A New Legal Avenue for Pricing GHG Emissions? To Trade or to Tax?

ABSTRACT

In a recent media release the Prime Minister of Australia presented the terms of reference for the newly established Multi Party Climate Change Committee. Although the Committee is charged with considering climate change mitigation measures in general, specifically the Committee must consider an appropriate mechanism for the establishment of a carbon price. The purpose of this paper is to provide an overview of the mechanisms to be considered by the Climate Change Committee, including the use of emissions trading and carbon levies in other jurisdictions. This paper argues that for any effective investigation of a carbon price for Australia to occur, a thorough knowledge of other jurisdictions' methods for carbon pricing is essential.

1. INTRODUCTION

On 27th September 2010 the Prime Minister announced the establishment of a Multi Party Climate Change Committee. The committee was established on the basis that:

> a carbon price is an economic reform that is required to reduce carbon pollution, to encourage investment in low emissions technologies and complement other measures including renewable energy and energy efficiency.[1]

The Committee is to consider different mechanisms for pricing carbon dioxide emissions, including a broad based emissions trading scheme, a broad based carbon levy, and a hybrid model of both these instruments. The consideration of these mechanisms will include the coverage, international linking, implementation and assistance for both households and businesses. This analysis must include a study of the advantages and disadvantages of emissions trading and those of a potential carbon levy. In addition, given that both the linking and implementation form criteria for the terms of reference of this committee, consideration must extend to emissions trading schemes and carbon taxes from other domestic jurisdictions. Finally the committee must consider the existing framework in Australia that may impact on any carbon tax legal framework.

The purpose of this paper is to provide an overview of some of the key issues that must be considered by the Climate Change Committee when a carbon price for Australia is examined. In presenting this

[1] Julia Gillard, 'Prime Minister establishes Climate Change Committee' (Media Release, 27 September 2010) http://www.pm.gov.au/node/6923 viewed 28 October 2010.

overview schemes and taxes implemented in other jurisdictions will be canvassed. These jurisdictions can provide valuable lessons for policy makers when evaluating the issues for an Australian carbon price. These other domestic schemes must also inform this committee when consideration is given to both linking and implementation issues. Indeed, some of these domestic legal frameworks already have implications for Australian industries.[2] The final part of this paper will review the existing legal framework in Australia that may have implications for a carbon price. This will form an important part of the analysis of the Climate Change Committee, given that any economic reform can potentially have widespread implications.

2. WHY PRICE GHG EMISSIONS?

Climate science dictates a need to reduce GHG emissions and limit the concentration in the atmosphere in order to avoid an increase in global temperatures.[3] These scientific claims lead to a moral obligation to avoid GHG emissions on a domestic level. The international climate change regime effectively transforms this moral obligation into a legally binding duty to take action to limit emissions.

2.1 The United Nations Framework Convention on Climate Change (the UNFCCC)[4]

The UNFCCC, adopted at the Rio Conference in 1992, formally acknowledges the need to reduce GHG emissions for the purpose of climate change mitigation.[5] The UNFCCC was drafted in response to scientific claims that the earth was warming as a result of human activity. Although doubt surrounded the scientific evidence in 1992, the precautionary principle[6] required remedial action.

The overriding objective of the international climate change regime is contained in Article 2 of the UNFCCC. This objective requires parties to prevent dangerous anthropogenic interference with the climate system by stabilizing GHG concentrations in the atmosphere.

The principles of the UNFCCC are embedded in Article 3 of the convention. The obligations include the promotion of sustainable development. Sustainable development was officially defined

[2] For example, the Coal Tax in India, discussed in later sections of this paper, has implications for any imported coal.
[3] See, eg, Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change* (2007).
[4] *United Nations Framework Convention on Climate Change*, Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994)
[5] *United Nations Framework Convention on Climate Change*, Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).
[6] Michael Bothe and Eckard Rehbinder, 'Climate Change as a Problem of Law and Policy' in Michael Bothe and Eckard Rehbinder (eds), *Climate Change Policy* (Eleven International Publishing, Utrecht, 2005) p 2. The precautionary principle is the principle that scientific uncertainty should not bar remedial action.

internationally in the Brundtland Report[7] in 1987 to mean 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[8] This report provided strategies to be used when introducing policies in accordance with the goal of sustainable development. The most relevant to this research program is the requirement to make more effective use of economic instruments, with a goal to internalising environmental costs.[9]

The commitments to the UNFCCC,[10] are contained in Article 4 of the Convention. These commitments include promotion of sustainable management and a recognised need for sustainable economic growth. There is also a clear obligation for developed country parties to 'adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases'.[11]

The UNFCCC does not stress a need to price GHG emissions, beyond references to sustainable development. However, through the implementation of the Kyoto Protocol, a price was indeed allocated to emissions for signatory parties. This was done by introducing limits, providing a means for trading these limits, and by imposing penalties on any parties failing to meet allocated targets.

2.2 The Kyoto Protocol (Kyoto)[12]

The Kyoto Protocol changed the shape of the international climate change regime from a single instrument containing broad and general obligations to a regime with strict targets, and penalties for non compliance. An unnamed price was attached to GHG emissions, for Annex I parties, through targets represented by unit allocation. The Protocol does not provide guidance for how nation states can meet these targets, but does include 'flexible mechanisms' as a means for parties to gain, trade and sell units when it is required. Included in these mechanisms is the concept of International Emissions Trading (IET),[13] which enables nation states to buy and sell units to meet the Protocol's obligations.

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[7] World Commission on Environment and Development, *Our Common Future: The World Commission on the Environment and Development* (1987).
[8] World Commission on Environment and Development, *Our Common Future: The World Commission on the Environment and Development* (1987)., 44.
[9] World Commission on Environment and Development, *Our Common Future: The World Commission on the Environment and Development* (1987). Paragraph 51 – 55.
[10] The Commitments in Article 4 use the language 'shall' rather than 'should'. See *United Nations Framework Convention on Climate Change*, Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994), Articles 3 and
[11] *United Nations Framework Convention on Climate Change*, Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994), Article 4.2.
[12] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005).
[13] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005), Article 17.

The IET mechanism under Kyoto creates what is effectively a nation based trading market. Companies and individuals who release GHG gases are not recognised by the Protocol. Although the possibility of governments devolving their obligations to entities in their territory and allowing these entities to trade allowances internationally is recognized by the treaty, [14] the development of a carbon price domestically is independent of the international climate change regime. The result of a price on GHG emissions domestically is that entities and individuals responsible for emissions are economically accountable for pollution. It is this same pollution that the units allocated through the Kyoto Protocol attach to.

2.3 Enforcement of the Regime

The compliance system of the International Climate Change Regime has been heralded as the most advanced in international environmental law.[15]

Tightly defined consequences follow any unattained targets of the Kyoto Protocol.[16] Firstly, a mandatory unit deduction of 30 percent from subsequent commitment periods is taken from the state. The provision of a detailed compliance plan is also required of the noncompliant state. These penalties will increase the economic burden on nation states, and taxpayers of those states that do not meet their targets. Therefore, failure to take action may result in an economic burden on national governments through either a requirement to buy additional units, or through payment of a penalty.

The analysis of the International Climate Change regime presents a compelling argument for pricing carbon domestically. The obligations of the regime are legally binding, and targets must be reached, or penalties paid. The argument to price GHG emissions also has foundations in economic theory. Specifically the theory of externalities and demand theory.

2.4 The Theory of Externalities

> Freedom in a commons brings ruin to all.[17]

The tragedy of the commons describes situations where valuable resources are squandered because users are not charged for them. When a valuable resource has a price of zero, people will continue to

[14]Richard Baron and Michel Colombier, 'Emissions Trading under Kyoto Protocol: how far from the ideal?' in Farhana Yamin (ed), *Climate Change and Carbon Markets* (EArthscan, London, 2005) 153, p 157.
[15] Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, Cambridge, 2004) p 378.
[16] Yamin and Depledge, n 15, p 393. These failures include the methodological and reporting requirements, the eligibility for flexibility mechanisms and the quantified emission limitation reduction.
[17] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243 .

exploit it as long as its marginal benefit remains positive. The polluter pays principle is an economic rule of cost allocation. The source of the principle is in the theory of externalities.[18]

An externality can be described as a cost or an impact to a third party to a transaction, which they, as the third party, have no control over. In the case of manufacturing, externalities are costs of producing a product that is not reflected in the final cost of that product,[19] it is a cost, however, which is borne elsewhere. A negative externality can be described as a cost to the external environment. For climate change the negative externality is the release of anthropogenic greenhouse gases into the atmosphere, thus causing the atmospheric concentration to increase, and ultimately, the climate to change. To enable the price of a good to properly reflect the costs associated with its production, a price must be allocated to these emissions.

Pigou was first to suggest a tax mechanism to internalise externalities in 1920.[20] The tax structure conceptualised by Pigou required that externalities were wholly internalised in the cost of a product, thus environmental damage reduced and damage limited. Pigouvian taxes can be considered corrective taxes, as they correct the bias of using an apparently *free* resource and cause the price of a product to be closer to the social cost of production.[21]

The ensuing discussion reviews the economic arguments and considerations for pricing externalities.

2.5 The Economic Theory of Demand

A market for any good consists of all the buyers and sellers of that good. People buy at particular prices and sell at others. The price of a good is dependent on a number of things, including the value to the buyer, the cost of production and the amount a person is willing to pay for the good. One of the fundamental theories of economics is the theory of demand. The basis of this theory is that, in a given market, there is an inverse relationship between demand and price.

