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Australia's greatest moral challenge?

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Abstract. Australians are amongst the highest per capita emitters of carbon on Earth. The evidence is now clear that climate change will terribly impact all living things. As the window of opportunity to prevent this closes the country prevaricates on the need to act, rather deferring the cost to future generations.

Key words: Australia, climate change, emissions trading scheme

Introduction

As a country Australia has faced, and continues to face, many moral challenges. The treatment of the first Australians, of refugees, of non-European immigrants, of same sex orientated individuals continue to test the moral fabric of the community and its political representatives. Unfortunately paranoia, xenophobia and plain ignorance overly-dominate the community's response to these challenges. With politicians focused on short-term election cycles, too much regard is placed on focus groups and, even, shock-jocks, in the formulation of government policy. It seems that Ben Chifley's light on the hill burns ever so dimly for many marginalised Australians.

As important as these moral challenges are it is a far different one that a recent prime minister described as Australia's "greatest" moral challenge. It is a challenge that if Australia, and the rest of the World, does not respond to then the existence of the Earth itself is imperilled. It is probably in this respect then that the prime minister was expressing that it was the greatest. If Australia does not meet this challenge then how it responds to all those others may be irrelevant. It is climate change.

The evidence is clear that the current rate of emission of greenhouse gases will have terrible implications for life on Earth.[1] The window to minimise the impact is rapidly closing. Yet Australians prevaricate. Some of the wealthiest and most highly educated peoples on Earth,

who could readily respond to the crisis, but, rather, remain at the top of the World´s list of emitters of greenhouse gases.

This is more astounding given that as the driest continent and home to the World's largest coral reef, a national icon, and with 85% of the population coastal dwellers, Australia stands to be affected by climate change more than any other country. Any other country, that is, with the exception of those that will simply cease to exist being submerged under water.

This paper traces Australia´s response to climate change over the last decade of (apparent) political consensus on the scientific evidence. It critiques the latest policy directed at curbing greenhouse emissions. The paper does not seek to explain why Australians seem so reluctant to rise to the challenge but does illustrate some of the considerations that have influenced the design of the policy and explain its limitations. Ultimately, it may be that this reluctance can only be attributed to the power of vested interests in influencing public opinion and a failure of political leadership.

Climate change and the World's response

During the early 1970s scientists first began to reach a consensus that the climate was warming as a result of increased concentrations of greenhouse gases in the atmosphere, most likely arising from human activity. International agreement on the need to respond to this change in climate took another twenty years. In Rio de Janeiro, Brazil in 1992, 166 countries signed the *United Nations Framework Convention on Climate Change* ("UNFCCC") agreeing to work towards stabilizing greenhouse gas concentrations in the atmosphere. This Convention set no mandatory limits but in December 1997 the parties adopted the *Kyoto Protocol*, under which developed countries collectively committed to reduce greenhouse gas emissions by at least 5% below 1990 levels during 2008 to 2012.

Working alongside the *Kyoto Protocol* have been the United Nations climate change conferences. Since the 2010 session at Cancun (Mexico), countries have pledged to limit or reduce their emissions. These countries include Australia, which has pledged to reduce its emissions by 5% compared with 2000 levels by 2020. Whilst it is difficult to compare the various pledges, Australia's *Climate Commission* had suggested that Australia's commitment was broadly comparable to other countries, in particular the targets of the United States, Japan, Europe and China.

Whilst the consensus on the science of global warming is now almost unanimous, in the early 1990s it was still contested, both as to whether warming was, in fact occurring, and, indeed, whether it could be attributed to human actions. In the absence of a definitive answer the UNFCCC adopted the pre-cautionality principle. If humankind is to blame then the consequences of not reducing emissions carries too many risks. The burden of proof that our actions are not harmful then falls to those alleging it.

Once it is accepted that human induced emissions must be reduced then how can this be achieved given the energy needs of modern society? First, governments can embrace command and control regulatory measures, such as prohibitions on, or phase out of, particular energy sources, energy efficiency mandates, the setting of renewable energy targets and the promotion

of measures to capture greenhouse gases before they are emitted. Public transport can be promoted, community energy conservation education programs implemented and subsidies and incentives provided to both businesses in the development of renewable energy sources and consumers in the take up of energy efficient products. These policies focusing on reducing energy consumption and embracing renewable energy tend to be less controversial.

Somewhat more controversial are programs directed at the sequestration of already emitted carbon, such as trapping carbon emissions underground and, more commonly, the planting of trees. Scepticism remains as to whether, and to what extent, such programs can be effective. Forestry plans run the risk that all can be undone by wild fires, a particular risk with the prognosis of more, and more intensive, wild fires into the future.

