CORPORATE REPORTING OF GREENHOUSE GAS EMISSIONS: IS IT VOLUNTARY OR MANDATORY?

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The debate as to whether emission of greenhouse gases is linked to the risks associated with global warming is over. There is a sufficiently high degree of scientific certainty and community anxiety regarding climate change so that governments, policy-makers, companies, and individuals are pressured to take responsibility on greenhouse gas emissions. Rather, the present debate on climate change is what levels of emissions cuts are needed to address climate change, and what programs, policies and regulations are required to be implemented to achieve those emissions cuts. An essential element of this debate is how to report emissions. This is because the very act of emissions reporting requires a true appreciation of emissions data. And emissions data is the foundation of understanding, capturing and achieving emission cuts.

This article explores key legal issues arising from voluntary or mandatory disclosure of emissions data. The article reveals that these legal issues do not merely arise from compliance requirements arising under voluntary or mandatory schemes for emissions reporting, but also traverses across legal areas that legal counsels or lawyers commonly advise on. These legal areas include liabilities for breach of contract, contracting for professional services such as advisory or auditing services, and failure to comply with trade practice laws.

1. INTRODUCTION

At the time of the introduction of the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act), there were 15 Australian Federal and State schemes requiring the reporting of emissions data, nine of which required mandatory reporting of emissions data.[1] One reason for the reluctance of governments or policy-makers to implement an effective climate change policy or regulatory response can be attributed to the evolution of climate change science. In 1988, the Intergovernmental Panel on Climate Change (IPCC) was established as a scientific body by the World Meteorological Organization and the United Nations Environment Programme to provide an objective source of information on climate change science. In 1990, the IPCC's first Assessment Report led to the establishment of the United Nations Framework Convention on Climate Change as the global body to tackle greenhouse gas emissions and introduce international reporting obligations,[2] which was opened for signature at the Rio de Janeiro Summit in 1992 and

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1 The Parliament of the Commonwealth of Australia, *National Greenhouse and Energy Reporting Bill 2007 Revised Explanatory Memorandum* (2007), http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/18090701.pdf (9 February 2008), p11. It is also generally accepted that reporting of emissions by companies for developments that involve emissions are required in accordance with the principles of Ecologically Sustainable Development: see Susan Malone, "Is the Judiciary Warming to Global Warming?" (2007) 26 ARELJ 92.

2 *Framework Convention on Climate Change*, 31 ILM 849, 9 May 1992, Arts 4(a) and (b).

entered into force in Australia in 1994.[3] The following table outlines how the IPCC's work over time has improved both in regards to its scientific certainty on the effects of global warming as well as the extent of future effects of global warming.[4]

IPCC Assessment Reports/Synthesis Reports	**Is global warming human induced?**	**What is the predicted average rise in temperature in 2100?**	**What is the predicted average sea level rise in 2100?**
1990 (1st)	Perhaps	+ 3.3°C	+ 66cm
1995 (2nd)	Discernible influence	Uncertain	Uncertain
2001 (3rd)	Stronger evidence	+ 1.4 to 5.8°C	+ 10 to 99cm
2007 (4th)	90% confident	+ 1.8 to 4°C	+ 28 to 43cm

The release of IPCC's 4th Assessment Reports on the level of scientific confidence in linking human induced greenhouse gas emissions to predicted average temperature and sea level rises[5] generally occurred at the same time of heightened public engagement and concern on the threats associated with climate change,[6] as well as an emerging body of research that advocated the economic value of taking action on greenhouse gas emissions.[7]

At about this time, prior to the Federal Government election in late 2007, and in the lead up to the release by the IPCC of the 4th Syntheses Report in November 2007, the Federal Government flagged its intention to introduce a national greenhouse and emissions reporting framework under

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3 *United Nations Framework Convention on Climate Change* [1994] ATS 2, entry into force generally and for Australia on 21 March 1994.

4 See the Intergovernmental Panel on Climate Change Assessment Reports Synthesis Reports tab at http://www.ipcc.ch/index.htm.

5 The Physical Science Basis Report was released on 2 February 2007; the Impacts, Adaptation and Vulnerability Report was released on 6 April 2007; the Mitigation of Climate Change Report was released on 4 May 2007; and the Syntheses Report was released on 17 November 2007: see http://www.ipcc.ch/press/index.htm (11 February 2008).

