
CLIMATE CHANGE LEGAL UPDATE – JULY 2009

Our last climate change legal update outlined the changes contained in the Climate Change Response (Emissions Trading Forestry Sector) Amendment Bill. While we had thought our next update would cover the recommendations of the ETS Review Committee once it had reported, 3 matters of significance have occurred in the last week that we thought justified another brief update.

This update covers:

- The passage of the Forestry Sector Amendment Bill, including the changes made during its brief select committee consideration
- The Commerce Select Committee's report on the Settlement Systems, Futures, and Emissions Units Bill
- The government's consultation on New Zealand's 2020 greenhouse gas emissions reduction target.

A minor tweak for the forestry sector

As foreshadowed in our last special update, legislation to amend parts of the New Zealand Emissions Trading Scheme (NZ ETS) relating to forestry was passed into law on Tuesday this week (30 June 2009). More detail on the Climate Change Response (Emissions Trading Forestry Sector) Act can be found at <http://www.buddlefindlay.com/public/about/announcements.aspx?id=368>.

During the Select Committee process on the Bill (as it was then), one minor change was made - namely that a final deadline of 1 July 2010 was set for applications to be made for exemptions from the NZ ETS for land holdings with less than 50 hectares of pre-1990 forest land. A deadline earlier than 1 July 2010 can be set either through regulations or via a public notice from the Chief Executive of the Ministry of Agriculture and Forestry.

This amendment was promoted by Charles Chauvel, the Labour Party spokesperson on Climate Change Issues, and accepted by the government. Its purpose is to minimise the period of delay before which pre-1990 forest owners are to receive their freely allocated New Zealand Units (NZUs). It does so by placing a final deadline of 1 July 2010 for exemption applications, the lodgement of which is seen as necessary (although not legally required) before the free allocations can proceed.

Even with this change, however, there is no real indication of when pre-1990 forest owners will receive their freely allocated NZUs. This could still be as late as the second half of 2010 or early-2011.

Also of note is the comment by Hon Dr Nick Smith, Minister for Climate Change Issues, during the first reading debate that "Parliament will need to deal with a more substantive emissions trading scheme amendment Bill at the appropriate time." He expected this to be some time after the ETS Review Select Committee reports back, likely to be in August.

Given separate comments from Dr Smith to the Select Committee that it is not possible to bring the stationary energy and industrial processes sector into the NZ ETS on 1 January as scheduled, part of this substantive Bill is likely to involve delaying these sectors' entry into the NZ ETS. This Bill can therefore be expected to be passed before Christmas, although this involves a very tight legislative schedule.

Emissions units - changes at the margins

The Commerce Select Committee released its report on the Settlement Systems, Futures, and Emissions Units Bill on 22 June 2009. The Bill is designed, amongst other things, to facilitate trading in emissions units. To achieve this outcome the Bill seeks to provide clarity about the legal status of emissions units through amendments to securities law and the Personal Property Securities Act. Our previous update provides a summary of the Bill's provisions, and can be found at <http://www.buddlefindlay.com/public/about/announcements.aspx?id=336>.

The Committee has recommended widening the definition of "emissions units" to be inserted into the Securities Act 1978, the Securities Markets Act 1988, and the Personal Property Securities Act 1999. The definition already included Kyoto Units and NZUs, and contained a form of words that would cover most voluntary or "grey" market units. The definition has now been expanded to include units created by any jurisdiction within a country (for example, units issued by state or local government), and units created under international treaties and protocols, in each case which represent a fixed amount of greenhouse gas, or are evidence of a specified amount of greenhouse gas reduction, avoidance, removal, or sequestration.

Another notable point is that the Committee has recommended that the definition of emissions units also include personal property that is created as evidence of greenhouse gas "storage", and even more widely, units relating to *any form* of greenhouse gas mitigation. The Committee stopped short of broadening the definition to cover any type of "environmental unit", such as a "biodiversity unit". While such a change could promote environment-related tradable rights, the Committee felt that this change was beyond the scope of this Bill.

The Committee acknowledges that the carbon market is in its infancy, and therefore considered that a broad definition of emissions units is appropriate to provide flexibility in an area of development. The changes highlight the fact that the Bill is intended purely to facilitate trading in units, whether those units are units capable of being surrendered for compliance purposes under the NZ ETS or not.