There are a number of reasons for the behaviour reflected in the demand curve, most to do with individual reactions to price. One such explanation is the substitution effect.[22] As the price of a commodity increases consumers may have an increased desire to change commodities and substitute one for another. When discussing climate change the relevant commodity would be the cause of the GHG emissions, and the price increase would be a result of any charge implemented for the emissions

[18] Hon Justice Brian J Preston, 'Sustainable development law in the courts: The polluter pays principle' (2009) 26 *The Environmental and Planning Law Journal* 253 at 258.
[19] Maria Lee, *EU Environmental Law: Challenges, Change and Decision Making* (Hart Publishing, Oxford, 2005) p 3.
[20] Louis Kaplow, *The Theory of Taxation and Public Economics* (Princeton University Press, Princeton, 2008) p 20.
[21] Richard A Ippolito, *Economics for Lawyers* (Princeton University Press, Princeton, 2005) p240.
[22] Robert H Frank and Ben S Bernanke, *Principles of Economics* (McGraw Hill Irwin, Boston, 2009), 98.

associated with the product, therefore increasing the cost of the product. Any substitution would either need to be for a product with less GHG emission outputs as a result of production, through either energy changes or otherwise, or for a reduced GHG emissions intensive product itself, such as natural gas in place of petrol. The economic benefits of doing this, would of course, be related to the nature of the mechanism used to price the GHG emissions.

A decreasing quantity demand may also be explained through reduced purchasing power of the individual. This is called the income effect of a price change. There is simply less capacity for an individual to purchase as much as they previously did prior to the price increase and therefore the demand decreases. [23]

Finally the willingness of the buyer plays a significant role in the quantity demanded of a particular product. The cost benefit principle of economics suggests that buyers will only purchase a product if the expected benefit exceeds the cost. As the price increases so too does the cost to the buyer, and the number of buyers who perceive the cost as less than the benefit decreases.[24]

In simple terms as the price of a product goes up through taxation, the demand will decrease.[25] However, the capacity of a tax to change behaviour is determined by a number of factors such as the elasticity of demand, the availability of substitutes and the profits or economic efficiency of particular firms.[26] Therefore, although the result of any price associated with GHG emissions will ultimately lead to a decrease in those emissions, there is some difficulty in reducing the amount of GHG emissions enough to have an impact on climate change, without substantially disturbing the economic environment.

This means that where a tax is positioned in the economy, or in the case of emissions trading, who is obliged to buy permits, is of vital importance to potential environmental success of the economic mechanism. It is through the implementation and methodology of the tax base, or ETS structure, that the internalisation of GHG emissions can be assured. In addition to ensuring that the right products, goods or processes are subject to the mechanism, identifying the causes of GHG emissions, and imposing liability as broadly as possible, without crippling the system administratively, will increase the chances of positive changes occurring across the economy. Furthermore, any successful mitigation strategy will have to have an effect on the potential availability of substitutes. This will mean encouragement of technological innovation will be necessary.

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[23] Frank and Bernanke, n 22, p99.
[24] Barry C. Field and Martha K. Field, *Environmental Economics* (McGraw Hill Irwin, Boston, 2009), 2.
[25] Frank and Bernanke, n 22, p 99.
[26] Lee, n 19, p 192.

The economic arguments are important when considering any new economic instrument for the purpose of mitigating climate change. These theories may assist in the determination of the necessary liable parties, and the most effective points of obligation for an instrument to achieve the maximum reductions in GHG emissions, whilst maintaining the domestic economic status quo.

If it is accepted that a price must be allocated to GHG emissions as a negative externality of modern society, the question then begs, which economic instrument is the most effective mechanism for allocating this price?

3. EMISSIONS TRADING AND CARBON TAXES

> Climate change presents a unique challenge... it is the greatest and widest-ranging market failure ever seen. [27]

The virtues of the market were first advocated by Adam Smith, claiming that individual self interest would lead to an efficient economy.[28] It was his claim that a market left unregulated would lead to general well being as if guided by an invisible hand.[29] The failure of the free market, resulting in inefficiencies in resource allocation,[30] can occur for a number of reasons. One of these includes the existence of externalities. The terms of reference of the climate change committee require that a price is allocated to GHG emissions through a market based mechanism using either an emissions trading scheme, a carbon levy or a hybrid model.

Although it is generally accepted that an economic instrument is an important legislative tool for climate change, the question begs, which form of instrument is best? Unfortunately this presents a difficult question to answer, and hinges on the design of the mechanism itself. The Garnaut Review acknowledged the importance in designing a well functioning scheme in the 2008 report:

> Policy makers would be better off abandoning an emissions trading scheme in favour of a broad-based emissions tax without exemptions if they felt unable to resist pressures on the political process for ad hoc and overly generous assistance arrangements for…industries.[31]

An emissions trading scheme (ETS) is a scheme developed for the purpose of trading in rights to emit greenhouse gas emissions.[32] An ETS generally requires a target to be given to the source of greenhouse gases, with permits either issued or auctioned. Whether the source will buy emissions

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[27] Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge, 2006), Executive Summary i.
[28] David A. Anderson, *Environmental Economics and Natural Resource Management* (Routledge, London, 2010), p 47.
[29] J. Stiglitz, 'Guided by an invisible hand' (2008) 137(4919) *New Statesman* 18.
[30] Anderson, n 28, p 48.
[31] Ross Garnaut, *Garnaut Climate Change Review Final Report* (2008), 13.3.3.
[32] Jurgen Lefevere, 'Greenhouse Gas Emissions Trading: A Background' in Michael Bothe and Eckard Rehbinder (eds), *Climate Change Policy* (Eleven International Publishing, Utrecht, 2005) 103, p 104.

permits rather than mitigate greenhouse gas emissions, logically, depends on the price of the permits on the emissions trading market.[33] The price of the permit can potentially fluctuate continually.

A common argument in favour of an ETS over a carbon tax is based on the capacity of an ETS to place a cap on the number of emissions.[34] Although appealing at first consideration, this argument is flawed, especially with the concessions, available credits and uncertainty associated with emissions trading in its infancy. Furthermore, the ability to substitute emissions units from other jurisdictions, and indeed, even Kyoto units themselves, can cause loss of scheme credibility.[35]

It has been suggested that a carbon tax would be too difficult to implement, based on the difficulties in setting the optimum rate of taxation.[36] Although there are some merits in this argument, the same can be said of permit numbers under an emissions trading scheme. The difference, however, between changing the rate of taxation and reducing or increasing permit numbers is that permits have a defined legal identity.[37] Although this may lead to legislative complications, including banking and borrowing requirements, it may prove more attractive to investors, which could be essential for the environmental effectiveness of the instrument.

One obvious benefit of a carbon tax is its *price stability*.[38] It is this stability that allows governments and industries to both plan with a degree of economic precision. Where emissions trading fixes the quantity of emissions, taxation allows the quantity to fluctuate, but fixes the price. For governments this stability means that revenue can be predicted and allocated accordingly.[39] Where a scheme is to be revenue neutral, this ability to predict levels is absolutely essential for balancing a fiscal budget. This allows efficient planning for whichever method of revenue recycling is used.[40]

The argument of *familiarity*, which can make traditional command and control regulation so appealing, can also be applied to a carbon tax. The administrative structure of a tax is not a new concept to policy makers and legislators. Liable entities will be familiar with reporting obligations of other tax regimes, which will make implementation less problematic. Furthermore legal rules, such as a nation's Constitution, that potentially impact new taxation laws, are well known to policy makers and drafters alike.

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[33] Permits can also be known as rights to emit or credits.
[34] Regulation Impact Statement, Carbon Pollution Reduction Scheme Bill 2009 (Cth), 4 – 6; Garnaut, n 31, 309.
[35] Credits can actually be created through the CDM mechanism of the Kyoto Protocol.
[36] Garnaut, n 31, 309.
[37] The legal definition for a permit differs between schemes. For example when the US proposal was contained in the *American Clean Energy and Security Act 2009* [H.R.2454.PCS] it was specifically stated that emission allowances do not constitute a property right, where in the Carbon Pollution Reduction Scheme Bill (2010) where an Australian scheme was proposed an emissions unit was defined as personal property.
[38] Submission to the Prime Minister's Task Group on Emissions Trading in response to the Task Group's Issues Paper of February 2007, Parliament of Australia, March 2007, 3 (John C.V. Pezzey).
[39] John Humphreys, 'Exploring a Carbon Tax for Australia' (2007) *The Centre for Independent Studies* <http://www.cis.org.au/policy_monographs/pm80.pdf> at 31 May 2010.
[40] Humphreys, n 39.

It is possible to make arguments that favour both forms of economic instrument. Regardless of which market mechanism is chosen, it will be essential to review historical implementation in other domestic jurisdictions, as well as the current existing regimes for the mitigation of GHG emissions.

4. EMISSIONS TRADING

Emissions trading is regarded as a flexible economic instrument, which has been described as providing the best means of achieving cost effective emission reduction.[41]

The concept of trading in emissions began in the United States with the Sulphur Dioxide Reduction Plan.[42] The purpose of this plan was to reverse the effects of acid deposition through an emission allocation and transfer program. This plan began with capping the emission units of sulphur dioxide from coal-fired power plants and expanded to incorporate more corporations and areas.[43] It was a highly successful method of sulphur dioxide emission reduction.

International Emissions Trading (IET) was introduced to the rest of the world as a means of achieving emission reduction targets as a flexible mechanism of the Kyoto protocol[44]. IET was included in Kyoto after successful negotiations by the United States in the early stages of discussions. The success of the acid rain program was presented as evidence of the potential of a market to cost effectively reduce emissions. [45]

There have been a number of academic articles published discussing the different scheme proposals and the differences between them and this article does not intend to replicate these in any detail.[46] The following is a brief discussion of key features of emissions trading schemes in the European Union and New Zealand, and an overview of the Australian CPRS proposal.

