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Tim Kelly
Adelaide

ASIC Consultation

Regulatory Reform and Implementation

Australian Securities and Investments Commission email: CP 378 Safeguard mechanism reforms:

RG236.Feedback@asic.gov.au

Dear ASIC Safeguard Mechanism Reforms Team.

RE: CP 378 Safeguard mechanism reforms: Updates to RG 236

Thank you for providing me with the opportunity to comment on this proposal.

In the past I have identified significant issues relating to Safeguard Mechanism Credits in recent years and Australian Carbon Credit units since 2011. My submissions included providing detailed input to the Independent Review of Australian Carbon Credit Units, multiple NGER determination submissions and others to the Climate Chage Authority and ACCC. None of the issues that I have identified have yet been adequately acknowledged as a concern or addressed. The Agencies have not disagreed with my concerns, they have just been silent in their reporting on these consultation processes as if they were never identified.

INTRODUCTION

In this submission how it is discussed how concerns play out in regard to the certificate markets that ASIC is seeking to provide guidance on in the context of broader honesty, transparency and integrity.

I note the recent View from the Regulator on Greenwashing which includes the following:

> *Combating greenwashing is critical to supporting trust in sustainable finance-related financial products and services.*
>
> *ASIC's greenwashing interventions are founded on enforcing well-established legal obligations that prohibit misleading and deceptive conduct, and our focus is on entities that we consider carelessly give inaccurate or misleading statements.*
>
> *In essence, sustainability-related claims – like any other information provided to investors – must be founded on reasonable grounds. They must be accurate. And, in particular, they must be able to be substantiated. Investors rely on this information, so that the decisions they make have a solid footing.*

I argue that it is not possible for ASIC or the ACCC or the CER to provide adequate guidance or undertake enforcement actions because whilst there may be "*well-established legal obligations that prohibit misleading and deceptive conduct"* there is not yet a legitimate market-based accounting framework for carbon related green attributes to be traded, nor for green claims to be made. There are some elements of legislation but the critical elements of legislation that are required are missing. There is not yet and economy wide legislated market-based framework to guide what is being

described as carbon markets. There are not yet basic debit and credit rules for trading emissions abatement. Certificates definitions are mal identified in legislation to confuse and mislead stakeholders in what can only be described as legislated deception.

In regard to the Safeguard Mechanism, the foundational units (Australian Carbon Credit (ACCUs) Units and Safeguard Mechanism Credits SMCs)) are not described in legislation to incorporate the attributes that they are traded for. They could be but DCCEEW has for years intentionally not incorporated the essential attributes of certificate units within certificate units.

The history of this problem started with Renewable Electricity Certificates (RECs) which were never defined in large to incorporate the attributes of renewable use at zero scope 2 emissions. Even today with billion-dollar markets, the updated Large-scale Generation Certificates (LGCs) are not legally defined as incorporating renewable use at zero emissions.

All accredited renewable electricity is still double counted as two different methods of accounting are in use at the same time being market-based accounting and location-based accounting. DCCEEW claim that these different accounting methods are for different purposes but both methods are used for performance related claims including to communicate reduced emissions, to contribute to net zero goals, for renewable electricity use and zero scope 2 emissions) DCCEEW has not made recommendations to clarify in law that one method should be used for claims and the other for context. Worse than that, DCCEEW and the CER actively promote the two methos as a choice in the Corporate Emissions Reduction Transparency (CERT) report scheme and actively defend that corporations can use either method in the CERT and Climate Active schemes to date.

The same problems were established with ACCUs where the legislation describes how ACCUs are created but does not then describe that they include any attributes such as negative emissions. The site of creation is free to continue to claim the abatement on site, as well as selling ACCUs to third parties where they are claimed as abatement a second time.

DCCEEW did start to restrict Safeguard Facilities from creating and selling ACCUs and claiming the abatement on site but for the vast majority of landscape based ACCUs these are coming from non-safeguard entities where there are no debit and credit rules, and the abatement is or can be double counted. For example, the cattle growers think they are reducing their emissions and selling ACCUs as a revenue stream. For years, Councils when upgrading street lighting with LED luminaires would continue to claim lower electricity emissions whilst ACCUs were created and sold to fund projects, and the abatement was claimed by third parties. Both site claims and third-party claims or beliefs cannot co-exist without double counting.

