# australian network of environmental defender's offices

**Submission on the proposed architecture and implementation arrangements for a carbon pricing mechanism**

**10 May 2011**

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.


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## Executive Summary

ANEDO welcomes the opportunity to comment on the proposed architecture and implementation of a carbon price.

ANEDO strongly supports a national carbon price. A price on greenhouse gas pollution is a vital first step in responding to climate change and driving the transition to a low carbon economy. It is also a welcome recognition that polluters must pay for the environmental damage they are doing, and that taxpayers and the community cannot be left to bear that social cost. By placing a strong price on pollution now, Australia can establish an early advantage in the emerging low carbon economy, assume a constructive leadership role in international climate change negotiations, and take an important step toward a safe climate and a healthy planet for future generations.

ANEDO recognises that a carbon price is a complex policy instrument, and that even small errors in its design can jeopardise its environmental effectiveness. This is particularly the case with the hybrid fixed-price transitional emissions trading scheme that the Multi-Party Climate Change Committee (**MPCCC**) has committed to. It is therefore extremely important that the Department and the Government design the carbon price effectively. The design principles and proposed architecture released by the MPCCC thus far are, broadly speaking, positive.[1] However, some parts of that proposal require improvement, and many of the most difficult and contentious design issues have not yet been dealt with.

The rest of this submission sets out design features that ANEDO considers necessary to ensure that the proposed carbon price is effective. Our recommendations are set out under the following headings:

1. Coverage must be as broad as possible
2. The permit price and scheme cap must be credible
3. The transition to full emissions trading must provide maximum certainty
4. Industry assistance should be determined by an Independent Carbon Bank
5. Permits should be a limited licence to emit, not personal property
6. Caution must be exercised in linking with other trading and offsets schemes
7. The legislation should include fair and robust enforcement mechanisms
8. The scheme must provide for regular independent review
9. The carbon price must be combined with other, complementary measures

We would be happy to discuss our submission further. To do so, please contact Nicola Rivers, Law Reform Director (EDO Vic), on (03) 8341 3100 or at nicola.rivers@edo.org.au.

[1] Both available here: http://www.climatechange.gov.au/government/initiatives/multi-party-committee.aspx.

## Summary of Recommendations

**1. Coverage must be as broad as possible**

- The scheme should have broad coverage, like that of the former Carbon Pollution Reduction Scheme (**CPRS**).
- Coverage should *not* be phased in for any sector. The scheme should commence in all sectors on 1 July 2012.
- The electricity sector should *not* have its own intensity-based allocation scheme.
- Emissions sources covered by the Carbon Farming Initiative (**CFI**) need not be covered by the carbon price.
- However, deforestation should be covered by the carbon price, not the CFI.

**2. The permit price and scheme cap must be credible.**

- The permit price and scheme cap must be commensurate with the scientific and economic urgency of responding to climate change.
- The scheme cap should be set by an independent, expert, statutory authority.
- The scheme should include a price floor, to provide investment certainty.
- The scheme cap must be flexible and capable of adjustment, not limited by binding scheme gateways.

**3. The transition to full emissions trading must provide maximum certainty**

- The transition from a fixed price phase to full emissions trading must be fixed in time from the outset. There should be no discretion in choosing the date of transition, and no option to defer the transition.
- The date of transition should be no later than 1 July 2015.
- Permits from the fixed price phase must not be 'banked' for use in the full emissions trading scheme.

**4. Industry assistance should be determined by an Independent Carbon Bank**

- An Independent Carbon Bank should be created to determine the appropriate amount of transitional assistance to industry.
- The Independent Carbon Bank could also use scheme revenue and private investment to drive investment in clean technologies.
- Decisions about household compensation and international climate finance should remain with the Government.

**5. Permits should be a limited licence to emit, not personal property**

- Permits should be legally designed as a limited licence to emit greenhouse gases, not personal property, to avoid the application of s 51(xxxi) of the Constitution.

**6. Caution must be exercised in linking with other trading and offsets schemes**

- There should be a cap on the use of international and domestic permits and offset credits under the scheme.
- Linkages to other international and domestic schemes must be approved on a case-by-case basis by an independent expert body like the Independent Carbon Bank.

