australian network of environmental defender's offices

Submission regarding the Possible Design for a National Greenhouse Gas Emissions Trading Scheme

22nd December 2006

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.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8982 1182)
edont@edo.org.au

EDO QLD (tel. 07 3210 0275)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDO VIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

This submission is on behalf of the Australian Network of Environmental Defender's Offices (ANEDO).

For further information on this submission, please contact Rachel Walmsley, Policy Director EDO (NSW) on 02 9262 6989 or rachel.walmsley@edo.org.au.

Submitted to:

National Emissions Trading Taskforce Secretariat
The Cabinet Office
GPO Box 5341
SYDNEY NSW 2000

submissions@emissionstrading.net.au

22nd December 2006

CONTENTS

EXECUTIVE SUMMARY

Climate change has emerged over the last 10 years as one of the most pressing and complex global environmental problems. The observable impacts of climate change, such as extreme and severe weather conditions, prolonged drought and high temperatures, are being experienced across Australia. In New South Wales, there are predictions that the area of snow cover in the Australian Alps will be reduced dramatically by 2020. Numerous studies have been conducted that show unequivocally that the increase in greenhouse gases in the atmosphere will have serious consequences for biodiversity.[1] Studies commissioned by the Department of Environment and Heritage have also found that climate change is already impacting on the functioning of biological systems.[2] Climate scientists predict that the impacts of climate change will be felt even more intensely over the coming century, with anticipated temperature increases, in best scenarios, of between 2 and 4 degrees by 2100 if greenhouse gas emissions remain at current levels.[3]

It is now broadly accepted that climate change is primarily the result of increased emissions of greenhouse gases derived from human activities, and in particular, the burning of fossil fuels. Addressing the problem of climate change, or even stabilising emissions at current levels, will require significant reductions in greenhouse gas emissions of at least 60% by 2050.[4] This requirement should be the foremost consideration in developing a state based emissions trading regime. In particular, the precautionary approach should be applied as a primary principle in the design of the scheme.

The State Governments are to be commended for their recognition of the urgent need to reduce greenhouse pollution. However, the scale of the problem requires further and stronger action by all.

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) welcomes the opportunity to provide comment on the Discussion Paper: *Possible Design for a National Greenhouse Gas Emissions Trading Scheme* ('Discussion Paper'). ANEDO is a network of community legal centres that specialise in public interest environmental law. Its functions include legal advice and representation, law reform and policy work, scientific advice and community legal education. We refer to our previous *Submission on State-based Emissions Trading*, November 2005 for further detail. It is available at: http://www.edo.org.au/edonsw/site/policy.php.

ANEDO strongly supports initiatives that aim to ensure that greenhouse gas emissions (**GHGs**) are reduced in Australia and acknowledges that one mechanism to achieve this is through a robust cap on national emissions. However, ANEDO is of the opinion that trading should not be treated as a solution in and of itself. Rather, there remains an urgent need to implement such an approach in conjunction with a range of regulatory tools, incentives and policies that address demand side management in the energy sector

---

[1] See Lesley Hughes, 'Climate change and Australia: Trends, projections and impacts", *Australian Ecology* (2003) 28 423-443.

[2] Will Steffen, "Stronger evidence but new challenges: climate change science 2001-2005"March 2006, Department of the Environment and Heritage- Australian Greenhouse Office."

[3] Dr Barry Pittock, "Scientific Issues in Decision Making Context" 2004, CANA conference.

[4] Dr Andy Pitman, "Latest IPCC related science" 2004, CANA conference.

and promote the development of low emission technology, thus allowing for a transition away from a carbon dependent economy.

Consistent with our previous submission, ANEDO submits that the following matters should form the basis of any State based emissions trading regime:

- A national cap and trade system should be adopted where permits or credits are surrendered according to a legislated timetable, thus achieving significant reductions in GHG emissions;
- While it may initially be preferable to focus on carbon dioxide emissions from the stationary energy sector, the system should be robustly designed in a manner that allows it to expand to cover other industry sectors and other GHGs;
- The allocation of permits by auctioning is the most efficient and environmentally effective approach and should be supported;
- There should be clear incentives for existing installations and new entrants to actively participate in the scheme and achieve emissions reductions;
- Penalties for non-compliance should be set at a level significantly high enough to deter participants from just paying the compliance cost. Penalties should also be linked to making good the excess emissions in future compliance periods; and
- Offsets should not be relied upon to achieve compliance. If offsets are to be allowed, clear guidelines limiting the circumstances for their use should be developed in accordance with the following principles:
    - Environmental impacts must be avoided first by using all cost-effective prevention and mitigation measures on-site. Offsets are then only used to address remaining loads of pollutants;
    - All standard regulatory requirements must still be met;
    - Offsets must never reward ongoing poor environmental performance;
    - Offsets will complement other government programs;
    - Offsets must not result in a net increase of target pollutants.

This submission makes comments on each of the 13 key areas addressed in the Discussion Paper including:

1. The need for action
2. Coverage
3. Scheme cap
4. Penalty and make-good provisions
5. Offsets
6. Estimated impacts of addressing greenhouse gas emissions through NETS
7. The nature of permits, permit allocation and assistance measures
8. Institutional arrangements
9. Emissions monitoring, reporting and verification
10. Accommodating multiple objectives
11. Transitioning to the NETS
12. Linking with International schemes
13. Complementary measures

1. The need for action

Irrefutable evidence is mounting that indicates urgent action on climate change is required. 2006 has been the 6th hottest year on record,[5] and there has been an increasing frequency of storm surges and extreme weather events across the globe.

The potential impact of such events and patterns was officially recognised as early as 1992, when Australia signed the *United Nations Framework Convention on Climate Change*. Australia signed onto an agreement underpinned by the recognition that not only is abatement action necessary, but that developed nations should move first.

Not only is the need for abatement action necessary, it is inevitable. If practical measures are not put in place now, such as an effective cap on emissions, more drastic regulatory measures will inevitably be required over the next decade.

