

EMISSIONS TRADING LAW

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*Commentary at a seminar on Emissions Trading Law organised by the NSW
Bar Association*

4 December 2008

- 1 When carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and preventing heat from the sun's rays escaping back into space. Most climate scientists, including the influential United Nations Intergovernmental Panel on Climate Change, consider that a significant increase in the concentration of carbon dioxide in the atmosphere is related to global warming, and that global warming presents climate change risks that threaten our survival. The risks include sea level rises, increases in the severity and frequency of storms, and coastal flooding.
- 2 The 1997 Kyoto Protocol, which Australia ratified in late 2007, provides a legal framework to reduce greenhouse gases and thus arrest global warming and climate change. It does so in two ways. First, when ratified, it binds the parties to the Protocol to decrease their levels of greenhouse gas emissions, including carbon dioxide emissions, to specified targets. Under the Protocol, Australia's emission reduction target is 108% of its 1990 emissions over the first commitment period, 2008 to 2012.
- 3 Secondly, the Protocol provides for a new international market between the parties to the Protocol, trading in greenhouse gas emission permits. These permits are a right to emit a certain amount of gas over a certain period of time. Hence it is not the actual gases which are traded; rather, it is the right to

emit that is traded.¹ The permits are created and issued by governments for a price, and must be surrendered at the end of each year in proportion to the amount of greenhouse gas emitted.² In substance, the permits are a form of tax on polluters. However, the emissions trading market allows polluters to trade in their unused permits, which are a right to emit a certain amount of gas over a certain period of time. Hence the market encourages emissions reductions by (a) requiring polluters to purchase permits to emit greenhouse gases; and (b) allowing emitters to trade (and thus potentially profit) unused emissions permits. The emissions trading market does not involve the trading of actual gases. Rather, the right to emit a certain amount of gas over a certain period of time is traded.³

- 4 Apart from the requirements of the Kyoto Protocol, the Federal Government has committed to reducing Australia's greenhouse gas emissions by 60% by 2050, compared with 2000 levels.⁴ It has also indicated that it shortly proposes to commit to an emissions reduction target by an as yet unspecified percentage by 2020.⁵ Professor Ross Garnaut's report to the Government recommends a cut of 10% by that date.⁶

Greenhouse gas trading markets at a glance

- 5 There are a number of carbon trading markets operating at an international level. An Australian Parliamentary Library background note on emissions

¹ See generally, Hodgkinson D, and Garner R, *Global Climate Change: Australian Law and Policy* (2008), pp 240-241.

² See generally, Australian Government, Department of Climate Change, "Implementing the Kyoto Protocol in Australia" (fact sheet), at <http://www.climatechange.gov.au/international/publications/fs-kyoto.html> (3 December 2008).

³ See generally, Hodgkinson D, and Garner R, *Global Climate Change: Australian Law and Policy* (2008), pp 240-241.

⁴ See generally, Australian Government, Department of Climate Change, "Kyoto Protocol, Latest News", at <http://www.climatechange.gov.au/international/kyoto/index.html> (3 December 2008).

⁵ Wilkinson M, and Cubby B, "Wong to resist calls for greenhouse cuts" (Sydney Morning Herald, 10 December 2008), at <http://www.smh.com.au/news/environment/global-warming/wong-to-resist-calls-for-greenhouse-cuts/2008/12/09/1228584839266.html> (10 December 2008).

