RECENT DEVELOPMENTS

COMMONWEALTH

LEGAL ISSUES SURROUNDING EARLY CARBON ABATEMENT*

Companies that reduce carbon emissions early will not be disadvantaged once an emissions trading scheme starts, according to the Department of Prime Minister and Cabinet's Climate Change Group. Following the June release of the Federal Task Group's Report on Emissions Trading (ETS Report), the Climate Change Group released in September a discussion paper on early abatement incentives. Submissions closed on 1 December 2007. The paper outlines proposals for incentives for firms to undertake abatement prior to the commencement of the emissions trading scheme (ETS) without being disadvantaged in the allocation of permits under the scheme. The paper canvasses areas for discussion and stakeholder input, and sets out several key features intended to drive early abatement. Importantly, the paper flags the creation of a new type of credit (early action credits). However, there has been little guidance to date on the topic of early abatement from other emissions trading schemes around the world, for example the EU ETS, where there was an absence of any significant early action recognition prior to commencement of that scheme in 2005.

Determining the Appropriate Credit Vehicle: Early Action Credits vs Offset Credits

The abatement incentives differentiate between abatement in sectors to be covered by the emissions trading scheme (ETS) (early action credits) and abatement in sectors outside the ETS compliance net (offset credits).

Abatement in covered sectors between 3 June 2007 and the scheme start (2011) will generate early action credits, which will be convertible to ETS permits in 2011. Like credits under the ETS, the permits will be purely statutory in nature. However, the early action credits will be date stamped for the first year of the scheme (likely 2011), so are only eligible for surrender in that year (ie they cannot be banked). Internal abatement in covered sectors will not qualify for credits after the scheme commences.

The reason for this 'disconnect' between the role abatement plays pre and post commencement of the scheme can be rationalised, as rewarding early movers by way of a limited credit is intended to serve the specific purpose of 'getting the ball rolling' on early abatement. It would be counterproductive to the development of a functioning and robust ETS if abatement were awarded with credits once the scheme commences, the intention being that internal abatement be driven by the desire to reduce emissions liability, and thus reflect the market working in practice.

Abatement before 3 June 2007 (the date the ETS was announced) will not be eligible for ETS recognition. Offsets credits can be created in the uncovered sectors (eg agriculture and forestry). These credits will also be convertible to ETS permits, but their validity period is unclear (ie whether they will also be first year date stamped).

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Determinating the 'but for' Baseline: Additionality

To be eligible for either type of abatement credit, abatement projects must have actually occurred, and be:

- additional ie beyond 'business as usual';
- permanent;
- measurable; and
- verifiable.

The requirement for 'additionality' raises a number of novel legal issues. Firstly, establishing a baseline level of emissions to allow meaningful abatement to occur before 2011 will be difficult, as the verified data collation process will take some time. As a corollary, one of the key proposals of the paper is to give the regulator power to obtain various sources of data, including:

- verified emissions data submitted under the National Greenhouse and Energy Reporting System for the year 2008-09;
- verified abatement data from 2007-08 if firms have such records; and
- other sources of data (eg information from environmental approval processes for greenhouse or energy use programmes such as Energy Efficiency Projects).

A second complication associated with proving additionality is whether a particular abatement project would have been undertaken in any event to mitigate impending ETS liability.

For example, take the case of a manufacturing firm that, in preparation for the start of the ETS in 2011, proposes to carry out an abatement project in its production process to generate abatement for the start of the ETS. It is now considering accelerating the start of the project to get the benefit of the early abatement incentives. Carrying out the abatement should not affect the allocation of permits to the firm, given the Climate Change Group's assurance that firms which undertake abatement between 3 June 2007 and 2011 will not be disadvantaged upon permit allocation. However, if the manufacturing firm brought the project forward, say 18 months, could additionality only be demonstrated in respect of those 18 months (because the project would have gone ahead anyway)? Presumably credits for the 18 months of additional abatement would be awarded. As such, and as the paper itself concedes, it is unlikely many credits will be generated in the interim period from 3 June 2007 to 2011 because of long lead times for project start ups.

HIGH COURT ENDORSES NEED FOR CERTAINTY IN ACCESS REGULATION*

East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission [2007] HCA 44 High Court of Australia (unreported, 27 September 2007, S57/2007)

Facts

On 27 September 2007 the High Court of Australia handed down its decision in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*.[1] This case was an appeal from a decision of the full Federal Court.

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