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# THE PLACE OF LEGISLATION AND REGULATION AND THE ROLE OF POLICY: LESSONS FROM THE CPRS

SERGE KILLINGBECK\*, MICHAEL B. CHARLES\*\*

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## **Abstract**

*This article discusses the hierarchical relationship between legislation, regulation and the place of policy in that relationship. In particular, it outlines how this was represented in the development of a legislative framework for the introduction of an Australian emissions trading scheme (ETS) under the banner of the Carbon Pollution Reduction Scheme (CPRS). It is argued that the authors of the draft CPRS and the policy statements made in the White Paper (the blueprint for the CPRS regulations) did not pay sufficient regard to the necessity to provide clear connections between regulations and the provisions of the proposed Act. The potential dysfunction that this creates is viewed through the prism of the treatment of carbon offsets, since this area of the proposed scheme was most demonstrative of such deficiencies. The article proposes that not paying sufficient attention to the relationship between draft regulations and the draft enabling Act could have undesirable consequences. With respect to the implementation of an ETS or any other form of carbon pricing, entities reluctant to move from business as usual to a lower emissions business model may choose to challenge the validity of their liabilities on the basis of a disconnection between the provisions of the enabling Act and the associated regulations.*

## **I INTRODUCTION**

In Australia, legislative regimes have a clear hierarchy, with the laws (Acts) passed by parliaments having ascendancy over subordinate legal instruments such as regulations, orders and rules that take their authority from the enabling Acts.<sup>1</sup> Departmental policy and guidelines may be included in that regime as an administrative addendum in support of regulatory instruments, even though they lack independent legal authority.<sup>2</sup> It follows that each subordinate category must remain inside the boundaries set by the governing (enabling) legislation. Despite the established strictures and a well-developed line of authority, the development of the proposed legislative regime intended to underpin an emissions trading scheme (ETS) for Australia strayed from this hierarchy. The principal documents meant to reflect that development was the Carbon Pollution Reduction Scheme Bill 2009 (Cth) exposure draft (10/03/2009) (CPRS),<sup>3</sup> and the *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future White Paper (White Paper)*.<sup>4</sup> The *White Paper* and the CPRS received considerable attention regarding their content, but much less attention appears to have been paid to their relationship with each other. Indeed, they read as if they were drafted to complement each other as equals, rather than establish a clear hierarchy, with the CPRS as the enabling Act. It is this relationship that constitutes the focus of the remainder of this article.

While the CPRS failed to pass through parliament and was finally dropped as a policy by the current Gillard Labor Government before the 2010 election, a discussion concerning the nature of the CPRS as a legal regime is nevertheless still relevant. With acknowledgement from all sides of politics that mitigating anthropogenic climate change remains a major issue, most agree that a market-based carbon pricing mechanism, such as an Emissions Trading Scheme (ETS), would ultimately prove the most effective means to move the nation to a decarbonised energy future. While the rhetoric in the public debate often refers to the development of a pricing strategy as a 'carbon tax', if one looks past the headlines and the doorstep comments of politicians, much of the current language currently being

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<sup>1</sup> *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 321.

<sup>2</sup> *Minister for Industry and Commerce v East West Trading Co Pty Ltd* (1986) 64 ALR 466, 470.

<sup>3</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth).

<sup>4</sup> Department of Climate Change, *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future-White Paper (White Paper)*, Commonwealth of Australia, 2008.

used in the context of developing mechanisms to create a carbon pricing regime would be quite familiar to those who have studied the CPRS in detail.<sup>5</sup>

Given the proximity of the language being employed in discourse relating to the setting of a carbon price to elements of the CPRS, it is not impossible that those elements will find their way into a revised legal regime designed to oversee a carbon pricing mechanism. To what extent they are reviewed and modified beforehand is naturally open to question, but that likelihood means that discussion regarding any weaknesses in the proposed CPRS regime remains important, especially in order to ensure that inherent weaknesses are not transferred into any future Australian carbon pricing mechanism. While this article focuses on carbon offset schemes as a reference point, the general observations concerning the relationship between regulations and legislation will nonetheless have application to other aspects of the CPRS requiring revision if they are to be transposed into any future pricing mechanism.

Beyond the development of a carbon pricing mechanism and the potential for elements of the CPRS to find their way into a supporting legal regime, the issues discussed here have wider implications. In a political climate with an apparent preference for highly publicized and grandiose policy agendas supported by complex legislative regimes that often need to be prepared in relatively short periods of time,<sup>6</sup> rather than following a more considered path of stepped reforms, cutting corners in the review process to save time may be regarded as an effective strategy to meet imposed political deadlines. By way of contrast, the Office of Legislative Drafting and Publishing's guide to the preparation of legislative instruments stresses the need for thorough and methodical preparation of legislation and policy documents to ensure high quality and robust legislative instruments.<sup>7</sup> This failing has also been addressed by the courts, in one of the accepted authorities on the subject in Australia, *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519. Here, Wells J was highly critical of imprecise drafting, directing those given the task of drafting to a 1958 journal article on the subject.<sup>8</sup> The clear inference was that those given the task of drafting legal instruments, in view of the importance of such instruments, do not have the luxury of latitude in a) their attention to detail, or b) in following proper, accepted practice.

## II OFFSETS IN THE CPRS

Throughout the development phase of the legislative regime for an Australian ETS, offset schemes and the credits that they generate (offsets) remained part of the emissions trading equation, although they moved from a central strategy to the periphery.<sup>9</sup> The CPRS<sup>10</sup> did not directly refer to offset projects at all, but included particular emissions mitigation strategies that, by any estimate, fall into the category of offset schemes, including reforestation,<sup>11</sup> and the destruction of synthetic greenhouse gases (GHGs)<sup>12</sup>. Unlike the CPRS, the *White Paper* policy discussions,<sup>13</sup> which were

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<sup>5</sup> Department of Climate Change and Energy Efficiency, Multi-Party Climate Change Committee, *Carbon Price Mechanism*, Commonwealth of Australia, 2011.

<sup>6</sup> Consider, et al., Workchoices, the National Broadband Network, the Education Revolution.

<sup>7</sup> Office of Legislative Drafting and Publishing Attorney-General's Department, *Drafting services for legislative instruments and other instruments*, Commonwealth of Australia, 2003, 4-7 and 16-17.

<sup>8</sup> *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519, 541, Wells J referring to the article by Elmer A Driedger, 'Public Administrators and Legislation' (1958) 1(2) *Canadian Public Administration* 14.

<sup>9</sup> To follow the change, see Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group on Emissions Trading*, Commonwealth of Australia, 2007, 112; R Garnaut, *Garnaut Climate Change Review Final Report* (2008) <[www.garnautreview.org.au](http://www.garnautreview.org.au)>, 230, 327 and 358 ; *White Paper*, above n4, 6.62.

Furthermore, the CPRS does not expressly use the term 'offset' at all.

<sup>10</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth).

<sup>11</sup> *ibid* pt 10.

<sup>12</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 11. For examples of the types of projects approved for generation of Certified Emissions Reduction Credits under the International Panel on Climate Change's (IPCC) Clean Development Mechanism (CDM), see UNEP Risoe Centre, *Approved CDM methodologies*, UNEP (2010) UNEP Risoe CDM/JI Pipeline analysis and database <<http://cdmpipeline.org/cdm-methodologies.htm>>.