**7. The legislation should include fair and robust enforcement mechanisms**

- The enforcement provisions of the former CPRS should be adopted.

- In addition, the carbon price should provide third party rights to merits review for decisions with high significance and broad discretion.

**8. The scheme must provide for regular independent review**

- An independent review of the operation of the scheme must be mandated for 2015, and at regular intervals thereafter.

**9. The carbon price must be combined with other, complementary measures**

- The carbon price must be accompanied by other climate laws and policies like the Renewable Energy Target, a national energy saver initiative, and an emissions intensity standard for new power stations.

## 1. Coverage must be as broad as possible

An effective carbon price must have broad coverage. Broad coverage is key to ensuring both the environmental effectiveness and economic efficiency of a carbon price. For this reason, we support the inclusion of the stationary energy, transport, industrial processes, fugitive emissions and non-legacy waste sectors as proposed by the MPCCC. Coverage under the former Carbon Pollution Reduction Scheme (**CPRS**), which captured about 1000 liable entities and 75% of Australia's emissions, was generally sound.

ANEDO strongly opposes the exclusion of any other industry sectors or emission sources from the proposed carbon price. In particular, we oppose suggestions that the gas industry, the steel industry or the mining industry could be excluded from the carbon price. The environmental effectiveness and economic credibility of a carbon price depends on sending an accurate price signal which is commensurate with actual carbon emissions. Arbitrarily excluding sectors from the scheme would undermine its credibility, and increase the costs of abatement in other covered sectors. In the words of the Garnaut Climate Change Review in 2008, "[s]eemingly small compromises will quickly erode the benefits that a well-designed emissions trading scheme can provide."[2]

We oppose the MPCCC's suggestion that coverage in some sectors could be phased. Treating different sectors differently distorts the price signal, undermining the administrative and economic simplicity of the carbon price. To maximise the environmental effectiveness, economic efficiency, administrative simplicity and fairness of the carbon price, the scheme should commence on 1 July 2012 for all covered sectors.

We also oppose the suggestion that the electricity sector could be covered by an intensity-based baseline and credit scheme operating separately to or embedded within the broader carbon price. An intensity-based baseline and credit scheme is simply less environmentally effective than a cap-and-trade scheme. It would significantly reduce the impact of a carbon price on electricity demand (which is crucial to driving emissions reductions in this sector). It also allows electricity generators to avoid paying for their carbon pollution, and greatly reduces the revenue that will be raised from the scheme. Finally, it will undermine the administrative and economic simplicity of the carbon price.

We understand that there are good reasons for excluding the agricultural sector from a national emissions trading scheme. Therefore, we accept the MPCCC's decision to exclude emissions from sources covered by the proposed Carbon Farming Initiative (**CFI**) from the carbon price, and stress the importance of developing robust policies (including, but not limited to, the CFI) for driving abatement in this important sector.

The one exception to that is forestry, which we would prefer to see included in the carbon price. ANEDO opposed the inclusion of avoided deforestation in the CFI, on the basis that the government should penalise pollution rather than reward avoided pollution.[3] We therefore oppose the exclusion of the forestry sector from the carbon price. Deforestation is a significant source of carbon pollution and should be recognised as such. It would be quite practical to include deforestation in the carbon price, just as the New Zealand emissions trading scheme (**NZ ETS**) has done: excluding small-scale clearing, but requiring permits to

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[2] The Garnaut Climate Change Review (2008) chapter 14, p 1.

[3] See ANEDO's submission on the CFI Bills: http://www.edo.org.au/policy/110408carbon_farming_inititiative.pdf

be surrendered for the large-scale clearing of pre-1990 forest.[4] This would also avoid the inequities and impracticalities that arise from including avoided deforestation as an eligible activity under the CFI.

**Recommendations**:
- The scheme should have broad coverage, like that of the former CPRS.
- Coverage should *not* be phased in for any sector. The scheme should commence in all sectors on 1 July 2012.
- The electricity sector should *not* have its own intensity-based allocation scheme.
- Emissions sources covered by the CFI need not be covered by the carbon price.
- However, deforestation should be covered by the carbon price, not the CFI.