4.1 European Union Emissions Trading Scheme (EU ETS)

[41] See, eg, Garnaut, n 31, 304.
[42] 42 USC § 7651 (1990)
[43] Anthony Hobley, 'Creating a Global Carbon Market' in Paul Q Watchman (ed), *Climate Change - A Guide to Carbon Law and Practice* (Globe Business Publishing, London, 2008) 127, p 132.
[44] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005), Australia ratified 12 December 2007.
[45] Sonia Labatt, and Rodney R White, *Carbon Finance: The Financial Implications of Climate Change* (John Wiley and Sons, Hoboken, 2007), p 141.
[46] See, eg, Caroline Haywood, 'The European Union's Emissions Trading Scheme: International emissions trading lessons for the Copenhagen Protocol and implications for Australia?' (2009) 26 *Environmental and Planning Law Journal* 310 ; Hobley, n 43; Nicole Lederer, 'The European Emissions Trading Scheme and International Emissions Trading - A Comparative Analysis' (2008) 12 *New Zealand Journal of Environmental Law* 1.

The EU ETS was established by a Directive of the European Council.[47] The scheme has since been amended by a number of subsequent directives.[48] This scheme is designed to apply to all members of the European Union, and effectively redistributes allowances as allocated under the Kyoto Protocol.

The EU ETS directive includes a prohibition on emissions by relevant installations, prohibiting emissions unless a permit has been issued by the competent authority.[49] This inclusion effectively combines the use of economic incentives with the traditional command and control regulation permit system. The EU ETS permit sets out reporting and monitoring conditions and is to be reviewed by the authority every 5 years.[50] In addition to holding a permit the installation is required to surrender a relevant number of allowances at the end of each year. [51]

The EU ETS covers approximately 45 per cent of European carbon dioxide emissions, this translates to 30 per cent of total EU ghg emissions.[52] Initially only carbon dioxide was included in the ETS, however, the second phase of the scheme included nitrous oxide emissions. The liable parties are stationary installations including combustion plants, oil refineries, coke ovens, iron and steel factories and factories making cement, glass, lime, brick, ceramics, pulp and paper. [53]

The EU ETS recognises credits from CDM and JI projects to comply with their emission reduction targets. The Directive[54] issues some qualitative limits on which projects CDM and JI credits may be used from[55]. In addition there is a quantitative limit on the number of credit units that may be used. This is to enable adherence to the supplementarity principle of Kyoto.[56] The quantitative requirement

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[47] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC* [2003] OJ L 275/46, 32.
[48] *Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms* [2004] OJ L 338/47, 18.
[49] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC* [2003] OJ L 275/46, 32, Article 6.
[50] *Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community* [2009] OJ L140/52, 63, Article 1 Paragraph 7.
[51] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC* [2003] OJ L 275/46, 32, Article 6 (2) (e).
[52] European Commision, *'EU Action Against Climate Change: EU Emissions Trading - an Open Scheme Promoting Global Innovation'* (2005), p 7.
[53] Haywood, n 46 at 312.
[54] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC* [2003] OJ L 275/46, 32, Article 6 (2) (e).
[55] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC* [2003] OJ L 275/46, 32, Paragraph 8, restriction on nuclear credits.
[56] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005. Article 6.1 (d). The supplementarity

ensures a degree of scheme credibility is maintained. Without this limitation it would be possible for the ETS to be 'flooded' by Kyoto units that may or may not represent tangible, permanent GHG emissions reductions.

Through the first and second phase the EU scheme has operated through National Allocation Plans (NAPs), enabling each country to set its own targets[57] and conditions. However, different national approaches among the member states has seen similar industries allocated different allocations and treated differently between jurisdictions. The most recent directive concerning the EU ETS has amended this in paragraph 8,[58] and NAPs will no longer form part of the EU ETS from 2013. It has been suggested that this would enable a more harmonised market, avoid distortions in that market and to improve the possibility of linking.

4.2 The New Zealand ETS

The New Zealand Emissions trading scheme (NZ ETS) was established by the *Climate Change Response (Emissions Trading) Amendment Act 2008* (NZ) amending the *Climate Change Response Act 2002* (NZ) (CCRA).

The New Zealand scheme uniquely aims to incorporate all sectors, including agriculture, and all GHGs by 2015.[59] Sectors are staged into the scheme from 2008 to 2015[60]. The inclusion of the agricultural sector in the NZ ETS, although unique, is essential for the effectiveness of the NZ ETS; Electricity in New Zealand is currently 67 percent renewable,[61] and the majority of New Zealand GHG emissions are from the agricultural sector.[62]

The New Zealand scheme accepts all forms of Kyoto units regardless of the origin of the unit, with the exception of units generated by nuclear projects.[63] There are no restrictions on the number that can

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principle of Kyoto is contained in Article 6.1 and requires that parties' acquisition of emissions units is only an action 'supplemental' to domestic emissions reductions.

[57] Two recent judgements by the Court of First Instance found that the Commission had misused its powers by reducing the quantities of emission allowances of Poland and Estonia. *Poland v Commission* (T-183/07) [2007] ECR II-00152.

[58] *Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community* [2009] OJ L140/52, 63.

[59] The Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (NZ) amended this date from 2013 to 2015.

[60] The Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (NZ) amended this date from 2013 to 2015.

[61] Debroah Lynne Johnson, 'Electricity and the Environment - Current Trends and Future Directions' (2008) 12 *New Zealand Journal of Environmental Law* 195.

[62] Karen Price, Lisa Daniell, and Laura Cooper, 'New Zealand Climate Change Laws' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (Lawbook Co., Pyrmont, 2009) 89, p 96.

[63] Excluding CERs from nuclear projects. See Price, n 62, p 93.

enter the scheme, however foreign units allocated through the Kyoto targets, also known as AAUs, are unable to be used for compliance beyond 2012.[64]

On 25th November 2009 the New Zealand parliament passed the Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (NZ).[65] This Bill introduced a fixed price option of $25 to be included in the revised scheme for transport, energy and industrial sectors until 1 January 2013.

4.3 The Australian Carbon Pollution Reduction Scheme (CPRS)

The most significant action by Australian legislators, intended to reduce the national GHG emissions inventory, was represented by the Carbon Pollution Reduction Scheme proposal.

The CPRS proposal contained the details of the framework for an emissions trading scheme in Australia. The bills containing the proposed legislation for this scheme were twice voted against in the Australian Senate in 2009.[66] The bills were reintroduced for a third time, after negotiations between opposing political parties, however, two months after the reintroduction it was announced that the CPRS would be delayed until the end of the first Kyoto commitment period.[67]

Although this continues to be the policy of the Australian government subsequent to a leadership change, it would appear that the likelihood of the scheme receiving the support needed to be accepted into law is remote.[68]

The scheme was intended to eventually regulate 75 percent of Australia's GHG emissions. Agricultural activities represented the most significant exclusion, which were intended to be left out of the scheme on an indefinite basis. The scheme contained a number of industry assistance measures, which were cautioned against by the Garnaut Review.[69] Indeed the Garnaut review suggested that if these measures could not be resisted by legislators and policy makers, then a broad based carbon tax would be the preferable policy option.

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[64] Price, n 62.
[65] New Zealand, *Parliamentary Debates*, House of Representatives, 24 September 2009, 6854, (Nick Smith, The Minister for Climate Change Issues).
[66] The bills were voted down in the Senate in August 2009 and December 2009. The Bills were reintroduced to the House of Representatives in February 2010.
[67] Australian Government Department of Climate Change, *CPRS latest updates* (2010) http://www.climatechange.gov.au/government/initiatives/cprs/latest-news.aspx at 21 September 2010.
[68] Christine Milne, 'Why the Greens could not support the CPRS' (Media Briefing, May 2010) <http://christine-milne.greensmps.org.au/webfm_send/356>, at June 21 2010.
[69] Garnaut, n 31, p 312.

The CPRS bill contained provision for a fixed price period where units would be capped at A$10 per tonne of carbon dioxide from 2011 to 2012. This was to then transition to a period of price cap until the end of the financial year commencing on 1 July 2015.[70]

The CPRS bill recognised different types of Kyoto units,[71] with no restriction on the number of eligible international emissions units.[72] This is in contrast to the EU ETS which has both quantity and quality limits on the Kyoto units. This provision would have had the potential to lead to the greatest loss of scheme credibility. The CPRS also allowed credits from emission reduction through domestic reforestation projects to be used to meet reduction obligations, which the EU ETS forbids.[73]

Although the defeat of the scheme in the Senate was seen as a set back for climate change policy in Australia, the actual environmental effectiveness of the CPRS proposal was doubtful. Through an initially low ceiling price, unlimited numbers of acceptable Kyoto units, and recognition of 'temporary' emissions reductions, it is unlikely the CPRS would have had the desired environmental impact.

5. CARBON TAXES FOR CLIMATE CHANGE MITIGATION

5.1 Definition of a Carbon Tax

The use of taxes to address environmental concerns is not a new concept. Indeed, taxes to control emissions were first introduced in the 1950s in European countries. The United States introduced taxation as a method of controlling Ozone Depleting Substances in the 1980s, and carbon taxes have been implemented since 1990. Before considering carbon taxes of other domestic jurisdictions it is important to define what is meant by the term 'carbon (or emissions) tax'.