6 For example, in September 2006, Al Gore's movie *An Inconvenient Truth* was being shown in Australian cinemas.

7 For example, in October 2006, the UK Government released the *Stern Review: The Economics of Climate Change*. Also, the NSW Government commissioned a number of reports on the economic impact of a national emissions trading scheme as part of its work on a State-based emissions trading scheme by the (now known as) National Emissions Trading Taskforce, such as *The Economic Impacts of a National Emissions Trading Scheme Final Report* (June 2006): see http://www.emissionstrading.nsw.gov.au/__data/assets/pdf_file/0008/2015/060811_Final_MMRF_report.pdf (12 February 2008).

the *National Greenhouse and Emissions Reporting Bill 2007* in August 2007 (Bill). The then Federal Minister for Environment and Water Resources said:[8]

> "The bill I am introducing today lays the foundation for Australia's emissions trading scheme. Robust data reported under this bill will form the basis of emissions liabilities under emissions trading, and will inform decision making during the establishment of the emissions trading system, including with regard to permit allocation and incentives for early abatement action. The bill will establish a single, national framework for reporting greenhouse gas emissions and abatement actions by corporations from 1 July 2008."

In noting that the Australian Federal system of government enabled a number of overlapping Federal and State emission reporting schemes, the Minister stated that one of the objectives of the Bill was to streamline companies' emissions reporting burdens, and further said:

> "The bill will improve the Australian government's ability to meet its international reporting obligations …. It will also, for the first time, provide easily accessible company level information to investors and the general public on greenhouse gas emissions and energy use by Australia's major companies."

Companies too have swung their support for emissions reporting. Some observers say that this support reflects growing risks of climate change litigation for continued non-disclosure of companies' emissions.[9] Other observers say that disclosure of companies' emissions forms part of reporting practices now expected by employees, investment community and the public. For example, on 3 April 2007, the Business Council of Australia – an association of the Chief Executive Officers (CEOs) of 100 of Australia's leading corporations with a combined workforce of one million people[10] – issued a policy document entitled "Strategic Framework for Emissions Reduction" that set out its support for the introduction of an AETS that balances the need to implement emissions cuts and preserve the competitiveness of Australian companies.[11] This policy document included a number of recommendations, in particular, that:[12]

- an information collection, measurement and reporting framework be established to ensure that the AETS is subsequently designed and implemented based upon a 'bottom-up' emissions data basis; and
- an effective regulatory governance structure be developed to ensure emissions data integrity.

The NGER Act commenced on 29 September 2007,[13] and the current Federal Government has affirmed its intention to bring forward the implementation of the Australian Emissions Trading

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8 Malcolm Turnbull, MP (Wentworth), Minister for the Environment and Water Resources, LP, Government) Second Reading, *National Greenhouse and Energy Reporting Bill 2007*, House Hansard, 15 August 2007.

9 Dr Joseph Smith and Professor David Shearman, *Climate Change Litigation – Analysing the law, scientific evidence & impacts on the environment, health & property* (Presidian Legal Publications, 2006), pp 170-174.

10 See the Business Council of Australia web site at: http://www.bca.com.au/ (12 February 2008).

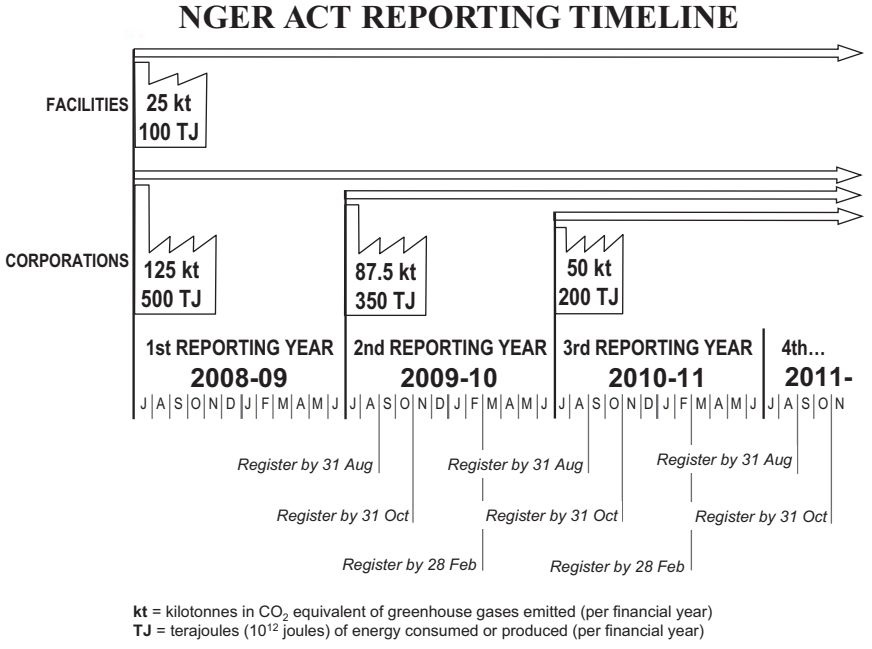
11 Business Council of Australia, *Strategic Framework for Emissions Reduction* (2007), http://www.bca.com.au/Content.aspx?ContentID=101042 (12 February 2008).