Then there are the Safeguard Mechanism Credits which are tradable carbon permits misrepresented as emissions reduction units for Facilities to claim reduce emissions to keep within their baseline (which in any coherent world would have been called a facility emissions cap).

When engaging DCCEEW they have justified that ACCUs are legitimate on the basis that they are legislated financial instruments. Whilst it is agreed that ACCUs and SMCs are legally defined as financial instruments, they still do not include carbon attributes so **their portrayal as emission units is greenwashing**. ACCUs carbon are not emissions units.

Until these issues are acknowledged and addressed, no market framework or business claim relating to carbon emissions or renewable electricity can be made on reasonable grounds.

The issues that I identify can be easily fixed and should be fixed. It would mean that free riding and double counting will be stopped. Whilst that would upset those enjoying a free ride for emission reduction claims reforms to clarify the attributes of certificate units and prevent systemic double counting are necessary for integrity.

I note a recent response from ASIC when I referred to preparing this submission stating that *"We will consider the issues you have raised in your correspondence, noting that these matters are primarily for DCCEEW to consider given it is the government body responsible for administering the NGER Scheme legislation".* This response concerns and offends because it reflects the pattern of responses over 20 years where each agency avoids taking any responsibility and refers to another agency which also avoids taking any responsibility or denies the obvious.

The standard that ASIC overlooks is the standard that ASIC accepts. If ASIC ignores the issues of lack of adequate legal foundation, contradictory schemes, certificates without the attributes that they are traded for, systemic free riding, double counting and widespread confusion, then that would not be consistent with its statement that "*In essence, sustainability-related claims – like any other information provided to investors – must be founded on reasonable grounds".*

There are easy solutions to these problems of course but DCCEEW have resisted reforms for 18 years (renewables) 13 years (ACCUs). Reforms include:

- Legally defining ACCUs to incorporate the negative emissions attribute with the certificates and apply basic debit and credit rules to prevent double counting between the site and consumer and across sectors.
- Redefining Safeguard Mechanism Credits under the legislation as the transferable emission permits that they are with their function to allow Safeguard Facilities it increase their emissions above their cap. Also, the narrative and accounting practices should reflect this and be consistent with broader NGER and NGA factors market-based accounting.
- Market based accounting should be clarified as being the method corporations use for reputational claims, net zero progress and renewable electricity use, with location-based accounting clarified for context and dual reporting only.

If ASIC just ignore or smooth over these foundational shortcomings that would be continuing support for embedded greenwashing.

Forward apology

I must also apologise in advance. After 19 years of pointing out foundational issues for renewable electricity, a dozen or so years pointing out foundational issues relating to ACCUs and several years pointing out foundational issues relating to SMCs, I am going to use very mild profanity in this submission to call out the words and culture of deception that exists across Australia's certificate markets relating to the Safeguard Mechanism. It has taken me nearly 20 years to get to this point.

My understanding is that ASIC do not publish non-confidential submissions on its website and may never acknowledge issues raised so it should be no problem to accept these views. Please contact me if this would preclude my submission from being accepted and I will replace any wording with more acceptable wording. In frustration, I think that mild profanities are justified.

My understanding of this consultation

ASIC is proposing to update Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?* (RG 236) to address the safeguard mechanism reforms.

The proposed updates also address recent changes, particularly in relation to Australian Carbon Credit Units (ACCUs). The proposed guidance is "*intended to assist participants in ~~carbon~~ markets understand their Australian financial services (AFS) licensing requirements*".

Shortcomings in legislation

LARGE-SCALE RENEWABLE ELECTRICITY CERTIFICATES (LGCs)

Not directly relevant to the Safeguard Mechanism but is relevant to the multi-billion-dollar renewables market.

Part 2, Subdivision A Section 18 of the Renewable Energy (Electricity) Act 2000 describes how Large-scale Generation Certificates (LGCs) are created **but does not describe** what they are, nor does it describe attributes that the units contain any attributes, nor does it describe how any attributes might be traded in a way that prevents double counting. Examples of double counting and systemic market unfairness:

- For GreenPower customers they are charged for 100% LGCs above their ~30% mandatory payments.
- For corporations producing, consuming and claiming renewable electricity use behind the meter, LGCs are seen as something to sell for a revenue stream.