## 2. The permit price and scheme cap must be credible

A carbon price will only succeed in driving the shift to a low carbon economy if it is high enough. It is therefore very important that the price of permits reflects the urgency of reducing greenhouse gas emissions. The price of permits must be sufficiently high to drive the shift to a clean economy, and respond to the increasing scientific evidence that dangerous climate change is happening much faster than was previously thought.

ANEDO is an organisation of environmental lawyers — most of us are not scientists or economists. We do not have the expertise to recommend specific levels for an emission reduction target, carbon cap, or permit price. However, as experts in environmental law and policy, we can recommend the best institutional framework for making those decisions.

ANEDO therefore recommends that scheme caps (during the floating price phase) be set by an independent expert body, such as an Independent Carbon Bank. Once the Government has set national emission reduction targets (a task that, though guided by science and economics, is inextricably linked to international and domestic politics), the task of determining the level of the scheme cap is an essentially technical one. It is best that this task be insulated from political pressures, and given to an independent expert authority. This function could be combined with the functions exercised by an Independent Carbon Bank, or existing bodies like the Climate Commission or the Australian National Registry of Emissions Units.

A similar model is used in the United Kingdom, where the Committee on Climate Change — an expert, independent, statutory public body — advises the government on 5 year 'carbon budgets' and associated policies to meet their 2020 and 2050 emission reduction targets.[5] The Californian cap and trade scheme, due to commence on 1 January 2012, places similar reliance on the California Air Resources Board.[6] A similar proposal has also been made by the Garnaut Climate Change Review,[7] The Climate Institute,[8] the Southern Cross

[4] See Ministry of Agriculture and Forestry (NZ), *Forestry in the Emissions Trading Scheme*(2010) available here: http://www.maf.govt.nz/forestry/forestry-in-the-ets.

[5] See the Committee on Climate Change website: http://www.theccc.org.uk/.

[6] See the California Air Resources Board website: http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm.

[7] Garnaut Climate Change Review (2008) Chapter 14, section 14.7.

[8] The Climate Institute, *Submission to the Multi-Party Climate Change Committee* (2011) available here: http://www.climateinstitute.org.au/images/reports/tci_mpcccsubmission_march2011.pdf.

Climate Coalition,[9] the Clean Energy Council,[10] and Reserve Bank board member Professor Warwick McKibbin.[11]

The scheme should also include a price floor during the full emissions trading phase of the scheme. A price floor would provide investment certainty to business, thus driving the required change in investment behaviour. It would also ensure that the carbon price remains high enough to be effective.

The need for certainty should not, however, outweigh the need for flexibility in setting and adjusting the scheme cap. It is easy to envisage situations where the scheme cap may need to be adjusted to preserve the effectiveness of the carbon price — in response to new developments in climate change science, or changes in international climate change policy, or a collapse in the price of permits, to name a few. It is therefore not appropriate to have binding scheme gateways (like those in the former CPRS) which limit the ability to adjust the scheme cap in the future.[12]

**Recommendations**:

- The permit price and scheme cap must be commensurate with the scientific and economic urgency of responding to climate change.
- The scheme cap should be set by an independent, expert, statutory authority.
- The scheme should include a price floor, to provide investment certainty.
- The scheme cap must be flexible and capable of adjustment, not limited by things like binding scheme gateways.

## 3. The transition to full emissions trading must provide maximum certainty

The 'hybrid' model of a fixed price emissions trading scheme transitioning to full emissions trading is an acceptable model. However, it is important to manage the transition to provide maximum certainty, minimum opportunity for political pressure or interference, and a speedy transition to full emissions trading.

ANEDO submits that the date for transition to full emissions trading should be fixed at the outset. There should be no option to defer the transition. Removing the discretion as to when full emissions trading begins will increase investment certainty, and reduce the scope for opponents of the scheme to capitalise on that uncertainty and lobby for the scheme to be stayed. To reduce that uncertainty further, and move to a cap and trade scheme as fast as possible, the date of transition from a fixed price scheme to full emissions trading should be no later than 1 July 2015. There is no need to persist with a fixed price scheme for longer than 3 years.

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[9] The Southern Cross Climate Coalition, *A Policy Platform for a Low Pollution Economy* (2011) available here: http://www.climateinstitute.org.au/images/sccc_pp.pdf.