Article 3.3 of the United Nations Framework Convention on Climate Change (UNFCCC) states:

> The Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures…

Although there is an incontrovertible body of scientific evidence to demonstrate that human-induced climate change is already impacting on the planet, there remains significant uncertainty regarding the precise consequences of climate change - for example, on weather conditions, and essential ecosystem services. It is this uncertainty that triggers the precautionary principle. A market-based emissions trading scheme has the potential to lead to demonstrable environmental benefits as has been seen in other trading schemes discussed below. As a consequence, ANEDO believes that implementing an effective, robust and transparent emissions trading scheme as a matter of urgency is consistent with applying the precautionary principle. Taking significant action now is also consistent with the principle of intergenerational equity.

2. Coverage

The World Resources Institute has commented that a GHG cap and trade system 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.[6]

It is recognized that currently there are difficulties in incorporating a broad set of emissions sources into the scheme, because determining baselines and measuring emissions in some sectors (such as transportation and agriculture) is difficult and may be too costly in sectors where there are many small emitters. However, other sectors are more adaptable and in many cases are already monitoring emissions. There may be scope

[5] World Meteorological Organisation has released a report saying it's the 6th hottest year on record. See attacked links:http://www.wmo.ch/web/Press/PR_768_English.doc.
[6] 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 13 November 2005, p.32.

to develop opt-in arrangements to enable non-stationary energy sectors to participate if initial regulation is not possible.

ANEDO submits that while the scheme may commence with a focus on the stationery energy sector, it must aim to incorporate the broadest possible range of sectors and greenhouse gases and be designed so that it is flexible enough to achieve this. It must be made clear that the intention is to expand the scheme to include other sectors as soon as possible, subject to feasibility studies and consideration of overseas experience. It is important that an appropriate institutional body is made responsible for co-ordination of ongoing research into the feasibility of expanding the coverage of the scheme.

Overseas experience suggests that it will be possible to increase the coverage of the scheme in the short to medium term. The European Union Emissions Trading Scheme (EU ETS) already has coverage that is broader than the stationery energy sector, and applies to a number of other large scale industries.[7] In addition, the British Government has recently investigated the feasibility against key criteria of further expanding the coverage of the EU ETS for Phase 11 (2008-2012) as it applies to the UK. Based on these investigations, a number of additional industries are being considered for inclusion, including methane emissions from coal mining in the longer term.[8] In addition, UK governments are pushing to include aviation emissions in the EU ETS by 2008 or soon after, and are currently examining the potential to include the transport sectors in emissions trading at an EU level in the future.[9] In recognition of the potential for emissions reductions in the agriculture sector, UK governments have also committed to examining the potential to include this sector in emissions trading in the future.[10]

3. Scheme cap

The key objective of a national emissions trading scheme (NETS) must be its long term environmental performance, which is determined primarily by the cap. As identified in the Discussion Paper, there are a number of key considerations in setting the cap, including economic considerations and the availability of low emission technologies. However, ANEDO submits that primary consideration must be given to making the caps consistent with a long term emissions reduction target based on the best available scientific knowledge, as well as ensuring that the gateways give the NETS the capacity to respond flexibly to improvements in scientific knowledge and international obligations.

The cap and gateway approach has the potential to meet the objectives of both flexibility in responding to improvements in scientific knowledge and certainty for industry and investors, and ANEDO generally supports this approach. However, we make a number of points on this issue, which are discussed below.

The ultimate objective of climate change policy, as defined by the *United Nations Framework Convention on Climate Change* is to stabilize greenhouse gas concentrations at a level that avoids 'dangerous anthropogenic interference' with the climate system. Despite some uncertainty regarding the links between emissions, greenhouse gas concentrations, climate change, and impacts, and a lack of consensus on what constitutes dangerous

[7] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003.
[8] Department of the Environment, Food and Rural Affairs (2005) *Consultation Paper on the EU Emissions Trading Scheme Phase 11 (2008-2012)* DEFRA, London.
[9] HM Government *Climate Change: The UK Program 2006*, TSO, Norwich.
[10] *Ibid.*

climate change or at what level greenhouse gas concentrations should be stabilised;[11] it has been suggested that limiting levels between 450 and 550 ppm may be an appropriate goal.[12]

Although there is not yet a global consensus on what long-term reduction targets are appropriate, the United Kingdom has calculated a long-term reduction target of 60% by 2050 based on the likely reductions needed if global emissions are to be stabilized at 550 ppm.[13] NSW has also committed to the same target and a return to year 2000 levels by 2025.[14]

However, long-term reduction targets are likely to need to change as scientific knowledge improves. For example, it is now perceived that there is a greater risk that the upper end of the Intergovernmental Panel on Climate Change (IPCC) estimate of a 1.4 to 5.8ºC temperature rise will be reached or exceeded by 2100.[15] This suggests that deeper cuts over a shorter period of time than currently proposed may be required. Long-term reduction targets will also depend on a range of political, economic, and social factors, including considerations of accountability (the developed world is responsible for the majority of historical emissions) and capability (the developed world has greater resources available to reduce emissions).[16] Long term and short-term reduction targets must be identified to indicate the likely trajectory of the caps in the long-term and short-term. ANEDO supports a long term reduction target based on the best available scientific knowledge, such as that currently proposed by the United Kingdom and NSW. However, it must be made clear that this target is likely to change as scientific knowledge improves, and that if anything, it will be made more stringent over time. In determining short-term reduction targets, it must be recognised that there is only limited time within which developed countries must make significant emissions reductions, as emissions in the next few decades will significantly constrain what greenhouse gas stabilisation levels will be possible, due to the long atmospheric residence time of CO_2.[17]

A key factor in making the caps consistent with long-term and short term reduction targets is to make them consistent with the covered sectors contribution to Australia's net greenhouse gas emissions. This ensures a corresponding obligation on the covered sectors to reduce emissions to a level that enables reduction targets to be met. The sectors covered after 5 years following NETS commencement contribute about 45% to Australia's net emissions.

---

[11] O'Neill, B. and Oppenheimer, M, (2002) 'Dangerous climate impacts and the Kyoto Protocol' *Science* 296 1971-1972.

[12] 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.