⁶ Garnaut R, "The Garnaut Climate Change Review" (Final Report, 30 September 2008), p 277, at [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FinalReport-30September2008\(Fullversion\)/\\$File/Garnaut%20Climate%20Change%20Review%20-%20Final%20Report%20-%2030%20September%202008%20\(Full%20version\).pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FinalReport-30September2008(Fullversion)/$File/Garnaut%20Climate%20Change%20Review%20-%20Final%20Report%20-%2030%20September%202008%20(Full%20version).pdf) (15 December 2008).

trading includes the following table entitled “Carbon markets at a glance – estimated volumes and values 2006 and 2007”:⁷

Scheme	2006 Volume (Mt CO2)	2006 Value (US\$m)	2007 Volume (Mt CO2)	2007 Value (US\$m)
European Emissions Trading Scheme	1,104	24,436	2,061	50,097
NSW Greenhouse Gas Reduction Scheme	20	225	25	224
Chicago Climate Exchange	10	38	23	72
Primary Clean Development Mechanism	537	5,804	551	7426
Secondary Clean Development Mechanism	25	445	240	5,451
Joint Implementation	16	141	41	499
Voluntary and other Transactions	33	146	42	265
Total	1,745	31,235	2,983	64,035

6 “Mt CO₂” stands for “million tonnes of carbon dioxide”. The “clean development mechanism” and “joint implementation” are mechanisms created by the Kyoto Protocol which feed the carbon market. The former mechanism allows a country with an emission reduction commitment to implement an emission reduction project in developing countries. Such projects earn saleable credits. The latter mechanism enables industrialised countries to earn emission reduction units from an emission reduction project carried out jointly with another industrialised country.

The proposed Australian national emissions trading scheme

7 The Federal Government is currently working towards establishing a national emissions trading scheme, which it calls a “Carbon Pollution Reduction Scheme”.⁸ The national scheme will place a limit on the amount of greenhouse gas pollution that can be emitted. The Government released its Green Paper in July 2008. Its White Paper, in which the Government will announce its emissions reduction target for 2020, is due in December 2008.

⁷ See Nielson L, “Emissions – who is trading what?” (Parliament of Australia, Parliamentary Library, Background note, 15 August 2008), at <http://www.aph.gov.au/library/pubs/BN/2008-09/emissions.htm> (3 December 2008).

⁸ See generally, Australian Government, Department of Climate Change, “Carbon Pollution Reduction Scheme”, at <http://www.climatechange.gov.au/emissionstrading/index.html> (3 December 2008).

It is aiming to have the Bill before Parliament in March 2009, and the national scheme to have commenced by 2010.⁹

- 8 The national scheme will be a cap and trade scheme. This means that the Government will set an overall cap on carbon pollution, which is consistent with its longer term goal of reducing national emissions by 60% compared with 2000 levels by 2050. After setting the cap, the Government will then create a set number of permits up to the cap level and will require affected emitters covered by the national scheme to buy a pollution permit. The quantity of emissions by each emitter will be monitored and verified. At the end of each year, each emitter must surrender a permit for every tonne of emissions produced in that year.¹⁰ One important reason for choosing a cap and trade scheme is for international consistency: it will assist the national scheme in linking, in the future, to the global carbon market.¹¹
- 9 There are two distinct elements of a cap and trade scheme. The first is the cap itself. This is said to achieve the environmental outcome of reducing greenhouse gas pollution and also creates a carbon price. The second element is the ability to trade. This ensures that emissions are reduced at the lowest possible cost.¹²
- 10 The national scheme is a market based mechanism. By allowing participants to utilise least-cost abatement opportunities to reduce their emissions, the national scheme will create a market for emission permits, with a price per unit of tradable emissions based on market forces.¹³ Hence, the price of

⁹ Australian Government, Department of Climate Change, "Carbon Pollution Reduction Scheme - Timetable", at <http://www.climatechange.gov.au/emissionstrading/timetable.html> (3 December 2008).

¹⁰ See generally, Australian Government, Department of Climate Change, "Carbon Pollution Reduction Scheme – Overview, Fact Sheet 1", at <http://www.climatechange.gov.au/greenpaper/factsheets/fs1.html> (3 December 2008).

¹¹ Wong P, "Climate Change: A Responsibility Agenda" (Speech to Australian Industry Group Luncheon, Melbourne, 6 February 2008), at <http://www.environment.gov.au/minister/wong/2008/pubs/tr20080206.pdf> (3 December 2008).

