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8 April 2009

Mr John Hawkins
The Secretary
Senate Select Committee on Climate Policy
PO Box 6100
Parliament House
CANBERRA ACT 2600
Via email: climate.sen@aph.gov.au,

Dear Mr Hawkins

Inquiry into policies relating to climate change

Leighton Holdings and its subsidiary companies welcome the opportunity to make a submission to the inquiry into policies relating to climate change. We agree with the Government's overarching objective to reduce Australia's carbon pollution while building long-term economic prosperity in a lower carbon economy.

As a successful Australian-based company, large employer and big energy user, the Leighton Group supports the introduction of an emissions trading scheme as the central policy to reduce the nation's carbon pollution. We are keen to work with the Government to ensure the design of the Carbon Pollution Reduction Scheme (CPRS) meets Australia's economic and environmental goals.

However, we believe the move towards a carbon constrained economy must not come at the expense of jobs and our standard of living. Cutting our greenhouse gas emissions to meet our Kyoto obligations and beyond will be a major economic reform. Yet the pace of the Government's timetable leaves little time for genuine consideration of the practical implementation difficulties and the impact of the proposed design on business.

The National Greenhouse and Energy Reporting System (NGERS), which will provide data to underpin the CPRS, is in its first year of operation and there is still much detail to be clarified and tested. The Leighton Group believes there are significant flaws in this emissions reporting system as it applies to contractors. If the anomaly is not corrected, there is a risk of double counting or incomplete emissions data, particularly from mine sites. Ultimately this will undermine the integrity of the CPRS.

The draft CPRS legislation was released less than a month ago and much of the detail, such as compensation to Emissions Intensive Trade Exposed industries and proposed changes to the emissions reporting system, has not yet been released. While the Leighton Group is working to ensure it will comply with NGERS and to be prepared for the introduction of the CPRS next year, the complexity of both schemes is creating significant commercial and contractual uncertainty for us and our clients.

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Take the time to get the detail right

It is important to get the scheme right. This is even more critical when the current economic climate is forcing businesses to focus on survival, leaving fewer resources to work on preparation for, and compliance with, such a major new regulatory scheme.

The CPRS is only one measure to reduce carbon pollution and others are also needed. These include incentives for investment decisions that are being made now to be directed towards low-emissions technology and behaviour. For example, our coal fired power stations are ageing and even at the current rate of investment in cleaner technologies Australia still experience a shortage of electricity supply.

Australia accounts for only 1.5% of global carbon emissions and has many trade exposed industries. Without the momentum for a global agreement we risk jeopardising our resilient economy which is helping to cushion us from the most severe impacts of the current international financial turmoil. We risk our competitiveness, jobs and prosperity if we impose a significant cost on our exports ahead of other countries.

As the world's largest contract miner employing some 6500 people in Australian mining activities, we are concerned mining companies have warned the CPRS will jeopardise investment and force mine closures in Australia. This will obviously have flow-on effects to companies which provide services to the minerals industry.

As an owner and operator of landfills, Leighton Holdings subsidiary Thiess Services Pty Ltd is also concerned that the proposed CPRS includes waste when there is still no accurate measurement of CO_2-e emissions. It is also concerned that legacy emissions will be included in the scheme from 2018, effectively imposing a retrospective tax on landfill owners and their customers.

Our submission focuses on the impact of NGERS and the proposed CPRS on contract mining. Thiess Services is making separate submissions about waste through the Australian Landfill Owners Association.

Contract mining is unique and requires flexibility

Contract mining is a unique Australian service industry and the proportion of mining done by contractors is increasing, accounting for about 28 per cent of total mining in 2006/07 and employing around 25,000 people. Contract mining has special features that do not fit the basic emissions trading scheme model which is primarily designed for owner-operated facilities. The Leighton Group believes that greater reductions in carbon emissions can be achieved by imposing scheme obligations on project owners, rather than service providers.

The problem relates to the definition of 'operational control' in the NGER Act which does not apply logically or fairly to the mining sector, where a third of work is undertaken by contractors. The definition has the potential to draw service providers

into the trading scheme and make them liable for emissions not of their own making, such as fugitive emissions from coal, with limited potential for recovering the costs of carbon permits and additional administration. Obligations to reduce emissions should properly rest with those best able to do so and those benefiting most from the mining industry – the mine owners.