[10] Clean Energy Council, Institutional Arrangements for a Carbon Price Discussion Paper, May 2011, available here: http://www.cleanenergycouncil.org.au/cec/mediaevents/CECnews/MW-CEW-speech.

[11] Submission to the Senate Economics Committee, available here: http://www.aph.gov.au/senate/committee/economics_ctte/cprs_09/.

[12] The scheme gateway was a target range set by the Minister 10 years in advance, which bound the Minister's ability to set scheme caps in future: Carbon Pollution Reduction Scheme Bill 2009 cll 15(2)-(3).

Without these changes, the hybrid scheme will create great uncertainty for business. There will be no certainty as to what the carbon price will be (removing the chief benefit of a carbon tax) and no certainty as to what the scheme cap will be (removing the major benefit of an emissions trading scheme). This will make it much harder for business to shift their investments from polluting industries to the clean industries of the future. Without that shift in investment, the carbon price is unlikely to change behaviour, and will simply impose extra costs on the economy.

Finally, it is essential that permits issued under the fixed price phase of the scheme are not eligible for acquittal under the full emissions trading phase. This type of 'banking' will undermine (if not overwhelm) the scheme cap in the floating price phase.

**Recommendations**:
- The transition from a fixed price phase to full emissions trading must be fixed in time from the outset. There should be no discretion in choosing the date of transition, and no option to defer the transition.
- The date of transition should be no later than 1 July 2015.
- Permits from the fixed price phase must not be 'banked' for use in the full emissions trading scheme.

## 4. Industry assistance should be determined by an Independent Carbon Bank

One of the best features of a carbon price is that it factors in the environmental and social cost of polluting industries, and makes polluters pay for the cost of their pollution. This is more than a matter of ethics — it is how the carbon price works. A carbon price creates change by making polluting industries uneconomic, thus making non-polluting industries relatively economic and shifting investment into the clean industries of tomorrow.

In certain situations, there may be a genuine economic need for financial assistance to correct market failures — like transitional assistance to emissions-intensive trade-exposed (**EITE**) industries, or funding for emerging clean industries. But these decisions must be based on economics, not politics. A solid institutional framework is required to ensure that these decisions are insulated from political considerations and are made on a sound public policy basis.

ANEDO therefore submits that an independent expert body — an Independent Carbon Bank — be created to determine industry assistance on purely economic grounds. The Independent Carbon Bank would be an independent body of economic experts much like the Reserve Bank of Australia (**RBA**). Like the RBA, it would make its decisions based on clear and principled criteria (for example, with the objective of 'compensating actual trade exposure and preventing carbon leakage'), and a broad range of economic, industry and company data. Like the RBA, it would acquire legitimacy and political acceptance by making its decisions on an independent, rational, economic basis.

The RBA has proven very effective in insulating contentious economic decisions from political interference. Despite the high degree of political controversy that surrounds decisions on interest rates, the RBA has been able to make these important economic decisions outside the arena of politics and beyond the reach of self-interested lobbyists. In our view, very similar considerations apply to the decision to grant 'compensation' to industries affected by the carbon price.

This is not a new idea. The Garnaut Climate Change Review made a similar suggestion.[13] Noting that the process for determining industry assistance is 'especially vulnerable to capture by special interests',[14] Garnaut's Sixth Update Paper recommends that an independent regulatory authority apply a principled approach to EITE industry assistance, with advice from an independent agency of economic experts like the Productivity Commission.[15] The Clean Energy Council (**CEC**) also supports the creation of an Independent Carbon Bank to distribute scheme revenue to affected industries, amongst other things.[16] The CEC also suggested that the Independent Carbon Bank could drive investment in clean technologies, by using scheme revenue to directly invest in clean technologies, and leveraging private investment to do the same. A similar model is used in the UK, where a Green Investment Bank is being established to generate public and private investment.

However, not all scheme revenue should be spent on purely economic grounds. The proposed compensation to households is not an appropriate matter for the Independent Carbon Bank, because important ethical and social considerations are also at play. Further, if the Government wants to use tax reform to compensate households, as proposed by the Garnaut Climate Change Review, broader macro-economic policy settings are involved and this will have to be determined by the Government itself. Important non-economic considerations also apply to any scheme revenue that is spent in satisfaction of Australia's international diplomatic commitments to finance clean development. These types of payments from scheme revenue should not be determined by the Independent Carbon Bank (though even in these matters it may be able to provide valuable advice).