¹² Australian Government, "Carbon Pollution Reduction Scheme Green Paper – Summary July 2008", p 12, at <http://www.climatechange.gov.au/greenpaper/summary/pubs/greenpaper-summary.pdf> (3 December 2008).

¹³ *Ibid*, at pp 12-14. See also Hodgkinson D, and Garner R, *Global Climate Change: Australian Law and Policy* (2008), p 241.

permits is not set by the Government but rather emerges from the market.¹⁴ Emitters compete in the market to purchase the number of permits that they require. Emitters that value the permits most highly will be prepared to pay the most for them. If an emitter faces difficulty in remaining below its allocated emissions limit, it can choose to (a) reduce production; (b) take measures to reduce emissions, such as investing in more efficient technology; (c) buy extra permits at the market rate; or (d) a combination of these actions.¹⁵ Some emitters will choose to reduce emissions, where it is cheaper to do so than to buy permits.¹⁶

- 11 Thus, the Government believes the national scheme should provide a strong incentive for participants to reduce their own emissions.¹⁷ Businesses will decide whether to reduce emissions or trade in permits, and so will operate within the overall cap at the least cost to themselves. In this way, the national scheme gives the flexibility to choose the most cost-effective way to meet the emissions cap. At the same time, the emissions market provides a financial incentive for firms to develop and adopt technologies to reduce emissions.¹⁸
- 12 The Government proposes that the scheme caps will be set five years in advance. The caps would be extended by one year, every year, to maintain a constant five-year cap horizon. Beyond the five year period, the Government proposes to identify a range within which future caps will be set.¹⁹ The Government also proposes to auction the majority of permits to generate revenue that will be used to assist households and businesses with adjustment to the scheme. Over the long term, the Government proposes to move to 100 per cent auctioning.²⁰ Four auctions will be held each financial

¹⁴ Ibid, at p 13.

¹⁵ Hodgkinson D, and Garner R, *Global Climate Change: Australian Law and Policy* (2008), p 241.

¹⁶ Australian Government, "Carbon Pollution Reduction Scheme Green Paper – Summary July 2008", p 12, at <http://www.climatechange.gov.au/greenpaper/summary/pubs/greenpaper-summary.pdf> (3 December 2008).

¹⁷ Ibid, at pp iv, 11, 13.

¹⁸ Ibid, at pp 11, 14.

¹⁹ Ibid, at p 22.

²⁰ Ibid, at p 20.

year.²¹ As noted above, at the end of each year, each emitter must surrender a permit for every tonne of emissions produced that year.

- 13 The national scheme as proposed will have maximum coverage of greenhouse gases and sectors, to the extent that this is considered to be practical.²² The Government proposes that all greenhouse gases included under the Kyoto Protocol will be covered by the national scheme. However, it also proposes that only emissions from stationary energy, transport, industrial processes, waste, and fugitive emissions from oil and gas production would be covered from the commencement of the national scheme.²³ This means that the national scheme would include around 75% of Australia's emissions.²⁴ The Government does not intend to include agriculture emissions in the national scheme at commencement. Rather, agriculture would be included no earlier than 2015.²⁵
- 14 Imposing national scheme obligations directly at the point where carbon pollution originates creates the clearest incentives to reduce emissions. However, it would be impractical to apply national scheme obligations to all emitters. For example, in the transport sector there are many millions of cars that contribute to carbon pollution. The Government proposes that, in general, national scheme obligations would apply directly to large emitters – that is, to facilities that have direct emissions of 25,000 tonnes of carbon dioxide equivalent a year or more. Where there are large numbers of small emitters, emissions would be covered by applying national scheme obligations at another point along the supply chain. For example, to cover emissions from fuel use, the Government proposes to apply national scheme obligations upstream on fuel suppliers.²⁶

²¹ Ibid, at p 46.

²² Ibid, at pp 16, 35.

²³ Ibid, at p 16.