By far the most controversial response is the proposal to place a price on carbon emissions. Whilst such an approach is viewed as the most cost effective, in a globalised market, the central controversy with such a measure is the potential to drive industry offshore to escape the competitive disadvantage generated by the added cost burden. In carbon pricing parlance the expression "carbon leakage" has been coined to refer to the phenomenon where origin based carbon pricing leads to a reorientation of carbon emitting activities away from countries that price carbon to destinations that do not.

For those countries that look to implement a carbon pricing mechanism, essentially there are two choices: a tax on carbon emissions or a market mechanism whereby a cap is placed on the amount of carbon that the country should emit (in line with its ultimate goal of achieving its international obligations) and permits to emit carbon can be traded. Under such a "cap and trade" system, or emissions trading scheme ("ETS"), permits might be auctioned off by the government. Furthermore, entities trapping carbon might be rewarded with permits they could trade.

The respective advantages and disadvantages of these alternative approaches have been the subject of much debate, one which it is not appropriate to engage in this paper. Suffice to say that a major deficiency in the carbon tax approach is the lack of a cap – conceivably the amount of carbon emissions could stay the same or even rise with the added cost simply passed on to consumers. The setting of the tax rate (the carbon price) would also be problematic for governments. Too low and nothing is achieved. Too high and the economy might be harmed. Whilst a market based "cap and trade" scheme avoids these limitations, such regimes suffer from the unknown and complexity. The negative impact on investment planning arising from the uncertainty as to the future carbon price, difficulties in fairly allocating carbon permits and the potential for speculation and corrupt market practices also have the potential to derail their effectiveness.

In the absence of a global co-ordinated regime either mechanism has to deal with the international environment. Carbon leakage, as described above, is a real threat. One policy response is to introduce a border adjustment tax that seeks to tax the underlying amount of emissions inherent in imports from destinations without pricing mechanisms. Apart from the obvious difficulties, in setting the rate of tax and identifying the amount of indirect carbon emissions, there is a concern that such taxes may violate international trade rules, in particular, the *General Agreement on Tariffs and Trade* (the "GATT").

For an ETS a further issue is as to whether and what permits issued by foreign countries should be recognized. If foreign carbon markets are not available to domestic entities then a higher domestic market price compared to other countries (as would be expected if other markets were larger) might lead to carbon leakage. However, recognizing foreign permits exposes the country to integrity issues which might be problematic for its carbon regulator to resolve.

Year zero in Australian climate change policy

Until the mid-2000s Australia was in a convenient denial on climate change. Since 1996 a conservative government had been in place, championed by climate change sceptics. Any grand plan to reduce emissions was seen as an unnecessary intrusion into the Australian way of life and impacting on the country's all important coal industry. After all, as a relatively small country in terms of population, the global impact of any emissions reductions would be negligible. Thus, along with the US, Australia stubbornly refused to ratify the Kyoto Protocol or establish a comprehensive greenhouse gas reduction strategy. Australia would not act until everyone else did.

However 2007 was to be year zero for climate change response in Australia. Public sentiment was changing and the government was forced to react. Following a report by the *Prime Ministerial Task Group on Emissions Trading*, the government committed the country to an ETS. The Labor opposition party had also commissioned the *Garnaut Climate Change Review* earlier in the year. The result was that both major parties went to the November 2007 election with a promise to introduce carbon trading.

The subsequent election of a Labor government was viewed as a mandate to deal with climate change, with the new Prime Minister issuing the greatest moral challenge statement. Thus one of the government's first acts was to ratify the *Kyoto Protocol* and make the pledge that Australia would reduce its emissions by 5% by 2020.

The introduction of an ETS was to be Australia's primary response to its moral responsibility. However, this was not to be so easy. The public consultation process dragged on throughout 2008 and 2009. In the absence of control in the Senate the government needed to negotiate to ensure passage of its legislation. Against this political reality the government introduced a Bill into Parliament in May 2009 to enact its ETS termed the "carbon pollution reduction scheme". However as a negotiated compromise the scheme failed the expectations of environmentalists nor was it acceptable to industry. There were too many exclusions, free permits and a particular problematic feature allowing for the acquisition of cheap permits from the developing world. Furthermore, uncertainties remained and the complexity of the regime made it difficult to sell to the community. A foreshadowed low fixed permit price of AUD$10 per tonne in the first year of operation raised doubts as to whether it would achieve its environmental objectives.

Nevertheless, successful negotiations with the leader of the Liberal coalition in November 2009 seemed to ensure the safe passage of the Bill. However the inability of the opposition leader Malcolm Turnbull to convince his party saw him imprudently issue an ultimatum leading to him being replaced as leader by Tony Abbott. Abbott, a professed climate change sceptic, led the Senate to reject the Bill for a second time.