[13] Department for Environment, Food and Rural Affairs "The scientific case for setting a long-term reduction target"
http://www.defra.gov.uk/environment//climatechange/pubs/pdf/ewp_targetscience.pdf.

[14] NSW Greenhouse Office (2005) *NSW Greenhouse Plan*, NSW Government.

[15] Pittock, B, (2006) 'Are scientists underestimating climate change?' *Eos* 87, 34 pp340-341; Steffen, W. *Stronger Evidence but New Challenges: Climate Change Science 2001-2005*, AGO, Canberra.

[16] Centre for Energy and Environmental Markets (2005) 'CEEM submission to: A National Emissions Trading Scheme', CEEM, Sydney.

[17] Department for Environment, Food and Rural Affairs 'The scientific case for setting a long-term reduction target'
http://www.defra.gov.uk/environment//climatechange/pubs/pdf/ewp_targetscience.pdf.

The gateways (the range within which future caps will be set), which will be defined up to 20 years ahead of time, must also reflect a long-term reduction target. In addition, it is vital that they are defined as widely as possible to reflect the considerable uncertainties of climate change science and to give the NETS the capacity to respond flexibly to improvements in scientific knowledge and international obligations. The setting of the gateways is a critical aspect of the environmental credibility of the NETS. As long-term reduction targets are likely to be driven by IPCC Assessment Report findings, consideration should be given to timing decisions on gateways in accordance with releases of the IPCC Assessment Reports.

4. Penalty and make-good provisions

Penalties should be sufficiently high so as to deter companies from non-compliance. Low penalties may be relatively ineffective for large industries, where it may be more cost-effective to write-off any fines as simply a cost of doing business. The Centre for Energy and Environmental Markets suggests that the penalty should be set at least double the expected permit price.[18] Furthermore, ANEDO submits that effective monitoring and independent auditing is required to underpin compliance.

ANEDO submits that an emissions trading scheme should include a 'make good' provision for companies to compensate for breaches in successive compliance periods. This approach has been adopted in the EU ETS. The addition of a make good provision adds additional weight to the financial incentive of compliance with a GHG cap, particularly when linked with an effective penalty regime. Without such provision, achievement of the overarching goal of capping emissions will be undermined. The scheme must not be designed to allow concerns regarding investor certainty and price increases to undermine the fundamental goal of capping emissions.

The EU ETS scheme uses significant penalties to ensure that the cap is achieved. ANEDO endorses such an approach.

5. Offsets

While we recognise that offsets may lower the cost of the NETS by increasing the number of options available for achieving abatement at lowest cost, we are concerned about the potential widespread use on offsets and we do not support the use of offsets as the primary mechanism for achieving compliance. It is imperative that a reliance on offsets does not divert the focus of the scheme from greenhouse gas emissions reductions to the lowest-cost offset options for emitters to achieve compliance. The system needs to be tiered so that cost-effective abatement options are undertaken first. Offsets may be useful in dealing with the remaining load of GHGs once such options are exhausted. We make a number of points on this issue, which are discussed below.

Offsets have the potential to reduce innovation and investment in greenhouse gas abatement technologies in the covered sectors (initially the stationary energy sector). Offsets may have the beneficial effect of driving innovation and investment in abatement technologies in other sectors. However, it may not be possible to achieve long-term reduction targets without substantial investment in abatement technologies in the

[18] CEEM submission to: *a National Emissions Trading Scheme* (November 2005) at 25.

stationery energy sector. There is a risk that this may not occur if the energy sector is able to offset substantial amounts of emissions in other sectors at a lower cost.

A crucial element of offsets is the principle of the offset being additional to action already required by law. As identified in the Discussion Paper, determining additionality is difficult and essentially unknowable. Effectively addressing additionality is critical to the environmental integrity of the NETS. A number of baseline methodologies have been developed recently to assess additionality. A recent study discussed the use of different baseline methodologies using four case studies. The study showed how difficult it is to determine additionality and get an accurate estimate of greenhouse gas reductions from offset projects. In one case study, four baseline methodologies were applied to an offset project and these resulted in large differences in estimated emissions reductions (between 3730 to 7240 t CO2e).[19]

The accuracy of measurement methodologies used to quantify emissions and reductions for some offset projects is uncertain. For example, carbon sequestration by forest projects cannot be as accurately measured as emissions from fossil-fuel combustion. A range of factors effect tree carbon sequestration rates, including climate, topography, soils, and management practices. This complexity is further compounded by the potential impacts of climate change, which may change site productivity.[20] ANEDO supports the use of internationally approved measurement methodologies, and supports the proposal to make an Australian scheme compatible with the Kyoto Protocol and its offset rules. We also support the proposal to undertake an uncertainty analysis or similar in relation to estimates of carbon sequestration, as is currently done under the NSW Greenhouse Gas Abatement Scheme (GGAS). However, heavy reliance on offsetting is problematic in the absence of accurate methodologies for measuring offsets. Strict rules regarding monitoring, evaluation and reporting must apply to all offset projects proposed under the scheme.

The permanence of offset projects such as forest projects and carbon capture and storage projects is uncertain and cannot be guaranteed. In relation to forest projects, the predicted increased risk of fire, disease, pests, and potentially reduced site productivity due to climate change makes the issue of permanence more significant. ANEDO supports the requirement to 'make good' any sequestration shortfall in cases where the proponent cannot maintain sequestration for 100 years. We would also support a requirement that proponents of forest projects provide financial insurances (for example, a bond or an insurance policy) that could be drawn upon in cases where the proponent is unable to meet the make-good provisions. We recognise the importance of carbon capture and storage (CCS) in stabilizing greenhouse gas emissions and meeting long-term reduction targets if coal continues to be used as a primary fuel. However, considerable uncertainties exist in relation to the effectiveness of CCS projects in retaining CO_2 in the ground, and very little testing has been undertaken to date.[21] There is a need for a much better understanding of long-term storage, migration and leakage processes, as well as a need to improve monitoring methodologies to determine the behaviour of CO_2

[19] De Leeuw R. and van Ierland, C, 'CDM in climate policies in the Netherlands: a promising tool?' in *Climate Change and the Kyoto Protocol* (2003) (eds Faure, M. Gupta, J. and Nentjes, A.), Edward Elgar Pub., United Kingdom.