²⁴ Australian Government, "Scheme Coverage – Fact Sheet 3", at <http://www.climatechange.gov.au/greenpaper/factsheets/fs3.html> (3 December 2008).

²⁵ Ibid.

²⁶ Ibid.

New South Wales electricity industry greenhouse gas emissions trading scheme

- 15 New South Wales already has a mandatory greenhouse gas reduction scheme for the electricity industry which commenced on 1 January 2003.²⁷ The scheme aims to reduce greenhouse gas emissions associated with the production and use of electricity, and is implemented under the *Electricity Supply Amendment Act 2002* and the 2002 Regulations thereunder.²⁸ The scheme establishes annual statewide greenhouse gas reduction targets, and then requires electricity retailers, electricity generators and large electricity consumers in NSW to meet mandatory targets for reducing or offsetting the emission of greenhouse gases from the production of electricity they supply or use.²⁹ Failure to meet a target results in a penalty, currently \$12.00 per tonne of shortfall.³⁰ The Independent Pricing and Regulatory Tribunal of New South Wales monitors the performance of participants.³¹
- 16 The scheme involves a “baseline and credit” greenhouse gas emissions trading scheme (as distinct from a “cap and trade” scheme).³² Participants can meet their mandatory target by (a) reducing emissions; or (b) purchasing abatement certificates and surrendering them to the Tribunal. Abatement certificates are created by accredited abatement certificate providers (**ACPs**). ACPs carry out activities that abate greenhouse gases, including (a) low-emission generation of electricity or improvements in emission intensity of existing generation activities; (b) activities that result in reduced consumption of electricity; and (c) carbon sequestration activities.³³ Each abatement certificate represents one tonne of carbon dioxide equivalent that would otherwise have been released into the atmosphere.³⁴ Abatement certificates

²⁷ NSW Government, “Introduction to the Greenhouse Gas Reduction Scheme (GGAS)”, p 3, at <http://www.greenhousegas.nsw.gov.au/documents/Intro-GGAS.pdf> (3 December 2008).

²⁸ *Ibid*, p 6.

²⁹ *Ibid*, p 3.

³⁰ *Ibid*.

³¹ *Ibid*, p 5.

³² *Ibid*, p 4.

³³ *Ibid*, p 9.

³⁴ NSW Government, “Fact sheet - Abatement certificates”, p 1, at <http://www.greenhousegas.nsw.gov.au/documents/FS-Sch-Certs-03.pdf> (3 December 2008).

are therefore the main way in which ACPs will turn their electricity-related abatement activities into “currency”, which scheme participants can purchase and use to meet their obligations.³⁵

Voluntary emissions trading schemes

- 17 There are also voluntary emissions trading schemes operating in Australia. In July 2007, the Australian Climate Exchange (**ACX**) commenced operation.³⁶ The ACX is a marketplace for buying and selling emissions commodities. It trades in government accredited emissions credits.³⁷ At the moment, there are four instruments tradeable on the ACX.³⁸ All the instruments basically represent some form of carbon offset, and include (a) Voluntary Emission Reductions, which come from projects which reduce emissions below business-as-usual levels;³⁹ and (b) Renewable Energy Certificates, which are created by eligible parties for each megawatt hour of eligible renewable energy generated.⁴⁰ Renewable Energy Certificates are surrendered by liable parties under the Federal Government’s Mandatory Renewable Energy Target.⁴¹ The latter is a national scheme that places a legal liability on wholesale purchasers of electricity to contribute towards generation of renewable energy.⁴²
- 18 An industry has developed for the provision of voluntary offset credits and services. In Australia, there are now over 50 carbon offset providers offering

³⁵ Ibid.

³⁶ Nielson L, “Emissions – who is trading what?” (Parliament of Australia, Parliamentary Library, Background note, 15 August 2008), at <http://www.aph.gov.au/library/pubs/BN/2008-09/emissions.htm> (3 December 2008).

³⁷ Ibid.