Whilst the Bill was reintroduced into Parliament in 2010, public weariness of the issue, together with reluctance to impose a cost on the economy during a period of continuing global economic instability, induced Prime Minister Rudd to announce that the introduction of an ETS would be deferred until such time as greater world consensus was reached. His subsequent inability to achieve passage of an equally controversial piece of legislation enacting a special mining tax was to see him replaced as leader in June 2010. Reading the community's fatigue with the issue his successor, Prime Minister Gillard, went to the August election on a no carbon tax platform. With the opposition leader publicly doubting the science of climate change, both major Australian political parties had dramatically retreated from a policy to impose a price on carbon in three short years. A highly popular Prime Minister and well regarded leader of the Liberal coalition had been dethroned in the process.

Nevertheless, a swing against the government was to see it only retain office with the help of independents and the Greens. Carbon pricing was now back on the agenda and as part of the power sharing agreement a *Multi-party Climate Change Committee* was established to determine the exact way this would be delivered. Fundamental design issues had to be negotiated in a highly charged atmosphere. Business and right wing lobby groups were fuelling the attacks by the opposition party. Pledges in blood that the regime would be repealed when they were returned to office, calls for a national plebiscite and attempts to arrest power from the government in the lower house were all part of the attack. On the other side, environmental lobby groups were demanding a price that internalized the full cost of carbon pollution and an end to contradictory policies (such as assistance to polluting industries). Even actor, most famously Cate Blanchett, and state politicians entered into the fray. In this environment, the government's primary mechanism for galvanizing community support and introducing credible evidence to support its policy, the *Climate Commission*, was largely drowned out by emotional rhetoric.

Nevertheless, in February 2011 the Prime Minister announced the broad features of a resurrected ETS to commence 1 July 2012 with the aim to reduce emissions by 160 million tonnes per annum by the year 2020.

Emissions Trading Scheme circa 2012

The 2012 ETS had the following broad features (including those not implemented before repeal):[2]

- Entities emitting 25,000 tonnes or more of CO2e annually were to acquire and surrender an eligible emissions unit ("EEU") per tonne of emissions from facilities over which they have operational control (with no caps imposed until 2014).
- Entities were to report carbon emissions for a financial year to the *Clean Energy Regulator ("CER")* whose function was to ensure the accuracy of these reports and impose penalties if insufficient EEUs were surrendered.
- From 1 July 2014 fixed price EEUs were to be replaced by a "cap and trade" ETS with annual caps on emissions set five years in advance.
- Following the fixed price period EEUs were to be allocated by auction in most cases. No EEUs from the fixed price period were to be carried over to the full ETS.

- Australian Carbon Credit Units generated through the carbon farming offset scheme could be acquired and used to satisfy emissions obligations.
- Emissions intensive trade exposed ("EITE") industries received free units covering up to 94.5% of their liability during the fixed price period. Free EEUs were also issued to coal-fired electricity suppliers and tax cuts, pension increases and other compensatory government payments were implemented by way of household and small business assistance.
- The agricultural sector was exempted. Gasoline was also exempted but large diesel and jet fuel users were subject to increases in excise taxes.

Linkage with the European Union ("EU")

Shortly after the scheme came into effect it was announced that it would be fully linked to the EU ETS by 1 July 2018. As an interim measure, from the commencement of trading under the Australian ETS, entities would be able to purchase EU allowances to satisfy their domestic obligations.

To facilitate linking the government's plan to implement a floor price in the ETS was dropped. This was controversial. Price parameters provided some certainty for business planning. Furthermore, there was also a risk that the EU allowances would continue to price carbon much lower than the Australian government forecasts, forcing down the auction price for Australian government issued allowances and thereby adversely impacting revenue streams to the government. A lower price would also translate to a lower incentive to reduce emissions hence impacting the environmental objectives of the regime.

The government continued to propose a price ceiling as a cost containment measure, although it would be set by reference to the expected price of EU allowances.

As a final concession to the EU, with Australian entities between 2015 and 2020 able to source 50% of their required allowances from international sources (rising to 100% from 2020), under the agreement to link a new 12.5% sub-limit was to apply to Kyoto units. [3] This made it more likely that Australian entities wishing to acquire international allowances would source them from the EU. Furthermore, it provided some additional protection against the availability of so-called "hot air" allowances (primarily excessive allowances issued to former Soviet Bloc countries) asserting downwards pressure on the carbon price.