**Recommendations**:

- An Independent Carbon Bank should be created to determine the appropriate amount of transitional assistance to industry.
- The Independent Carbon Bank should also use scheme revenue and private investment to drive investment in clean technologies.
- However, decisions about household compensation and international climate finance should remain with the Government.

## 5. Permits should be a limited licence to emit, not personal property

Emissions permits under the scheme should be legally characterised as licences to emit carbon, not as personal property. This is essential to ensuring that the Government retains full power to amend the carbon price, and ensure it remains effective in response to changing circumstances.

Making emissions permits personal property will activate the limitation on the Government's power to acquire property under s 51(xxxi) of the Constitution. Section 51(xxxi) provides that the Commonwealth may not acquire property unless it pays 'just terms' compensation for it. This means that if the Government wants to change the carbon price mechanism in a way that diminishes polluting companies' rights to permits, they will have to pay them for it. This obviously threatens the budget neutrality of the scheme.

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[13] Garnaut Climate Change Review (2008) Chapter 14, section 14.7

[14] Garnaut Climate Change Review, *Carbon pricing and reducing Australia's emissions* (2011) p 14.

[15] Garnaut Climate Change Review, *Carbon pricing and reducing Australia's emissions* (2011) pp 36-7.

[16] Clean Energy Council, Institutional Arrangements for a Carbon Price Discussion Paper, May 2011, available here: http://www.cleanenergycouncil.org.au/cec/mediaevents/CECnews/MW-CEW-speech.

There are a wide range of situations where the obligation to pay just terms compensation might apply. ANEDO has analysed this question in considerable detail. In our view, the following situations will give rise to an obligation to pay 'just terms' compensation:

- the government amends the scheme cap for a year, and tries to take back permits that have already been issued;
- the government amends the scheme cap for a year, and cancels permits that have already been issued (if the government thereby receives a corresponding benefit);
- the government amends the rights attaching to permits that have already been issued (if the government thereby receives a corresponding benefit);
- the government amends industry assistance arrangements, by taking back permits that have already been issued;
- the government amends industry assistance arrangements, by cancelling permits that have already been issued (if the government thereby receives a corresponding benefit); and
- possibly — though it is an outside chance — where the government amends industry assistance arrangements or the scheme cap so as to reduce companies' future entitlement to permits.

There are many realistic situations where the Government might need to make these amendments. The scheme cap may need to be rapidly adjusted in response to a collapse in the price of permits, or a sudden economic downturn, or new and urgent developments in the science of climate change. The Government may also need to amend industry assistance arrangements if industries obtain a windfall gain, or if industry assistance obstructs urgently needed transformations in liable entities' operations. There are a whole range of reasons why the Government might want to recover those permits. Limiting their ability to do so is reckless.

It is also out of step with emissions trading schemes in other countries. Of all the emissions trading schemes in Australasia, Europe and North America,[17] almost none of them declare that permits are personal property in the way that the former CPRS did,[18] and the CFI does.[19] Only the New Zealand emissions trading scheme explicitly provides that permits are personal property.[20] Critically, however, the New Zealand government (unlike Australia) is not under a constitutional obligation to pay 'just terms' compensation for the acquisition of property.

The emissions trading schemes in the United States (**US**) are particularly interesting, because US state and federal governments *are* subject to a constitutional obligation to pay compensation for regulatory 'takings', very similar to the just terms provision in the Australian Constitution. US governments have not made the mistake of giving emissions trading permits the status of property.

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[17] We have analysed 17: the NSW Greenhouse Gas Abatement Scheme, the NSW energy savings scheme, the federal Renewable Energy Target, the former Victorian Renewable Energy Target, the Victorian Energy Efficiency Target, the NZ ETS, the European ETS, the former Norwegian ETS, the Swiss ETS, the UK Carbon Reduction Commitment Energy Efficiency Scheme, the US EPA $SO_2$ ETS, the US $NO_x$ ETS, the US Regional Greenhouse Gas Initiative, the proposed US Western Climate Initiative, the Californian ETS, the proposed American Clean Energy and Security Act of 2009, and the proposed Lieberman-Warner Climate Security Act 2008.