The Government recognised in the CPRS White Paper that contract mining has special features that do not fit the basic emissions trading scheme model which is primarily designed for owner-operated facilities. It has sought to address the issue through the CPRS with the proposed Liability Transfer Certificate mechanism to allow transfer of CPRS and NGERS obligations from an entity with operational control to an entity with financial control.

However this has practical and commercial difficulties.

There are practical difficulties in collecting data from sub-contractors and other contractors on site with whom the contract miner does not have a commercial relationship. But the legislation would currently make the entity with operational control liable for errors and omissions. Fugitive emissions present particular difficulties as this information often lies beyond the control of the contractor. Open cut coal mines which represent more than three quarters of Australia's coal production have real measurement difficulties for all parties but particularly for contract miners. Measurement control measures are usually not within the ambit of the contractors' agreement with the client nor the feasible scope of their activities. A contract may for instance be to only remove the overburden.

There are commercial difficulties as negotiations to confirm who has operational control under NGERS have stalled without the final CPRS legislation and regulations. If the parties cannot agree, the Greenhouse and Energy Data Officer (GEDO) or new Australian Climate Change Regulatory Authority will be required to determine the liable party. The current uncertainty means there is the potential for a flood of applications to the GEDO over the coming months.

Given the LTC mechanism will not take effect until the CPRS starts on 1 July 2010, there is also the potential the Leighton Group will incur the costs of setting up systems, reviewing contracts and collecting data to meet its NGERS obligations for two years until we can transfer these responsibilities. There appears to be little gain to the Government and a significant burden to our business with this approach.

Given the problems with data integrity and collection of information from sub-contractors, the Government could consider an enforcement moratorium for NGERS data until the CPRS provisions are bedded down and operational control issues are resolved with our clients.

A more effective solution is to change the NGER legislation.

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The National Greenhouse and Energy Reporting (Amendment) Bill 2009 is currently before the Parliament. The Leighton Group believes the Bill should include a further minor but important amendment of the National Greenhouse and Energy Reporting Act 2007 to ensure the design of the emissions reporting system is workable and that it provides robust data on which to establish the CPRS.

As with the other amendments in this Bill, our proposed amendment would impose no burdens on industry beyond those intended by the Act. Rather, it would ensure the Act applies to the mining industry in a clear, workable and sensible way.

An amendment will give practical effect to the flexibility to transfer operational control from contractors to mine owners intended by the Government in the CPRS White Paper and draft CPRS Bills. It will:

- Allow entities to commercially negotiate emissions reporting and acquittal liabilities ahead of the first reporting period on 31 October 2009, therefore ensuring accurate data underpins the CPRS.
- Provide more certainty for business and reduce compliance costs as we prepare to meet our obligations under NGERS and any resulting obligations under the CPRS.
- Limit the number of applications to the Greenhouse and Energy Data Officer for determinations of the entity with operational control.
- Reduce the regulatory burden on industry and improve the reporting effectiveness of NGERS.

We urge that it be incorporated into the Bill currently before the Parliament because of the urgent need to correct the problem and provide certainty ahead of the requirement to register for NGERS by 31 August 2009 and to report by 31 October 2009. Otherwise the early years of the NGERS could be fraught with transitional problems which could be avoided with mine owners being recognised in the legislation as the liable parties.

The Leighton Group's initial proposal for a new regulation under the NGER Act is supported by the Australian Industry Group, Australian Constructors Association, and Minerals Council of Australia (attached). The Department of Climate Change has advised (orally) that it may not be feasible to proceed by way of regulation due to inconsistency with the NGERS Act, which is why a corresponding amendment to the Act is needed as a matter of priority.

Leighton Group proposal

The Leighton Group makes the following recommendations:

- Include a further amendment in the NGER (Amendment) Bill 2009 to explicitly recognise mine owners as the facility operator on mine sites, with responsibility for reporting on energy use, energy production and greenhouse emissions and for acquitting carbon permit liabilities.

