

Dr Ted Christie, Barrister and Mediator, Queensland Bar

Dr Christie will be participating in a panel discussion on the interface between native title, environmental protection and cultural heritage at the upcoming **LexisNexis Native Title Summit QLD June 2009**. The special focus Dr Christie will bring to the Panel will be on sustainability and biodiversity. To reserve your place for more information, email: nicola.mclintock@lexisnexis.com.au/

A full profile of Dr Christie can be found at the following link: www.environment-adr.com/

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REGULATORY CONTROL OF CARBON DIOXIDE EMISSIONS AND CLIMATE CHANGE: AN ALTERNATIVE PATHWAY TO THE EMISSIONS TRADING SCHEME¹

The Emissions Trading Scheme [referred to as the *Carbon Pollution Reduction Scheme* (“CPRS”) in Australia], as proposed by the Federal Government, persists as a volatile issue. The CPRS caps the maximum amount of emissions and leaves major emitters with two alternatives: Either (i) to buy permits where their emissions exceed their cap or (ii) to reduce their emissions. Carbon dioxide emissions arising from the use of fossil fuels for energy production account for around 70% of Australia’s greenhouse gas emissions².

Concerns expressed within Australia over the potential adverse impacts arising from the CPRS include its impacts on Australia’s overseas exports, significant increases in power costs for the manufacturing sector through to job losses and possible closure of mines. Moreover, there are also concerns whether the adoption of the CPRS will exacerbate the economic impacts of the global financial crisis³.

Is there a more effective alternative to reduce CO₂ emissions that warrants consideration in Australia, relative to the CPRS? Should climate change be seen as an environmental problem that requires a “**sustainable solution**” rather than an “**economic fix**”? Recent case law in the United States provides the basis for an alternative pathway that could form **one key element** for any sustainable solution for climate change and which may secure as much available value as possible for Government, industry and the community.

Climate Change and Regulatory Control of CO₂ Emissions in the United States

On a Federal basis, The United States represents a paradox, in terms of addressing the global need to address CO₂ emissions and climate change.

On the one hand, the United States is a signatory nation to the *Kyoto Protocol* – but the Senate has yet to ratify it and so consent for the United States to become bound by the Protocol.

In contrast, on 2 April 2007, a landmark decision by the Supreme Court of the United States has taken an entirely different direction. In a 5:4 majority decision in *Massachusetts et al. v Environmental Protection Agency*, 549 U.S. 497 (2007); 127 S. Ct. 1438, the Supreme

Court ruled that the greenhouse gases that cause climate change are air pollutants under the *Clean Air Act* (42 U.S.C.); in addition, that the United States Environmental Protection Agency (the “EPA”) may regulate their emission.

The action was brought by 12 States and a number of cities. It focussed on Section 7521(a)(1) of the Clean Air Act which provided for the EPA to set emission standards for “any air pollutant” from motor vehicle engines “which... cause, or contribute to, air pollution which may be reasonably anticipated to endanger public health or welfare”.

Contemporary Approaches to the Regulatory Control of Air Emissions

The traditional approach for dealing with environmental problems associated with air emissions has been a reactive one focussing on polluting industries and regulatory control. However, a contemporary global approach has seen a shift away from an approach based strictly on pollution control to one directed at preventing “**environmental harm**”. The concept of “environmental harm” incorporates air pollution but also extends to the much broader considerations of environmental quality and sustainability as well.

Air pollution statutes, such as the clean air acts of the past, represent the “first generation” approach to the environmental regulatory control of pollution. The position in Australia, today, has changed significantly. Australia has generally adopted “environmental harm” as the basis for environmental regulatory control of pollutants i.e. the “second generation” approach.

Regulatory Control of Environmental Harm in Australia

Environmental harm, as the legislative basis for the regulatory control of pollutants, was first introduced in South Australia in 1993: *Environment Protection Act 1993 (SA)*. Almost all of the other States and both Territories then followed: *Environmental Protection Act 1994 (Qld)*; *Environmental Management and Pollution Control Act 1994 (Tas)*; *Protection of the Environment Operations Act 1997 (NSW)*; *Environment Protection Act 1997 (ACT)*; and *Waste Management and Pollution Control Act 1998 (NT)*. In Victoria, the *Environment Protection Act 1970 (Vic)*, whilst still primarily pollution-based, now has provisions giving general effect to “harm to the environment”. In Western Australia, the *Environmental Protection Act 1986 (WA)* is also pollution-based but now also incorporates “environmental harm”.

Depending on the specific statute, a licence, authority, permit or developmental approval must be applied for and granted for any industry or activity that may emit a listed substance that will, or has the potential, to cause environmental harm, dependent on the intensity [or concentration] of the substance emitted.