<sup>13</sup> *White Paper*, above n4.

intended to provide a template for future regulations concerning the CPRS,<sup>14</sup> expressly referred to the administration of offset schemes as a general category.<sup>15</sup> The disparate treatment of offset schemes between the draft CPRS and the *White Paper* could imply that the architects of the legislative framework were uncertain what to do with them.<sup>16</sup> Perhaps more simply, in the rush to meet the Government's own well-publicized deadlines, the respective teams drafting the CPRS and the *White Paper* did not communicate with each other as frequently as they might otherwise have done.<sup>17</sup> Irrespective of the explanation for these anomalies, the disparate treatment of offsets between the two documents is one of the more obvious departures from accepted practice in drafting legislative instruments to be found in the development of the CPRS. Given that the treatment of offsets was one of the most deficient aspects of the CPRS's development, with a considerable gulf between their treatments in the two documents being discussed, it serves as a highly appropriate prism through which to view the disjointed nature of this proposed legislative scheme.

### III DEVELOPING AN AUSTRALIAN CARBON PRICING REGIME

Until the mid 1990s, any serious discussion on anthropogenic climate change in Australia remained within the scientific community and the conservation movement. In the early 1990s, the Hawke and Keating Labor Governments articulated 'in principle' agreements that something needed to be done to minimise GHG emissions.<sup>18</sup> At the same time, the European Union began to develop the first phase of its ETS, but a material response from the Australian government remained elusive.<sup>19</sup> In 1997, the Howard Coalition Government set up the Greenhouse Gas Abatement Program under the auspices of the Australian Greenhouse Office. This was designed to contribute AU\$400 million to a four-year program of investigation into the development of an ETS.<sup>20</sup> As soon as the four-year commitment expired in 2001, the Coalition retreated from engagement on climate change until 2007.

By 2007, the Coalition had become increasingly concerned about the need for a political response to climate change.<sup>21</sup> This reengagement in the debate resulted in the release of the *Report of the Task Group on Emissions Trading* on 31 May 2007.<sup>22</sup> This comprehensive document indicated a clear preference for a market-based response to mitigating carbon emissions.<sup>23</sup> The then opposition initiated its own investigations, with the economist Ross Garnaut being asked to develop a report. A series of discussion papers were released and culminated in a final report released in mid 2008,<sup>24</sup> by which time the opposition had become the newly-elected Rudd Labor Government.

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<sup>14</sup> Senate Standing Committee of Economics, *Exposure draft of the legislation to implement the Carbon Pollution Reduction Scheme*, Senate, Australian Parliament, Canberra, 2009, 120 and 121 per Mr Barry Sterland, Acting Deputy Secretary, Department of Climate Change.

<sup>15</sup> Ibid 6.62-6.64 and Chapter 11.

<sup>16</sup> Ibid 6.62-6.64.

<sup>17</sup> Department of Climate Change, *Carbon Pollution Reduction Scheme: Green Paper*, Commonwealth of Australia, 2008, 454-455. (*Green Paper*). See also Wells J's discussion on the importance of being thorough in the development of subordinate legislation in *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519, 540-541.

<sup>18</sup> J Staples, 'Our lost history of climate change', *Australian Policy Online*, 11 November 2009, Swinburne University of Technology, Melbourne, <<http://www.apo.org.au/commentary/our-lost-history-climate-change>>.

<sup>19</sup> T Bonyhady and P Christoff, *Climate Law in Australia*, (Federation Press, 2007) 1-2.

<sup>20</sup> See: Australian Greenhouse Office, *National Emissions Trading: establishing the boundaries*, Discussion paper No.1, Commonwealth of Australia, 1999; Australian Greenhouse Office, *National Emissions Trading: issuing the permits*, Discussion Paper No.2, Commonwealth of Australia, 1999; Australian Greenhouse Office, *National Emissions Trading: crediting carbon*, Discussion Paper No.3, Commonwealth of Australia, 1999; Australian Greenhouse Office, *National Emissions Trading: designing the market*, Discussion Paper No.4, Commonwealth of Australia, 1999.

<sup>21</sup> "[T]here does seem to be a consensus around the fact that significant levels of global warming imply losses in global GDP over the longer term that should be factored into the policy choices made today", *Australian Government Intergenerational Report* (2007), 73, as cited in the Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group on Emissions Trading* Commonwealth of Australia, 2007, 15.

<sup>22</sup> Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group on Emissions Trading* Commonwealth of Australia, 2007.

<sup>23</sup> Ibid 17.

<sup>24</sup> R Garnaut, *Garnaut Climate Change Review Final Report* (2008) <[www.garnautreview.org.au](http://www.garnautreview.org.au)> (Garnaut).

After coming to power in November 2007, the Rudd Government immediately set about developing its response to climate change concerns, including ratifying the *Kyoto Protocol*,<sup>25</sup> and attending the United Nations Framework Convention on Climate Change's Bali Conference.<sup>26</sup> These undertakings moved Australia from outsider to full participant and bound the nation to the terms of the *United Nations Framework Convention on Climate Change*,<sup>27</sup> together with the associated *Kyoto Protocol*. Contemporaneous with Garnaut's final report, the Rudd government developed and released the *Carbon Pollution Reduction Scheme Green Paper* policy discussion in July 2008.<sup>28</sup> This policy discussion did not mirror Garnaut on all matters, but remained closely aligned with his basic findings.

As a consequence, the Rudd Government developed a comprehensive draft of legislation, viz., the Carbon Pollution Reduction Scheme Bill (CPRS),<sup>29</sup> which was released in the first part of 2009. With regard to the Office of Legislative Drafting and Publishing's emphasis on the need for a thorough and methodical approach to preparing legislative instruments and policy documents, less than 12 months had passed since beginning the process of developing a strategy on GHG reduction. The CPRS passed the House of Representatives twice, and was rejected by the Senate on two occasions.<sup>30</sup> In an attempt to have the CPRS passed in some form through the parliament in time to meet the Government's own timeline for having the scheme in effect (i.e., 2011),<sup>31</sup> a number of amendments were negotiated with the opposition.<sup>32</sup> In November of 2009, a comprehensive package of amendments was released. These included changes to the treatment of agriculture; dispensations for coal mining and fossil fuel exporters; adjustment schemes for industry and households; funds to combat the ecological impact of climate change; and broadening and increasing assistance to emissions intensive trade exposed businesses, electricity generators and households. Despite this, the opposition continued to oppose the CPRS' passage.

The CPRS was withdrawn in early 2010, with the Rudd Government announcing that it would delay implementation until after the end of the first commitment period under the *Kyoto Protocol* (post 2012).<sup>33</sup> Shortly thereafter, the Liberal Party's Malcolm Turnbull, who had supported the revised CPRS, was dumped as opposition leader, and Kevin Rudd was deposed as Prime Minister soon thereafter. The subsequent August 2010 election resulted in a hung parliament, but the return of a minority Labor Party Government led by Julia Gillard. The Gillard Government promised to review the Government's response to climate change, but has moved little beyond agreeing that a price on carbon is needed, although it did release a very broad outline for a proposal for a pricing mechanism on 24 February 2011.<sup>34</sup> Alongside the CPRS's development, the Rudd government initiated the development of a *White Paper* policy discussion, which was released in December 2008 and was intended as preparatory to the development of the regulatory regime.<sup>35</sup> It would be expected that the fate of this proposed policy and the regulatory regime that it articulates will be linked closely to the fate of the contents of the CPRS, more so as the government develops an alternative response to pricing carbon.

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<sup>25</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005) (*Kyoto Protocol*).

<sup>26</sup> *United Nations Climate Change Conference at its Thirteenth Session / Twenty-seventh Sessions of the Subsidiary Bodies*, UNFCCC, COP 13 (CMP 3 and AWG 4) 3-14 December 2007, Bali, Indonesia (the Bali Conference).

<sup>27</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992 1771 UNTS 107 (entered into force 21 March 1994) (UNFCCC).

<sup>28</sup> Department of Climate Change, *Carbon Pollution Reduction Scheme – Green Paper* Commonwealth of Australia, 2008 (*Green Paper*).

<sup>29</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth).