The definition of a carbon tax varies based on existing legal and economic commentary and from observing the different designs of taxes implemented worldwide. A carbon tax may be narrowly defined to include only those taxes with a base directly related to the carbon content of a particular commodity or pollutant. This definition would exclude the legal measures adopted in the United Kingdom, for example, where the Climate Change Levy is designed without regard for the carbon content of the taxable product.

The definition may extend to energy taxes or fossil fuel taxes that have been implemented for the specific purpose of reducing GHGs, which are emitted as a direct result of the production of the taxed

[70] Garnaut, n 31.
[71] For the definition of an eligible international emissions unit see Carbon Pollution Reduction Scheme Bill 2009 (Cth) s5
[72] John Taberner, 'The Carbon Pollution Reduction Scheme Bill 2009' (2009) 24(4-5) *Australian Environment Review* 4 at 4.
[73] Haywood, n46 at 327.

energy or the combustion of the taxed fossil fuel. The express purpose of these taxes is to mitigate climate change.[74] This definition falls short of the broadest definition of a carbon tax, which includes all taxes on activities that cause GHG emissions.[75] If defined broadly to include *all* taxes on activities that cause GHG emissions, an exhaustive analysis would require discussion of all fossil fuel based taxes, which may or may not lead to GHG emissions reductions. Therefore this paper is concerned strictly with taxes that have been implemented to mitigate climate change through GHG emissions reductions.

5.2 Existing and Proposed Carbon Taxes

The terms of reference of the Australian climate change committee include the consideration of coverage, linking, implementation and assistance. Far from being a new method for climate change mitigation, carbon taxes have been implemented and proposed since 1990. Although it will be unlikely that any carbon taxes implemented in domestic jurisdictions will be 'linked' internationally, as is contemplated for an ETS, it may be that existing carbon taxes offer points of consideration for a carbon tax in Australia. This may include the consideration of Australian exports subject to double taxation, if no border adjustment is included in the Australian framework. Therefore the committee must give adequate attention to the practices of overseas domestic jurisdictions when contemplating any proposal for a carbon tax for Australia.[76]

5.2.1 European Union

The first carbon taxes in the world were initially introduced in Scandinavian countries. The majority of these countries are now part of the European Union, and are subject to Community law. The European Union provide legal frameworks for nation states to implement domestically, through directives and other sources of Community law. The Directives provide a result to be achieved, but the choice of how it is achieved is left to individual nation states.[77]

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[74] Kerstin Tews, Per-Olof Busch and Helge Jorgens, 'The Diffusion of New Environmental Policy Instruments' (2003) 42 *European Journal of Political Research* 569 at 586.

[75] Lars Hoffmann, 'The Role of Economic Instruments to Reduce Carbon Emissions and Their Implementation: A Comparison of Environmental Policies in New Zealand and Germany ' (2006) 10 *New Zealand Journal of Environmental Law* 129 at 142.

[76] There are a number of jurisdictions currently exploring policies incorporating direct carbon pricing, however any review of these policies is premature given that these models for direct pricing are not yet conceptualised. These jurisdictions include China, Japan and South Korea. These jurisdictions, along with other key economies such as India, the United Kingdom, Germany and the United States are the subject of a Productivity Commission Study into the effective carbon price for the electricity sector, see Productivity Commission, *Emission Reduction Policies and Carbon Prices in Key Economies* (26 November 2010) <http://www.pc.gov.au/projects/study/carbon-prices>.

[77] Europa, *'Access to European Union Law - Process and Players'* (2010) <http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm> at 21 July 2010.

At the EU level there have been difficulties in trying to introduce environmental forms of taxation. Although environmental legislation is ordinarily submitted to a majority vote, any fiscal measure requires unanimity.[78] The concept of a carbon tax was introduced in a 1992 Commission White paper, but following severe opposition, it was withdrawn. This was replaced by a far less ambitious proposal on energy products in 1997. The unanimous agreement eventuated through a modified version of the 1997 proposal in 2003.[79] The revised directive came into force on 1 January 2004. The directive provides a framework of rules to restructure and harmonize national tax systems within the context of the single market.[80] The Directive sets minimum rates of excise taxation for energy and electricity production.

The directive is based on two key ideas:

1. The legal framework includes competing sources of energy, such as coal, lignite and natural gas, whenever they are used for heating purposes and as motor fuels. They are not taxed when used for chemical reduction in the steel industry for example. Electricity is also to be taxed; and,

2. The energy tax character of the levy is underlined by the fact that both the tax rates for natural gas and coal are set at an identical level per unit of energy created. [81] This means that the rate is in no way affected by the actual emissions.

It must be noted that the destination principle of taxation, that is that taxation is imposed at the point of destination rather than at the production stage, is not supported within the EU framework by virtue of the 'single market' principle. There have been no attempts to link different methods of taxation or provide rebates accordingly in the EU market. The single market principle requires minimal frontiers between member states.[82] Border tax adjustments, imposed in accordance with the destination principle, pose barriers to free trade.

The second important point to note is that the EU directive does not actually require the implementation of a carbon tax. Nations are able to simply impose taxation on energy and still be in compliance with this directive. A number of EU states, however, have imposed levies beyond the obligations of the directive, through implementation of carbon taxes.

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[78] *Treaty on the functioning of the European Union,* opened for signature 13 December 2007, [2008] OJ L C115/01 (entered into force 1 December 2009), Article 192.
[79] Lee, n 19, p 191.
[80] *Directive 2003/96 Restructuring the Community Framework for the Taxation of Energy Products and Electricity* [2003] OL J 283/51.
[81] This means that the EU tax framework cannot be said to be based on emission levels. See, Manfred Rosenstock, 'Energy Taxation within the EU' in Marjan Peeters and K. Deketelaere (eds), *EU Climate Change Policy* (Edward Elgar, Cheltenham, 2006) 240 , p 242.
[82] *Treaty on the functioning of the European Union,* opened for signature 13 December 2007, [2008] OJ L C115/01 (entered into force 1 December 2009), Article 26 and Article 28.

Taxes imposed on GHG emissions, or for the purpose of mitigating climate change have been implemented in a number of countries across the European Union. These countries include: Ireland, The Netherlands, Denmark, Norway, Finland, Sweden, Germany, Italy and the United Kingdom. The following provides an overview of these carbon taxes, for the purpose of demonstrating the different means chosen by the different jurisdictions for achieving reductions in national GHG emissions.

5.2.1.1 The United Kingdom (UK)

Following extensive consultation with business, the Government of the United Kingdom introduced the Climate Change Levy (CCL) in the UK in April 2001. The Climate Change Levy is effectively a tax on energy, rather than a broad based carbon tax. Although renewable energy is excluded from the tax, the base of the tax is not dependent on the prospective carbon emissions potential of the energy.[83] This is highlighted by the inclusion of nuclear power as a taxable energy type under the levy.[84]

The overall objective of the Climate Change Levy is to reduce carbon emissions by taxing *upstream* energy users who cause those emissions.[85] The CCL is intended to be a tax on energy and fossil fuels supplied to industries and commercial operations in a number of sectors of business.[86] These sectors include industry, commerce, agriculture, public administration and other services.[87] Any supplies used for domestic or non-business charity use are considered excluded supplies. [88]

There are a number of exemptions, and provisions for application of a reduced rate of tax under the CCL.[89] Broadly, these categories include exclusions for domestic and charity use; exemption for supply used in transportation; exemption for fuels supplied not intended to be burnt in the UK; exemption for any electricity generated from renewable sources; exemption for self suppliers of electricity; exemption for electricity supplied from partly exempt power and heating combined stations; exemptions for supplies not used as fuel; and, exemption for supplies used to produce taxable commodities other than electricity.

The Government gives an 80 percent discount in the levy rates for those energy intensive sectors of industry that have agreed to meet challenging targets for improving energy efficiency or reducing greenhouse gas emissions within a climate change agreement. These arrangements produce environmental benefits while allowing the industries to determine how best to achieve energy savings.

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[83] Ian Fleming, *The Environmental Taxes Handbook* (2006), p 14.
[84] Benjamin J. Richardson and Kiri L. Chanwai, 'The UK's Climate Change Levy: Is it Working?' (2003) 15(1) *Journal of Environmental Law* 39 at 46.
[85] Fleming, n 82.
[86] Department of Energy and Climate Change, United Kingdom,'*The UK's Fifth National Communication under the United Nations Framework Convention on Climate Change'* (2009), p 41.
[87] Fleming, n 82, p 11.
[88] *Finance Act 2000* (United Kingdom), Schedule 6, Part II.
[89] *Finance Act 2000* (United Kingdom), Schedule 6, Part II, Paragraphs 8 - 21.

The Government has also suggested that participants in agreements will be able to achieve their targets either by trading emission allowances with other companies in an agreement or by participating in the wider UK emissions trading scheme.[90]

The United Kingdom government has recently announced that the Climate Change Levy will be revised in the Finance Bill 2011.[91] The purpose behind this revision is to provide more certainty and support to the United Kingdom carbon price. It is impossible to speculate on the results of this review, however, it may be that to provide more support to a price on emissions, the levy will be more closely linked with a commodity's emissions content.

5.2.1.2 Denmark

Denmark was one of the first countries in the world to introduce a carbon tax in March 1992. This tax was implemented as a carbon dioxide tax on energy products.[92] Even before a carbon tax was introduced Denmark had energy taxes attached to oil products, coal and electricity consumption. [93] The carbon tax was initially introduced to energy products consumed only by households but was expanded to include energy products consumed by businesses less than one year later.[94]

The carbon tax introduced in Denmark is effectively a surtax[95] added to existing energy taxes, which dominate the Danish environmental tax regime. The reform was originally drafted with the objective of reducing rates on personal income. This intention has been maintained with each reform of the carbon tax since its introduction, and recycling of revenue through the income tax regime continues.