The politics of implementation: price setting, exclusions and compensation

The Australian regime was the product of a political bargain. Although based on the EU regime, numerous qualifications were included diluting its environmental effectiveness. The rationale for how the fundamental elements of the regime were arrived can be attempted as follows:

Carbon tax or emissions trading scheme

As observed earlier, carbon pricing can be accomplished by either a carbon tax or a market mechanism. The regime was a hybrid, initially operating as a fixed price regime under which the required permits would be purchased from the government and immediately surrendered. From 1 July 2014 (brought forward from 1 July 2015 as initially proposed) it was intended that emissions caps would be imposed, permits auctioned off and trading expected to commence. This reflected a view that Australia needed to be part of a global market for carbon permits that the then government hoped would exist by 2014. Interim operation as a fixed price avoided the potential negative impact from price volatility, which was a particular risk during the post-Kyoto framework negotiations.

The carbon price

This hybrid nature of the regime required the government to set the initial price. Business interests referred to the price at which carbon permits were trading in Europe (then around AUD$15) whilst environmentalists pointed to the government's own Treasury estimates that a price around AUD$131 per tonne was necessary to meet the greenhouse gas reduction targets. Ultimately, the price of AUD$23 for the first year, rising at 2.5% in real terms per annum, was selected as a compromise. This approximated the *Garnaut Climate Change Report* recommendation, although that price was envisaged for a scheme where no free permits were issued.

Large emitter threshold

The regime applied to "large" emitters, specified as entities that emitted 25,000 tonnes of CO2e annually. Although this would only affect around 294 entities, the government estimated that this should account for around 60% of Australia's greenhouse gas emissions. The logic behind the threshold was to not burden smaller emitters with the cost and administration imposed by the regime, although those close to the threshold were required to verify that their emissions did not exceed it.

Exemption for the agricultural sector

The agricultural sector was exempted albeit that it is the country's third largest emitter. Various justifications for this were given including the difficulty of measuring emissions on farms, the fact that the industry is a price taker and could not pass on the added costs and that the concession was necessary to obtain the support of the independents on whom the government relied.

Emissions intensive trade exposed ("EITE") industries

EITE industries (such as steel, aluminium, zinc and glass production) received substantial assistance in the form of free units (although this assistance was to gradually taper off at 1.3% per annum). The natural gas, coal and electricity generation industries also received assistance. The level of assistance to industry was controversial. Whilst the rationale was to allow economically significant high emitting industries time to introduce measures to reduce their exposure and prevent carbon leakage it clearly had the potential to lead to windfall gains to these industries and increase the need for emissions reductions elsewhere in the economy to meet the country's international commitments. In particular, the *Garnaut Climate Change Report* had strongly argued against concessions of this type. However the alternative of a border adjustment mechanism to tackle carbon leakage was equally problematic, suffering from legal uncertainty in terms of compliance with GATT principles, administrative costs, calculation difficulties and the potential to lead to international trade disputes and protectionism. In the absence of international agreement on such mechanisms, the free allocation of units was the preferred approach to counter carbon leakage.

Compensation and managing price rises

Whilst the government acknowledged, and indeed it was the rationale for the scheme, that the price of certain products would rise, the *Australian Competition and Consumer Commission* ("ACCC") was to take action against any price gouging claimed falsely to be as a result of the introduction of the regime. Certainly it was anticipated that the price of electricity would rise but businesses intending on passing on additional costs to consumers were required to be able to substantiate that this was a result of the carbon price. Given the potential for the electricity price rises to challenge the community's resolve, a marketing offensive was initiated to defray concerns as to the significance of the carbon price on electricity prices vis-à-vis the government compensation provided.

Although the opposition mounted a scare program in the lead up to 1 July 2012, price monitoring in the months following identified little impact from the ETS. There were, however, a number of well publicized attempts to profit gouge blaming the carbon tax identified by the ACCC.[4] There were also businesses that were rumoured to have sacked workers, closed down or moved offshore in response partly, at least, to the introduction of the measures, with small business reportedly particularly affected due to their apparent inability to be able to pass on the additional costs.[5]

The politics of repeal

All ETSs compromise between environmental integrity and cost containment. This renders an ETS open to attack from two opposing fronts. Depending on the perspective of the analyst, the Australian ETS could be criticised for favouring one position over the other. The initial fixed price of AUD$23was an obvious flash point. Even on the government's own analysis at this price there was insufficient financial imperative to steer the economy towards a renewable

energy future. Yet those opposed to the regime argued that the price on carbon was damaging the economy. Stung by these attacks, in its September 2013 election platform the government brought forward the proposed linking with the EU by a year, to 1 July 2014, arguing that the availability of the lower priced EU credits would reduce the cost burden on Australian emitters. Of course this would also further impact on the environmental credentials of the scheme.

