Chapter 4

Property Rights

Introduction

4.1 This chapter examines the issue of property rights attaching to carbon units and the ramifications that may have if a future government seeks to reverse the Gillard Government's proposed carbon tax and emissions trading scheme.

4.2 The issue considered in this chapter has become a much vexed question in recent times. It was addressed, in brief, in the committee's Interim Report – *The Carbon Tax: Economic pain for no environmental gain* – and raised before the Joint Select Committee on Australia's Clean Energy Future Legislation (the Joint Committee), where it was not resolved. In that light, the committee feels property rights in carbon units requires further consideration.

Carbon units and property rights

Background

4.3 The government's proposed carbon tax is structured such that it will require emitters to acquire carbon units from the Clean Energy Regulator and then surrender those units to meet their obligations under the clean energy mechanism.[1] The legislative framework that has been drafted to give effect to this aspect of the carbon tax scheme is set out in Division 3 of Part 4 (Carbon Units) of the Clean Energy Bill 2011 (the Bill).

4.4 Although all of the clauses that Part 4 contains are detailed and complex to account for the transition from a fixed price carbon tax to a floating emissions trading scheme, one particular feature of the legislative design that has attracted significant commentary of late is clause 103, which specifies that a carbon unit is personal property.

4.5 The Explanatory Memorandum to the Bill seeks to explain the intent of clause 103:

> Transparent and secure property rights over and legal interests in carbon units will promote confidence in the integrity of the units and reduce uncertainty for their holders, and further promote confidence in the development of the market for carbon units.[2]

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1 Clean Energy Bill 2011, *Explanatory Memorandum*, p. 117.

2 Clean Energy Bill 2011, *Explanatory Memorandum*, p. 121.

4.6 It was this committee, in its Interim Report, that first cited concerns with the government's proposal to attach property rights to carbon units. Evidence provided to this committee suggested that enshrining such a feature in law may have unintended consequences:

> The definition of a carbon unit as a personal property right limits the scope of action of future governments and parliaments. As economist Professor Henry Ergas has noted:
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> ...internationally, governments have generally ensured that pollution permits are not treated as conventional property rights, precisely as to be able to revise environmental controls as circumstances change. Rather, this provision serves one purpose only: to guarantee any attempt at repeal triggers constitutional requirements to pay compensation, shackling future governments.[3]

4.7 The committee's concern is that by attaching property rights to carbon units, any future compulsory acquisition of carbon units by a government would create a liability to payment of compensation under subsection 51(xxxi) of the *Commonwealth of Australia Constitution Act 1901* (The Constitution). Subsection 51(xxxi) of The Constitution provides the Parliament with the power to make laws relating to:

> ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws[4]

4.8 This concern was again raised with the Joint Committee. The Joint Committee sought to clarify this matter throughout the course of their inquiry and sought the views of legal experts who appeared before their committee.

Certain Uncertainty

4.9 The legal experts who appeared before the Joint Committee were of the view that there is doubt as to whether or not compulsory acquisition of carbon units would give rise to compensation given that the creation of property has occurred through statute rather than common law.[5] As a result, they suggested that clarification is necessary:

> **CHAIR:** As a legal adviser and dealing with businesses in this space already, have you looked at this issue of personal property and the impact it would have? And has a view been formed with the people you represent, as opposed to your law firm, on how it would work and all the rest of it?

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3 Senate Select Committee on the Scrutiny of New Taxes, *Interim Report – The Carbon Tax: Economic pain for no environmental gain*, October 2011, p. 43.

4 Subsection 51(xxxi), *Commonwealth of Australia Constitution Act 1901*.

5 Professor Lee Godden, Director, Centre for Resources, Energy and Environmental Law, Melbourne Law School, University of Melbourne, Ms Noni Shannon, Special Counsel, Norton Rose, *Joint Select Committee on Australia's Clean Energy Future Legislation, Proof Committee Hansard*, 26 September 2011, p. 53.

> **Ms Shannon:** As to advising business, there is a benefit that they see from it being personal property. There is a certainty around the right, for example, to take security over it, to trade it and to carry it as an asset or a liability on their books. They consider it to be a positive that it is personal property.
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> **Prof. Godden:** What needs to be understood is that it is personal property and it is created as a particular form of statutory property. It does not necessarily have all the attributes that at common law are understood to attach to personal property. So I think we need some clarification around those issues. I am flagging that perhaps more needs to be clarified here because, if we look at other instances where we have had resources attributed as private property or as property—and here I am drawing on water trading examples—the High Court has not interpreted them, in certain instances, as having the same characteristics as at common law. **So I do think there is clarity needed around what is intended with the designation of personal property.**[6] [emphasis added]

4.10 On further questioning as to whether or not acquisition of these property rights through extinguishing the carbon unit regime would constitute the acquisition of property, and therefore require compensation on 'just terms', conflicting views would suggest that there is a degree of uncertainty surrounding this issue:

> **Senator BIRMINGHAM:** And of course this is of curiosity in that it is property that is being created to offset a liability that the companies who receive these permits would otherwise have. In your learned opinions, if the liabilities were extinguished by some future legislative means would there be a problem with extinguishing the property simultaneously?
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> **Ms Shannon:** To pick up on Professor Godden's comment previously, which made reference to the water rights that we have in each of the state based schemes: each of those are rights, and they look and feel very much like a property right—they are registered, there is legal title to those rights. But the courts have consistently held that they are not a property right subject to just-terms compensation on the extinguishment of those rights and the entitlement of those rights. We have not looked at that particular issue—if the liability were to be extinguished, whether the right could also be extinguished—but it is a statutory scheme established purely by statute and not based in the common law like our common law real property rights are. So it is open to statute to obviously abolish the scheme as well. We have not looked, as I said, though, at the issue of compensation.
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> **Mr CHRISTENSEN:** The parliamentary secretary for climate change has stated that these units are property rights in their nature; are you saying that that is not the case?

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6 Ms Anna Burke MP, Chair, Joint Select Committee on Australia's Clean Energy Future Legislation, Professor Lee Godden, University of Melbourne, Ms Noni Shannon, Norton Rose, *Joint Select Committee on Australia's Clean Energy Future Legislation, Proof Committee Hansard,* 26 September 2011, p. 53.

> **CHAIR:** Again, it is a bit of a difficulty if they have not seen the information. I have not seen the information you are asserting.
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> **Mr CHRISTENSEN:** These units are not property in their own nature; they are property by legislative means.
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> **Ms Shannon:** They are property by legislative means and they are different from property in real property which comes from the common law, basically.
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> **CHAIR:** But that is not uncommon, as you have said, in respect of water rights; it is not extraordinary—
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> **Mr Young:** And offshore exploration rights.[7]

4.11 Mr Grant Anderson of the Law Council of Australia suggested that the just terms compensation provision of subsection 51(xxxi) of The Constitution would not be 'enlivened' should the carbon unit scheme be repealed in future as repeal would not amount to an acquisition of property:

> For the just terms provisions to be enlivened, there has to be a transfer of property from one entity to another. If you were, for example, to repeal the legislation, these carbon units would still have a separate life, I guess, out there, but there would not—in my view, at least—be any acquisition which would enliven those just terms, because there is no transfer of the property. It has just lost value.[8]

4.12 It could be expected that that outcome would be challenged by those entities left with worthless carbon units.

4.13 Senator Milne, Deputy Chair of the Joint Committee, sought to clarify how that outcome would result:

> **Senator MILNE:** Mr Anderson, you said a moment ago that, in the event that a scheme was abolished or repealed, the permit would lose value—as opposed to not requiring compensation. So are you are saying that, if a company spends money buying permits and the scheme is abolished, they would not receive any compensation; they would just lose a massive investment?
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> **Mr Anderson:** That is correct, because under the Commonwealth Constitution, for it to enliven the requirement for just terms acquisition, there has to be a transfer of property from the entity that owns that property

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7 Mr George Christensen, Member Joint Committee on Australia's Clean Energy Future Legislation, Senator Simon Birmingham, Member, Joint Committee on Australia's Clean Energy Future Legislation, Professor Lee Godden, University of Melbourne, Ms Noni Shannon, Norton Rose, Mr Douglas Young, Chairman, Climate Change Law Working Group, Law Council of Australia, *Joint Select Committee on Australia's Clean Energy Future Legislation, Proof Committee Hansard*, 26 September 2011, p. 53.

8 Mr Grant Anderson, Member Business Law Section Working Group on Climate Change Law, Law Council of Australia, *Joint Select Committee on Australia's Clean Energy Future Legislation, Proof Committee Hansard*, 26 September 2011, p. 54.

> to, say, the Commonwealth. If you merely repeal the legislation, there is no transfer of property; you just have the carbon units sitting out there. They are valueless because there is no liability to use them to acquit—
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> **Senator MILNE:** So all those companies that are required to buy permits who had bought permits would suffer a very substantial loss under that policy?
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> **Mr Anderson:** Under that scenario—if that were to be the case.[9]

4.14 The Joint Committee in its report, however, did not canvass these concerns or conflicting views but rather preferred the view that the object of clause 103 of the Bill is to create certainty and avoid any unfortunate consequences of fraud, as has been experienced in Europe in recent times.[10]

4.15 The Joint Committee concluded that:

> The effect of clause 103 of the Clean Energy Bill 2011 is to make clear that a carbon unit issued under the mechanism is an item of personal property capable of being owned and transferred from one person to another for the purposes of the mechanism. This is intended to clarify the status of the units and provide confidence in their integrity under the mechanism. It also provides clarity on the status of units for the purposes of using them as security or creating equitable interests in them.[11]

Committee comment

4.16 As a general matter, the distinction between property rights created by statute and rights created under the common law is not necessarily helpful in resolving the issue of the potential consequences of future repeal of the legislative scheme. It is clear, for example, that intellectual property rights, though largely statutory in nature, are capable of benefiting from the protection of subsection 51(xxxi) of The Constitution.