There are a number of exemptions under the Danish CO2 tax regime to address competitiveness concerns. These exemptions are primarily for energy intensive industries.[96] In 2000 businesses were offered reduced rates under the tax when agreements were entered with the Danish government promoting energy efficiency. [97]

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[90] Department for Environment, Food and Rural Affairs, United Kingdom, '*The UK's Third National Communication under the United Nations Framework Convention on Climate Change*' (2001).
[91] Department of Energy and Climate Change, United Kingdom, *Annual Energy Statement* (2010), p 12.
[92] Ministry for Climate and Energy, Denmark,'*Denmark's Fifth National Communication on Climate Change under the United Nations Framework Convention on Climate Change and the Kyoto Protocol*' (2010), p 148.
[93] Stefan Speck and Jirina Jilkova, 'Design of Environmental Tax Reforms in Europe' in Mikael Skou Andersen and Paul Ekins (eds), *Carbon Energy Taxation: Lessons from Europe* (Oxford University Press, Oxford, 2009) 24.
[94] Speck and Jilkova, n 92.
[95] A surtax is defined as an extra tax on something already taxed. See Catherine Soanes, Sara Hawker and Julia Elliot (eds), *Oxford English Dictionary* (Sixth Edition ed, 2010).
[96] Anonymous, 'Denmark: New energy taxes' (1995) 7(6) *International Tax Digest* 7.
[97] Speck and Jilkova, n 92, p 32.

Currently the full rate of the tax is equal to approximately 12 EUR per tonne of CO2, with plans to increase this rate to 20 EUR per tonne, which will be offset by a decrease in the energy tax component. [98]

5.2.1.3 Finland

Finland was the first country in Europe to introduce a carbon tax in 1990.[99] The tax was levied on all energy products with the exclusion of transport fuels, which were already subject to existing energy taxes. When introduced, the tax was based purely on the carbon content of the energy product. Between 1994 and 1997 the tax changed to be based on a mixture of energy and carbon content of the product. In 1997 the carbon tax was revised again to be based purely on the carbon content of the energy product.

The Finnish Ministry describe their energy tax regime as a basic tax and a surtax.[100] This is slightly misleading, given that a surtax is a tax that is levied as an additional percentage to an existing tax. In Finland, however, the 'basic' tax is only collected on oil products, where the 'surtax', which could also be described as the carbon tax, is levied on all fossil fuels and electricity. [101] Electricity is taxed at the consumption stage, with any fossil fuels used for power generation exempted to avoid double taxation.[102]

There are some exemptions offered under the Finnish tax regime, although considerably less generous than some of their Nordic neighbours' exemptions. There are partial refunds for energy intensive industries; however the Finnish definition of 'energy intensive' is significantly more difficult to satisfy than the definition of comparable jurisdictions.[103]

The Finnish energy taxation regime did, at one point include a border tax adjustment on imported electricity. This adjustment was imposed at a different point of obligation to the domestic tax, using a different method for the liability calculation. This resulted in the flat rate for imported electricity being taxed at a higher rate than the lowest rate applicable to domestic electricity. This resulted in a challenge in the European Court of Justice, using Articles 9, 12 and 95 of the *EC Treaty*[104] as justification for this challenge. It was held that the Finnish border tax adjustment did infringe Article

[98] Speck and Jilkova, n 92, p 32.
[99] Speck and Jilkova, n 92, p 32.
[100] Ministry of Housing, Spatial Planning and the Environment, Finland,'*Finland's Fifth National Communication under the United Nations Framework Convention on Climate Change'* (2009), p 17.
[101] Ministry of Housing, Spatial Planning and the Environment, Finland,'*Finland's Fifth National Communication under the United Nations Framework Convention on Climate Change'* (2009), p 128.
[102] Ministry of Housing, Spatial Planning and the Environment, Finland,'*Finland's Fifth National Communication under the United Nations Framework Convention on Climate Change'* (2009), p 17.
[103] Speck and Jilkova, n 92, p 32.
[104] *Treaty Establishing the European Community,* opened for signature 7 February 1992, [1992} OJ C 224/6 (entered into force 1 November 1993).

95 by imposing a higher level of taxation on imported than domestic products.[105] The border tax adjustment was subsequently removed from the Finnish energy tax regime.

5.2.1.4 Germany

Environmental tax reforms with a goal to reduce GHG emissions and shift taxation from labour based to energy based, was introduced in Germany in 1999. The initial reforms required an increase of existing energy taxes coupled with the introduction of an electricity tax. The taxes are contained in the Statute of Energy Taxes, which has recently been amended to incorporate a tax on natural gas and coal. [106]

The tax is implemented on both electricity and fossil fuels. The total liability for the tax is determined according to volume or weight of most fossil fuels, with the exception of natural gas, which is measured by the kilowatt hour. Electricity is also taxed by kilowatt hour.[107]

Many sectors within the German economy receive relief from the energy taxes. Manufacturing, agriculture, forestry and fisheries are all granted special provisions, offering up to 80 percent relief from the tax. These exemption provisions were initially introduced to prevent any competition distortion from the tax. They may also, however, lead to reduced environmental effectiveness of the tax.

5.2.1.5 Ireland

A carbon tax in Ireland was conceptualised in a 2009 Commission on Taxation Report. [108] The tax has since been incorporated into the 2010 Budget, with details of the legislation contained in the Finance Bill 2010.[109]

The Irish price on carbon is imposed in three separate instruments of taxation. The first is a Natural Gas carbon tax[110] which imposes a carbon tax on each megawatt hour of natural gas supplied. The rate is set per megawatt hour to equate to a charge of 15 Euros per tonne of carbon dioxide.[111]

The second instrument is a Solid Fuel carbon tax.[112] This imposes a carbon tax on each tonne of solid fuel supplied. Solid fuel is limited to coal or peat. Similar to the natural gas carbon tax, the rate on

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[105] *Outokumpu Oy v The Government of Finland* (C-213/96)[1998] ECR I-1777.
[106] Hoffman, n 75 at 18.
[107] Ministry of Finance, Republic of Germany, '*The ecological tax reform: introduction, continuation and development into an ecological fiscal reform'* (February 2004).
[108] The Commission on Taxation, Republic of Ireland, *Report 2009* (July 2009) , Part 9.
[109] Finance Bill 2010 (Republic of Ireland), Chapter 2.
[110] Finance Bill 2010 (Republic of Ireland), Chapter 2.
[111] Finance Bill 2010 (Republic of Ireland), Chapter 2, Section 63.

each tonne of solid fuel is imposed to equate to a charge of 15 Euros per tonne of carbon dioxide emitted.

The third means of pricing carbon emissions in Ireland is through the imposition of a surtax on mineral oil. This is not a separate carbon tax, unlike the solid fuel carbon tax and the natural gas carbon tax, rather it increases the percentage of the existing tax imposed on mineral oil. The increase in mineral oil tax applied in a two stage process, beginning in December 2009 with light oil, including petroleum, and some heavy oils; this was extended to include a greater number of heavy oils and liquefied petroleum gas in May 2010. Once again, the rate is set to equate to a charge of 15 Euros per tonne of carbon dioxide emitted.

The tax period is two months for each of the taxable commodities, with a point of obligation imposed on the supplier of the product at the time supply is made to a consumer. [113]

A relief from the carbon charge is to apply where any of these fuels contain a form of biofuel, as long as the percentage of biofuel is greater than 10 percent.[114] Furthermore, any fuel that is used for an installation covered by the EU ETS will be relieved from any tax obligations, thus potentially avoiding double taxation.[115] The environmental impact of this provision may hinge on the market price of the EU ETS credits.

5.2.1.6 France

In 2009 the French Parliament proposed to introduce a carbon tax. The objective of the tax was to establish a price signal reflecting the nuisance caused by emissions of carbon dioxide.[116] The rate of tax applicable to each category of fuel, calculated on the basis of cost per tonne of carbon, was originally fixed at €17 per tonne of carbon dioxide emissions. This rate was intended to evolve to reflect fully, eventually, externalities associated with greenhouse gas emissions.

The French carbon tax was incorporated into legislation in the Finance Bill 2010.[117] Article 5 of the Bill outlined the details for the proposed carbon tax, explicitly excluding any emissions that were subject to the EU ETS. Furthermore Article 7 of the Finance Bill 2009 provided for a 75 per cent refund of the carbon tax to farmers. This refund was to allow farmers to participate in international competition without facing undue consequences from the carbon tax.

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[112] Finance Bill 2010 (Republic of Ireland), Chapter 3.
[113] Finance Bill 2010 (Republic of Ireland), s62, s64.
[114] Finance Bill 2010 (Republic of Ireland) s60 (1)i.
[115] Finance Bill 2010 (Republic of Ireland) s60 (1)i.
[116] Finance Bill 2010 (The Republic of France).
[117] Finance Bill 2010 (The Republic of France), Articles 5, 6 and 7.

The French carbon tax bill was challenged in the Conseil Constitutionnel,[118] where the proposal was rejected on the basis that it violated the principle of equality of taxation.[119] Following this the French parliament suggested that the carbon tax may be reintroduced, however, at the time of writing the carbon tax has been indefinitely delayed.

5.2.1.7 Norway

Taxes specifically on carbon dioxide emissions have been implemented in Norway since 1991. Before this, energy, electricity and sulphur taxes had been implemented as early as 1951. The legal framework for taxation in Norway underwent changes in 1998, with amendments made to incorporate all taxes levied on fossil fuels under the one act.[120] The carbon tax is levied according to the emissions content of the fuel itself.[121] Interestingly, there is no carbon tax on coal, coke[122] or electricity, although, given that electricity is generated almost exclusively through hydropower, any carbon tax would be nominal.