The Scope for the Regulatory Control of CO₂ Emissions in Australia

Environmental harm has a much broader legal meaning under the environmental protection legislation in Australia, relative to the meaning of pollutant in the various clean air statutes that have been superseded. On the basis of the impacts on Australia’s environment arising from increasing CO₂ emissions, as described in the Commonwealth’s White Paper, *The Carbon Pollution Reduction Scheme*, it is argued that there is a case for the States and

Territories to consider amending their environmental protection legislation; and to list CO₂ emissions in the Schedules of these statutes as a substance that will, or has the potential, to cause environmental harm. The States and Territories would then have the authority to regulate CO₂ emissions.

If there were to be the case, then the Commonwealth has the legislative power to set national pollution standards for the regulatory control of CO₂ emissions as “pollutants” (in the language of the White Paper) that will, or may, cause environmental harm under the environmental protection legislative schemes of the States and Territories.

Under the *National Environmental Protection Council Act 1994 (Cth)*, “National Environmental Protection Measures” could be introduced designed to improve the national consistency in environmental protection measures – such as a national pollution standard for specific air emissions. For example, by prescribing a standard for “*lowest achievable CO₂ emissions*”, throughout Australia based on *existing technology/best practice environmental management* that is specific for each trade or industry that emits CO₂. Depending on the risk of environmental harm, a uniform Australia-wide standard for CO₂ emissions, specific for each industry, or activity, would apply nationally.

National pollution standards may be achieved through the co-operative procedures arising under the national environmental policy, the *Intergovernmental Agreement on the Environment (1992)*. The process for achieving “National Environmental Protection Measures” is the National Environment Protection Council established by the *National Environment Protection Council Act 1994 (Cth)* and corresponding legislation for each State and Territory.

The implementation by the Commonwealth and by Commonwealth agencies of “National Environmental Protection Measures” is governed by the *National Environment Protection Measures (Implementation) Act 1998 (Cth)*. The States and Territories give effect to the national standards through their own legislation.

There is scope for Government to *effectively engage* affected industries in setting national standards, based on established principles for conflict resolution. An approach based on *shared responsibility, joint action* and *joint problem-solving* for setting national standards for CO₂ emissions would offset any concerns by Industry that unnecessarily onerous obligations may be imposed. *Ownership in the outcome* so derived in such an approach, would facilitate the national implementation of CO₂ emission standards by Industry. It is clearly evident that co-operation between the Commonwealth and the States and Territories is paramount if such a regulatory approach for CO₂ emissions is to be adopted, as part of any sustainable solution to address climate change in Australia.

Conclusions

Is there a realistic and appropriate alternative for finding the “right balance” for climate change other than the *White Paper’s Carbon Pollution Reduction Scheme*? I believe that there is provided that the problem of climate change is effectively considered in the context of ***sustainability and the environment*** - an innovative pathway that has not yet been considered.

The approach of the *White Paper's Carbon Pollution Reduction Scheme* to climate change represents an **economic fix** to an environmental problem – notwithstanding that a **sustainable solution** is required. A sustainable approach integrates a number of options as elements of the overall solution to achieve a prescribed cap for national CO₂ emissions. Other elements, apart from the regulatory approach of a national standard for CO₂ emissions, must also be considered as part of the mix for a sustainable solution e.g. renewables, technological (clean coal technology, biochar...).

Following the release of the “Brundtland Report in 1987 and during the “Hawke-Keating era”, Australia led the world by implementing an innovative national environmental policy for sustainable development followed by its subsequent incorporation into environmental protection legislation. There are now opportunities for Australia to once again lead the world by finding a sustainable solution to address the environmental impacts of climate change.

The US statute, the *National Environmental Policy Act of 1969* has been described as possibly being “the most successful legal export in history” as it has been a model for the EIA process for over 100 countries⁴. Could it also be possible that the decision of the US Supreme Court in *Massachusetts et al. v Environmental Protection Agency* could also fulfil a role equivalent to NEPA i.e. as an international model for providing one element of a sustainable solution for addressing greenhouse gas emissions and climate change?

¹ **The Author:** Dr Ted Christie, Barrister and Mediator, Queensland Bar and author of the cross-disciplinary book, “*Finding Solutions for Environmental Conflicts: Power and Negotiation (New Horizons in Environmental Law Series)*”, Edward Elgar, Cheltenham, UK (2008).

This is the first of two parts. **Part 2** will outline the conflict resolution principles and processes for finding a sustainable solution for climate change.

² Environment Protection and Heritage Council and the Ministerial Council on Mineral and Petroleum Resources, ‘Draft Paper on Environmental Guidelines for carbon Dioxide Capture and geological Storage – November 2008’. <http://www.nepc.gov.au/taxonomy/term/25> (accessed 6 February 2009).

³ See columns of Dennis Atkins and Graham Readfern in the “*Brisbane Courier Mail*”, February 21-22, 2007 at pages 50-1.

⁴ Craig, R.K. *Environmental Law in Context: Cases and Materials*, Thomson West, St. Paul, Minnesota USA (2005).