[20] Department of Environment and Heritage (2006) 'Planning Forest Sink Projects: A Guide to Forest Sink Planning, Management and Carbon Accounting', DEH, Canberra.

[21] Schiermeier, Q, (2006) 'Putting the carbon back' *Nature* 442 620-623

underground.[22] It is doubtful whether CCS can play a major role in greenhouse gas reductions in the near to mid-term future.[23]

For the above reasons, ANEDO believes the widespread use of offsets may place the environmental integrity of NETS at risk and we submit that the use of offsets should be limited. The principle that applies under the EU ETS is that, in accordance with the relevant provisions of the Kyoto Protocol and Marrakech Accords, the use of credits from Joint Implementation (JI) and Clean Development Mechanism (CDM) projects should be supplemental to domestic action, which should therefore constitute a significant part of the effort made.[24] Member States may use credits from JI/CDM projects for compliance up to a specified limit, which is set as a percentage of the allocation of allowances to each installation. In addition, certain projects are not able to generate offset credits (nuclear projects are not recognized until 2012 and land use changes and forestry activities are excluded).[25] ANEDO submits that such principles should apply to NETS. Consideration should be given to limiting the use of offsets for compliance by requiring that offset credits may only be used up to a specified limit, which is set as a percentage of the allocation of permits to each installation. In setting this limit, it may be appropriate to consider benchmarks that reflect the emissions reductions possible with implementation of best practice abatement technologies. In addition, offsets should further be limited to projects where there is a reasonable level of certainty as to the accuracy of measurement methodologies.

6. Estimated impacts of addressing greenhouse gas emissions through NETS

A primary reason for Australia's failure to ratify the Kyoto Protocol is the potential negative impacts on our fossil fuel industry and thus the Australian economy. In this respect, we note the Discussion Paper states:

> Overall, these results indicate that the economy would continue to grow strongly with a carefully designed emissions trading scheme. Importantly, it would appear that some industries and regions most vulnerable to the effects of introducing an emissions trading scheme – trade-exposed energy intensive industries – could be successfully sheltered from the impacts of the scheme in a way that maintains their competitiveness but does not limit the amount of abatement that occurs.[26]

The potential consequences of inaction are likely to be significant from both an economic and social, as well as an environmental perspective. Considerations of implementing the principle of ecologically sustainable development under the scheme are discussed below.

---

[22] Intergovernmental Panel on Climate Change (2001) *IPCC Special Report: Carbon Dioxide Capture and Storage* http://www.ipcc.ch/activity/srccs/index.htm.
[23] Shinnar, R. and Citro, F, (2006), 'A road map to U.S. decarbonization' *Science* 313 1243-1244.
[24] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003.
[25] WWF, *Carbon Countdown: Emissions Trading to combat Climate Change* (2005), http://www.panda.org/downloads/climate/wwfsummaretsreports071105lowres.pdf, accessed 10 November 2005.
[26] Discussion Paper, page xx.

7. The nature of permits, permit allocation and assistance measures

The creation of tradeable rights under the proposed scheme raises two critical questions: 1) how will the rights be characterised, and 2) will alteration of the rights give rise to compensation? ANEDO is deeply concerned that calls for compensation from industry will function to undermine the scheme by creating a disincentive for government to lower the emissions cap. This section examines the legal and policy considerations relating to emissions permits, property rights and compensation.

7.1 Legal considerations

Consistent with the current (federal) legal position applying to permits, ANEDO submits that:

- Permits should be characterised as licences allowing emitters to conduct an activity (namely the emission of GHGs) that would otherwise be unlawful.
- However, in the event that such rights are characterised as proprietary under the scheme, it does not automatically follow that compensation is payable for alteration of those rights.
- Proprietary rights created by statute, that have no existence outside legislation can, by their very nature, be altered, suspended or revoked at any time with no right to compensation. This would clearly apply to emission permits.
- The revocation of permits does not constitute an 'acquisition' as the person redeeming the permits has not acquired anything of value. The revocation of permits is merely a regulation of the right to emit, not the acquisition or sterilisation of the right itself.
- There is no requirement for compensation under state constitutions when property rights are altered or removed so there should be no expectation of compensation.

The Discussion Paper proposes that permits be issued that grant the holder firm property rights. As a result, the scheme anticipates that a right to compensation will arise, to be borne by taxpayers, if emission levels are revised through the taking away of permits. The rationale given is that this will ensure that emitters will have a clear right to emit. Furthermore, if no compensation is provided for revocation this would increase uncertainty for permit-holders as buyers will be unsure whether permits could be used and the price of permits will therefore be very low. ANEDO is opposed to this proposal. The reasons given to support this proposal are unsound and unsupportable on legal, equitable and ESD grounds. ANEDO disagrees with the contention that conceptualising permits as property rights automatically "implies that any decision to take away permits should be accompanied by compensation."[27] Our reasons are set out below.

Permits are licences to emit

The first question is whether emission permits can fit into the established definitions of property.

[27] *Ibid,* page 120.

The widely accepted definition of property is that given by Lord Wilberforce in *National Provincial bank v Ainsworth:*[28]

> Before a right or an interest can be admitted into the category of property, or a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability…

An emission permit is definable as it allows the emission of one tonne of greenhouse gas to be emitted per permit. Hence, it is also identifiable by third parties. It will obviously be capable of assumption as being tradeable is the reason for its existence. However, in relation to permanence and stability, Wylynko states that there is a "serious question" as to whether a permit to emit would satisfy these requirements. [29] He concludes that while it would appear that permits are capable of being property, "they will likely be mere authorisations."[30] Further, 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.

As will be discussed below, such an approach, which essentially categorises permits as licences, will ensure that the scheme will be consistent with pollution licensing schemes around Australia. In further support of this, 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."[31]

Compensation

Notwithstanding arguments in favour of permits being correctly characterised as licences, if the alternative that permits are secure property rights is accepted, it does not follow that compensation must be paid for alteration of those rights.