Renewable electricity use via the grid has not been legally defined in legislation. Systemic double counting many times larger than the entire voluntary market is the result.

AUSTRALIAN CARBON CREDIT UNITS (ACCUs)

Part 2, Division 1, Section 11 of the Carbon Farming Initiative (Carbon Credits) Act 2011 describes how Australian Carbon Credit Units are created **but does not describe** what they are, nor does it describe attributes that the units contain any attributes, nor does it describe how any attributes might be traded in a way that prevents double counting.

No debit and credit rules apply to the abatement claimed through ACCUs under this Act or any other legislative instrument.

The carbon abatement can be claimed on site and within the sector of creation whilst it is also claimed by those buying the certificates for other sites and from other sectors.

Safeguard Mechanism Credits

The establishment of Safeguard Mechanism Credits has been undertaken in such a way as to pervert basic concepts of carbon accounting. The Explanatory Memorandum states that:

> *To support this, the Bill provides for credits, known as Safeguard Mechanism Credits or SMCs, to be issued to facilities whose emissions are below baseline levels. These credits each represent a tonne of emissions and can be traded and used by other Safeguard covered facilities* ***to reduce their net emissions****. This means that facilities with emissions below baseline levels will retain an incentive to reduce their emissions if cost-effective emissions reduction opportunities exist.*

SMCs are tradable emissions permits that allow safeguard facilities to increase their emissions, but they are falsely presented as an emission reduction unit that enables companies to say they have reduced their emissions to keep within their baseline. This is legislated deception.

Because Safeguard Mechanism Credits (SMCs) are created from an allowable permission to pollute that can be transferred to other polluters. They are by definition, carbon permits.

In transferring permission to pollute SMCs should have been described as permits which then would increase the baseline for the buyer in that year. That doesn't fit the narrative of helping polluters towards net zero, so ***Pollution became Reduction***.

> ***Recommendation***
>
> Before ASIC could provide guidance on Safeguard Mechanism Credits, they need to be properly defined in the NGER Determination as transferrable Carbon Pollution Permits which allow a corresponding increase to the baseline of the purchasing Safeguard Facility, for Australia's reputation as a nation where its schemes and business claims are respected.

Comments on the proposed updated REGULATORY GUIDE 236 Do I need an AFS licence to participate in carbon markets?

First Issue: Australia does not have carbon markets. It has certificate markets for units that do not include the attributes that they are traded for to make end use claims. Emissions abatement is still claimed by those selling ACCUs and Safeguard Mechanism Credits are actually tradable permits to enable facilities to increase their emissions. To refer to the certificate markets as financial products is correct because they have been defined as financial products. To refer to these markets as carbon markets is bullshit because the certificates do not incorporate the carbon emissions attribute into the certificates and double counting, or false claims are the result.

> ***Recommendation***
>
> ASIC should not refer to any markets associated with the Safeguard Mechanism as carbon markets until the relevant certificates legally incorporate the emissions attributes that they are traded and used for.

The proposed Guidance states that "*Among other things, ASIC is responsible for assessing and approving AFS licence applications, and ensuring that licensees operate efficiently, honestly and fairly. ASIC also keeps a register of all AFS licensees"*. How can licensees to operate honestly when SMCs are used to claim emissions reductions whilst enabling an increase in emissions? How can licensees operate honestly by claimant that ACCUs reduce the net emissions of an entity when in fact the project site and sector where the ACCU was created is still claiming the abatement and when the negative emission has not been integrated into the tradable SMC unit?

As for eligible international emissions units (EIEUs) where is the assurance that the country and site owner that created the unit is not still claiming the abatement?

The statement that Australian Carbon Credit Units "represent one tonne of carbon dioxide equivalent emissions that are avoided or sequestered by an eligible offsets project" is bullshit. ACCUs do not actually represent this. They are created in reference to a project, but the attribute is not integrated with the certificate. Part 2, Division 1, Section 11 of the Carbon Farming Initiative (Carbon Credits) Act 2011 describes how Australian Carbon Credit Units are created **but does not describe** what they are, nor does it describe attributes that the units contain any attributes.