The low price imposed on carbon was exacerbated by other design features that detracted from the effectiveness of the scheme in reducing emissions. Notable of these was the limited application of the regime to just 294 big polluters, the exclusions for some industries and sectors (notably agriculture), the free units for trade exposed high polluting entities and the massive household compensation scheme that saw 90% of households receiving some compensation.[6]

Meanwhile the opposition maintained its promise that it would repeal the ETS. However, although this introduction of political risk into the renewable energy investment equation impacted on the emerging clean energy industry, there was scepticism as to whether the threat would be carried out. For one, it would need control of both houses of Parliament which was highly unlikely. Furthermore, given that an agreement had been reached with the EU to link the regimes it appeared inconceivable that Australia could now, unilaterally, withdraw from this commitment. The need to unwind the compensation arrangements for business and households also rendered repeal a challenging proposition.

Nevertheless, in July 2014, ten months after the election of the new conservative government, repeal legislation was successfully negotiated through the upper house. The delay was attributed to the control of the upper house by the Greens until 1 July 2014. With the reversion of control to a minority party financed and controlled by mining magnate Clive Palmer, the government was able to negotiate its removal. Bizarrely Palmer, who had only recently been heralded by Al Gore in a high profile joint media appearance in Australia, insisted that as part of the agreement a now aimless *Climate Change Authority* be retained to conduct a review into whether Australia should implement an ETS in the future!

Ultimately, the demise of the regime might substantially be attributed to the perceived dishonesty of Prime Minister Gillard in breaking her pre-election promise not to impose a carbon tax. This was played upon by conservative forces within the media and the opposition who also played up concerns about Australia's waning international competitiveness, attributing it to carbon pricing. The protective cost containment features of the regime, and dire predictions of science, were overshadowed by the political rhetoric of impending economic Armageddon.

The Emissions Reduction Fund

The new government had demonstrated a deft hand at negative politics in the manner in which it demonised the ETS for its political gain. However, as it had given bipartisan support for Australia's international undertakings to reduce emissions it needed an alternative policy to achieve this. For a conservative government, a carbon tax was out of the question. The policy, that eventuated, it terms "direct action." This policy has, at its core, the emissions reduction

fund ("ERF"), a scheme to provide government assistance to industry to encourage a reduction in emissions.

The ERF builds on the *Carbon Credits (Carbon Farming Initiative) Act* 2011 ("CFI"). The CFI is an offset scheme under which Australian Carbon Credit Units ("ACCUs") are issued in relation to projects securing verifiable emissions reductions or carbon sequestration pursuant to approved methodologies. These methodologies have focused on land sector projects, such as methane trapping from landfill and piggeries and the devotion of farming land to reafforestation. Whilst the scheme has its critics,[7] under the ERF amendments this scheme is extended to a wider range of activities allowing industry to participate.

In the absence of an ETS generated market in which to sell ACCUs, participants in the ERF submit approved proposals to the *Clean Energy Regulator* ("CER") to reduce emissions identifying a per tonne CO2e cost. The CER holds reverse auctions whereby it will undertake to fund those projects below an undisclosed price. The successful bidders enter into "abatement contracts" and undertake to deliver the emissions reductions (or alternatively ACCUs generated by other projects) at their bid price. The government funds the acquisitions from an earmarked AUD$2.55Billion fund. The rationale is that those proposals resulting in the lowest abatement cost will be funded first.

The absence of any mandatory cap imposed on emissions by this scheme creates the risk that these reductions may be offset by increases in emissions elsewhere in the economy. Accordingly, there is a safeguard mechanism that is to apply from 1 July 2016. Under this mechanism entities with direct emissions in excess of 100,000 tonnes CO2e per annum have an emissions cap imposed. Entities that breach their cap are able to purchase ACCUs from other entities in lieu of paying a penalty.

Whilst this policy is expressly not premised on carbon pricing, in fact, by virtue of the reverse auctions and the obligations on successful bidders under their abatement contracts, together with the caps on large emitters, it is likely that a secondary market will exist. However, the depth of this market is unlikely to be that significant, at least in the short term, given the weak emissions caps with baselines set using the highest level of historical direct emissions over a five year period. These are further weakened by the ability for entities to average emissions out over three years and new and expanding activities receive additional flexible treatment. Exceptional circumstances exemptions also exist together with baseline setting concessions for the mining, oil and gas industry and the electricity industry. That the government watered down the safeguarding mechanism was probably to be expected given that it was forced to implement it as part of its agreement to ensure passage of its legislation.

The government has, however, committed to review the ERF, including the safeguard mechanism, in 2017 at which time it could be strengthened depending on how well Australia is travelling to meet its emissions reductions obligations. Given the government's fundamental complaint against the former ETS that it damaged Australia's international competitiveness the review may well amount to a whitewash.