The Discussion Paper's contention that categorising emission permits as property rights automatically implies that the permit holders would be entitled to compensation is unsupported by decided cases in Australia. The current position of the High Court on acquisition, although the issue has not been definitively determined, is that compensation is only payable where property is acquired, not where activities are merely regulated, and where these rights exist outside of statutes.[32]

---

[28] (1965) AC 1175.

[29] Brad Wylynko, 'On the road to greenhouse gas emissions trading' *AMPLA Yearbook 2000,* 359-376 at 372.

[30] *Ibid.*

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

[32] The application of section 51(xxxi) was considered by the High Court in *Commonwealth v Tasmania* (the *Tasmanian Dams* case) (1983) 158 CLR 1 at 145-6. Three of the four judges who dealt with the issue, determined that there was no acquisition by the Commonwealth as it had not acquired a proprietary interest in the land, and the restrictions on use were irrelevant to the question of acquisition. Subsequent cases have talked about the Commonwealth acquiring an "identifiable benefit or advantage:" per Kirby in *Commonwealth v Western Australia*. This principle was slightly altered in the case of *Newcrest Mining (WA) v Commonwealth* where it was held that, a mining company had been denied the exercise of its rights under the mining tenements it had been granted and that "there was an effective sterilisation of the rights

Applying these principles to the proposed scheme, the redemption of permits does not lead to an acquisition of proprietary rights but rather regulates the amount which the holder can emit. In this case, there is no acquisition of property that warrants the grant of compensation. The person or body taking away the emission permits will not be gaining anything of value to indicate that an acquisition has occurred. However, ANEDO concedes that if there is a revocation of *all* permits issued to an emitter, the 'sterilisation argument' may arise. This may be appropriate for structural adjustment of certain high-emission industries, but is not relevant to any incremental reductions of the cap.

Some judges of the High Court of Australia have recently expressed a willingness to depart from the acquisition/regulation distinction.[33] Nevertheless, ANEDO supports the currently accepted view that the revocation of permits does not constitute acquisition as it is mere regulation of the right to emit. As the government has gained nothing tangible or a financial interest, no acquisition can have occurred. Hence, the weight of judicial authority does not lend support to the proposition put forward in the Discussion Paper that conceptualising permits as property rights automatically implies that any decision to take away permits should be accompanied by compensation.[34]

Statute-based rights

In interpreting s 51(xxxi) of the Constitution, the High Court has unequivocally stated that property rights that are created by statute are not capable of requiring compensation under this section as they are by their very nature, inherently susceptible to change. The often cited passage in from the judgment of Mason CJ, Deane and Gaudron JJ in *Georgiadis v Australian and Overseas Telecommunications Corporation:*[35]

> A right which has no existence apart from statute is one that, of its nature, is susceptible to modification or extinguishment. There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course.

Further cases have endorsed this approach.[36] The result of these cases is that proprietary interests that are created by statute are not property rights for the purpose of s51(xxxi) of the Constitution and do not therefore attract a right to compensation. Hence, applying the constitutional and common law position to the NETS scheme, if permits are considered as constituting property rights, these rights would be of a limited nature.[37] According to this analysis, even if emission permits are categorised as proprietary within the context of the proposed legislative scheme, then permit-holders should anticipate the

---

constituting the property in question" (per Gummow J at 634). In this respect, a distinction was explicitly drawn between "sterilisation" and "mere impairment" where, for example, other uses were available (per Gummow J at 634). Hence, if the property rights are effectively sterilised, this will amount to acquisition not mere regulation.

33 See for example, Gleeson CJ in *Smith v ANL (2000) HCA 58* where he states that the correct approach should be to look at the 'degree of impairment of the bundle of rights constituting the property in question." Also see Gummow J in *Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513.*

34 Discussion Paper, page 120.

35 (1994) 179 CLR at 305-306.

36 See *Commonwealth v WMC Resources Pty Ltd* (1998) HCA 8*, Minister for Primary Industries v Davey* (1993) 119 ALR 108*, Health Insurance Commission v Peverill* (1993-94) 179 CLR 226.

37 Brad Wylynko, 'On the road to greenhouse gas emissions trading' *AMPLA Yearbook 2000,* 359-376 at 371.

possibility that these rights may be altered or eradicated at any time. As such, emitters do not have a legitimate expectation of compensation, nor a legal basis to expect it. ANEDO supports this position as it is in line with legal authority and consistent with other pollution schemes around Australia.

It is important to note that the states do not have a constitutionally entrenched right to compensation for acquisition of property like the Commonwealth Constitution. Indeed, it has been held that states are free to acquire property as they choose, however unjust.[38] Hence the proposition that attributing property rights automatically implies that compensation is payable stumbles at the first hurdle, at least in a scheme where the federal Government is not involved.

Case studies

Pollution regulation in NSW

An examination of existing pollution and water laws in Australia shows that compensation is only payable in limited circumstances, if at all. The existing pollution (non-GHG) laws in Australia regulate air and water emissions using a licensing scheme. This regulatory approach has been used in Australian states for the past 30 years in controlling air emissions.[39] These licences give companies a clear right to emit. Thus, they are essentially permission to do what would otherwise be illegal. These licences are assignable and as discussed above, may constitute proprietary rights. However, there is generally no right to compensation if these licences are amended or revoked.

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*. The Regulation prescribes the standards of concentration (thresholds) for emissions of pollutants for each scheduled activity type.

Permits to pollute take the form of licences. The Regulation sets out the activities that require a pollution licence. These activities include industrial works that contribute to pollution. Operating any of these activities without a licence, or in breach of a licence, is an offence. It is important to note that where thresholds are amended *there is no right to compensation*. However, as an alternative to compensation, the Act includes a load-based licensing scheme. Licence holders can now enter into a load reduction agreement with the EPA for the purpose of obtaining a reduction in licence fees.[40] The promise of lower licensing fees is certainly an attractive prospect for industry and provides it with the impetus required to reduce emissions. ANEDO fully supports such financial incentives. Incentives aid in ensuring optimal co-operation from the industrial sector and in stimulating new technology. Early indications are promising. There has been an 8% improvement from 2001-02 to 2002-03 in total pollutant load (PLI) emitted by licensed

---

[38] See also: *Durham Holdings Pty Ltd v The State of New South Wales* (2001) HCA 7 *; PG Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382* where it was held that States "may acquire on any terms which they may choose to provide in a statute, even though the terms are unjust."