<sup>30</sup> Parliament of Australia, *Senate bills list 15 December 2009* (2010) Commonwealth of Australia, <<http://www.aph.gov.au/bills/index.htm>>

<sup>31</sup> *Green Paper*, above n17.

<sup>32</sup> 'Details of proposed CPRS changes', media release, Department of Climate Change, 24 November 2009.

<sup>33</sup> CCH, *Emissions Trading and New Energy – Global Law Guide*, [AUS 2-000] (2010) <[http://intellconnect.wkasiapacific.com.ezproxy.scu.edu.au/scion/secure/index.jsp#page\[3\]](http://intellconnect.wkasiapacific.com.ezproxy.scu.edu.au/scion/secure/index.jsp#page[3])>.

<sup>34</sup> Department of Climate Change, Multi-Party Climate Change Committee, above n5.

<sup>35</sup> *White Paper*, above n4.

While it seems unlikely that the Government would attempt to revive the CPRS, at least as it was envisaged in the exposure draft and *White Paper*, there remains no real indication as to the extent to which the existing exposure draft and *White Paper* will influence the shape of any future carbon pricing legislation. Given the language used by the Multi-Party Climate Change Committee on the proposed pricing mechanism outline,<sup>36</sup> any assumption that the CPRS regime will have no bearing on the Government's response to climate change would appear to be premature.

#### **IV THE RELATIONSHIP BETWEEN LEGISLATION AND REGULATION: AN OVERVIEW**

As stated in our introductory remarks, there must be an identifiable relationship between an enabling Act and subordinate legislation (regulations).<sup>37</sup> It is not enough for the legislation to provide simply that regulations can be made, since the nexus between the provisions and objectives of the legislation and the regulations made under its auspices must be readily ascertainable.<sup>38</sup> Commonwealth regulations are subject to parliamentary review.<sup>39</sup> Regulations, as delegated legislation, are also subject to judicial review by the courts regarding validity. The power to rule on the validity of delegated legislation has been established by a long line of authority across several centuries extending to the present day in Australia.<sup>40</sup> While regularly challenged, this power remains largely intact, thereby allowing the courts to declare a regulation invalid in instances where it deals with matters not within the scope of powers of the governing legislation. In these cases, the regulation's operation is *ultra vires*, i.e., beyond or in excess of the legal power or authority that purports to govern it.<sup>41</sup>

The operation of regulations and other subordinate legislation can also be subject to judicial review under the Federal Court's supervisory powers regarding the actions of administrative authorities and tribunals.<sup>42</sup> Within that judicial authority resides the power to declare decisions made in the exercise of regulatory authority *ultra vires*. This signifies a determination that regulations and the decisions made under them are only valid if the regulatory provision conforms exactly to the statutory power given by the enabling Act.<sup>43</sup>

##### **A. The courts consider the basis of regulatory authority and its extent**

###### **1 *Shanahan v Scott***

In reference to a general provision for the making of regulations contained within an Act,<sup>44</sup> the High Court in *Shanahan v Scott* (1957) 96 CLR 245 at 250 stated that:

[s]uch a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen

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<sup>36</sup> Department of Climate Change, Multi-Party Climate Change Committee, above n5.

<sup>37</sup> *Macquarie Bank Ltd*, above n1, 320-321.

<sup>38</sup> K Hall and C Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 24-25.

<sup>39</sup> *Legislative Instruments Act 2003*(Cth) Pt 5.

<sup>40</sup> See D Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2005), where, across several chapters, the authors cite a substantial body of case law supporting the legitimacy of judicial review of the validity of delegated legislation, from the statements of Holt CJ in *The City of London v Wood* (1702) 12 Mod 669 at 678; 88 ER 1592 to decisions of superior courts of record in Australian jurisdictions. Chapter 28 includes a discussion of the ousting of judicial review and affirm that, other than by direct reference, this has been largely unsuccessful.

<sup>41</sup> D Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2005) 114-115.

<sup>42</sup> See *Administrative Decisions (Judicial Review) Act 1977* (Cth) and *Judiciary Act 1903* (Cth).

<sup>43</sup> G Heilbronn and others, *Introducing the Law* (CCH, 7<sup>th</sup> ed, 2008) 109-110.

<sup>44</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) s 387.

the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.<sup>45</sup>

As the court pointed out in *Shanahan*, regulations are intended to be a management tool to develop the day-to-day operative detail of how a particular Act is to be applied. To continue being valid, a regulation (or other category of subordinate legislation) must remain within the stated purview of the enacted law (the enabling Act). A regulation is therefore not permitted to extend an Act's stated scope and extent of operation beyond its expressed intention.<sup>46</sup>

### **2 *Morton v Union Steamship Co of New Zealand Ltd***

The High Court took the same general approach in *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 that it adopted in *Shanahan*. In a unanimous decision, the court provided guidance as to the task of a court in evaluating the validity of a regulation. The court made it clear that the purpose of regulation is to provide for the administration and management of an Act's operation—not determine its extent and coverage.<sup>47</sup> According to this ruling, regulations are meant to ensure solely that the purpose and objectives of the Act are put into practice.

The court identified two types of Acts and how the differences between them affected the validity of the subordinate regulation. Where an Act provides little more than a skeletal framework, regulation can be very broad and detailed so as to ensure the effective implementation of the Act's objectives and purpose. Conversely, where an Act goes into detail regarding its operation and coverage of a field of interest, regulation must show a close link to specific provisions in the legislation, and will be restricted in its application to the precise subject matter of the enabling provision.<sup>48</sup> However, irrespective of the level of detail, the fundamental requirement remains that the regulation must stay within the purview of its enabling Act, and *must not* be used as an ancillary tool to define or expand the scope and extent of the subject Act.

### **3 *R v Goreng-Goreng***

The view of the High Court in *Morton*<sup>49</sup> was confirmed by Refshauge J in *R v Goreng-Goreng* (2008)220 FLR 21, where it was held that the relevant regulation could be related back to the Act.<sup>50</sup> In particular, his honour referred to the provision providing authority to make regulation '(a) required or permitted by this Act to be prescribed'.<sup>51</sup> This mirrors s 387 (a) of the CPRS. His honour also discussed provisions of the subject Act that provide for regulations to prescribe further matters covered by specific Parts of the Act as exists in numerous sections of the CPRS.<sup>52</sup> While the court in *Goreng-Goreng* applied a very broad application to determine the validity of the regulations, Refshauge J accepted the principle, as espoused in *Shanahan*,<sup>53</sup> that the subject matter of the regulatory provisions must still be connected directly with the subject matter of the enabling Act.<sup>54</sup>

Refshauge J looked at the interpretation of the first part of the authorising provision referring to those regulations that are 'required or permitted by this Act to be prescribed' in comparison with regulations that take their authority from the second part, which are '[n]ecessary or convenient to be prescribed for carrying out or giving effect to this Act'.<sup>55</sup> He acknowledged, too, that regulations taking their authority from a specific provision do not have to pass the same test with regard to giving effect to an Act's objectives. The subject matter of these regulations must, however, demonstrate a clear, direct connection to the provision prescribing their use.

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<sup>45</sup> *Shanahan v Scott* (1957) 96 CLR 245, 250 (*Shanahan*).

<sup>46</sup> *Ibid* 291.

<sup>47</sup> *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402, 410 (*Morton*).

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> *R v Goreng-Goreng* (2008)220 FLR 21, 34-35 (*Goreng-Goreng*).

<sup>51</sup> *Ibid* 36.

<sup>52</sup> *Ibid* 36.

<sup>53</sup> *Shanahan*, above n45, 250.

<sup>54</sup> *Goreng-Goreng*, above n50, 36.

<sup>55</sup> *Ibid*.