12 Ibid, pp 4-5.

13 *National Greenhouse and Energy Reporting Act 2007*, s 2.

Scheme (AETS) by 2010[14] as part of its commitment to the UNFCCC international reporting obligations as well as Australia's emissions target under the Kyoto Protocol to the UNFCCC.[15]

In short, the NGER Act requires a "controlling corporation"[16] to report greenhouse gas emissions, reductions, removals and offsets, and energy consumption from 1 July 2008. Around 700 corporations are expected to register and report emissions[17] where reporting thresholds as set out in the following figure are exceeded.[18]



kt = kilotonnes in CO_2 equivalent of greenhouse gases emitted (per financial year)
TJ = terajoules (10^{12} joules) of energy consumed or produced (per financial year)

More recently, the Commonwealth Department of Climate Change issued the following papers that detail how companies will comply with their NGER requirements:

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14 Senator Penny Wong, "Climate Change: A Responsibility Agenda", 6 February 2008, http://www.environment.gov.au/minister/wong/2008/pubs/tr20080206.pdf (12 February 2008).

15 On 3 December 2007, Prime Minister Rudd signed the instrument of ratification of the Kyoto Protocol as the first official act of the new Australian Government. However, as at the time of this article the instrument of ratification has not as yet appeared on the UNFCCC web site: see http://maindb.unfccc.int/public/country.pl?country=AU (12 February 2008).

16 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 7 defines "controlling corporation" as a constitutional corporation that does not have a holding company incorporated in Australia.

17 Reproduced from the Department of Environment and Water Resources' *NGER Act Fact Sheet* (October 2007), p 1, http://www.greenhouse.gov.au/reporting/publications/pubs/nger-fs.pdf (12 February 2008).

18 Ibid, p 2.

- in October 2006, *National Greenhouse and Energy Reporting System – Regulations Discussion Paper*,[19] which sets out how emissions data is proposed to be defined, captured and reported under the National Greenhouse and Energy Register;[20]
- in January 2008, the *Technical Guidelines for the Estimation of Greenhouse Emissions and Energy at Facility-Level Discussion Paper*;[21] which sets out technical data including default emission factors for the calculation of greenhouse gas emissions for certain facilities; and
- in February 2008, a further *National Greenhouse and Energy Reporting System Regulations Policy Paper*, [22] which clarifies and updates reporting requirements set out in the October 2006 regulations discussion paper.

It is clear that the trend for emissions reporting by companies is moving towards a mandatory standard. What remains unclear – and particularly in light of the current regulatory development of the detail of how emissions reporting is required under the NGER Act – is the extent (if any) of any flexibility given to companies for mandatory emissions reporting. What also remains unclear is how voluntary emissions reporting fit in as part of the new national emissions and energy reporting framework under the NGER Act.

2. LIABILITY UNDER THE NGER ACT

At the introduction of the NGER Act, the (then) Minister for the Environment and Water Resources said:[23]

> "It is anticipated that corporations will improve their reporting processes over time. The emphasis of the compliance and enforcement regime in the initial years of the scheme will accordingly be on encouraging compliance, rather than on punitive measures. As the scheme matures, a more stringent approach will be appropriate, particularly with regard to data that will inform emissions trading."

Whilst the intent of the Government is to take an initial soft compliance approach, it is instructive to analyse the compliance provisions of the NGER Act particularly in the context of long-term relationships with external service providers engaged for the purpose of establishing corporate systems, policies and procedures for emissions data to be reported under the NGER Act.

2.1 Regulatory Compliance Requirements under the NGER Act

The NGER Act's civil penalties for companies are as follows:

- failure to register under the NGER Act if required to do so by 31 August in each year ($220,000);[24]

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19 Department of Climate Change, *National Greenhouse and Energy Reporting System - Regulations Discussion Paper*, http://www.greenhouse.gov.au/reporting/publications/pubs/ngerregs-discussion.pdf (12 February 2008).

20 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 16(2).

21 Department of Climate Change, *National Greenhouse and Energy Reporting System, Technical Guidelines for the Estimation of Greenhouse Emissions and Energy at Facility-Level Discussion Paper*, http://www.greenhouse.gov.au/reporting/publications/pubs/nger-techguidelines.pdf (12 February 2008).

22 Department of Climate Change, *National Greenhouse and Energy Reporting System Regulations Policy Paper*, http://www.greenhouse.gov.au/reporting/regulations/pubs/ngerregs-policypaper.pdf (12 February 2008).