It would be great if the legislation defined ACCUs as including the negative emissions attribute to represent a tonne of negative emissions, but the legislation HAS NOT DONE THIS! In addition, the legislation has not described basic debit and credit rules to enable carbon markets to work.

ASIC is correct to say that an eligible offsets project is a project carried out in accordance with the Carbon Credits (Carbon Farming Initiative) Act 2011 (CFI Act). ACCUs can be sold to generate income, and that is typically what they do.

ACCUs can be sold to the Australian Government through contract, or to companies and other private buyers (i.e. in the secondary market), **but to describe this as a carbon abatement contract is bullshit** because the abatement is not incorporated into the certificates that are traded.

ASIC and entities can just be lazy and say this refers to that in legislation buy when meaning is put to the words then that needs to be honest, transparent and have integrity.

> ***Recommendation***
>
> ASIC Legal and Governance teams should read the CFI, NGER, renewable electricity Target and Safeguard Legislation closely, to confirm that ACCUs and SMCs are not adequately defined in legislation to incorporate the attributes that they are used for. DCCEEW can write into legislative instruments that certificates cut from cereal packets could be approved but that does not establish integrity.

RE: *ACCUs can also be used by operators of certain large industrial facilities to ensure they do not exceed their baseline of emissions*. **This statement is bullshit because the abatement is not integrated into the ACCU certificate**. The owners of projects creating the ACCUs are not required to add emission to their carbon inventory account when they sell ACCUs. The transfers across sectors are also not adjusted when the land use sector sells ACCUs to the fossil fuel sector. These requirements could have been established but have not been established.

Re: *The avoidance of emissions, or the removal of one or more greenhouse gases from the atmosphere, is referred to as 'carbon abatement'*, this is agreed but for the abatement to be traded in certificates, it must first be defined as being an attribute that is incorporated into the certificate then be traded and claimed within a set of debit and credit rules that do not yet exist.

Re: *emissions units,* **Australia does not yet have tradable emissions units**. **Australia has certificate units with bullshit names** that do not include tradable emissions abatement attributes.

Re: "*Australia's largest industrial facilities (referred to in this guide as 'safeguard facilities') must ensure that their net emissions number does not exceed their baseline emissions number"* The baseline (facility cap) is an intentionally confusing term. SMCs cannot under any logic help a facility reduce their emissions to within their cap. As tradable permits to pollute, SMCs enable facilities to increase their emissions and there is absolute deception in their function. ACCUs do not legally incorporate the abatement so how can they honestly help a facility reduce their emissions until the accounting is sorted out. Everything about the sentence above in the proposed Guideline is bullshit.

RE: *Both SMCs and ACCUs represent one tonne of carbon dioxide equivalent emissions stored or avoided*. **This statement is bullshit**. They just cannot. SMCs can only represent a tradable emissions permit to increase emissions and ACCUs whilst they were created from an abatement project, do not incorporate the emissions abatement attribute and therefore cannot represent a tonne of carbon dioxide removal for an end user.

If ASIC aim to "promote fair, orderly and transparent markets, and to support confident and informed participation by investors and financial consumers" then the tradable certificates must not only be financial units but also incorporate the attributes that they will be purchased for, and claims made upon.

When there is systemic double counting, free riding and confusion in markets because basic legislated market-based frameworks have not been established and debit and credit rules do not apply then nothing in the market is operate efficiently, honestly or fairly.

RE: *We refer to this as the 'AFS licensing regime'*, **I refer to Australia's carbon and renewable energy markets as farcical non-legal doublethink** and hope that ASIC can be the first Government Agency in nearly 20 years to call for the foundational rules to be cleaned up.

RE:*" Other emissions-related financial products include, for example, derivatives over emissions units and interests in managed investment schemes involving carbon abatement activities or emissions units. for the derivative or the interest in the managed investment scheme to be a financial product",* No other carbon related derivative markets should be allowed until market-based accounting is properly defined in legislation and the systemic double counting stopped.

I would be happy to discuss my submission in more detail.

For your reference I also draw your attention to other recent submissions (hyperlinked to google drive) which contain more information.

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[redacted]

Kind regards

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Tim Kelly

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