His honour also referred to a section allowing regulations to prescribe the treatment of 'other conduct' so as to include prescribing codes of conduct with respect to employee conduct not actually envisaged by those framing the legislation<sup>56</sup>. Yet he limited this broad scope by saying that 'they would still have to fall within a proper construction of the breadth allowed by the permission (or requirement) granted'.<sup>57</sup> Where a regulation is claimed to draw its authority from a specific provision rather than a general authority to give effect to an Act, the regulation must remain specifically within the subject matter of that provision.

### **B. Pearce and Argument on legislation, regulation and other Acts**

In their authoritative text *Delegated Legislation in Australia*,<sup>58</sup> Pearce and Argument provide several authorities regarding the relationship between regulations and other Acts on which they may have an effect. They cite Channell J in *Gentel v Rapps* [1902] 1 KB 160, where his honour observed that a regulation could be made invalid where it was not only repugnant with the Act under which it was made, but also the 'general law'.<sup>59</sup> From this, the authors extrapolate that the comment 'general law' should include both legislation and the common law. They went further and observed that, in their opinion, *Powell v May* [1946] KB 330 provided the 'clearest authority' regarding delegated legislation being invalid where it is found to be inconsistent with an Act other than the Act under which it was made.<sup>60</sup> While relying on English authority to support their position, they also provide several examples of corresponding Australian authorities reaching equivalent conclusions.<sup>61</sup>

However, the same authors noted that, where a regulation and an Act other than the enabling Act can both be complied with, the regulation in this case not being repugnant to the operation of the other Act, the operation of both should be cumulative, as seen in the case of *South Australia v Tanner* (1989) 83 ALR 631. *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519 at 541 provided that any argument that regulations and the provisions of another Act are to operate cumulatively may be more readily available if the enabling Act does not use the formula 'not inconsistent with this or any other Act'. Pearce and Argument qualified this by stating that, for an argument that both an Act and delegated legislation from another Act can be complied with together, there will have to be 'the clear intention of the Act ... that the delegated legislation is to remain on foot notwithstanding the apparent inconsistency'.<sup>62</sup> This tends to comply with the authorities cited in the previous section, such as *Shanahan v Scott*,<sup>63</sup> since a regulation can only have an effect on matters within an identifiable legislative authority. If that authority cannot be specifically identified, irrespective of the legislative source, the regulation is beyond its legislative scope of operation and is therefore invalid.

It is possible for an empowering Act to indicate that delegated legislation made under it has priority over earlier Acts. That said, Pearce and Argument provide that there must be either a) specific direction within the empowering legislation elevating delegated legislation to enacted provision, or b) a judicial ruling on the proper effect of the regulation.<sup>64</sup> The authority that the authors cite is *R v Minister of State for the Interior* (1972) 20 FLR 449 at 458.<sup>65</sup> Here, the court cited the earlier *Ex Parte Reid; Re Lynch* (1943) 43 SR (NSW) 207 where, at 215, the court determined that a regulation is invalid if it is in excess of the power vested in the regulation-making authority provided for in the governing legislation. But if it is within the scope of that power, a court cannot examine it for invalidity. The court in *R v Minister for the Interior* also addressed an instance where a regulation is apparently repugnant to the general law and other regulations. Their views were in accordance with

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> D Pearce and S Argument, above n41, Chapter 19.

<sup>59</sup> Ibid, 231.

<sup>60</sup> Ibid, 231.

<sup>61</sup> Ibid, Chapter 19, citing *Stevens v Perrett* (1935) 53 CLR 449; *Re Port Adelaide; Ex parte Groom* [1922] SASR 35; *Webster v McIntosh* (1980) 32 ALR 603; *TN v Walford* (1998) 126 NTR 8, et al.

<sup>62</sup> D Pearce and S Argument, above n41, 232.

<sup>63</sup> *Shanahan v Scott*, above n45, 250

<sup>64</sup> D Pearce and S Argument, above n41, 233 citing *R v Minister of State for the Interior* (1972) 20 FLR 449 on the elevation of delegated legislation through enactment and *Hall v Manahan* [1919] StRQd 217 regarding a judicial ruling.

<sup>65</sup> Ibid.



the authorities already cited, i.e., that where a regulation appears to be operating in excess of its legislative authority and thereby extending the scope of the enabling legislation beyond its stated subject matter, it should be determined to be invalid.<sup>66</sup>

Pearce and Argument referred to *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519 with regard to the capacity for a regulation and another Act to have cumulative effect, at least where that regulation is not repugnant to the Act.<sup>67</sup> In that case, Wells J went further and stated that, where there is no direct statement concerning inconsistency, 'the question of reconciling the challenged legislation becomes one that is to be resolved by invoking the ordinary canons for the construction of legislation, principle and subordinate'.<sup>68</sup> Thus, in assessing the validity of regulation, we come back to the authorities already mentioned regarding the ability of regulations to extend the scope of the governing Act beyond its stated authority. A regulation *must not* interfere or otherwise impact on the operation of others Acts, unless that possibility is expressly provided for in legislation.

## V MAKING REGULATIONS UNDER THE CPRS

In the CPRS, the general authority to make regulations can be found at Section 387, which states:

The Governor-General may make regulations prescribing matters:

- a) Required or permitted by this Act to be prescribed; or
- b) Necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The two subsections address, at a), where there is specific reference to the authority to make regulation on a specific aspect of the Act and, at b), a more general authority acknowledging that regulations are needed to ensure the day-to-day management of matters addressed by the Act. This general provision is found in many Acts and could therefore be considered a standard provision. However, this form of words is not prescribed, with legislators being able to vary the power to make regulations as they see fit. From an inspection of the form of words used in Section 387, the drafters of the CPRS have clearly not deviated from the standard form. Accordingly, the making of regulations generally under this Act (and their validity) should be viewed in accordance with the accepted rules and boundaries for making regulations.<sup>69</sup>

Within the draft CPRS, several sections limit the application of other regulations and legislation to actions taken under the CPRS.<sup>70</sup> Sections 24(b), 181 (4) and 250 provide several references to matters applying to the CPRS to be considered in accordance with specific terms provided for in regulations nominated by those sections. Ss 112 to 116 refer to the extent to which the regulations made under the CPRS can give effect to the Kyoto Rules as they relate to the issue and transfer of Kyoto units. Section 384 does make a general provision that regulations under the CPRS can adopt the terms of any other instrument or writing irrespective of its source, although this does not translate as a general authority to extend the scope of the enabling Act. While s384(2) expressly provides that s14(2) of the *Legislative Instruments Act 2003* is not to apply, it does not exclude the operation of s14(1) of that same Act, which requires that the adoption of any matter from outside the existing regulation must confirm with the scope of power set out in the provisions of the enabling Act.

These observations indicate that, on its proper construction, s 384 does not step outside the authorities cited and that it is not open for the Australian Climate Change Regulatory Authority to adopt policy as if it were regulation unless the subject material of it is addressed in the CPRS. Note that s384 refers to making provision for 'a matter', and not 'any matter'. Here, it is reasonable to assume that 'a matter' refers to a matter expressly referred to in the CPRS, which would accord with

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<sup>66</sup> (1972) 20 FLR 449 at 458.

<sup>67</sup> D Pearce and S Argument, above n41, 232 referring to the comments of Wells J in *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519, 541.

<sup>68</sup> *Keen Bros Pty Ltd v Young*, above n8, 540.

<sup>69</sup> See *Acts Interpretation Act 1901* (Cth) and *Legislative Instruments Act 2003* (Cth). An equivalent provision and commentary can also be found at *R v Goreng-Goreng* (2008)220 FLR 21, 36.

<sup>70</sup> See ss8(6), 24(b), 31(5)(b), s32(5)(b), s302(5)(b).

subsection 14(1).<sup>71</sup> Such a contention is further supported by virtue of there being a number of specific regulation-making authorities within the CPRS that do refer specifically to particular subjects. In addition, s387, which deals with the general authority to make regulations, makes no provision for allowing the adoption of a matter into the regulations that does not conform to the existing scope of the Act.