Talking targets

Last Friday (26 June 2009), the government announced its intention to hold public meetings in July on New Zealand's 2020 emissions reduction target. Meetings commence next Monday in Wellington, followed by Auckland and Christchurch on Tuesday and Wednesday. Meetings in other centres will continue until 17 July.

Industrialised countries have been asked to table their 2020 target in August at the international climate change negotiations in Bonn, Germany. These public meetings are therefore part of the government's programme to establish New Zealand's negotiation position for these negotiations, and ultimately the negotiations at Copenhagen in December, where the aim is to agree the post-2012 international response to climate change.

The government has already set its broad negotiating parameters, which are set out in the Cabinet Paper (<http://www.mfe.govt.nz/issues/climate/resources/cabinet-papers/cab-09-120.pdf>) considered by Cabinet last March. In essence, the new government has committed itself to the international climate change framework, signalling that New Zealand will remain within the international consensus. It has also set a number of goals to ensure that the system will require all developed countries (and other major emitters) to take effective mitigation measures, and will take individual national circumstances into account.

Importantly, the government has also agreed that New Zealand should support the Intergovernmental Panel on Climate Change's (IPCC) lowest feasible long-term goal of greenhouse gases in the atmosphere at no higher than 450 ppm CO₂-equivalent. This provides a clue about New Zealand's necessary 2020 target, as to achieve this level of greenhouse gas concentration in the atmosphere, developed countries as a whole need to reduce emissions by 25 to 40% from 1990 levels by 2020. On the other hand, the Cabinet Paper is quick to point out that these are aggregate figures, and not every developed country's target needs to fall inside this range. It is possible to argue that New Zealand should have a lower target due to its unusually high agricultural emissions compared with other developed countries, in respect of which mitigation potential remains limited.

The government also agreed that the IPCC target should be kept under review depending on the latest available assessment of the science. Support was also made conditional on comparable efforts by other developed countries, and increased efforts from major emitters and advanced developing countries to reduce their emissions.

The broad goals of the government are thus fairly clear. However, it is surprising that before going out for consultation on an emissions target, no specific proposal, or even list of options, has been released, nor any analysis of the possible economic impact of the different target options. Such a preliminary proposal and/or list of alternative options is common practice in government consultations on regulatory policy. While unusual, this lack of specificity could provide an opportunity: with no clear goal expressed, it is open to interested parties to make their own case for whatever target they consider is appropriate.

More information

Please contact Alastair Hercus or Alastair Cameron in our public law team if you have any questions, or would like to discuss the implications of these announcements.

Climate change and emissions trading expertise

Alastair Hercus

Partner

Expertise: Public law, industry regulation and commercial law

DDI: 04 498 7318

Mobile: 021 449 993

alastair.hercus@buddlefindlay.com

Alastair Cameron

Senior Solicitor

Expertise: Public law, climate change and emissions trading

DDI: 04 498 7340

alastair.cameron@buddlefindlay.com

Steve Nightingale

Partner

Expertise: Corporate and commercial law

DDI: 04 498 7312

Mobile: 027 668 2832

steve.nightingale@buddlefindlay.com

Tony Wilkinson

Partner

Expertise: Taxation

DDI: 09 358 7066

Mobile: 027 476 6587

tony.wilkinson@buddlefindlay.com

Laura O’Gorman

Partner

Expertise: Litigation

DDI: 09 358 7031

Mobile: 021 313 653

laura.ogorman@buddlefindlay.com

Jason Boyes

Partner

Expertise: Corporate, finance and derivatives

DDI: 04 462 0444

Mobile: 021 588 993

jason.boyes@buddlefindlay.com

Peter Owles

Partner

Expertise: Corporate, finance and derivatives

DDI: 09 358 7047

Mobile: 021 750 509

peter.owles@buddlefindlay.com

If you have any questions on issues covered please contact the sender.

This article is provided for general information purposes only and not as legal advice.

***Click here to unsubscribe** if you no longer wish to receive climate change e-mail legal updates from Buddle Findlay.*

BUDDLE FINDLAY NEW ZEALAND LAWYERS