³⁸ ACX, “What can I trade?”, at <http://www.climateexchange.com.au/Content/tpWhat.aspx> (3 December 2008).

³⁹ ACX, “Greenhouse Friendly™ Voluntary Emission Reductions (VERs)”, at <http://www.climateexchange.com.au/Content/oVERS.aspx> (3 December 2008).

⁴⁰ ACX, “Mandatory Renewable Energy Target (MRET) and Renewable Energy Certificates (RECs)” at <http://www.climateexchange.com.au/Content/Page.aspx?ref=080808063925> (3 December 2008).

⁴¹ Ibid.

⁴² See generally, Australian Government, Department of Climate Change, “Background on Australia’s renewable energy target”, at <http://www.climatechange.gov.au/renewabletarget/background.html> (3 December 2008).

different types of offset products. This is an increase of 40% in the three months between March and June 2008.⁴³

- 19 Individual companies also appear to be undertaking private, over the counter, exchanges with banks or other financial institutions.⁴⁴ For example, in May 2008, AGL sold 10,000 Australian Emissions Trading Units to Westpac.⁴⁵ This is the right to emit 10,000 tonnes of carbon. There are also voluntary company-based schemes. For example, both BP and Shell Petroleum operate company-wide emissions trading schemes.⁴⁶ In 1997, BP committed to reducing its greenhouse gas emissions to 10% below its 1990 levels by 2010. It achieved this target by 2001.⁴⁷ BP implemented a cap and trade system across its business units in over 100 countries. Each business unit was assigned a quota of emissions permits and could achieve compliance through emissions reductions or purchasing reductions credits from other BP units.⁴⁸

Carbon sequestration rights under the *Conveyancing Act 1919 (NSW)*

- 20 The NSW legislature was innovative in passing the *Carbon Rights Legislation Amendment Act 1998*, which amended the *Conveyancing Act 1919*. The amendments recognise that rights associated with carbon sequestered from the atmosphere by trees and forests may be a kind of forestry right and can

⁴³ Moore L, "What lies ahead for the voluntary carbon offset market in Australia?" (Blake Dawson, Greenhouse Update, 9 September 2008), at http://www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=53035 (3 December 2008). See also, Carbon Offset Guide Australia, "Summary of providers", at <http://www.carbonoffsetguide.com.au/providers> (9 December 2008).

⁴⁴ Nielson L, "Emissions – who is trading what?" (Parliament of Australia, Parliamentary Library, Background note, 15 August 2008), at <http://www.aph.gov.au/library/pubs/BN/2008-09/emissions.htm> (3 December 2008).

⁴⁵ Ibid. See also Mark D, "Westpac, AGL set benchmark for Aust carbon trading" (ABC News online, 20 May 2008), at <http://www.abc.net.au/news/stories/2008/05/20/2250392.htm> (3 December 2008).

⁴⁶ Ibid.

⁴⁷ Hueston G, "Beyond Petroleum – learning to achieve prosperity through sustainability" (speech delivered 3 August 2005 at West Australian Business Leaders Breakfast, Perth), at http://www.bp.com/liveassets/bp_internet/australia/corporate_australia/STAGING/local_assets/download_pdf/a/Aust_speech_WA_business_breakfast_030805.pdf (3 December 2008).

⁴⁸ Wild F, "BP Australia and Shell Australia: Internal Emissions Trading" (Australian Government, Department of the Environment, Water, Heritage and the Arts), at <http://www.environment.gov.au/settlements/challenge/members/bp-shell.html> (3 December 2008).

be the subject of forestry covenants.⁴⁹ Section 88AB of the *Conveyancing Act* provides that a forestry right is to be deemed, for all purposes, to be a profit à prendre.⁵⁰ Under s 87A,⁵¹ a forestry right, in relation to land, includes:

- (a) an interest in the land pursuant to which a person having the benefit of the interest is entitled to enter the land and establish, maintain and harvest, or to maintain and harvest, a crop of trees on the land;
- (b) a carbon sequestration right in respect of the land;
- (c) a combination of such an interest and such a right.