Aside from these provisions, the 74 separate provisions in the CPRS concerning the making of regulations pertaining to specific matters display this same conformity with accepted practice.<sup>72</sup> As a result, the validity of the regulations made under the CPRS, and how they should relate to the enabling Act, can be determined by application of the existing judicial authorities cited in this article. For the present purpose, it is noteworthy that the CPRS does not make any statement relating to a) regulatory authority, or b) the consideration of regulations in making decisions, which provides for regulations to be treated as if they are enacted provisions of the CPRS.<sup>73</sup> This means that all regulations and any decisions made under them ought to remain within the express scope of the enabling provisions, in accordance with the authorities discussed above.

## VI THE NEXUS BETWEEN LAW AND POLICY

### A. Policy and law generally

When considering statutory interpretation, the courts have traditionally divided themselves into two distinct schools of thought. The first school is composed of the literalists. These hold that, where the meaning of the words is clear, statutes should be interpreted literally, irrespective of whether that would produce an unjust or inappropriate outcome.<sup>74</sup> The alternative is the purposive approach, which not only looks at the meaning of the words in the provision, but also the statute's intended purpose. This second approach can be considered the prevailing wisdom in Australia and is provided for in Section 15AA of the *Acts Interpretation Act 1901*(Cth):

(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Policy only plays a role in the interpretation of legislation where ambiguity is identified, and where a court determines that it is necessary to move beyond the statute's words. Where this occurs, the court can consult the extrinsic material applicable to the legislation. This can include policy statements that could establish a reasonable interpretation of the words of a provision, provided that they are logical and fall within the ambit of the legislation's intent and purpose.<sup>75</sup> Extrinsic material can include not only any policy statements relating to the legislation's development, but also various parliamentary records, such as reading speeches, parliamentary commissions of enquiry, and the proceedings of parliament during the debate of the legislation. Resort to these materials will occur only when ambiguity cannot be resolved by reading the subject provision in the context of the surrounding Act.

Where an Act is silent on a particular issue, it cannot be claimed that a regulation is valid merely because the issue has been subject to extensive debate and policy discussion. To be valid, the regulation must find support within the enabling Act.<sup>76</sup> The implementation of policy must remain subordinate to the operation of law. The application of policy must remain within the boundaries set

<sup>71</sup> *Legislative Instruments Act 2003* (Cth).

<sup>72</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) ss 6, 14, 15, 20, 21, 22, 37, 42, 50, 56, 57, 65, 66, 70, 72, 74, 76, 79, 81, 97, 108, 109, 110, , 119, 120, 121, 122, 123, 129, 133, 135, 137, 147, 148, 162, 164, 167, 178, , 186, 195, 196, 199, 201, 202, 206, 209, 210, 212, 214, 218, 220, 225, 226, 234, 247, , 254, 256, 257, 276, 283, 284, 287, 288, 290, 293, 294, , 307, 363, 374, 375, 383, 384, 385, 387.

<sup>73</sup> See Pearce and Argument, above n 41, 233.

<sup>74</sup> See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-162.

<sup>75</sup> K Hall and C Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009), 77.

<sup>76</sup> *Morton*, above n47.

by governing legislation.<sup>77</sup> Policies should therefore only serve as aspirational statements regarding the direction of government, or provide further detail for the implementation of a legislative scheme where such clarification is expressly allowed for in the governing statutory instrument.<sup>78</sup>

#### **B. CPRS and *White Paper* policy discussions**

Divergence between the draft CPRS and the *White Paper* with respect to offsets, the prism used in this study, can be examined within the context of the judicial authorities already discussed in this article. The draft CPRS covers, in detail, the ability to issue free emissions units for the sequestration of carbon in reforestation projects and the destruction of synthetic GHGs, rather than coverage of domestic offset projects in general.<sup>79</sup> It also states, as its first objective, that it is designed to give effect to Australia's international climate change obligations.<sup>80</sup> The *White Paper* makes precise policy statements concerning how the government intends to deal with domestic offset schemes by applying, in general, significant restrictions to their use.<sup>81</sup> It does not follow that a combination of the relevant provisions in the CPRS on specific offset categories and the *White Paper* policy discussions would provide sufficient support for any regulations concerning general restrictions on domestic offset schemes not addressed in the CPRS.

In accordance with the judicial findings on the subject of valid regulation and the nature of the enabling Act,<sup>82</sup> the existence in the CPRS of Parts covering specific fields of offset schemes, together with a lack of general reference to domestic offset projects, could militate against any claim asserting the validity of regulations addressing other types of offset projects not specifically mentioned.<sup>83</sup> Since the CPRS is quite specific on the subject<sup>84</sup> of offset schemes that will be covered, a court, following Refshauge J's application of the High Court's reasoning in *Morton*,<sup>85</sup> could decide that the intention was that only *particular* offset schemes should be covered in detail, and that others—provided that they meet with international requirements in accordance with section 3(2) of the CPRS—are not to be restricted by regulation.

#### **V OFFSETS AND ACCREDITATION UNDER THE KYOTO PROTOCOL**

With regard to international conventions, it is an accepted principal in Australian law that, where there are international agreements to which Australia is signatory, it is appropriate for decision-makers to give effect to those agreements. The High Court, in the authority case of *Minister for Immigration and Ethnic Affairs v Teoh*,<sup>86</sup> stated that, 'Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party'.<sup>87</sup> With respect to the CPRS, this would include the framing of regulations under Section 387<sup>88</sup> so as to give effect to Section 3(2), which provides:

*Climate Change Convention and Kyoto Protocol*

The first object of this Act is to give effect to Australia's obligations under:

- (a) the Climate Change Convention; and
- (b) the *Kyoto Protocol*.<sup>89</sup>

<sup>77</sup> *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11 (Stephen J).

<sup>78</sup> *Re Drake and Minister for Immigration and Ethnic Affairs (No2)* (1979) 2 ALD 634, 640 per Brennan J.

<sup>79</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 10 and pt 11.

<sup>80</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) s 3.

<sup>81</sup> *White Paper*, above n4, Vol 1.

<sup>82</sup> See *Morton*, above n47 and *Goreng-Goreng*, above n 50.

<sup>83</sup> *ibid.*

<sup>84</sup> See Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 10 and pt 11.

<sup>85</sup> *Morton*, above n47.

<sup>86</sup> (1995) 183 CLR 273.

<sup>87</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

<sup>88</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth).

<sup>89</sup> *ibid.*

Regulations that provide the detail for Australia meeting its international commitments under the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol* should accordingly find a nexus with the CPRS.

#### A. Offset projects under Kyoto and domestic abatement

Under the Kyoto Protocol, entities have the choice to offset their onsite carbon emissions by sponsoring projects or purchasing emissions mitigation units generated by projects that reduce, sequester or otherwise measurably mitigate carbon emissions elsewhere.<sup>90</sup> Such projects may be carried out domestically, or can be hosted by other countries. Article 12(5) of the *Kyoto Protocol* identifies that units to offset emissions can be sourced from projects certified under *Kyoto* rules that provide '[r]eal, measureable and long term benefits ... and reductions in emissions that are additional to any that would occur in the absence of the project [commonly referred to as 'additionality']'.<sup>91</sup>

With the exception of significant restrictions on removal units (RMU) resulting from concerns over the accuracy of accounting for emissions,<sup>92</sup> international units that meet the management requirements of the *Kyoto Protocol* are generally acceptable.<sup>93</sup> Both Clean Development Mechanism (CDM) and Joint Implementation (JI) projects endorsed under the *Kyoto Protocol*<sup>94</sup> have particular requirements for accreditation so as to ensure that they assist in GHG mitigation. The *United Nations Framework Convention on Climate Change* (UNFCCC) guidelines on applications for accreditation of CDM schemes provides for a baseline and monitoring methodology that: a) chooses the baseline scenario; b) demonstrates additionality; c) calculates baseline emissions; d) calculates project emissions; e) calculates leakage; f) identifies and collects monitoring data; and g) calculates emissions reductions.<sup>95</sup>

Criticisms of CDM and JI have not only come from environmentalists, but also the International Emissions Trading Association and the Executive Board of the CDM itself.<sup>96</sup> Criticisms have included inconsistencies in the approvals processes, the ability to ensure the ongoing integrity of the projects, and the professionalism and expertise of the CDM Executive Board. These criticisms resonate with the Commonwealth's growing reluctance to include domestic offset schemes in the

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<sup>90</sup> *National Carbon Offset Standard Discussion Paper*, Department of Climate Change, Australian Government, 2008, 3.