23 Turnbull, op cit n 8.

- failure to report greenhouse gas emissions, energy production, and energy consumption to the Greenhouse and Energy Data Officer (GEDO)[25] before the end of four months after the end of the financial year ($220,000);[26]
- failure to report emissions data to the GEDO as required ($220,000);[27]
- failure to keep records as required for emissions reporting or to enable the GEDO whether the NGER Act has been complied with ($110,000).[28]

Further, the NGER Act provides for imposition of a daily civil penalty for the above regulatory compliance requirements ($11,000 per day).[29] However, breach of a civil penalty does not constitute an offence.[30]

Also, the NGER Act provides for a civil penalty for a CEO in the event of the following circumstances:[31]

> "(a) a corporation contravenes a civil penalty provision; and
> (b) a chief executive officer of the corporation knew that, or was reckless or negligent as to whether, the contravention would occur; and
> (c) the officer was in a position to influence the conduct of the corporation in relation to the contravention; and
> (d) the officer failed to take all reasonable steps to prevent the contravention."

The NGER provides guidance as to what matters a court is to have regard to when determining whether a CEO of a corporation had failed to take all reasonable steps to prevent a contravention; these matters are arranging for professional compliance assessment, implementation of any recommendations from such an assessment, and whether the corporation's employees, agents and contractors have a reasonable knowledge and understanding of the NGER Act.

Other enforcement provisions under the NGER Act are:

- issue of infringement notices;[32]
- enforceable undertakings;[33] and
- monitoring compliance powers, including search and interrogation powers such as use of electronic equipment.[34]

This outline of corporate and CEO liability provisions of the NGER Act reveals the importance of:

- assuming mandatory reporting is required under the NGER Act, updating a corporation's compliance diary for reporting dates as required by the NGER Act;
- when seeking professionals to advise on compliance requirements under the NGER Act, to make inquiries as to key personnel's reasonable knowledge and understanding of the NGER Act; and

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24 *National Greenhouse and Energy Reporting Act 2007* (Cth) s 12(1) and *Crimes Act 1914* (Cth) s 4AA.
25 Ibid, s 49.
26 Ibid, ss 19(1) and 19(6)(d).
27 Ibid, s 20(4).
28 Ibid, s 22(1).
29 Ibid, s 30(2)(a).
30 Ibid, s 32.
31 Ibid, s 47(1).
32 Ibid, Part 5 Enforcement Division 2 Infringement notices.
33 Ibid, Part 5 Enforcement Division 3 Enforceable undertakings.
34 Ibid, Part 6 Administration Division 4 Monitoring compliance.

- when engaging professionals to advise on compliance requirements under the NGER Act, and agreeing in writing the terms of that engagement to ensure that services obtained are properly given or supervised by professionals having reasonable knowledge and understanding of the NGER Act.

In regards to suitably qualified and experienced professionals, the NGER Act provides that the GEDO can appoint an external auditor on one or more aspects of the corporation's compliance with the NGER Act or related regulations.[35] The Department of Climate Change has flagged that the appropriate standard for work performed by auditors appointed under the NGER Act is the Auditing and Assurance Standards Board's ASAE 3000 *Assurance Engagements Other than Audits or Reviews of Historical Financial Information*.[36] It is anticipated that the Department will establish a professional services directory similar to the Energy Services Directory established under related legislation being the *Energy Efficiency Opportunities Act 2006* (Cth).[37]

2.2 Strategic Aspects of Regulatory Compliance under the NGER Act

On the introduction of the NGER Act, the more immediate areas of advice sought by lawyers have focused on:

- the boundary of the "controlling corporation" for the sake of understanding data capture and information technology requirements for emissions data;
- "operational control" of facilities to determine whether a facility in question ought to be included or excluded from emissions data collection;[38]
- whether liability for reporting emissions data arises in circumstances where emissions data not in the possession or under the control of the registered corporation, and the same emissions data is in the possession or under the control of another person with whom the registered corporation has a contractual relationship but is not provided by the other person;[39]
- whether the corporation is able to ask the GEDO to withhold publication of certain information on the National Greenhouse and Energy Register on the basis that such disclosure could be capable of revealing: trade secrets; or any other matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished.[40]

Some companies, particularly those in the resources sector, have reviewed their standard terms and conditions of service contracts with a focus on emissions reporting requirements under the NGER Act. This scrutiny of contracts is, in the opinion of the authors, largely a reflection of commercial sensitivity and strategic importance accorded to emissions data under the NGER Act. Public reporting of energy production and consumption does not for example receive a similar degree of attention. A further observation is that companies do not wish to be surprised by any unexpected emissions data disclosure, and so amendments made to business arrangements or contractual

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35 Ibid, s 73(2)(b).