[39] Brad Wylynko, 'On the road to greenhouse gas emissions trading' *AMPLA Yearbook 2000,* 359-376 at 367.

[40] *Protection of the Environment Operations (General) Regulation 1998* - clause 25(1).

activities.[41] Recent amendments have increased the toxicity weighting for many air pollutants which means that participants to the scheme will effectively have to halve their emissions to meet their agreement targets. There is no right to compensation for such a reduction. The scheme has prevented 2114 tonnes of pollution per year being discharged into the environment, 903 tonnes of which are air pollutants.[42] Similar schemes exist around Australia.

As GHGs 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. It enables the provision of financial incentives and ensures that taxpayer funds are not being diverted to compensate industry for constraints of their ability to continue environmentally deleterious activities.

US Acid Rain Program

Previous and current international trading regimes expressly stipulate that tradeable permits do not constitute property rights and consequently, no right to compensation arises for alteration of these rights. One example is the US Acid Rain Programme that established a Sulfur Dioxide trading scheme. Under section 7651b(f) of *US Code Title 42* it states:

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

The scheme makes it clear that emission licences do not represent a property right and this means that they can be rescinded without cost to government. Nevertheless, the allowances were able to be bought, sold or banked.[43] Previous trading schemes have also adopted an approach similar to the SOx scheme.[44] As Wylynko observes, there is therefore no guarantee that the allowances, licences or permits in such schemes would not be revoked at any time. This is consistent with the general approach taken towards licences and other statutory authorisations (such as permits) granted by governments.

EU Emissions Trading Scheme

The EU specifically ensures that emissions allowances are not defined as property rights and that they only exist within the confines of the EU trading scheme. This is made clear in the definition of allowance under Article 3 of the EU ETS Directive:

---

41 Department of Environment and Conservation Annual Report 2004-05, page 16.
42 *Ibid.*
43 Ibid at 368.
44 For example the New South Wales Hunter River Salinity Trading Scheme, the previous Victorian water trading scheme under the *Water Act 1989,* the New Zealand commercial fisheries programme.

> 'Allowance' means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive.[45]

Furthermore, there is nothing contained in the EU ETS Directive that grants a right to compensation to emitters if their allowances are withdrawn. In summary, these allowances constitute a 'right to emit', are not considered to be property rights, and they can be withdrawn without compensation. ANEDO calls for the proposed Australian scheme to characterise permits in a manner consistent with the US Acid Rain Scheme and the EU scheme.

7.2 Policy considerations

Consistent with previous submissions, ANEDO has identified potential drawbacks of compensating for regulatory measures.[46] These drawbacks include that providing compensation is likely to:

- create precedents for other sectors (such as where industries seek compensation for the regulation of pollution);
- result in an inefficient use of the limited resources devoted to the protection of the environment (as compared to, say, financial assistance or incentives for the performance of certain duties);
- create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions;
- involve Australia in complex and costly litigation over what regulations require compensation (as has happened in the USA); and
- create practical and legal difficulties in distinguishing between the public and private elements of any regulation (as a basis for compensation).

Disincentives to lower the cap

Entrenching a right to compensation would create a disincentive for government to lower the emissions cap. As ANEDO has previously submitted, compensation for restrictions may create a climate "whereby Governments are hesitant to regulate property and effectively for fear of the financial repercussions."[47] In other words, the right to compensation will ensure that governments (or the regulatory body policing the caps) will be reluctant to reclaim permits for fear of the cost implications, even where the latest scientific and environmental information calls for a re-adjustment of the cap. Furthermore, making taxpayers bear the cost of any adjustment 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.'[48]

---

[45] Directive 2003/87/EC of the European Parliament and of the Council, *Official Journal of the European Union* 2003 at 3 - establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[46] See: EDO (NSW) submission, Jeff Smith, *Water Property Rights* (2003) at 17. http://www.edo.org.au/edonsw/site/pdf/water_prop_rights.pdf.

[47] *Ibid.*

[48] Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: should farmers have a right to compensation?' (2004) The Australia Institute at 29.

Focus should be on incentives rather than compensation

A primary focus of the Discussion Paper is to overcome uncertainty for investors in the trading scheme, and create certainty for industry. In this context, we note that every business and investment that operates within a consumer marketplace is inherently subject to some uncertainty, and it is impossible to legislate away uncertainty.

The rationale given for compensation is that a lack of this right would increase uncertainty for permit holders as well as those wishing to purchase permits. The Discussion Paper states that this would "transfer significant risk to the holders of permits, who would find it more difficult to make decisions about long-lived investments."[49] Essentially there would be financial risks imposed on emitters and investors. ANEDO does not believe this is ample justification for granting a right to compensation.

The dangers posed by GHG emissions have been known for some time, at least from the early 1980s. There has been significant forewarning to industry of the need to drastically reduce emissions to combat climate change. Hence, it is certainly arguable that GHG emitters have had sufficient notice of the need to reduce emissions and have therefore suffered no disadvantage. Instead of focusing on compensation, ANEDO supports the grant of financial assistance based on equitable principles that address real hardships and that stimulate better environmental practices. Early movers should be encouraged and benefit from action undertaken to reduce emissions.

Uncertainty may be minimised to some extent if the regulators of the scheme clearly articulate the circumstances whereby permits may be revoked. There is currently no such detail in the Discussion Paper. If the cap is set at levels based on the latest scientific information, then the possibility of a reduction in the level of the cap within the 10 years of firm caps will be unlikely. This will reduce uncertainty about the 'usability' of the permits. Furthermore, even if permits are reclaimed, this need not generate excessive uncertainty for emitters. As stated by The Australia Institute, whether regulation will create uncertainty depends on several factors.[50] These include how often levels are changed, how the laws are developed and their content and design. If changes are infrequent and developed through a public and transparent process then uncertainty can be reduced. Most relevantly, The Australia Institute finds that changes can in fact *reduce* regulatory uncertainty by 'satisfying society's demands for higher environmental standards.'[51]

Allocation as a share of total emissions

ANEDO submits that the proper characterisation of permits is as shares of a pool of emission credits similar in nature to those under the National Water Initiative. This view is supported by several commentators.[52] Indeed, the Australian Greenhouse Office has stated that allocating individual emitters a predetermined share of the national allocations

---

[49] Discussion Paper, page 120.