There are a number of exemptions in the Norwegian energy and carbon dioxide tax regime. Taxes on the continental shelf are significantly higher, with mineral oil taxed twice as much as mineral oil on the mainland, and natural gas being completely excluded from carbon taxation on the mainland.[123] Emissions intensive industries are also offered exemptions from the full tax rates.

The overall impact of the fossil fuel excise tax regime in Norway is significant. With only 10 percent of the nation's GHG emissions subject to the requirements of the EU ETS, taxation is the primary means of addressing GHG pollution.

5.2.1.8 Sweden

The excise duties on fossil fuels in Sweden consist of four separate elements. These are energy, carbon dioxide, sulphur and nitrous oxide, with the carbon dioxide tax by far the most significant element, carrying the largest tax burden. The energy tax on fossil fuels was introduced in 1957.[124] This was subsequently lowered when the carbon tax was introduced in 1991. The intention of the carbon tax introduction was not to increase overall revenues, but to address environmental

[118] Gabriele Parussini, 'Constitutional Council Strikes Down French Carbon Emissions Tax ', *The Wall Street Journal* (New York), 2009, .
[119] Leonardo Massai, 'Current Developments - European Union' (2010) *Carbon and Climate Law Review* 112.
[120] Stefan Speck et al, National Environmental Research Institute Denmark, '*The Use of Economic Instruments in Nordic and Baltic Environmental Policy 2001-2005'* (2006), p 169.
[121] The Sulphur tax is levied in the same manner.
[122] The CO2 tax on coal and coke was removed in 2003, probably a result of the widespread exemptions leading to the tax having little impact.
[123] Speck et al, n 119, p 172.
[124] Speck et al, n 119, p 192.

degradation through a taxation mechanism. Both the carbon dioxide and the sulphur taxes are levied in accordance with the corresponding GHG content of the fossil fuel.

There are a number of exemptions under the Swedish excise tax scheme, although the opportunities for reductions are less than other neighbouring Nordic countries.[125] There are general tax exemptions for industries, with agriculture, forestry, fisheries and energy intensive industries receiving additional exemptions.

The tax on carbon dioxide is the primary climate change mitigation measure in Sweden. Through the EU ETS Sweden has agreed to a four percent *increase* in their national emissions, giving little incentive to industrial installations to reduce their GHG emissions.

5.2.1.9 The Netherlands

Similar to many other European nations, taxation of energy products is not a recent reform in the Netherlands. Carbon dioxide became part of the energy tax base as early as 1990.[126] Reform of energy and fuel taxes occurred during the 1990 decade, merging different tax measures. Since 2004 the taxes on energy products form part of the excise tax regime; coal is the notable exception to this, and is not the subject of taxation in the Netherlands.[127]

Revenues raised by the energy excises are returned to the taxpayer through reduction of other tax mechanisms.

Industries receive exemptions from the energy excise measures through industry agreements. Agreements negotiated between the government and energy intensive industries represent an important measure for climate change in the Netherlands.

5.2.1.10 Italy

Italy implemented a carbon tax in 1998.[128] The carbon tax applies to all energy products, and is directly related to the carbon dioxide content of the product. The tax is imposed on energy industries, with transport fuels and coal used in electricity production most heavily taxed.[129]

The funds from the carbon tax were initially used to finance domestic measures for climate change mitigation. Since 2002 the funds contribute to finance bilateral and multilateral activities in developing countries, with the purpose of widespread implementation of the UNFCCC.[130]

[125] Speck et al, n 119, p 192.
[126] Speck and Jilkova, n 92, p 39.
[127] Speck and Jilkova, n 92, p 39.
[128] Tews et al, n 74 at 586; Law No.488/1998.
[129] Silvia Tiezzi, 'The Welfare Effects and the Distributive Impact of Carbon Taxation on Italian Households' (2005) 33 *Energy Policy* 1597 at 1601.

5.2.1.11 Slovenia

Slovenia was the first country in Eastern and Central Europe to introduce a carbon tax.[131] Energy taxation coupled with a carbon dioxide tax commenced in 1997. All energy products, with the exception of coal, attract a tax liability. The objective of the tax measures is to internalise the costs of the external costs of air pollution and to reduce energy consumption across all sectors of the economy.[132]

In Slovenia, the tax rates are directly related to the carbon content of the products, equalling approximately €12.5 per tonne of CO2 equivalent. The revenue generated through the carbon and energy taxes in Slovenia are not recycled, as they are in many other European nations. Thus the carbon tax represents an additional burden on taxpayers. Having said this, companies may be eligible for tax reductions up to 100 percent of their liability. In order to access these reductions companies must sign voluntary agreements for energy efficiency.[133]

Emissions intensive industries required to participate in the EU ETS are completely exempt from the carbon tax in Slovenia.

5.2.1.12 Estonia

In Estonia all enterprises are obliged to have an air pollution permit when combustion equipment is either owned or operated. All permit holders are subject to the *Environmental Charges Act 2006,* which imposes an obligation to pay pollution charges for GHG emissions. Since 2009 the charge has been set at €2 per tonne of CO2 equivalent.[134]

Industries subject to the charge are able to escape liability through environmental protection measures that reduce waste and pollution in the course of production.[135]

5.2.2 Other Jurisdictions

Beyond the EU carbon taxes are few and far between. Fuel taxes and other energy taxes are reasonably commonplace; although in general they are implemented without the specific purpose of

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[130] Ministry for the Environment, Land and Sea, Italy, *'Fifth National Communication under the UN Framework Convention on Climate Change'* (2009), p 7-1.
[131] Speck and Jilkova, n 92, p 42.
[132] Ministry of the Environment and Spatial Planning, Republic of Slovenia, *'Slovenia's Fifth National Communication Under the United Nations Framework Convention on Climate Change'* (March 2010)., p 67.
[133] Ministry of the Environment and Spatial Planning, Republic of Slovenia, *'Slovenia's Fifth National Communication Under the United Nations Framework Convention on Climate Change'* (March 2010)., p 76.
[134] Ministry of the Environment, Estonia, *'Estonia's Fifth National Communication'* (2009), p 80.
[135] Ministry of the Environment, Estonia, *'Estonia's Fifth National Communication'* (2009), p 80.

mitigating climate change. The following is a description of climate change taxes proposed and implemented beyond the European borders.

5.2.2.1 Canada

The Constitution in Canada imposes a number of powers exclusively on the provincial governments. One of these powers is the exclusive authority to make laws in relation to the development, conservation and management of non-renewable natural resources.[136]

There are powers with respect to taxation, imposed through the Constitution, which pose questions of direct and indirect taxation.[137] It is sufficient, at this stage, to note that it is the Provincial governments, rather than the National Government, that have imposed taxes for the purpose of reducing greenhouse gas emissions. The result of this is that there is no tax or pricing measure for greenhouse gas emissions at a national level, and there is no uniformity in the provincial approaches.

British Columbia (BC)

In 2008 British Columbia introduced a broad based, revenue neutral carbon tax. This tax is imposed on fuels and combustibles, at various points of the supply chain.

A purchaser is liable to pay the tax where fuel is purchased for their own purposes. This extends to use in industrial installations.[138] The tax becomes payable on any combustible[139] when a person within the jurisdiction burns the combustible for energy or heating purposes.

The revenue collected through the tax is returned to taxpayers through tax cuts of personal and business income taxes. [140]

Quebec

Quebec introduced a 'duty' payable on coal, natural gas and oil in 2006.[141] Producers and importers of these commodities are required to pay an annual duty into the Green Fund, which provides funding for measures to reduce GHG emissions in the province.[142] The rate of the tax is directly linked to the

[136] *The Constitution Act 1982* (Canada).
[137] *The Constitution Act 1867* (Canada), Section 92 [2].
[138] *Carbon Tax Act 2008* (British Columbia), Section 11.
[139] Combustibles are defined in *Carbon Tax Act 2008* (British Columbia), Schedule 2.
[140] Ministry for the Environment, Government of Canada, '*Fifth National Communication on Climate Change*' (February 2010) , p 49.
[141] Jamie Benidickson, *Environmental Law: Essentials of Canadian Law* (3rd ed, Irwin Law, Toronto, 2009), p 366.
[142] *An Act Respecting the Implementation of the Quebec Energy Strategy 2006* (Quebec), Section 85.36.

carbon dioxide content of the commodity.[143] The point of obligation of the Quebec tax is upstream of the obligation contained in the BC carbon tax.

Manitoba

The Manitoba 2008 budget announced a coal emissions tax of $10 per tonne of carbon dioxide equivalent to commence in July 2011. A schedule to increase the tax to $30 per tonne is set to be released by this province.