<sup>91</sup> *Kyoto Protocol*, above n25, art 12.

<sup>92</sup> *White Paper*, above n4, 11.19.

<sup>93</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) Part 4 Div 3 and 4.

<sup>94</sup> Under the *Kyoto Protocol*, above n25, Article 12 provides for Clean Development Mechanisms (CDM) projects where developed (Annex I) countries work with developing (non Annex I) countries to create offset schemes in the non-Annex I country. Such schemes generate emission offset credits that can be transferred to the use of entities in Annex I countries so as to achieve their mitigation obligations under the *Kyoto Protocol*. Article 6 provides for Joint Implementation (JI) offset projects between developed countries that operate in the same manner, i.e., where one Annex I state hosts a project sponsored by the entities of another Annex I state that generates offset credits that can be used by the entities from the sponsoring state to realise their domestic mitigation obligations.

<sup>95</sup> CDM-Executive Board, *Guidelines for completing the project design document (CDM-PDD) and the proposed new baseline and monitoring methodologies (cdm-nm) (version 07)*, EB-UNFCCC, EB41 Report, Annex 12, UN Doc. FCCC/CP2001/13 (2008), 28.

<sup>96</sup> See: International Emissions Trading Association, *State of the CDM 2008: Facilitating a Smooth Transition into a Mature Environmental Financing Mechanism* (2008) <<http://www.ieta.org/ieta/www/pages/download.php?docID=3111>> at 1 July 2009, 4-6; *Annual report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol*, Framework Convention on Climate Change, UNFCCC, COP15, 5<sup>th</sup> Session, Item 6, UN Doc. FCCC/KP/CMP/16 (2009), 5-7, 20-23, 36-40; CDM-Executive Board, *Guidelines for completing the project design document (CDM-PDD) and the proposed new baseline and monitoring methodologies*, above n 78, Annex 2, 34-36; M Coghlen, 'Prospects and pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (2002) 3 *Melbourne Journal of International Law* 166, 170-173.

CPRS.<sup>97</sup> This reluctance, in turn, reflects Garnaut's concerns relating to the effectiveness of offsets, including:

- Double counting of emission reductions and demonstrating genuine additionality.<sup>98</sup>
- Using offsets as a way for entities to avoid genuine reductions and embrace strategies that actually reduce emissions.<sup>99</sup>
- The cost of effective surveillance, accurate monitoring and prompt enforcement to ensure integrity may prove less cost effective than sectors meeting their obligations under the CPRS by direct abatement.<sup>100</sup>

While concerns remain regarding whether the standards for accreditation of projects set by the boards of management dealing with these mechanisms are sufficient to meet the overall objective of mitigation,<sup>101</sup> further analysis is beyond the scope of this article. That projects must meet accreditation standards under the *Kyoto Protocol* is sufficient to satisfy the requirements of s 3 of the CPRS.

## VI OFFSETS, EMISSIONS CREDITS AND THE CPRS

The draft legislation discusses, in detail, the a) issuance, transfer and acquittal of emissions units<sup>102</sup>, b) treatment of *Kyoto* and non-*Kyoto* international units,<sup>103</sup> c) total emissions limits as to whether a business is covered or uncovered,<sup>104</sup> and d) the overall objective of the CPRS regime.<sup>105</sup> It even provides for the specific categories of reforestation and synthetic gas destruction projects (offset schemes by any measure), and the issuing of free Australian emissions units equivalent to the level of CO<sub>2</sub> removed by projects approved under pt 10 and pt 11 of the CPRS.<sup>106</sup>

The CPRS also provides extensive detail in dealing with coal-fired energy and the treatment of emissions-intensive trade-exposed businesses. Beyond these specific subjects and the significant detail regarding various administrative and management arrangements for the scheme, there is little coverage of other fields dealt with (some in detail) by the *White Paper*. Of particular note is the lack of real legislative detail in the CPRS regarding the intended treatment of domestic offset schemes in general. By way of contrast, the *White Paper* covers this subject in some detail.<sup>107</sup> The authors of the proposed regulatory regime, in places, have overlooked the need to articulate clearly the links between the enabling legislation and the regulations through the *White Paper*. This would become a real concern if this lack of clarity and linkage is written into enacted legislative and regulatory schemes. Entities made liable under the schemes may elect to challenge the validity of their obligations based on such failings.

### A. Importing eligible international units into Australia

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<sup>97</sup> L Nielson and A Talberg, *The Kyoto Protocol Clean Development Mechanism, Background Note, 23 April 2009*, Parliamentary Library, Canberra, 2009, <[http://www.aph.gov.au/library/pubs/bn/2008-09/Kyoto\\_Protocol\\_CDM.htm](http://www.aph.gov.au/library/pubs/bn/2008-09/Kyoto_Protocol_CDM.htm)>, 15-20.

<sup>98</sup> Garnaut, above n20, 327.

<sup>99</sup> *ibid*, 182.

<sup>100</sup> *Green Paper*, above n12, 137.

<sup>101</sup> See: S Beder, 'Carbon offsets are not sustainable' (2007) 22 *Green* 16,16ff; International Emissions Trading Association, *State of the CDM 2008: Facilitating a Smooth Transition into a Mature Environmental Financing Mechanism* (2008) <<http://www.ieta.org/ieta/www/pages/download.php?docID=3111>>, 5-6 and 23; L Nielson and A Talberg, above n80,15-20.

<sup>102</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) above n3, Parts 4 and 6.

<sup>103</sup> *ibid* pt 4.

<sup>104</sup> *ibid* pt 3.

<sup>105</sup> *ibid* s 3.

<sup>106</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pts 10 and 11. For a list of projects that will be considered by the UNFCCC's CDM Approvals Panel, see *List of sectoral scopes (version: 4)*, CDM-AP, UN Doc CDM-ACCR-06 Version 04 (2009). Note that both reforestation and synthetic GHGs have been the subject of projects approved by the CDM and remain within the scope of projects that can receive approval by the CDM Approvals Panel.

<sup>107</sup> See *White Paper*, above n4.

According to the *White Paper*, Australian entities should have a free hand to import eligible international units<sup>108</sup> for use in Australia.<sup>109</sup> While not expressly stated, the draft CPRS in effect allows Australian enterprises to participate in *Kyoto*-approved CDM<sup>110</sup> and JI offset projects.<sup>111</sup> Entities can also utilise non-*Kyoto* international offset schemes for purposes other than the direct acquittal obligations under the CPRS.<sup>112</sup> Non-*Kyoto* units may well have a place in the development of voluntary abatement action by individuals and organisations outside the prescribed obligations under the CPRS.<sup>113</sup> The only real restriction for Australian entities with respect to taking advantage of international units is whether they have the necessary commercial expertise to engage successfully in international carbon offset markets.