[50] Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: should farmers have a right to compensation?' (2004) The Australia Institute at 26.

[51] *Ibid*.

[52] 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.

is one means of addressing the uncertainty facing permit holders over continued access to permits.[53] The emissions share may be held in 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 has signed up to. This approach has already been implemented in certain countries. For example, schemes in Canada have included formal trading in emissions shares.[54] Shares were characterised as the right to receive a fixed percentage of the annual allowable emissions in current and all future years. In particular, the McMaster experiments demonstrated that markets with tradeable shares had less permit trading but "a more rapid convergence of price to equilibrium levels than markets which exclude futures trading."[55]

New entrants may be accommodated under this approach. The EU ETS allocates allowances to new entrants through the New Entrants Reserve (NER). Essentially, the NER is a residual pool of allowances left over after free allowances are given to existing installations.[56] For example, as at May 2006, the UK has allocated 93.7% of the total quantity of allowances to existing installations. The remaining 6.3% constitutes the NER to be disposed of by auction or sale.[57] ANEDO is supportive of such an approach being adopted by the NETS scheme.

ANEDO calls for the allocation of the majority of the percentage shares to existing emitters. A residual amount should be set aside for new entrants (possibly up to 20% of the shares). It is important to encourage new entrants that use best practices and efficient technologies to enter the market.

Banking and borrowing

ANEDO does not support the indefinite banking of permits.

ANEDO supports a prohibition on borrowing. The risk of companies not meeting their debts in future years has the potential to undermine the environmental outcomes of the scheme. Companies will have the flexibility to purchase more permits or participate in the offsets scheme if they anticipate not meeting their obligations.

8. Institutional arrangements

The detail of the legislative framework required to establish the necessary institutional and regulatory aspects of the scheme will depend on whether the Commonwealth becomes involved. In the interim, ANEDO submits that the development of state-based legislation to be enacted in each jurisdiction must make provision for the following elements:

- An independent regulatory body, which is expertise-based;

[53] Australian Greenhouse Office, "National Emissions Trading- designing the market: Discussion Paper" (1999) at 22.
[54] See Muller and Mestelman, "What have we learned from emissions trading experiments?' *Managerial and Decision Economics* 19 (1998) 225-238 at 233.
[55] *Ibid.*
[56] European Environment Agency, "Application of the emissions trading directive by EU Member States", EEA Technical Report, No 2/2006 at 31.
[57] Department for Environment Food and Rural Affairs (UK), "An Operator's Guide to the EU Emissions Trading Scheme- the steps to compliance', May 2006 at 9.

- An independent review group comprising a range of stakeholders beyond state governments and industry;
- Annual triple bottom line reporting by regulatory bodies involved in the scheme;
- Annual independent review of the scheme based on comprehensive monitoring and random audits of participants;
- An easily accessible public register that tracks price signals and trading activity;
- Penalty and enforcement provisions, including innovative compliance orders;
- A provision clarifying that compensation is significantly limited; and
- A requirement that the scheme be implemented in accordance with the principles of ESD (discussed below).

In negotiating the intergovernmental agreement, there is always a danger of settling for a 'lowest common denominator' approach in order to obtain agreement from all parties. For an issue as critical as addressing climate change it is essential that the states draft international best-practice legislation and do not lock in a watered-down compromise for 10 years that will not achieve its environmental objectives.

9. Emissions monitoring, reporting and verification

It is essential that emitters be monitored regularly and accurately to ensure the validity of emissions levels and to increase public confidence in the scheme. The EU ETS has stringent monitoring regime which could provide a model for the Australian scheme.

Comprehensive independent monitoring is vital to the effectiveness of the NETS regime, especially in relation to monitoring and evaluating the efficacy of offset projects.

10. Accommodating multiple objectives

The emphasis of the Discussion Paper is very much on the economic impacts of the scheme. Although this is a fundamental consideration, the overarching focus must be on achieving the ultimate goal of significantly reducing greenhouse gas emissions.

ANEDO submits that ecologically sustainable development (ESD) and its constituent elements should be the guiding principle of the proposed scheme.[58] The 2002 *World Summit for Sustainable Development* reaffirmed the three pillars of sustainable development - economic development, social development and environmental protection. This need to account for a "triple bottom line"[59] has been affirmed in the UNFCCC and adopted by Australia in the *National Strategy for Ecologically Sustainable Development.*[60]

ESD calls for the integration of environmental, social and economic concerns. It is therefore not sustainable to "allow one or the other priority to completely fall off the

[58] The generally accepted definition of ESD is development that meets the needs of the present without compromising the ability of future generations to meet their own needs: World Commission on Environment and Development, *Our Common Future* (1987) at 8.
[59] Lewis Hawke, 'Walking the talk on sustainable development in the public sector' (2004) *Public Administration Today* 50 at 50.
[60] 1992. See Gerry Bates, *Environmental Law in Australia* (6th edition, 2006) at 123 for further discussion on Australia's policies and legislative response to ESD.

table."[61] Consequently, ANEDO submits that true integration envisaged by ESD means according environmental considerations the same weight as economic considerations in all government decisions. It is vitally important that this is reflected in the proposed scheme. Indeed, in light of the recent Stern report,[62] it is clear that without a primary focus on the environmental considerations of climate change, purely economic approaches are likely to fail to maintain economic sustainability in the long run.[63] As noted, modeling undertaken by the Taskforce indicates that a reduction in greenhouse emissions *can* be accommodated without major economic disruption.[64]

Notwithstanding this, the Discussion Paper focuses predominantly on providing "certainty for industry." This emphasis is misguided and places the scheme in danger of violating ESD principles. The scheme needs to import an effective and discernible balance between certainty for industry (economic considerations) and the needs of the environment in order to satisfy the requirements of ESD. This will involve introducing flexibility into the scheme to be able to alter targets in response to changing conditions. ANEDO submits that to be consistent with ESD, the scheme must introduce a robust cap that will contribute significantly to reducing the impact and extent of climate change. This should not be compromised by perceived 'industry uncertainty'. The NETS scheme must not lose sight of its overarching goal, which is to significantly reduce Australia's GHG emissions. As noted in Part 1, establishing an effective scheme now is consistent with the precautionary principle and Article 3.3 of the UNFCCC, and ensuring intergenerational equity.