4.17 Similar issues to those canvassed here were raised in 2009 when the Parliament was considering the Carbon Pollution Reduction Scheme (CPRS). In that case, the scheme, through legislation, sought to lock in a pollution reduction target, the concern being that if future governments sought to amend that target, such action

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9 Senator Christine Milne, Deputy Chair, Joint Select Committee on Australia's Clean Energy Future Legislation, Mr Grant Anderson, Law Council of Australia, *Joint Select Committee on Australia's Clean Energy Future Legislation, Proof Committee Hansard*, 26 September 2011, p. 54.

10 Mr Martin Wilder, Partner, Baker and McKenzie, *Joint Select Committee on Australia's Clean Energy Future Legislation Committee Hansard*, 26 September 2011, p. 53.

11 Joint Select Committee on Australia's Clean Energy Future Legislation, *Advisory Report on the Clean Energy Bills and the Steel Transformation Bill 2011*, October 2011, paragraph 4.43, p. 75.

could trigger a requirement to pay compensation under subsection 51(xxxi) of The Constitution.

4.18 Legal opinion on this aspect of the CPRS identified these concerns:

> The government's power to toughen the CPRS once it has begun is further limited by cl 94, declaring AEUs [Australian Emissions Units] to be "personal property". According to both the White Paper and the Explanatory Memorandum, the intention here was to provide maximum security and certainty in AEUs, promoting investor confidence in these instruments. However, it is worth noting that in most emissions trading schemes that have preceded the CPRS tradable permits were limited to licenses to emit, rather than full-fledged proprietary rights. The importance of this proprietary designation lies in the way it limits the Commonwealth's ability to alter or acquire AEUs subsequent to issuing them...Rights conferred by statute are not necessarily covered by s 51(xxxi), but nor are they necessarily excluded from its protection. Whether they are covered depends on the terms of the statute; in particular, whether it creates rights with a degree of permanence and stability, or rights that are "inherently susceptible of variation". The definition of "acquisition" is also broadly defined, extending to restrictions on property rights that confer a benefit on the Commonwealth, regardless of whether that benefit "correspond[s] precisely" with the restricted right.
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> AEUs are clearly intended to attract this protection... This legal conclusion has important political ramifications, because if the government should wish to recall AEUs for whatever reason, it cannot simply take them back – it must buy them back. If AEUs are over-allocated, this will cause serious problems. So much is demonstrated by the experience of water trading in Australia over the last decade. Previous governments set the overall "caps" on water allocations in the Murray-Darling Basis too high... To remedy this dire situation, the current Commonwealth Government has had to commit billions of dollars of taxpayer funds to purchase water entitlements... If AEUs are similarly over-allocated under the CPRS, which appears increasingly likely, the resulting failure will cost taxpayers millions of dollars to fix. Even more disturbingly, future attempts to amend the scheme might also amount to an "acquisition of property".[12]

4.19 There is, in other words, at least the possibility that reducing to zero the value of permits would expose the Commonwealth to a compensation claim. Indeed, that possibility was flagged by the Parliamentary Secretary for Climate Change, the Hon. Mark Dreyfus QC MP. The result would be to hinder repeal of this legislation by a future government.

4.20 This is undemocratic in itself and on top of that, economically and socially irresponsible. After all, even supporters of the government’s scheme, such as

12 Michael Power, 'Emissions trading in Australia: Markets, law and justice under the CPRS', *Environmental and Planning Law Journal*, (2010) 27, pp 145–146.

Professor Garnaut, admit there are many uncertainties about the future global framework for climate change. It would be irrational for Australia to lock itself into a carbon tax and/or an emissions trading scheme should it emerge that comprehensive, effective, global action is not occurring.

4.21 It is understandable that the government, in implementing a system of tradeable permits, would want to clarify the legal basis for their acquisition and trade. However, as with water entitlements, it could achieve this goal, and thus provide investors with certainty, while making it clear that any modification to the value of the permits, including through their repeal, did not give rise to a basis for compensation. It could and it should, in other words, specify that it retained the right to vary the permits, including by repeal.

4.22 In contrast, the government has ignored the concerns raised by legal experts and their recommendation that clarification be sought as to whether or not just terms compensation pursuant to subsection 51(xxxi) of The Constitution would result from a future the repeal of the legislation.

4.23 The committee is of the view that in failing to clarify this issue the government is merely seeking to undermine the scope for future governments to reverse its policy. In addition, the government's acting in breach of an emphatic pre-election commitment not to introduce a carbon tax. The Gillard Government, irresponsibly, is also intent on preventing future governments from implementing a commitment to rescind the carbon tax and/or an emissions trading system.

Recommendation 5

4.24 In the event that the government proceeds with the carbon tax, the committee recommends that clause 103 of the Clean Energy Bill 2011 be amended to ensure that a property right does not attach to permits and to make it clear that permits can be altered, repealed or revoked at any time without that amounting to an acquisition of property.