36 Department of Climate Change, op cit, n 22, pp 8- 9, and 50.

37 Department of Resources, Industry and Tourism, Energy Services Directory, available at the Resource Material/Services directory tab at http://www.energyefficiencyopportunities.gov.au/index.cfm (10 February 2008).

38 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 11.

39 Ibid, s 20(3). The intent of this section is to allow commercially sensitive information held by a contracted corporation or person to be reported to the GEDO directly rather than being reported via a registered corporation.

40 Ibid, s 25(1).

clauses reflect a desire to properly allocate emissions reporting requirements between business parties, particularly joint venture parties.[41]

To appreciate future legal issues that may arise under the NGER Act, an analysis is required of the 35 submissions made to the Senate Environment, Communications and the Arts Committee's inquiry on the Bill (which subsequently became the NGER Act) between August and September 2007 (Senate Inquiry).[42] The Senate Inquiry reveals a contest between certain stakeholders that prefer aggregated reporting of emissions data at the controlling corporation level, with other stakeholders that prefer reporting of emissions data at the facility level. The significance of this contest is succinctly stated by one non-government organisation as follows:[43]

> "Public disclosure should be at the facility level, not the company level in order to allow communities to understand the emissions from their local area. Aggregating emissions across a company could mean communities will not be able to understand whether their local area, or even their state, was a laggard or a champion of greenhouse gas reductions. For example communities or local government areas wishing to become carbon neutral would not be able to gain the information they need to assess their carbon footprint through this scheme. Facility-level public disclosure is crucial to protecting the community's right to know.
>
> Providing accurate and detailed information to the public not only fulfils the community's right to know but also provides an opportunity for our scientists, engineers and business people to use the information to find solutions to quickly and cheaply reduce our greenhouse gas emissions."

The Department of Climate Change's recent policy paper on regulations for the NGER Act goes further than reporting of emissions data at the facility level. It has flagged that direct (scope 1) and indirect (scope 2) emissions data[44] will be publicly disclosed separately:[45]

> "the majority of stakeholders supported separate disclosure of scope 1 and scope 2 emissions data. The provision of separate scope 1 and 2 greenhouse gas emissions data to the public is seen as necessary to provide appropriate levels of clarity on the emissions footprint of Australian corporations.

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41 Ibid, s 8(4) whereby participants in the joint venture can nominate a party to be the responsible entity under the Act. Otherwise, if a responsible entity is not nominated by a joint venture, then all partners and joint venture participants will be considered to be responsible entities and will therefore have to report, or be subject to penalties for not reporting under the Act: Department of Climate Change, op cit, n 22, p 11.

42 Parliament of Australia, Senate Environment, Communications and the Arts Committee, see submissions received on the Inquiry into the National Greenhouse and Energy Reporting Bill 2007 at: http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sublist.htm (13 February 2008).

43 Nature Conservation Council, *Submission to the Inquiry into the National Greenhouse and Energy Reporting Bill 2007* (28 August 2007), http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub20.pdf, (13 February 2008).

44 For detailed explanation emissions scope, see the Department of Climate Change's technical guideline paper, op cit n 21, p 11. Scope 1 covers direct emissions from sources within the boundary of an organisation, such as fuel combustion and manufacturing processes; Scope 2 covers indirect emissions from the consumption of purchased electricity, steam or heat produced by another organisation.

45 Department of Climate Change, op cit n 22, p 44.

> Subsequent legal advice on whether subsection 24(1) of the Act is sufficient to allow scope 1 and scope 2 data to be disclosed separately has indicated that an amendment to the Act would be required. Therefore, it is proposed an amendment to the Act be introduced that allows the GEDO to separately disclose on a website the gross scope 1 and scope 2 greenhouse gas emissions data reported by corporations under the Act."

Further, the Department has determined that publishing separate data for each corporation that is a member of a corporate group would provide the public and investors with useful information, which is one of the objects of the NGER Act.[46]

It is clear that a range of climate change stakeholders, including NGOs, the investment community and employees will shortly have an unprecedented level of disclosure of companies' emissions data. Given that emissions data disclosure is proposed to be made available at the corporate group and scope 1/scope 2 level, it seems reasonable to speculate that some climate change stakeholders will carry out a comparative analysis of emissions both between that as disclosed in the past,[47] as well as between like facilities as publicly made available by the GEDO on the National Greenhouse and Energy Register. And it should be noted that the NGER Act provides that emissions data provided to the GEDO can be provided to State and Territory Governments.[48] It follows that another avenue of comparative emissions analysis is between that as disclosed in the past to State and Territory Governments and emissions data as disclosed to the GEDO.