Another relevant element of ESD is the Polluter Pays principle, whereby those who generate pollution should bear the full life cycle costs of that pollution. In the context of the proposed scheme, the free allocation of permits to existing installations is inconsistent with requiring the polluter to bear the full costs of their activities. ANEDO is supportive of the widely-held belief that auctioning is the most efficient and environmentally sound means of allocation and clearly applies the precautionary principle. Indeed, the Centre for Energy and Environmental Markets observes;

> Auctioning seems to be the best way for allocating permits since any possible windfall gains from free allocation are avoided and the 'polluter pays' principle is applied.[65]

As discussed in relation to property rights, it is consistent with the precautionary principle that permit-holders bear the cost associated with a reduction in their number of permits.[66] The proposed scheme as it currently stands, contemplates that compensation will be paid to emitters if caps need to be re-adjusted. This is inconsistent with ESD. ANEDO submits that if there has arisen 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

---

[61] Marie-Claire Segger and Ashfaq Khalfan, 'Sustainable development law: principles and practices' (2004) at 368.
[62] *Stern Review on the economic impacts of climate change*, 2006. Full text available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm
[63] Mark Diesendorf & Clive Hamilton (eds), *Human ecology, human economy- ideas for an ecologically sustainable future* (1997) at 71.
[64] Discussion Paper, page xxi.
[65] Regina Betz, Iain MacGill, Robert Passey, Centre for Energy and Environmental Markets, 'CEEM submission to: a National Emissions Trading Scheme', November 2005 at 21.
[66] Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: should farmers have a right to compensation?' (2004), The Australia Institute at 23.

the need for regulation. In such a scenario, if emitters then decide that it is still profitable to emit, they can pass the costs of compliance onto consumers. Indeed, the NETS scheme contemplates the fact that consumers will have to pay higher energy prices once the cap is implemented.

Market-based mechanisms that create incentives for the reduction of GHG emissions such as the proposed scheme are obvious means of implementing ESD. Market-based trading schemes have proven successful in some contexts. Examples include the US Sulfur dioxide scheme and the NSW Hunter Salinity Trading Scheme. An efficient trading system is an attractive option as it can offer the following advantages:[67]

- *Less pollution* - trading can lead to the achievement of environmental goals. The two examples given above led to clear environmental outcomes. Indeed, in the US sulfur dioxide scheme compliance has been 100 percent. No company has ever emitted more than allowed.
- *Lower costs than traditional regulations* – trading allows companies to seek out the cheapest emissions reductions regardless of where they are located. They leads to lower costs.
- *Development of new technology* – By stimulating competition to reduce emissions, trading leads to the development of cleaner technologies. Trading rewards companies that are able to do better than the minimum standard.

ANEDO supports any trading scheme that encapsulates these three elements. However, this is provided that the caps put in place are robust and meaningful and that the scheme is governed by strict rules and tough penalties. Otherwise any environmental benefits will be nominal and the scheme will simply be one that endorses the "right to pollute".

11. Transitioning to the NETS

ANEDO supports the proposed start date of 2010, provided that the scheme is designed to optimise environmental outcomes and fully implement ESD. The 2010 start date will allow sufficient time to ensure that the legislative and regulatory arrangements are developed in a transparent and accountable manner. Delaying commencement may in fact cause more significant transitional issues at a later date when emission reductions may need to be deeper. Australian states must commence the transition to a carbon constrained economy as soon as possible.

12. Linking with International schemes

As noted, ANEDO supports designing a scheme that will be compatible with measures under the Kyoto Protocol and international schemes in the future. Offsets, such as joint implementation (JI) clean development mechanisms (CDM) and carbon sinks have been incorporated into the Kyoto Protocol as measures to assist with target compliance. Credits generated by additional sources or sinks outside the trading program provide a more diverse range of compliance options which may lead to cost savings. However, as discussed above, these measures should be viewed cautiously.[68] Although Australia is

[67] Center for Clear Air Policy, 1997 'Greenhouse Gas Emissions Trading: Improved Compliance at Reduced Cost' Washington DC, available at www.ccap.org.
[68] WWF, *Carbon Countdown: Emissions Trading to combat Climate Change* (2005), http://www.panda.org/downloads/climate/wwfsummaretsreports071105lowres.pdf, accessed 10 November 2005.

outside the Kyoto framework and will not obtain benefits from JI/CDM projects in developing countries, if this stance were to change, it is important to note that there will ordinarily be a significant time lag in developing, financing and enacting projects. This may affect the certainty of using these credits in the market.

13. Complementary measures

The proposed emissions trading scheme is only one tool to be used for combating climate change and in implementing ESD. However, ANEDO believes that for such a scheme to make a meaningful contribution, the overarching environmental goal of significantly reducing Australia's GHG emissions must not be undermined by considerations of investor certainty, industry compensation, or an over-reliance of untested offset projects.

For these reasons, and the relative infancy of trading schemes as a policy tool, it is essential that other measures are also implemented as a matter of urgency to address climate change. Consistent with previous submissions, ANEDO recommends:

1. Australia ratifies the Kyoto Protocol;
2. A greenhouse gas emission trigger be included in the *Environment Protection and Biodiversity Conservation Act 1999* that recognises any development that produces over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance. This could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions.
3. More investment and incentives for development and expansion of renewable energy options, to complement increased mandatory renewable energy targets.