit form this category of assistance proposed in the Green Paper (Preferred Positions 10.1 and 10.2). It is noted that current contributions to development of CCS technologies will also benefit these industries (Preferred Position 10.3). The Green Paper does not suggest what the assistance limit will be, as this will be decided after the medium-range national target has been set (Preferred Position 10.6). Assistance is only for operating or committed facilities (Preferred Position 10.7).

We are concerned that the proposed Electricity Sector Adjustment Scheme (ESAS) is effectively a handout to an industry that has been aware of the coming of an ETS for several years, and will delay the inevitable transition to less greenhouse-polluting forms of energy. In this regard we note that:

- Some coal-fired power stations built in the 1970s (for example, Munmorah in NSW) are reaching the end of their lifecycles, and should be scrapped and replaced as part of normal business planning without government assistance. For instance, the former coal-fired power station at Tallawarra (Illawarra, NSW) has recently reopened as an open-cycle gas turbine plant without such assistance.
- The Liddell power station (Hunter Valley, NSW) has been experimenting for some years with solar thermal technology; this is in the process of being greatly expanded, and provides a model of innovation that other generators could follow.
- Ausra, the formerly Australian company that developed the Liddell solar plant, is now building a megawatt capacity solar thermal plant in the US, thereby providing large-scale baseload renewable energy supply. Alongside the current development of small-scale geothermal energy generation in the Cooper Basin, it is likely that baseload energy form renewable sources will be available to major Australian cities within a decade, with the right incentives and political will. By contrast, the Green Paper's reference to clean coal technology is questionable in view of the unproven nature, high cost and added energy demands of this technology.

The Green Paper indicates that to determine whether a project is a 'committed project' and hence a strongly affected industry, the NEMMCO criteria from the National Electricity Rules should be applied. ANEDO agrees that these criteria are an appropriate measure of whether an asset that was planned or under construction was 'in existence' at a particular date. It is not clear in the Green Paper, however, how these criteria will be taken in to account and to what threshold they must be satisfied. ANEDO submits that to be considered 'in existence', a project must properly and completely satisfy each of the five NEMMCO criteria.

Any assistance to this industry should therefore be directed at transitioning from coal-fired to renewable energy generation rather than to propping up old

infrastructure or to subsidising the greater use of natural gas, which still produces significant greenhouse gases. The suggestion that this scheme might involve "the provision of free permits" should therefore only be followed with strict performance criteria for industry transitioning.

The Green Paper indicates that allocation will be on an asset by asset basis (Preferred Position 10.9). ANEDO submits that there must be a clear and transparent process for how this is done, and we are concerned about assistance being allocated in particular to high emission brown coal-fired assets. These highly polluting assets should not have their permit requirements subsidized.

If this assistance is deemed essential, we support that it be provided on a "once and for all" basis pre-scheme commencement, and not ongoing (Preferred Position 10.11). The Green Paper nominates 3 June 2007 as the appropriate eligibility cut-off date for assistance under the CPRS. ANEDO submits that the eligibility cute-off date should be no later that this date nominated.

11. Tax and accounting issues

ANEDO supports a broader review of taxation measures for both the CPRS and complementary measures. As noted above, we have previously identified areas of taxation law in need of review to remove perverse incentives and subsidies to high emission activities.[72] We have also made comment recently on the taxation amendments to encourage the establishment of plantations as carbon sinks.[73]

In addition to the broader Review of Taxation to be conducted by Ken Henry, ANEDO would support a specific public review of current taxation as it impacts on emissions generating activities.

It has also come to our attention that certain business and industry stakeholders are lobbying for penalties under the CPRS to be tax deductible.[74] We strongly oppose this as it has no legal precedent and would greatly undermine the deterrence value of penalty provisions (as discussed above).

12. Transitional issues

Another form of assistance, in addition to that provided to EITEs and to strongly affected industries will be provided by a Climate Change Action Fund. According

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[72] See CANA Turning Down the Heat, p50-51.

[73] See ANEDO *Submission to the Inquiry into the implementation, operation and administration of the Legislation underpinning carbon sink forests*
31 July 2008, available at: http://www.edo.org.au/policy/080731carbon_sink_forests.pdf.

[74] Graeme Dennis, Calyton Utz, "Legal Implications of an Emissions Trading Scheme – Regulation and Enforcement" Legalwise Conference, Sydney, August 2008

to the Green Paper this will assist those industries that are not receiving free permits to adjust to the carbon price (Preferred Position 12.1). More clarity is required as to how this fund will be administered in a transparent manner and to ensure that funds are directed at activities to optimize transition to a low-carbon economy – such as investment in renewables.

A program for allocating early action credits will not be established (Preferred Position 12.3). ANEDO has previously commented on incentives for early abatement activities prior to the establishment of an ETS.[75]

13. Governance issues and implementation

As noted above, we are concerned about the statement:

> "A non-binding reference to medium- and long-term national targets would be included in the objects clause of the Act establishing the scheme. Factors that the Government may consider when making decisions about the national targets over time could also be set out in an objects clause. The scheme caps and gateways would be set out in delegated legislation." (Preferred Position 13.2).

We are concerned that including an aspirational target in the objects clause will not drive effective emissions reduction, particularly if the target is "non-binding."

The process for setting targets and factors that the Government is to consider in relation to setting targets should be clearly articulated in the body of the legislation and not just in the objects clause.

The Green Paper also indicates that target setting processes and transitional processes may be dealt with under delegated legislation. ANEDO submits that there should be consultation on the proposed delegated legislation before the primary legislation is passed in 2009. It is important that key functions and processes are clearly established in the head Act, and that draft regulations are made available to stakeholders wishing to assess the appropriateness of the whole legislative package.

In relation to Preferred Position 13.3, ANEDO submits that principles of industry assistance must be clearly set out in the Act including clear timeframes for phasing out assistance. As noted, there must be transparency in the process of free allocations in individual cases by the regulator according the criteria in the Act.

Preferred Position 13.5 proposes an independent expert committee would be constituted every 5 years to conduct public strategic reviews of the scheme. It is also foreshadowed that more regular 'care and maintenance' reviews would be conducted in the early years of the scheme and that "to improve market certainty, the scope of those early reviews would be tightly defined." It should be made clear

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[75] See *Submission regarding abatement incentives prior to the commencement of the Australian Emissions Trading Scheme*, 7 December 2007, available at: www.edo.org.au/edonsw/site/pdf/subs07/ets_abatement_incentives071207.pdf.

what can and cannot be reviewed by interim reviews, for example, whether these reviews are on certain operational aspects only and not targets.

ANEDO supports an independent regulator. As recommended by Garnaut, an independent regulator should be established with a "high degree of executive independence in the exercise of its powers". This would help to shield the scheme from political pressures that may come to bear. Preferred Position 13.7 indicates that the scheme regulator will have a "high level of operational independence" and would be accountable to the responsible minister and "subject to ministerial directions of a general nature only." The composition and terms of reference of the regulator must be clearly established by the legislation to ensure integrity and independence.

We note that regulator's decisions will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and merits review by the AAT (Preferred Position 13.8). ANEDO submits that the Act must also contain a clear open standing provision stating that any person may bring proceedings under the Act.