The new government had also criticised the ETS for recognising foreign emissions units on the basis that this resulted in Australia paying for emissions reductions overseas. This argument ignored the reality that emissions do not know national borders and that, furthermore, global emissions could be more cost effectively reduced where reductions occur in countries where

the marginal cost of abatement was lowest. It does explain though why the ERF scheme does not allow for the purchase of foreign units.

Will the ERF succeed in securing the committed emissions reductions?

The government states that the ERF will reduce emissions by the necessary 131 million tonnes per annum by 2020 to meet Australia's international commitments.[8] However commentary on the ERF has been universally negative.[9] The cost of abatement has been identified as higher than both a carbon tax or ETS and the fund set aside to acquire ACCUs inadequate to ensure that Australia meets its undertakings.

These criticisms evidence an essential design flaw in the scheme. For the ERF to generate sufficient incentive to encourage industry to innovate to reduce emissions the price offered by the CER must be sufficiently high. However, if the price is too high then the regulator will not be able to afford to fund the necessary number of proposals. With the second auction held in November 2015 a price signal has been established at AUD$12.25. At this price it would be expected that few businesses are likely to be encouraged to participate yet, given the amount of abatement secured at the auction prices to date, the fund will not be adequate to meet Australia's emissions reduction commitment.[10]

Are the environmental credentials of the ERF robust?

The key to registration of a project under the ERF is compliance with an approved methodology. These methodologies identify the implementation, measurement and monitoring activities necessary to generate credits. They may even specify whether "additionality" is made out, which otherwise is stated as a further consideration for project approval. Additionality is the necessity for projects rewarded under an offsets scheme to achieve additional emissions reductions from what may have occurred in any event. This requirement has been a much debated element of the Kyoto clean development mechanism ("CDM") where stringent additionality requirements have been identified as making it too difficult to have a project accepted. However, in the absence of a robust rule, business as usual reductions would be rewarded with no environmental benefit.

The CFI stated its additionality requirement in terms that a project had to demonstrate that the reductions went beyond what was "common practice" for the industry and were not required by another legislative scheme (former S 41 of the *CFI Act* 2011). Under the ERF this requirement has been replaced with a three new tests contained in S 27(4A):

- *Newness requirement*: the project must not have "begun to be implemented" (as defined) when the application for registration is made.
- *Regulatory additionality requirement*: the project must not be required to be carried out under another government law.
- *Government program requirement*: the project must be unlikely to be carried out under another government scheme.

Complementing the three tests the offsets integrity standards (the basis upon which methodologies are approved) have been amended to include a requirement that the emissions reductions would have been *unlikely to have occurred in the ordinary course of events* (S 133(1)(a)) The removal of the focus on additionality from the project approval stage to the methodology approval is likely calculated to have the effect of making project registration less onerous. It would also seem that the change in wording from beyond "common practice" to "unlikely to have occurred" may have also been designed to relax the requirement but whether this is indeed the case will depend on the subsequent approach of the regulator. Certainly the White paper and the Explanatory Memorandum to the amending legislation both make it clear that the amendments are intended to make it easier for projects to be registered. A number of requirements are (also) relaxed such as rules relating to the aggregation of projects, restrictions on clearing native forests, the need for proposals to be supported by peer reviewed scientific evidence, the time required for public consultation over new methods and the need for a project to be approved by the offsets integrity committee (now removed to the Minister).[11] There is also an opportunity to reduce the permanence obligation in the context of carbon sequestration from 100 years to 25 years.

As noted, the consensus amongst economists is that the ERF is an inferior measure in terms of delivering emissions reductions compared to an ETS. However, it is to be observed that the scheme does establish a price signal and envisages a secondary market operating for ACCUs. Whilst the voluntary project focused nature of the scheme reduces its impact compared to an economy wide ETS, the mandatory nature of the safeguarding mechanism has the potential to deliver greater benefits for the environment. Although the safeguard mechanism offers some hope as a form of ETS notably it is in the nature of a baseline and credit mechanism. Such mechanisms are generally viewed as second best to a cap-and-trade ETS due to the administrative demands in setting individual baselines. The process of setting these baselines is open to rorting and influence. Where the baselines might be set as a product of output and the emissions intensity factor of the items or services produced (an option under the ERS), the price of emissions intensive products is left unaffected, thereby not presenting any demand side pressure to reduce emissions that a cap-and-trade ETS can deliver. Furthermore, the mechanism only applies to facilities with emissions greater than 100,000 tonnes per annum and the already weak caps are not decreasing over time as might normally be expected.

Conclusion

Some climate scientists depressingly refer to the debate over how best to reduce emissions as the "irrelevant discourse".[12] It is all too late and rather we should be considering how we will adapt to a very different world.