21 Section 87A also provides that a carbon sequestration right in relation to land means a right to the legal, commercial or other benefit, whether present or future, of carbon sequestration by any existing or future tree or forest on the land after 1990. Carbon sequestration by a tree or forest means the process by which the tree or forest absorbs carbon dioxide from the atmosphere.

Under s 88AB(2), if a forestry right consists in whole or in part of a carbon sequestration right, the profit à prendre deemed to exist by the operation of s 88AB(1) in relation to the carbon sequestration right consists of the following:

- (a) the profit from the land is taken to be the legal, commercial or other benefit, whether present or future, of carbon sequestration by any existing or future tree or forest on the land that is the subject of the carbon sequestration right;
- (b) the right to take something from the land is taken to be the right to the benefit conferred by the carbon sequestration right.

22 These provisions of the *Conveyancing Act* were recently considered in *Spencer v Commonwealth of Australia* [2008] FCA 1256. Mr Spencer claimed that the effect of the NSW Native Vegetation Acts, the *Native Vegetation Conservation Act* 1997 and the *Native Vegetation Act* 2003, was to impose a

⁴⁹ See Schedule 1 [2] and [3] *Carbon Rights Legislation Amendment Act* 1998 (NSW).

⁵⁰ Inserted by Schedule 1 [4] *Carbon Rights Legislation Amendment Act* 1998 (NSW).

⁵¹ Inserted by Schedule 1 [3] *Carbon Rights Legislation Amendment Act* 1998 (NSW).

prohibition or general restriction on the reasonable use of his rural land, “Saarahnlee”, with the consequence that certain of his rights or interests in that land had been acquired without just compensation as required under the Constitution. Therefore, he argued, those Acts were invalid. Emmett J declined to summarily strike out the claim, as sought by the Commonwealth. Among Mr Spencer’s alleged rights or interests in the land were carbon sequestration rights under ss 87A and 88AB of the *Conveyancing Act* 1919. In relation to those provisions, Emmett J held:

138 The effect of those provisions of the Conveyancing Act is that Mr Spencer could grant a carbon sequestration right in respect of Saarahnlee as a profit à prendre. He would be entitled to receive consideration for such a grant. The effect of such a grant would be for Mr Spencer to confer on the grantee the legal, commercial or other benefit of the process by which trees on Saarahnlee absorb carbon dioxide from the atmosphere. Such a right may well be valuable if a mechanism for trading in such rights were to be established.

...

149 I consider that Mr Spencer has established that there is a serious question to be tried as to whether he has suffered such sufficient detriment as a consequence of the 1997 Vegetation Act and the 2003 Vegetation Act as might constitute a taking or acquisition in respect of Saarahnlee. Further, to the extent that there was a benefit to be derived from the grant of carbon sequestration rights by undertaking voluntary restraint, it is certainly arguable that Mr Spencer has been deprived of that benefit. Whether the restriction is such as to constitute a taking or acquisition or expropriation may depend upon detailed evidence of value. Nevertheless, there is at least a seriously arguable case for concluding that there has been an acquisition of property of Mr Spencer’s.

Commentary on papers presented at this seminar

23 The papers which have been presented at this seminar are not confined to the seminar topic of emissions *trading* law but range helpfully over what may be described, more broadly, as emissions law or, more broadly still, as climate change law. The papers demonstrate that emissions law or climate change law at present is accommodated mainly within conventional areas of statutory law and the common law including administrative law (e.g. see the recent decision in *Walker v Minister for Planning* [2008] NSWCA 224, (2008) 161

LGERA 423), property law, contract law, tort law, criminal law and even constitutional law (e.g. *Spencer v Commonwealth of Australia* [2008] FCA 1256). Climate change and greenhouse gas emissions present challenges to the common law and to existing statutory schemes such as those regulating the environment and planning.