### **B. The White Paper on domestic offset schemes**

Unlike the CPRS, the *White Paper* envisages a strict regime for offset schemes.<sup>114</sup> Most importantly, it restricts domestic offsets projects to sectors not covered by the CPRS.<sup>115</sup> With the exception of reforestation and the destruction of synthetic GHGs,<sup>116</sup> the draft CPRS provides no general guidance regarding the governance and administration of GHG mitigation projects, and nor does it make any definitive reference to which sectors are to be covered. Conversely, the *White Paper* provides for the governance of offset schemes beyond the restricted classes of reforestation and destruction of synthetic GHGs.<sup>117</sup> The omission of any general provisions dealing with the governance and administration of offset projects in the draft CPRS, in contrast to the *White Paper*, would provide scope to challenge the validity of regulations restricting access to offset schemes not referred to in the CPRS. This is particularly the case where it could be shown that a project falling outside those types defined in Parts 10 and 11 of the CPRS meets with the accreditation standards formulated under the *Kyoto Protocol*, thereby meeting the primary objective of the CPRS set out in Section 3(2):

- (2) The first object of this Act is to give effect to Australia's obligations under:
- (a) the Climate Change Convention; and
  - (b) the *Kyoto Protocol*.

The *White Paper* provided a clear intention that regulations should cover offsets in general,<sup>118</sup> something which the draft legislation did not do. In doing so, the proposed regulatory regime effectively widened the operation of the draft Act beyond its stated purview concerning offsets<sup>119</sup> by addressing subject matter not covered by the CPRS, but rather by the legislative regime of the *Greenhouse and Energy Reporting Act 2007* (Cth)—a related yet separate Act.<sup>120</sup> This state of affairs

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<sup>108</sup> 'Eligible international units' are defined by the *White Paper*, above n4, in the Glossary, Appendix F, as:  
'The types of international units which an entity may surrender to meet its obligations under the scheme. At the commencement of the scheme, eligible international units will include:

- certified emission reductions (except temporary certified emission reductions and long-term certified emission reductions);
- emission reduction units;
- removal units.'

All these units are further defined by the *White Paper* Glossary, Appendix F.

<sup>109</sup> *White Paper*, above n4, Part 11.4.

<sup>110</sup> *Kyoto Protocol*, above n21. For an introduction to the functioning of the CDM refer to M Wilder and P Curnow 'The clean development mechanism' (2001) 24 *University of New South Wales Law Journal* 577.

<sup>111</sup> *Kyoto Protocol*, above n21.

<sup>112</sup> See *White Paper*, above n4, 11.20 to 11.22 and Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt4 div4.

<sup>113</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 6.

<sup>114</sup> *White Paper*, above n4, .6.62-6.64.

<sup>115</sup> *ibid*.

<sup>116</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) Pts 10 and 11.

<sup>117</sup> *White Paper*, above n4 6.62-6.64.

<sup>118</sup> *ibid*.

<sup>119</sup> See Carbon Pollution Reduction Scheme Bill 2009 (Cth) pts 10 and 11 cf *White Paper*, above n4, 6.62-6.64.

<sup>120</sup> Sections 24 and 25 of the CPRS specifically hand the task of measuring emissions (and thus the determination of liability) to the *National Greenhouse and Energy Reporting Act 2007* (Cth) (*NGER*). The *NGER* refers to the reporting of offsets of greenhouse gas emissions at Section 21A and that the details of

could create a legislative scheme not in accordance with current convention as espoused by the line of authorities already discussed. If enacted and subjected to challenge, such a scheme would almost certainly see the offending regulations declared invalid.

### C. Export of Australian emissions units

From an international perspective, the discussion has so far dealt with the introduction of emissions units into the Australian jurisdiction so as to meet a liable entity's obligations.<sup>121</sup> It is also appropriate to consider the export of Australian units and the participation of Australian entities in CDM and JI schemes as host rather than as sponsor. As noted previously, the CPRS does not directly refer to the development of domestic offset schemes, or the participation of Australian entities as sponsors of CDM and JI projects. The CPRS is also silent with respect to direct reference to schemes to which Australian entities could play host.

The CPRS does, however, address the export of international (*Kyoto*) units, with a clear indication that they would be allowed.<sup>122</sup> Indeed, Section 112 specifically provides that a regulation can restrict transfers provided those restrictions are in accordance with the *Kyoto* rules.<sup>123</sup> With respect to Section 112, any regulations disallowing the sale of Australian units into international markets would likely be valid where those regulations are based on ensuring the integrity of Australian schemes in meeting the requirements for accreditation under *Kyoto* rules.<sup>124</sup> Regulatory prohibitions regarding the export of units that cannot be linked to the standards formulated under the *Kyoto* rules may be invalid if a) they range beyond the scope of Sections 3 and 112, and b) cannot find effective support elsewhere in the CPRS. Such regulations could be considered as extending the application of the enabling Act beyond its stated scope and extent of operation.<sup>125</sup>

Any differential treatment of JI projects in the regulations depending on whether they are based in covered or uncovered sectors (as is discussed in the *White Paper*<sup>126</sup>) could therefore be subject to challenge. This is because the CPRS does not address sectoral differences. As a result, regulations invoking these measures would be better placed under the auspices of the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGERA), whose legislative scheme *does* deal with 'sectors'.<sup>127</sup> From *Morton to Goreng-Goreng*, the courts have confirmed the notion that, irrespective of how broad the interpretation of the Act, for regulations and the decisions made under them to be valid, they must remain strictly within the actual subject matter of the provisions intended to give them validity.<sup>128</sup>

As discussed in Section IV (B), Pearce and Argument conceded that it would be possible for Acts and regulations authorised under other Acts to operate cumulatively. Despite this, it was also

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those reports are to be specified by the *NGER* regulations. Neither the *NGER* nor the CPRS make any reference to regulations made under the CPRS having any role in determining the content of reports made under the *NGER* Section 21A.

<sup>121</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 6.

<sup>122</sup> *ibid* s 109.

<sup>123</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) s 112:

(1) The regulations may make provision for, or in relation to, giving effect to the *Kyoto* rules, so far as the *Kyoto* rules relate to:

- (a) the transfer of a *Kyoto* unit from a Registry account to a foreign account; or
- (b) the transfer of a *Kyoto* unit from a foreign account to a Registry account; or
- (c) the transfer of a *Kyoto* unit from a Registry account to a Commonwealth Registry account; or
- (d) the issue of a *Kyoto* unit.

(2) Regulations made for the purposes of subsection (1) may:

- (a) prevent, restrict or limit the transfer of *Kyoto* units from a Registry account to:
  - (i) a foreign account; or
  - (ii) a voluntary cancellation account; or
- (b) prevent, restrict or limit the transfer of *Kyoto* units from a foreign account to a Registry account.

(3) Subsection (2) does not limit subsection (1).

<sup>124</sup> *White Paper*, above n4, 11-28.

<sup>125</sup> *Shanahan*, above n45, 291.

<sup>126</sup> *White Paper*, above n4, 11-32.

<sup>127</sup> See *National Greenhouse and Energy Reporting Act 2007* (Cth) ss 10-15.

<sup>128</sup> *Shanahan*, above n45; *Morton*, above n47; *Goreng-Goreng*, above n 50.

their view that such cumulative operation would only be valid if it was demonstrably the express intention of the subject Act that delegated legislation authorised under a different Act was to remain on foot.<sup>129</sup> In addition, it would also have to be shown that the regulation was operating within the stated purview of the authorising Act, irrespective of the detail with which the subject matter of the regulation was discussed in the subject Act.<sup>130</sup> With regard to the issue under investigation, ‘sectors’ and the differences in detail on that subject between the CPRS and the NGERA serves as an example of where such an inquiry would be needed. Any relevant CPRS regulations that dealt with matters addressed in the NGERA would need to find express authority from the CPRS, together with clear consent from the NGERA, to be valid.