- Mirror the provisions in the CPRS legislation.
  - The alternative would be to amend the NGER Act to achieve certainty and flexibility for parties on a mine or major construction project to transfer operational control to the entity with financial control ahead of the first reports due under the scheme by 31 October 2009.
- The CPRS should differentiate between mine owner liabilities for emissions directly associated with the resource (ie: fugitive emissions) and operator liabilities for emissions produced during extraction and haulage of the resource.
- The emission liability threshold for facilities of 25kt CO_2-e should exclude fuel-generated emissions to avoid unnecessary trading and administration burden for marginal emitters.

The Leighton Group is keen to work with the Government to ensure the CPRS is a workable and effective policy to reduce Australia's carbon pollution. However the complexity of the proposed CPRS makes it difficult to fully appraise whether it will achieve its desired objectives. We believe the it is important to take the time to get it right.

Kind regards

CATHERINE FITZPATRICK
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Attach Letter to Minister for Climate Change

AUSTRALIAN CONSTRUCTORS ASSOCIATION

Minerals Council of Australia

AUSTRALIAN INDUSTRY GROUP

14 November 2008

Senator the Hon Penny Wong
Minister for Climate Change
Parliament House
Canberra ACT 2600

Dear Minister

Proposal for mining industry NGERS regulation

We seek a further regulation under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) to provide certainty and flexibility to the mining industry in relation to carbon pollution reporting and acquittal liabilities.

As we have discussed with your office and the Department of Climate Change, we are concerned about implementation problems and potential emissions liabilities under the Carbon Pollution Reduction Scheme (CPRS) for contract miners arising from the definition of 'operational control' under the National Greenhouse and Energy Reporting Scheme (NGERS).

For a sector of the Australian economy as important as the mining industry, it is crucial that there be a clear, workable and sensible definition of 'operational control' under the NGERS - a definition that takes into account the commercial realities of contract mining operations. In our view the current definition is unworkable in the case of mining facilities involving contract miners.

We believe a revised definition of 'operational control' under s11 of the NGER Act would better accommodate the full range of functional relationships on mine sites and reduce compliance costs for industry, while still providing certainty for regulators and achieving the aims of the NGER Act. It would also provide flexibility for mine owners to arrive at the most efficient allocation of the full range of regulatory responsibilities at a mine.

We strongly urge the Government to make a further regulation under the NGER Act to achieve the certainty and flexibility that is required ahead of the first reports falling due next September. This would avoid the need to amend the Act. It would also resolve potential inconsistencies with the NGER Act and the proposed CPRS emissions obligations in relation to mining activities and facilities.

We attach a draft regulation and further background material for your consideration.

Yours sincerely,

Wal King, ACA

Mitchell H. Hooke, MCA

Heather Ridout , AIG

Attch.

ATTACHMENT

Draft regulation 2.24 (made under s11(1)(a) and s77 of the NGER Act)

Division 2.6 Operational control: section 11

2.24 Meaning of *operational control* for mining industry

(1) For paragraph 11(1)(a) of the Act, this regulation establishes further requirements for determining if a controlling corporation or another member of the controlling corporation's group has operational control over a facility.

(2) If:

(a) the relevant facility is a mine (the ***mine***); and

(b) the mine owner or mining lease holder in respect of the mine, or a manager or operator acting on behalf of the mine owner or mining lease holder, (collectively, the ***mine owner***) engages another entity (the ***contract miner***) to carry out mining activities at the mine,

then, for the purposes of the definition of ***operational control*** in section 11 of the Act:

(c) where the mine owner and the contract miner expressly agree in writing:

(i) that the contract miner is to be taken to have operational control over the facility for the purposes of section 11 of the Act; and

(ii) the period during which the contract miner is to be taken to have operational control over the facility (provided the period does not exceed the term of the contract miner's engagement to carry out mining activities at the facility),

then the contract miner will be taken to have operational control over the facility for the agreed period, whether or not the contract miner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act during the agreed period;

(d) where subparagraph (c) does not apply:

(i) the mine owner will be taken to have operational control over the facility for the purposes of section 11 of the Act, whether or not the mine owner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act; and

(ii) the contract miner will be taken not to have operational control over the facility for the purposes of section 11 of the Act, even if the contract miner satisfies any or all of subparagraphs s11(1)(a)(i), (ii) or (iii) of the Act; and

(e) subsection 11(4) of the Act will not apply as between the mine owner and the contract miner.

(3) If the mine owner is more than one entity, this regulation does not affect the operation of section 11 of the Act as between those entities.