2.3 Voluntary Emissions Reporting under the NGER Act

As noted above, direct (scope 1) and indirect (scope 2) emissions are required to be reported to the GEDO under the NGER Act. Other indirect (scope 3) emissions are not required to be reported under the NGER Act.[49]

Further, the NGER Act provides that a company may voluntarily report to the GEDO on emissions data relating to the following greenhouse gas projects:[50]

- reduction of greenhouse gas emissions;
- removals of greenhouse gases;
- offsets of greenhouse gas emissions.

Greenhouse gas projects must be project-based; examples of reductions and removals that will not satisfy this requirement would include divestments or acquisitions, company's closure or a company's changes in production levels.[51] The NGER Act distinguishes between voluntary reporting of scope 3 emissions and voluntary reporting of a greenhouse gas project. This distinction arises because voluntary reporting of greenhouse gas abatement projects is subject to

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46 Ibid.

47 For example, Carbon Disclosure Project, *Carbon Disclosure Project Report 2007 – Australia and New Zealand, on behalf of 315 investors with assets of USD41trillion*, http://www.cdproject.net/ (11 February 2008).

48 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 27.

49 Department of Climate Change, op cit n 22, p 22 where scope 3 emissions are defined as "greenhouse gas emissions generated in the wider economy as a consequence of a facility's activities, which are physically produced by another facility."

50 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 21(1).

51 Ibid, s 7 and Department of Climate Change, op cit 22, p 51.

provisions of the NGER Act,[52] including a defined standard for the measurement and reporting of reductions and removals of greenhouse gases which is proposed to be Part 2 of ISO 14064 which is the international standard for reporting of project-based emissions reductions and removals.[53] The Department of Climate Change proposes to make this distinction clear in the National Greenhouse and Energy Register by permitting contextual data to be reported and disclosed voluntarily that is not regulated by the NGER Act – however such contextual data may be published with disclaimers outlining that the data may not be consistent across corporations and has not been subject to external audit or quality assurance standards.[54]

Finally, it should be noted that there is a degree of optionality regarding the use of default emissions factors and methods used to determine calculate emissions data that is often overlooked. The technical guidelines that set out default emissions values and basis for calculation of emissions can be challenged by way of putting forward acceptable and sufficiently robust alternative methodologies.[55]

3. LIABILITY UNDER EXISTING DOMESTIC SCHEMES

As the first reporting year of the NGER Act is yet to commence, there is a lack of empirical data to gain an understanding of areas where emissions data reporting compliance has proven to be problematic.

An equivalent emissions data reporting compliance regime to the NGER Act is the NSW Greenhouse Gas Abatement Scheme (GGAS) which commenced in January 2003.[56] The GGAS imposes mandatory greenhouse gas benchmarks on all NSW electricity retailers and certain other parties, including those who elect to manage their own benchmark, to abate the emission of greenhouse gases associated with the consumption of electricity in NSW.[57] The greenhouse gas benchmark is expressed on a tonne of carbon dioxide equivalent (tCO_2-e) per capita basis, and parties are referred to as benchmark participants.[58] Benchmark participants are required to hold and surrender sufficient NSW Greenhouse Gas Abatement Certificates (NGACs) or else be liable for a greenhouse shortfall penalty.[59]

More importantly, the administrator of the GGAS, the Independent Pricing and Regulatory Tribunal of New South Wales (IPART) is required to prepare an annual "report on the extent to which benchmark participants have complied, or failed to comply, with greenhouse gas benchmarks during the 12 months ending on 31 December in the previous year".[60]

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52 Ibid, s 21(3).
53 Department of Climate Change, op cit n 22, p 53.
54 Department of Climate Change, op cit n 22, p 55.
55 *National Greenhouse and Energy Reporting Act 2007* (Cth), s 10(3), and Department of Climate Change, op cit n 21, p 78 for 4.2.3.2 higher-order methods for the B—carbon, capture and storage sector.
56 *Electricity Supply Act 1995* (NSW), as amended by the *Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002* (NSW).
57 Ibid, s 97B.
58 Ibid, s 97BB.
59 Ibid, s 97CA, the greenhouse shortfall is escalated by the consumer price index under s 97CA(3) and cl 73C of the *Electricity Supply (General) Regulation 2001* (NSW).
60 Ibid, s 97HF.