In Australia the debate has taken irrelevancies to an extreme level. Once the country had decided that climate change was real and a response was needed then it might have been expected that attention would focus on the best policy measures to address it. Indeed, this was our greatest moral challenge! With the World's economists supporting a carbon price, a responsible government might adopt the experts' advice. Then there would certainly be room for argument as to whether a carbon tax or ETS was the best way forward, with the former more consistent with a green philosophy and the later with a more business friendly government.

This debate has never happened in Australia. Rather the focus has been on matters such as whether Prime Minister Gillard lied and the nomenclature of a proposed measure, whether it was a carbon tax or emissions trading scheme. The views of conservative commentators, with no science expertise, have dominated the debate as to whether the Earth is actually warming and whether humans are to blame. With the liberal opposition running a successful scare campaign on the ETS to assist it to get into office, its natural policy measure was unavailable when grafting a climate change strategy. Instead the inferior ERF, a bureaucracy driven business subsidy measure, funded by tax revenue, has been implemented in lieu of a market based mechanism. A peculiar response for a free market orientated government.

Where there was some debate on the features of the ETS, the unfortunate reality is that the true facts were the first casualty. Claims about its impact on trade exposed industries ignored the concessions for such industries and exemption of agriculture. Claims about the cost to the community ignored the compensation handed out to families and small business. Claims that ETSs were not being adopted elsewhere ignored developments in the US, China, Korea and Japan amongst others. Claims that the initial carbon price was too high ignored the likely impact of linking with the EU. Claims that once linked it would encourage emissions abatement overseas but not domestically ignored the reality that emissions know no jurisdictional boundaries and may be more cheaply reduced in other jurisdictions. Claims that the ETS caused a huge spike in energy costs ignored the other factors impacting on electricity prices, especially the increased expenditure on capital investment. The government had created a Climate Change Commission empowered to educate and bring the community along. Staffed with scientists and issuing complex reports on the need to address climate change, it was spectacularly unsuccessful vis-à-vis the misinformation propounded by the general media, much of which was on a mission to replace the government.

The ERF has met with robust criticism but this has not stopped the government pushing ahead. Offset schemes can complement a price on carbon but only if properly designed. Where the regime is weak on additionality it becomes a mere windfall for business, achieving nothing for the environment. Should the scheme give rise to credits that can be traded in a carbon market these will further infect that market and impact its environmental credentials. With weak caps imposed and limited funding the ERF can only be a partial response.

If there is a positive from this sorry saga it is that had Australia continued with an ETS and linked with Europe then it may have been locked into a flawed regime, achieving little in terms of emissions reductions. The politics of implementation of the ETS placed cost containment over environmental integrity, illustrated by the low initial fixed carbon price, number of exemptions and the extent of free permits issued to high emitting trade exposed entities. The decision to link with the known problematic EU regime was also predicated on cost containment, as well as a measure against market manipulation and an attempt to secure legitimacy for the regime. However, although the theory is that a global market will ensure a cheaper cost of abatement and engage the undeveloped world, the low global price to which Australia was to link was, arguably, attributable to market failure arising from the oversupply of permits and offsets in the early years of the scheme and unambitious reduction targets exacerbated by the global financial crisis that saw emissions fall. In the absence of a floor price or, at least, greater limits on the use of foreign permits, Australia was set to contract the European contagion.

Although the emissions reductions sufficient to meet the country's international commitments are likely to come at too great a cost to its taxpayers from the ERF, its domestic focus quarantines Australia from exposure to the problematic international carbon market, With opposition parties continuing to favour an ETS, in line with the global trend, the likelihood is that the country will eventually again turn to an ETS. An interim ERF might then turn out to be a blessing in disguise that has saved the country from linking to a flawed scheme and provided an opportunity to learn from other´s mistakes. There may be much to commend focusing on getting a domestic scheme right rather than rushing to engage in a global market. But will the environment wait?

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[1] The latest science from around the globe and what it means for the World points a bleak picture: International Panel on Climate Change, *Fifth Assessment Report. Climate Change 2014. Synthesis Report*, available at http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1 (last visited 30 July 2015).

[2] The legislative package included four main bills: *Clean Energy Bill* 2011 (which set up the carbon price mechanism); *Clean Energy Regulator Bill* 2011 (which established a regulatory body to administer the mechanism); *Climate Change Authority Bill* 2011 (which established a new authority to advise the government on the future design of the carbon price mechanism) and *Clean Energy (Consequential Amendments) Bill* 2011. For discussion and analysis see: Rosemary Lyster, "Australia's Clean Energy Future Package: Are we there yet?" (2011) 28 (6) *Environmental and Planning Law Journal* 446.