Legislation commits Manitoba to emissions reductions of six percent below 1990 levels.[144] The coal tax aims to achieve this reduction, encouraging replacement of fossil fuels with biomass.[145]

5.2.2.2 India

India is responsible for the fifth largest inventory of GHG emissions in the world. Their yearly emissions currently exceed 1.2 billion tonnes.[146] Similar to Australia, India relies on coal for energy generation.[147] Coal accounts for 53 percent of India's energy consumption, and causes 65 percent of the country's carbon dioxide emissions.[148]

On 26 February, 2010 the Indian Finance Minister announced the *Clean Energy Cess*, which is simply a tax on coal. The rate of tax will equate to US$1 per tonne of coal mined in the country, and on coal imported from abroad.[149] The funds collected through the Cess will be allocated for the purpose of financing and promoting clean energy initiatives. Research into clean energy will also be funded through the new tax collection.[150]

The administrative simplicity of the tax is plainly evident, and possibly necessary given that India is a developing economy. Any more complicated measures may have been destined to fail through compliance issues. The regime for reporting of emissions contained in the National Greenhouse Energy Reporting Act in Australia, discussed in a subsequent section of this paper, does not exist in

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[143] *An Act Respecting the Implementation of the Quebec Energy Strategy 2006* (Quebec), Section 85.36.
[144] *The Climate Change and Emissions Reductions Act 2008* (Manitoba).
[145] Ministry for the Environment, Government of Canada, '*Fifth National Communication on Climate Change*' (February 2010) , p 51.
[146] *Sixth Compilation and Synthesis of Initial National Communications from Parties not included in Annex I to the Convention,* UN Doc FCCC/SBI/2005/18/Add.2 (2005), p 7.
[147] Mridul Chadha, *India's Coal Tax Would Generate $650 Million Annually for the Clean Energy Fund* (2010) <http://www.scientificamerican.com/article.cfm?id=indias-coal-tax-would-generate-650-2010-06> at 7 July 2010.
[148] Caroline Friedman and Teresita Schaffer, 'India's Energy Options: Coal and Beyond', *South Asia Monitor* (Washington DC), 24 August 2009 .
[149] Pranab Mukherjee, 'Budget 2010 - 2011' (Speech delivered before the Parliament of India, Lok Sabha, February 26, 2010).
[150] *Finance Act 2010* (Republic of India), Chapter VII, Section 3.

India, and therefore the Clean Energy Cess provides a simple, possibly effective solution, to reduce India's significant GHG inventory.

5.2.2.3 New Zealand

In 2005 a document conceptualising a carbon tax for New Zealand was sent out for consultation by the New Zealand government.[151] This document presented a framework for a carbon tax in New Zealand, which was to commence in 2007.[152]

The levy was calculated according to an emission factor for the commodity being taxed. The emission factor was to be set by the regulator if the proposal for the New Zealand tax had been implemented.

The products that were subject to the tax broadly fit into four distinct categories.

- Solid fuels such as coal and lignite;
- Liquid fuels such as diesel and petroleum;
- Gaseous fuels such as natural gas and including all fugitive emissions;
- Emissions from Industrial processes, such as coke, and emissions from aluminium production.[153]

Products were to be taxed as early as possible in the supply chain. The reason for this, as provided by a 1997 policy paper,[154] was to minimise the administrative burden, due to a low number of liable parties, and to increase the potential coverage of the tax. Therefore it was expected that coal suppliers would be liable for payment of the tax either at the first point of supply (unless it was intended for exportation), at the first point of use or, alternatively, at the point of importation.

Rebates and exemptions from the carbon tax were to occur in three circumstances:

- Negotiated Greenhouse Agreements;
- Exportation of the taxable product; and,
- Permanent sequestration or embedment.[155]

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[151] Policy Advice Division of the Inland Revenue Department, Parliament of New Zealand, '*Implementing the carbon tax – a government consultation paper'* (May 2005).
[152] Policy Advice Division of the Inland Revenue Department, Parliament of New Zealand, '*Implementing the carbon tax – a government consultation paper'* (May 2005), p 2.
[153] Policy Advice Division of the Inland Revenue Department, Parliament of New Zealand, '*Implementing the carbon tax – a government consultation paper'* (May 2005), Appendix 2.
[154] The Treasury, New Zealand, *The Design of a Possible Low-Level Carbon Charge for New Zealand* (1997), p 34.
[155] Policy Advice Division of the Inland Revenue Department, Parliament of New Zealand, '*Implementing the carbon tax – a government consultation paper'* (May 2005), p 22.

Negotiated Agreements were to offer relief from the tax for a firm's production activities. These agreements would not relieve a firm for their obligations to pay the carbon tax on fossil fuels. A Negotiated Agreement (NGA) was defined as an agreement between the government and a business that would be considered a competiveness-at-risk firm.[156] These agreements were intended to lead to low emissions intensity per unit of production, in return for receiving a partial or full exemption from the carbon tax for production activities.

Exports were exempted as part of the proposed border tax adjustment. The exemption for exportation was linked closely to the requirements for exemptions under the New Zealand GST legislation.

Finally, sequestration, for forestry and biomass, was excluded as a possible means of exemption from the tax. Embedment in slow releasing products was allowed, and included the production of tyres, tar and plastic.

In December 2005 the New Zealand government announced that the carbon tax proposal would not be implemented. The reason offered was that the tax would not achieve effective environmental outcomes, and therefore the cost of the scheme to both the government and to liable industries was unjustified.[157] The announced cancellation of the carbon tax proposal occurred on the same day as a release of a climate change policy review,[158] which recommended that the government undertake further consultation in response to this global environmental problem. The New Zealand government has since implemented an emissions trading scheme.

6. HYBRID SCHEMES

The meaning of a hybrid scheme for the climate change committee is undefined by the terms of reference or by any subsequent communications. It is likely that the meaning will be similar to the definition contained in the Garnaut review. The Garnaut review states:

> Hybrid models address the tension between wanting certainty in both price and quantity. The basic feature of these models is the establishment of an emissions trading scheme (cap and trade) with an imposed upper limit on the price of permits. This involves initially issuing tradable permits up to a cap, but with a commitment by government to issue unlimited amounts of extra permits at a specified ceiling price.[159]

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[156] Policy Advice Division of the Inland Revenue Department, Parliament of New Zealand, '*Implementing the carbon tax – a government consultation paper'* (May 2005), Appendix 1. Competitiveness-at-risk firms were defined by the Policy Advice Paper as a firm that would find adjustment to the price on carbon difficult or impossible.

[157] David Parker, 'Carbon tax will not go ahead in 2007' (Media Release, 21 December 2005) <http://www.beehive.govt.nz/node/24671>, viewed 25 April 2010.

[158] Ministry for the Environment, Parliament of New Zealand, *Review of Climate Change Policies (2005)* .

[159] Garnaut, n 31, p 310.

The New Zealand ETS and the Australian CPRS, by this definition would be considered hybrid schemes. The environmental impacts of a hybrid scheme are largely unknown. It does, however, suspend the biggest strength of an ETS over a tax, which is the ability to cap emissions absolutely.

7. A CARBON PRICE FOR AUSTRALIA?

The review of other domestic jurisdictions brings to light a number of important lessons for Australian policy makers when considering a price on carbon and other GHG emissions. Beyond policy issues, including the liable entities and point of obligation, there exists a number of legal issues that must be considered by the Climate Change Committee. The experience in France highlights the importance of considering the Constitution and its requirements for any proposed new tax or economic measure. Furthermore, the amendments that have been required in many of the European countries with existing carbon tax laws in order to implement the EU ETS, effectively demonstrates a need to consider the existing legal and economic requirements of parties prior to the introduction of new economic instruments. One other important lesson to be taken from the experience of other domestic jurisdictions is that any new economic measure *does not* need to represent an additional financial burden for liable entities. It is possible to implement a new measure, whilst at the same time reduce existing tax measures or obligations, thus alleviate any competitiveness concerns. This must be done while maintaining the environmental credibility of the scheme. This will require a review of existing taxation requirements for liable entities.

Any proposed legal framework for a carbon price in Australia must take specific national circumstances into account. The following discussion highlights some of the existing national circumstances that would need to be considered by the Climate Change Committee, when a carbon price is contemplated.

7.1 The Existing Legal Framework for Climate Change Mitigation

Australia ratified the Kyoto Protocol in December 2007, after years of refusing to participate in this international agreement. Australia has been a party to the UNFCCC, however, since it came into force in March 1994. As a country to these conventions Australia is obliged to take action to mitigate climate change,[160] and indeed, requires that targets are met for GHG emission inventory levels.[161] The response of the Australian legislators, however, has been somewhat underwhelming.

The most significant action by Australian legislators, intended to reduce the national GHG emissions inventory, was represented by the Carbon Pollution Reduction Scheme proposal. After this scheme

[160] See, eg, *United Nations Framework Convention on Climate Change*, Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994), Article 3.3.
[161] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005), Annex B.

was twice voted against in the Senate, it has been indefinitely shelved as a policy measure. This leaves Australia without a clearly defined policy for GHG emissions reductions. One important piece of legislation, however, enacted in anticipation of an Australian ETS is The *National Greenhouse and Energy Reporting Act 2007* [162] (NGER Act).

7.1.1 The NGER Act

The NGER Act contains the reporting framework for Australia's greenhouse gas emissions inventory information. The purpose of the introduction of this act was to support the emissions trading initiative of the CPRS. With the political future of the CPRS in doubt the NGER Act now predominately serves the purpose of assisting to meet international reporting obligations, and inform policy formulation. [163]

The NGER Act provides thresholds for reporting of GHG emissions, energy use and energy production, which were phased in from 1 July 2008.[164] Any company which has an inventory, energy use or production above the thresholds contained in the act must be registered and provide the information required through the legislation. This act also provides for a number of administrative issues, such as reporting intervals,[165] and required records. [166]

The NGER Act could potentially form the basis for a carbon price in Australia, given that the requirements for GHG emissions inventory reporting are contained in this legislation. To make the requirements for reporting within any taxation or emissions trading regime significantly different from the requirements of this act could potentially cause administrative difficulties both for the liable entities and the regulator themselves.