3.1 Regulatory Compliance Performance under the GGAS

The GGAS has equivalent enforcement provisions to the NGER Act.[61] Also, the GGAS like the NGER Act places a high reliance on companies to capture and report emissions data. And the GGAS like the NGER Act relies upon the same (updated) technical guidelines for the use of default emissions values and basis for calculation of emissions.[62]

Key compliance observations from the fourth annual report issued by IPART for the GGAS in the 2006 calendar year are as follows:

- 10 contraventions of the conditions of accreditation for the creation of NGACs – in which one contravention was discovered by voluntary declaration by the accredited party, two contraventions were discovered by IPART, and the remaining seven contraventions were discovered through the compliance audit process;[63]
- seven participants improperly created NGACs which "resulted in a total of 124,381 certificates (of both 2005 and 2006 certificate vintage) being over-created with the companies involved agreeing to forfeit the incorrectly created certificates, thereby ensuring that the number of certificates in the Scheme represents valid abatement".[64]

Conditions of accreditation relate to matters such as how emissions are to be calculated for the purpose of creating and reporting NGACs. IPART focuses on compliance with conditions of accreditation as undetected systemic creation of NGACs has the potential not only to jeopardise the GGAS but also erode public trust in the GGAS. An example where a condition of accreditation was contravened as reported in the fourth annual report was a participant who had failed to notify the Scheme Administrator that it had made changes to the approved turbine testing procedure as specified in the conditions of accreditation, and that it had completed all generating unit testing.[65]

A further compliance observation is that – as is reasonably expected – the trend for compliance is an improvement. For example, the fourth annual report noted that unlike the previous year, no participant created NGACs above the 110% level as set out in the accreditation conditions without first notifying IPART in the 2006 calendar year.[66]

The authors' own experiences with the operation of the GGAS are that the reporting regime presents ongoing challenges for companies to comply with record keeping requirements. Compliance contraventions and recommendations under the GGAS largely relate not to technical aspects such as the calculation of emissions data that can be controlled by way of automated data

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61 For example, s 97CB of the *Electricity Supply Act 1995* (NSW) requires the timely submission of an annual greenhouse gas benchmark statement (currently $27,500 under s 17 *Crimes (Sentencing Procedure) Act 1999* (NSW)).

62 For example, s 97DA of the *Electricity Supply Act 1995* (NSW) provides for the making of rules by the IPART, and the *Greenhouse Gas Benchmark Rule (Generation) No 2 of 2003* (23 December 2005) made under that section refers to the Emissions Workbook being the Department of Climate Change's (updated) technical guidelines at op cit n 21, http://www.greenhousegas.nsw.gov.au/documents/Rule-Gen-Dec05.pdf, (12 February 2008).

63 Independent Pricing and Regulatory Tribunal, *Compliance and Operation of the NSW Greenhouse Gas Reduction Scheme during 2006 Report to Minister* (July 2007), http://www.greenhousegas.nsw.gov.au/Documents/syn59.asp, (12 February 2008), p 35.

64 Ibid, p 36.

65 Ibid, p 37.

66 Ibid, p 36.

transfers or locked spreadsheet formulas, but rather to more mundane administrative aspects such as the need to notify the regulator of system changes that is dependent on the diligence of staff charged with the company's compliance responsibility for participation in the GGAS.

4. LIABILITY FOR PRODUCT OR SERVICE REPRESENTATION

No article on emissions reporting would be complete without mention of the possibility of liability for false or misleading carbon claims concerning the supply of a product or service. This is because companies that publicly disclose emissions data either voluntarily or under a mandatory scheme may also separately be regarded as making representations about the greenhouse gas abatement value associated with their product or service.

In short, companies are prohibited from making false or misleading representations about a product or service.[67] Obligations imposed upon companies relating to making of representations for products or services can arise not just in response to any policy and/or regulatory obligations but in relation to any public representations made. There is no need to demonstrate that the company concerned intentionally made a false representation, it is merely enough to show that the representation was wrong.[68]

On 16 January 2008, the Australian Competition and Consumer Commission (ACCC) released an Issues Paper regarding the operation of trade practice laws and carbon offset claims (Issues Paper).[69] The Issues Paper describes the concern that the ACCC has with carbon offset claims as follows:[70]

> "Marketing claims about the environmental benefits of products and services include the ability to 'neutralise' the 'carbon footprint' of a product or service, for example, cars, flights and households. The difficulties in understanding and verifying such claims give rise to a concern that consumers may be facing misleading and deceptive conduct associated with this emerging market."

The Issues Paper notes that claims of carbon-neutrality that are made without substantiation as being a "blatant disregard" for trade practice laws.[71] A separate related paper from the ACCC notes that:[72]

> "Environmental claims can be a powerful marketing tool. Companies are increasingly using environmental claims in an attempt to differentiate themselves and their products from the competition …
>
> Companies realise that consumers today have an increased awareness of the environmental impact that modern goods may have. Environmental claims are now relevant to a larger product range, from small household items such as nappies, toilet paper, cleaners and detergents to major whitegoods and appliances. Many consumers consider environmental

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67 *Trade Practices Act 1974* (Cth), s 52.