[3] The Protocol established three market based mechanisms under which carbon permits might be effectively traded. Initially developed countries receive an assignment of units relative to their emissions "budget" (known as assigned amount units ("AAUs"). Developed countries are also granted removal units ("RMUs") in relation to domestic activities resulting in the net removal of greenhouse gases. RMUs and AAUs may be converted into emission reduction units ("ERUs"), the later through a "joint implementation project", namely a project that allows developed countries to work together by jointly implementing initiatives that reduce overall greenhouse gas emissions. Finally, there are certified emission reduction units ("CERS") generated from developed countries investing in projects that either reduce emissions or sequester carbon in sinks in developing countries, the so-called "clean development mechanism" designed to draw developing countries within the Protocol. The intention was that CERs and ERUs can be used by countries to comply with their emissions targets under the Protocol or by operators of installations covered by domestic ETSs in order to meet their carbon emission obligations or can be assigned to other countries. Under the Australian ETS it was proposed that the following international units might be used: most certified ERUs from CDMs, ERUs from JI projects and RMUs. Furthermore, the government had stated that the types of international allowances recognized by both the EU and NZ ETSs and the restrictions on their use would be taken into account in determining which are acceptable to Australia.

[4] The managing-director of one of the country's largest bakery chains was forced to resign after a newsletter was leaked were he urged his franchises to put up prices and blame it on the carbon tax: Randall Jackson, "Head of bakery chain resigns over carbon tax deception", *Tax Notes International* 67 (16 July 2012): 201. Also see Randall Jackson, "Government clarifies relationship between carbon tax, GST", *Tax Notes International* 67 (23 July 2012): 305.

[5] Steve Lewis and Lisa Cornish, "Carbon price unfair to small businesses", *The Daily Telegraph* (August 20, 2012) available at http://www.news.com.au/business/your-business/carbon-pain-registers-for-businesses/story-fn9evb64-1226453653623 (last visited 31 July 2015).

[6] $10.10 per week compensation for the average family as against an anticipated increase in costs of $9.90: The Commonwealth of Australia, *Securing a clean energy future: The Australian Government's climate change plan*.

[7] The main reservations concern the science and recording of carbon sequestration in soil. Colin Bettles, "Carbon farming initiative falls short", *Farmweekly* (26 July 2014) available at http://www.farmweekly.com.au/news/agriculture/agribusiness/general-news/carbon-farming-initiative-falls-short/2706209.aspx?storypage=0 (last visited 23 April 2015).

[8] *Emissions Reduction Fund White Paper*, Commonwealth of Australia, April 2014 available at

http://www.environment.gov.au/system/files/resources/1f98a924-5946-404c-9510-d440304280f1/files/emissions-reduction-fund-white-paper_0.pdf (last visited 5 May 2015). Australia's emissions in 2012 were 555 million tonnes: http://data.worldbank.org/country/australia (last visited 5 May 2015).

[9] Chief amongst which is the *Climate Institute*: see its report on the inadequacies of the ERF at http://www.climateinstitute.org.au/articles/submissions/emissions-reduction-fund-green-paper-submission.html/section/478 (last visited 23 April 2015). Also see: *Emissions abatement options for Australia: assessments against criteria of magnitude, cost and quality*, ANU Climate Change Institute and Energy Change Institute, Canberra, April 2014 available at http://energy.anu.edu.au/files/Abatement_Options_report_FINAL.pdf (last visited 23 April 2015). For recent considered media comment see: Jake Sturmer and Lisa Main, "Direct Action: Government's $2b carbon scheme likely to fall short as first auctions approach, analysts say", *7 News* (12 April 2015) available at https://au.news.yahoo.com/world/a/27063861/direct-action-governments-2b-carbon-scheme-likely-to-fall-short-as-first-auctions-approach-analysts-say/ and Tristan Edis, "Direct Action: a billion-dollar party no one wants to attend?", *Business Spectator* (14 April 2015) available at http://www.businessspectator.com.au/article/2015/4/14/policy-politics/direct-action-billion-dollar-party-no-one-wants-attend (both last visited 23 April 2015).

[10] Tristan Edis, "Could Minister Hunt's magnificent bluff come to an end?", *Business Spectator* (23 April 2015) available at https://www.businessspectator.com.au/article/2015/4/23/policy-politics/could-minister-hunts-magnificent-bluff-come-end (last visited 23 April 2015).

[11] Explanatory Memorandum at paragraphs 1.6 to 1.9, 1.24 to 1.57, 2.7 to 2.24, 2.33 and 2.34, 2.39 and 2.40. Also see chapter 2 of the Commonwealth of Australia, *Emissions Reduction Fund White Paper*, April 2014.

[12] Andrew Glikson, The Faustian bargain – while we debate the numbers, the planet suffers, The Conversation (online) (27 July 2011), available at http://theconversation.com/the-faustian-bargain-while-we-debate-the-numbers-the-planet-suffers-2512 (last visited 31 July 2015).