Commentary on “Sovereignty and rights in the carbon debate”, by Peter King

- 24 Mr King in his paper has reviewed the history of the international response to climate change, starting with the 1972 Stockholm Conference. He has also surveyed Australia’s response to the climate change challenge, culminating in Australia’s ratification of the Kyoto Protocol last year.
- 25 Mr King’s paper focuses on the challenge to Australia’s sovereignty resulting from international measures to reduce climate change. He poses the question of why and how these measures affect Australia’s sovereignty. He also considers whether domestic laws adopting the Kyoto Protocol will create new property rights and new causes of action, and whether climate change itself will create any rights in respect of the environment.
- 26 The obligations of the Kyoto Protocol do impose a burden upon nation states to meet their commitments under the Protocol. The UN Secretariat is authorised to monitor and review a country’s performance of its commitments. The Federal Government now, in an international law sense, has little choice but to meet its Kyoto commitments. Although Australia can attempt to meet its commitments via the clean development mechanism or joint implementation, which both involve actions taken in other countries, Australia should use its Kyoto commitments to look towards reducing its own emissions. Mr King is correct in saying that any derogation from sovereignty which the ratification of the Kyoto Protocol involves should be welcomed. It will provide opportunities and incentives to find solutions to climate problems.
- 27 Whether the law will evolve so as to create so-called “climate rights”, such as a right to clean air, is an interesting question. Recognising these rights

potentially provides the opportunity for litigation by those whose “rights” have been infringed.

**Commentary on “Climate change mitigation and adaptation – a role for law”,
by Matthew Baird and Phillip French**

- 28 Mr Baird and Mr French first review the likely impacts of climate change, such as more flooding and more droughts in Australia, and international problems such as a lack of water and food security.
- 29 The authors point out that the biggest contributors to the problem of climate change, for example the United States, are not the countries that will suffer most in the short term. They suggest that this asymmetry should be the basis for attributing tortious liability to developed countries to make reparations to those countries critically impacted by climate change. Before any type of tortious liability can be established, the law must recognise new duties. This potential does exist, as the authors discuss. It is, of course, an immense challenge for the law to find the required specific causal linkage between polluters, the defendants in an action, and the climate change complained of.
- 30 The authors survey instances of climate change litigation in the US and Australia. They conclude that any failure by decision-makers to take into account the potential impacts of climate change raises serious issues of liability for negligence. It is true, as the authors quote, that the law has a long memory and can look back to decide whether decision-makers did enough to avoid or minimise climate change. However, in the face of overwhelming scientific evidence of climate change, these potential impacts should be confronted now, rather than later.

Commentary on “*National Greenhouse and Energy Reporting Act 2007 – Outline of reporting requirements and penalties for non-compliance*”, by Craig Carter

- 31 Mr Carter has examined the *National Greenhouse and Energy Reporting Act 2007*. This Act establishes the monitoring regimes for greenhouse gas emissions, energy production and energy consumption. The Act also establishes thresholds in relation to emissions and energy consumption and production, requiring a corporation to report on its activities above this threshold. These reports are then made public.
- 32 Interestingly, the Act prescribes relatively high penalties for a breach of reporting requirements. A CEO may also be liable if their company contravenes the Act. This is not dissimilar to the high penalties which can be imposed for environmental offences such as water and air pollution. In this way, it appears that the Act may contemplate a breach of a reporting requirement to be similar to an environmental offence.
- 33 The Act also gives wide powers of entry to premises and powers to seize documents and use electronic equipment. Again, these powers are not dissimilar to those granted by the *Protection of the Environment Operations Act 1997* (NSW) to authorised officers to investigate environmental offences.
- 34 The introduction of this Act therefore indicates that the Government intends that reporting and compliance requirements in relation to emissions and energy production and consumption be taken seriously.⁵²

⁵² I thank my tipstaff Noni Austin for her research assistance for this paper.