[18] Carbon Pollution Reduction Scheme Bill 2009 cl 94.

[19] Carbon Credits (Carbon Farming Initiative) Bill 2011 cl 150.

[20] The *Personal Property Securities Act 1999* (NZ) s 16(1) provides that emissions units are personal property.

Each of the following US emissions trading schemes explicitly specifies that permits are a limited licence to emit, *not* a personal property right:

- the Regional Greenhouse Gas Initiative (**RGGI**);[21]
- the Western Climate Initiative (**WCI**); [22]
- the Californian emissions trading scheme; [23]
- the federal $SO_2$ emissions trading scheme; [24]
- the Ozone Transport Commission $NO_x$ trading scheme; [25]
- the proposed American Clean Energy and Security Act of 2009; [26] and
- the proposed Lieberman-Warner Climate Security Act 2008. [27]

We are not aware of any US emissions trading schemes that use proprietary permits and activate the obligation to provide compensation for regulatory 'takings'. Indeed, we are not aware of any country which has a constitutional obligation to pay 'just terms' declaring permits to be personal property in this way. If Australia did make this mistake, it would be making it alone.

**Recommendations**:

- Permits should be legally designed as a limited licence to emit greenhouse gases, not personal property, to avoid the application of s 51(xxxi) of the Constitution.

## 6. Caution must be exercised in linking with other compliance and offsets schemes

ANEDO supports in principle that the carbon price be linked to other emissions trading schemes and offsets trading schemes in Australia and overseas. In particular, it is important that Australian Carbon Credit Units generated by the CFI be eligible for acquittal under the carbon price.

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21 The RGGI is an emissions trading scheme covering several North-Eastern States of the US. RGGI Model Rule Subpart XX-1.5(c)(6) provides that "*A $CO_2$ allowance …is a limited authorization…to emit one ton of $CO_2$…*", and subpart XX-1.5(c)(7) provides that "*A $CO_2$ allowance…does not constitute a property right.*"

22 The Western Climate Initiative is a forthcoming emissions trading scheme for Western US states and Canadian provinces. The design documents for the emissions trading scheme provide that allowances are a limited authorisation to emit one metric ton of $CO_{2e}$, and do not constitute a property right for any purpose.

23 The Global Warming Solutions Act and Proposed Regulation Order establish an emissions trading scheme due to commence on 1 January 2012. The Proposed Regulation Order would insert §95820(c) of the California Code of Regulations: "*Each compliance instrument…represents a limited authorization to emit up to one metric ton in CO2e of any greenhouse gas…No provision of this article may be construed to limit the authority of the Executive Officer to terminate or limit such authorization to emit. A compliance instrument…does not constitute property or a property right.*"

24 One of the first emissions trading schemes in the world, it came into effect in 1995. Title 42, Chapter 85, subchapter IV-A, §7651b(f) states that an allowance is "*a limited authorisation to emit sulphur dioxide in accordance with the provisions of the subchapter. Such allowance does not constitute a property right.*"

25 Regional nitrous oxide trading program for various North-Eastern United States. Model Rule defines an allowance as "*the limited authorisation to emit one ton of NOx during a specified control period.*" Some states' enacting legislation also explicitly confirmed that an allowance is not a property right.

26 Proposed national emissions trading scheme considered by Congress. Section 721(c)(1) states "*In General – An allowance…does not constitute a property right, nor does any offset credit or other instrument established or issues under the Act.*"

27 Proposed national emissions trading scheme considered by Congress. Section 1201(c)(1) states that "*In General – An emission allowance shall not be a property right.*"

This sort of 'linking' and the trade in permits that it encourages has the potential to reduce the overall costs of abatement, reduce price volatility in full emissions trading, and drive abatement in sectors where it would not otherwise occur. However, it also poses risks — that the small Australian market could be subsumed within a much larger market, that the problems of other schemes could be spread to the Australian carbon price, and that price volatility could actually increase in the early years.

To manage these risks, the carbon price should include a percentage cap on the use of international permits and offset credits. The Garnaut Climate Change Review has made a similar recommendation, [28] and has recently suggested a limit of 4% in 2012 rising to 10% in 2020.[29] This proposal is a good guide to the sort of cap that is required.