68 See *Halsbury's Laws of Australia*, Vol 1, Prof A J Duggan, "Consumer Protection" [100-150].

69 Australian Competition and Consumer Commission, *Issues paper - The Trade Practices Act and carbon offset claims* (16 January 2008), http://www.accc.gov.au/content/index.phtml/itemId/807902 (9 February 2008).

70 Ibid, p 2.

71 Ibid.

72 Australian Competition and Consumer Commission, *Green marketing and the Trade Practices Act* (February 2008), http://www.accc.gov.au/content/index.phtml/itemId/810050, (9 February 2008), p 1.

> claims, such as water or energy efficiency, as a major factor when evaluating products to purchase.
>
> Therefore, it is essential that consumers are provided with accurate information in order to make informed decisions.
>
> Firms which make environmental or 'green' claims should ensure that their claims are scientifically sound and appropriately substantiated. Consumers are entitled to rely on any environmental claims you make and to expect these claims to be truthful."

It is not the job of the ACCC to decide whether, for example, a certain agreed environmental standard[73] is in fact good enough and if a company meeting that standard is, or is not, doing enough to help the environment. However, if a business falsely claimed to have met such a standard, then that is an issue for the ACCC as it breaches the general prohibition on misleading and deceptive conduct.

The ACCC can take action in court against corporations and individuals involved in breaches of trade practice laws, and can apply to the court for an injunction and other orders. Severe penalties may apply where criminal proceedings are undertaken. In practice, companies subject to an investigation by the ACCC, the regulatory body that enforces trade practice law, tend to settle any allegations of false or misleading representations by way of negotiations rather than by way of litigation in the courts.

For example, on 18 January 2008, the ACCC commenced legal proceedings against GM Holden Ltd, which supplies and markets Saab motor vehicles in Australia and trades as Saab Australia, alleging misleading and deceptive conduct and false representations concerning 'green' claims made in the advertising of Saab vehicles.[74] In July and August 2007, Saab made various statements including "Grrrrrreen, Every Saab is green", "Carbon emissions neutral across the entire Saab range", and "Switch to carbon neutral motoring". Orders sought by ACCC were:[75]

- declarations that Saab has breached ss 52 and 53(c) of the *Trade Practices Act 1974* (Cth);
- injunctions restraining it from similar conduct in the future;
- corrective notices;
- a review of GM Holden Ltd's trade practices compliance program; and
- costs.

Such enforcement action is likely to continue given that in March 2000, the ACCC signed a cooperative agreement with the Australian Greenhouse Office (now part of the Department of Climate Change) to facilitate greater coordination of policing of environmental claims.[76] The objective of that agreement was to enable both government bodies to work together to protect the

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73 For example, the International Standard for Environmental Marketing (ISO/DIS 14021.2) approved in 1998.

74 Australian Competition and Consumer Commission, *ACCC takes action against GM Holden Ltd over Saab "green" claims* (18 January 2008), http://www.accc.gov.au/content/index.phtml/itemId/808355 (9 February 2008).

75 Ibid.

76 Commissioner John Martin, "Environmental Claims and the Trade Practices Act" (Presentation to the Annual National Air Conditioning & Energy Forum, 21 September 2005), http://www.accc.gov.au/content/index.phtml/itemId/708904 (9 February 2008), p 5.

interests of consumers and assist Australia meet its commitment to reducing greenhouse gas emissions.[77]

5. CONCLUSION

There are significant liability avenues associated with corporate reporting of emissions data. The introduction of the national greenhouse and energy reporting framework heralds unprecedented level of mandatory disclosure of corporate emissions data from 31 October 2009. Liability avenues arise under civil penalty provisions of mandatory emissions data reporting requirements, as well as compliance with trade practice laws. These liability avenues can exist whether or not a company elects to voluntarily disclosure emissions data. Many companies employ a migration business planning approach as part of a robust carbon management strategy that includes consideration of the company's position on climate change, existing and proposed contractual relationships, detailed understanding of regulatory obligations including the role and delivery of external professional services, and retail positioning for products and services.

It seems inevitable that disclosure of mandatory emissions data will be used for comparative analysis which may be used to challenge companies' level of response on climate change. More sophisticated comparative analysis may be used to assess companies' relative performance and risk exposure to the threats associated with climate change. It also seems inevitable that certain companies with a significant greenhouse gas emissions footprint will do a considerable amount of strategic positioning not just for the start of an emissions trading scheme in Australia, but also for the precursory start of the national greenhouse and energy reporting framework. Direct liability for emissions reporting by way of breaching mandatory emissions reporting requirements, and indirect liability for emissions reporting by way of revealing corporate weaknesses on the level of a company's emissions footprint, represents significant areas of corporate risk.

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77 Ibid.