7.1.2 Renewable Energy Legislation

The Australian Government has offered a renewable energy target as a primary policy for mitigating climate change in the interim period prior to the end of the first Kyoto commitment period. The target for renewable energy generation is set at 20 per cent by 2020.[167] A carbon price proposal will not be significantly influenced by the renewable energy target, although it is likely that the prospects of reaching this target would be improved if a carbon price was implemented. Indeed, the support of the

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[162] *National Greenhouse and Energy Reporting Act 2007* (Cth).
[163] *National Greenhouse and Energy Reporting Act 2007* (Cth), s 3.
[164] Chris McGrath, 'Australia's draft climate laws' (2009) 26 *Environmental and Planning Law Journal* 267 at 270.
[165] *National Greenhouse and Energy Reporting Act 2007* (Cth), s 19.
[166] *National Greenhouse and Energy Reporting Act 2007* (Cth), s 24.
[167] Department of Climate Change and Energy Efficiency, Australian Government, *Renewable Energy Target* (21 September 2010) <http://www.climatechange.gov.au/government/initiatives/renewable-target.aspx> viewed 14 October 2010.

existing renewable energy and energy efficiency schemes is listed in the terms of reference for the Climate Change Committee, as one of the primary reasons for the introduction of a carbon price.[168]

7.2 Other Relevant Australian Law

7.2.1 The Australian Constitution

Constitutional law regulates the three arms of government, the legislature, the executive and the judiciary. The constitution provides the source and authority for power and circumscribes the limits of that power. The constitution provides rules and laws, which limit these arms of government, and includes the power to strike down any legislation which does not adhere to the laws of the constitution. [169]

Therefore when researching and developing any legislative framework for Australia, the laws and restrictions contained in the *Australian Constitution* must be considered.

7.2.1.1 Definition of a Tax

Any law enacted with respect to taxation must contain certain elements to be a valid law.[170] In accordance with sections 51 and 99 of the Australian constitution, the High Court defines taxation to be the "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered".[171]

Therefore in line with this definition the requirements are:

- Compulsory exaction, which is achieved simply by the words "is imposed";[172]
- Public Authority, commonly the Commissioner of Taxation;
- Public Purposes, evidenced through the absence of earmarking and passing through to the Consolidated Revenue Fund; and,
- That the tax is not a fee for services.

Should a carbon tax be considered the best mechanism for an emissions price in Australia these provisions of the Constitution must be considered. It must also be noted that, in parts of the CPRS legislation, it was stated that the imposition of a permit price was taxation within the meaning of the

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[168] Julia Gillard, 'Prime Minister establishes Climate Change Committee' (Media Release, 27 September 2010) <http://www.pm.gov.au/node/6923> viewed 28 October 2010.
[169] Sarah Joseph and Melissa Castan, *Federal Constitutional Law* (Thomson Reuters Australia, Pyrmont, 2010), p 7.
[170] P. H. Lane, *A Manual of Australian Constitutional Law* (Sixth Edition ed, Lawbook Co, North Ryde, 1995), p 67.
[171] *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276.
[172] Lane, n 170.

Constitution.[173] Therefore, it is possible, that for any new legislative scheme for a carbon price in Australia to be implemented, the requirements of the Australian Constitution must be satisfied.

Public Purposes

The requirement that a tax is exacted for public purposes means that the funds of that tax cannot be earmarked for any particular purpose, and must be accumulated in the Consolidated Revenue Fund. However, payment into the Consolidated Revenue Fund does not mean that this condition is fulfilled.

The High Court Case of *Luton v Lessels* (2002) 210 CLR 333[174] was an example of monies being paid directly into the Consolidated Revenue Fund for child support purposes, with the same amount being redistributed directly to a particular child or their carer. The High Court held that this was not a tax as the scheme did not confer any benefit on the general community, didn't seek to exact money from the community and did not contemplate any *net* benefit to the Commonwealth.

This decision of the High Court is relevant to the framework design for a carbon tax when considering the revenue recycling measures. In the *Luton* Case the lack of net increment to revenue for general government purposes lead to the decision that the charge in that instance was not a tax.[175] This will be relevant when any revenue recycling measures, such as those of the European tax schemes, are contemplated for a carbon tax in Australia.

Fee for Services

A tax is distinguished from a fee for service, a licence or a charge on the basis that nothing is received in return for the payment of the tax.

A decision of the High Court in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462[176] clarified the difference between these instruments. In this case it was determined that a fee would not be considered a tax if there was a "discernable relationship" between the amount paid and the thing acquired by way of service, privilege or property.

This has some relevance to the development of a carbon tax. For any payment to be considered a tax it must not confer a privilege, such as a right to emit carbon into the atmosphere.

7.2.1.2 Excise Tax

[173] Carbon Pollution Reduction Scheme (Charges — Excise) Bill 2009, Section 7.
[174] *Luton v Lessels* (2002) 210 CLR 333 cited in Joseph and Castan, n 168, p 301.
[175] Joseph and Castan, n 168, p 302.
[176] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 cited in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, Annandale, 2006), p 1068.

Carbon taxes have been implemented and proposed throughout the world in many different forms. In most cases these jurisdictions have designated these taxes as excise duties.[177]

The importance in defining the legal nature of carbon taxes lies in section 90 of the Australian Constitution, which states that:

> On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods shall become exclusive.

Therefore only the Commonwealth has the power to impose duties of excise. Any state imposition will be unconstitutional. As such, any state based measure, such as those imposed in the provinces of Canada, will not be valid law in Australia.

The actual purpose of this section of the Constitution is a matter of dispute between different constitutional scholars, and indeed judges applying the law. It is the purpose, which has sometimes shaped the definition adopted in legal proceedings.[178]

There exists both a narrow and broad definition of excise duties, as decided by the High Court of Australia. In the case of *Ngo Ngo Ha v NSW* (1997) 189 CLR 465 the High Court was split over the meaning. The majority of the court adopted the broad interpretation of excise tax, which is that an excise is a tax that is imposed at any point in the production, manufacture, distribution or sale of goods before they reach the hands of consumers. The minority, interpreted excise duties considerably more narrowly, to be only those taxes which are imposed on goods produced or manufactured locally.

The broad view was similar to the definition expressed by Dixon J in *Parton v Milk Board* (1949) 80 CLR 229. In this case Dixon J claimed that section 90 of the Constitution was intentionally drafted to give the Commonwealth financial control over the taxation of all commodities.[179]

It is not the intention of this paper to examine the extensive case law defining excise taxes for the purposes of the Australian Constitution. It is sufficient to underscore the decision in the *Ngo Ngo Ha* case, and settle on the broad definition for present purposes. There is possibility that the definition will be disputed when the tax is imposed not on the commodity itself, but on the process or production associated with the manufacture of that commodity.

7.2.2 The Australian Taxation Regime

[177] See, eg, Finance Bill 2010 (The Republic of France), *Value-Added Tax Act 1972* (Republic of Ireland) s 8.
[178] Joseph and Castan, n 168, p 305.
[179] Joseph and Castan, n 168.

Should the decision to implement either an emissions trading scheme or a carbon tax be coupled with revenue recycling, then a review of the whole tax system will be necessary to ensure that effective reductions are implemented, that will not impact the environmental objective of a carbon price, but at the same time provide assistance to those affected economically. The revenue recycling measures implemented in the EU, discussed in previous sections of this paper, may be considered when the best practice is determined for Australia. As a recently imposed excise tax regime, the GST legislation, may provide important information if a carbon tax is used as the means to price GHG emissions in Australia.

7.2.2.1 Goods and Services Tax (GST) Legislation[180]

The carbon tax proposal of New Zealand had many references to the national GST legislation. The definitions included in the proposal, along with recommendations for alignment of reporting obligations would have resulted in entwinement of the two taxation instruments in New Zealand. Furthermore, it has been suggested that for a tax to be administratively efficient consistency between instruments is essential.[181] Therefore when considering a carbon price for Australia, an analysis of the existing GST laws may be required.

8. CONCLUSION

This article has argued for any legal framework for a carbon price to be specific to the national circumstances in Australia. The Climate Change Committee, established by the Prime Minister on 27th September 2010, must consider the frameworks implemented in other domestic jurisdictions before any decisions can be made on the desired instrument and design for an Australian carbon price. The consideration of other jurisdictions will inform this committee, not only on issues of linking schemes and economic matters beyond Australian borders, but it may also provide valuable information for implementation, coverage and assistance measures, that form the terms of reference for this committee.

If an ETS is presented as the best measure for a carbon price for Australia then issues, such as acceptance of other schemes units, Kyoto units and rebates for imports already subject to emissions trading, must be contemplated. If a carbon tax is proposed then issues of double taxation, destination taxation and border tax adjustments are matters to be carefully measured by the Climate Change Committee. This will require that the committee is well informed of other jurisdictions' climate change mitigation strategies.

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[180] The GST legislative framework in Australia is made up of 27 acts of parliament. The centrepiece of the legislation is, *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

[181] Richard A Westin, *Environmental Tax Initiatives and Multilateral Trade Agreements: Dangerous Collisons* (Kluwer Law, The Hague, 1997); Ben J. M. Terra, 'Excises' in Victor Thuronyi (ed), *Tax Law Design and Drafting* (Kluwer Law International, London, 2000) , p 248.

Finally, any Australian proposal must consider the existing legal framework, both nationally and internationally. The existing legal framework, both for climate change and taxation must be addressed when proposing a carbon price framework. Far from adding to the economic burden faced by individuals and businesses, a new carbon price framework may present a golden opportunity for taxation reform. The lessons of the European countries may prove valuable in this area. Indeed, a carbon tax price may present an opportunity to implement a much needed environmental reform, without an additional economic burden.