By allowing the hosting of Joint Implementation (JI) projects and/or the removal of Australian units from the Australian jurisdiction, the accompanying mitigation would not be credited towards Australia’s *Kyoto* obligations.<sup>131</sup> However, exporting Australian mitigation still increases the total amount of global mitigation, which is a primary purpose of the global effort to minimise anthropogenic climate change, as recognised in Article 3 of the UNFCCC and Article 2 of the *Kyoto Protocol*, more so since giving effect to these international agreements is the CPRS’ stated first objective.<sup>132</sup> Any regulations prohibiting such exports would need to find direct legislative support where such prohibitions do something more than meeting the JI requirements under the *Kyoto* rules. Although Section 112(2) does provide for ‘preventing, restricting or limiting the transfer of *Kyoto* units’, any regulatory prohibitions made under this provision must also find a basis within the *Kyoto* rules. This is because Section 112(1) expressly defines the regulation-making authority as existing for the purpose of ‘giving effect to the *Kyoto* rules’ as they relate to transferring units between accounts.

## VI THE CPRS AND THE WHITE PAPER: LEGISLATION VS REGULATION

The draft CPRS bill<sup>133</sup> refers, in detail, to specific aspects of the scheme that would be subject to regulation.<sup>134</sup> In contrast with its very specific details on other issues, there is no direct or general discussion in the draft legislation concerning the types of offset schemes to be included or excluded. Indeed, the CPRS only makes provision for two specific categories of mitigation projects commonly associated with offset schemes in other jurisdictions, viz., reforestation and synthetic GHG destruction.<sup>135</sup> That said, it does not categorise them as offset schemes. Rather, it provides for sponsors to be eligible for issuance of free Australian emissions units in accordance with the level of mitigation that each project achieves, but not the issue of tradable Certified Emissions Reduction credits.<sup>136</sup> In addition, there is extensive detail regarding how the emissions units generated by such schemes could be moved into and out of the Australian jurisdiction.<sup>137</sup>

Unlike the CPRS, the *White Paper* provides detailed discussion regarding a) the intended treatment of offsets generally,<sup>138</sup> b) sectors to be covered by the scheme,<sup>139</sup> and c) the relationship between domestic and international arrangements.<sup>140</sup> It is clear from the *White Paper* policy discussions regarding offset schemes that the detail pertaining to the inclusion or exclusion of such schemes was intended to be covered by the prospective CPRS regulations. According to the judicial authorities, for a regulation to be considered valid, there must be a clear nexus between the subject matter expressed in the enabling legislation and the regulatory provision.<sup>141</sup> The courts have made it very clear that, where there is insufficient legislative support, no amount of detailed regulation or policy will resolve that omission, i.e., the regulation will be invalid. In applying the judicial reasoning

<sup>129</sup> Pearce and Argument, above n41, 231.

<sup>130</sup> Morton, above n47, 410.

<sup>131</sup> *White Paper*, above n4, 11.31.

<sup>132</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) s3(2).

<sup>133</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth).

<sup>134</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth). A list of sections is provided above at n72.

<sup>135</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 10 and pt 11.

<sup>136</sup> *ibid* ss 191 and 245.

<sup>137</sup> *ibid* pt 4 divs 3 and 4.

<sup>138</sup> *White Paper*, above n4 6.62-6.64.

<sup>139</sup> *ibid*, 6.62-6.64.

<sup>140</sup> *ibid*, ch 11.

<sup>141</sup> *Goreng-Goreng*, above n50.



on regulations, portions of the proposed CPRS regulations dealing with offset schemes, and the decisions made under them, would potentially not stand up to parliamentary or judicial scrutiny in instances where the subject matter of the regulations could not sufficiently be correlated with the provisions of enabling Act.<sup>142</sup>

In the event that a regulation was found to be invalid (*ultra vires*), the overseeing government authority may be left with no alternative but to accept units generated by schemes that, in policy discussions, were intended to be denied currency. Since the CPRS went into quite extensive and specific detail concerning specific categories of projects typically characterised as offset projects, it could be argued that any proposed legislation drafted in the same terms would only intend to manage *those types* of offset projects *to the exclusion* of other types.<sup>143</sup> Any attempt to disallow or determine other categories of offset schemes by prescriptive regulation could well be considered as going beyond the scope of the enabling legislation—where it is quite specific and detailed on particular categories, as opposed to other categories where there is little or no detail. Such an approach would accord with the decision in *Morton*, where the court said that, the more precise and detailed an Act about a subject, the less scope there is for broad coverage by regulation.<sup>144</sup>

If a broad purposivist approach to interpretation were to be accepted across the whole field of the CPRS, and if one takes a plain-meaning approach to the language used in Section 387, it could be argued that any clear reference to a field of interest, such as offset schemes, would provide sufficient legislative support for that same general field of interest to be the subject of regulation. Yet even a broad approach to interpretation still requires a clear connection of the regulatory provisions with the enabling legislation.<sup>145</sup>

## VII CONCLUDING REMARKS

Where there is an extensive and complex piece of draft law and policy that would have far-reaching effects, it is critical that clarity and direct language are given priority. Any government needs to ensure that the potential for challenge to enacted law in a difficult area of policy is not exacerbated by creating an exercise, deliberate or not, in perplexity, especially where preliminary policy excursions indicate a predisposition for controversy and significant opposition, as has clearly been evident in the attempts to develop a meaningful response to mitigating carbon emissions.

The nature of the draft CPRS is difficult to determine, more so since it contained elements of the two broad categories of legislation mentioned in *Morton*.<sup>146</sup> In part, it represented a broad framework instrument setting out themes that would need to be fleshed out by regulation after the Act's passing. Yet it also represents an in-depth instrument providing detailed coverage of fields of interest within the provisions of the legislation, thereby leaving little scope for regulation. If such a dual personality was allowed to prevail in the eventual enacted legislative scheme, disparate approaches to interpretation could provide fertile ground for challenge and appeal. To determine the validity of any regulation, courts will first have to decide whether the legislation is a broad framework leaving detail to regulation, a detailed instrument leaving little scope for expansive regulation, or a confusing mix providing no clear delineation.

From a legislative drafting perspective, the issues raised in this article could be resolved by applying much greater commitment to clarity and having regard to the accepted tenets of drafting regulations discussed *infra*. The starting point, if policy makers opt to continue following the ETS path, would be to give the CPRS's successor a much clearer and more precise direction. In light of the shifting political environment that surrounds the national response to climate change, an Act reflecting a broad outline of policy that allows for some degree of flexibility in the development of regulation and policy would seem to be the most pragmatic approach.

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<sup>142</sup> For example, Policy Position 6.28 of the *White Paper*, above n4, provides: 'The scheme will not include domestic offsets from agriculture emissions in the period prior to coverage of those emissions'. Nowhere in the CPRS is there any reference to emissions generated by agriculture.

<sup>143</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) pt 10 (reforestation) and pt 11 (destruction of synthetic GHG).

<sup>144</sup> *Morton*, above n47.

<sup>145</sup> See *Goreng-Goreng*, above n50.

<sup>146</sup> *Morton*, above n47.

In sum, parliament can draft legislation in whichever way it chooses, yet, a greater commitment to clarity and uniformity in whatever follows the CPRS is needed to prevent the government's efforts to abate emissions from being bogged down in a legal quagmire. Those developing the legislative and regulatory schemes to deal with such abatement would do well to follow the advice of Wells J and make sure that they a) properly acquaint themselves with accepted practice with respect to the drafting of legislative instruments before commencing, and b) ensure that those standards are reflected in the instruments that they prepare.<sup>147</sup>

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<sup>147</sup> *Keen Bros Pty Ltd v Young*, above n8, 541.