These risks can also be managed by being selective about which schemes to integrate with. Linkages to other compliance and offset markets should be approved on a case-by-case basis by an independent expert body, like the proposed Independent Carbon Bank.

**Recommendations**:

- There should be a cap on the use of international and domestic permits and offset credits under the scheme.
- Linkages to other international and domestic schemes must be approved on a case-by-case basis by an independent expert body like the Independent Carbon Bank.

## 7. The legislation should include fair and robust enforcement mechanisms

The enforcement provisions in the former CPRS were generally sound, and should be replicated in any future carbon price mechanism.

An exception to that is the lack of provision for third party merits review under the CPRS proposal. There will be many decisions under a carbon price which have potentially significant consequences for the operation of the scheme as a whole, and where the decision-maker has broad discretion — a decision to grant free permits to an affected industry, for example. These decisions should be subject to merits review at the instance of the affected company or a third party. This can be achieved by providing that 'any person' or 'any person who has demonstrated concern with the decision' may apply for merits review.

This will provide a valuable 'quality control' mechanism, and maintain a high quality of decisions under the carbon price. It will also ensure that decisions under the scheme reflect the public interest in environmental protection, not just the private interest in extracting the most private benefit from the scheme. Many pieces of environment and planning legislation in Australia already include this sort of 'open standing' provision.[19] The experience with those laws is that such provisions do not 'open the floodgates' and swamp the courts with litigation, but in fact contribute to better decision-making and the more open administration of justice.[30]

[28] The Garnaut Climate Change Review (2008) Chapter 14, section 14.4.

[29] Garnaut Climate Change Review, *Carbon pricing and reducing Australia's emissions* (2011) p 25.

[30] Murray Wilcox, 'Loosening the Shackles' (1996) 13 *Environment and Planning Law Journal* 151; *Ogle v Strickland* [1987] FCA 36 [8] of the judgment of Wilcox J; *Oshlack v Richmond River Council* [1994] NSWLEC 20.

**Recommendations**:

- The enforcement provisions of the former CPRS should be adopted.
- In addition, the carbon price should provide third party rights to merits review for decisions with high significance and broad discretion.

## 8. The scheme must provide for regular independent review

ANEDO strongly supports a mandatory, regular, independent review of the carbon price. It is vital that a scheme as complex and unpredictable as the hybrid emissions trading scheme proposed by the MPCCC is reviewed shortly after its commencement, and regularly thereafter, to ensure its effectiveness. Such a review may also go a long way toward quelling anxiety about the carbon price in certain sectors of the community.

ANEDO therefore recommends that the first review of the scheme be held in 2015, three years after the scheme's commencement. This is the same period of time used for the NZ ETS. A specially constituted independent expert body should conduct the review.

**Recommendations**:

- An independent review of the operation of the scheme must be mandated for 2015, and at regular intervals thereafter.

## 9. The carbon price must be combined with other, complementary measures

A carbon price is a necessary and valuable first step in driving the transition to a low carbon economy. But on its own, it is not enough. Research suggests that price signals like a carbon price are generally good at driving gradual abatement over long periods of time, but less effective at compelling big changes in behaviour quickly.[31] In particular, it is unlikely that a carbon price will be effective on its own in driving the rapid investment in renewable energy that we require. In climate change policy — where the scientific evidence demands increasingly urgent action — this makes complementary measures essential.

To effectively tackle climate change, Australia needs a range of laws and policies at a national, state and local level to drive carbon abatement in different sectors in different ways. We need measures like a renewable energy target, a national energy efficiency initiative, and an emissions intensity standard for new power stations to drive abatement in particular key sectors. Though these are often referred to as complementary measures, in truth it is the carbon price which will complement them with its economy-wide underlying price signal.

**Recommendations**:

- The carbon price must be accompanied by other climate laws and policies like the Renewable Energy Target, a national energy saver initiative, and an emissions intensity standard for new power stations.

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[31] See Michael Power, 'Emissions trading in Australia: markets, law and justice under the CPRS' (2010) 27 *Environment and Planning Law Journal* 131, pp.139-141; T Profeta and B Daniels, *Design principles of a cap and trade scheme for greenhouse gases* (2005) p.2; James Prest, 'A dangerous obsession with least cost?' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) p.179.