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Australian Carbon Market and Safeguard Mechanism Reform

January 17, 2023



By Sara Bussiere
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A recently published [independent review](#) of Australia’s carbon credit units (ACCU) scheme, commissioned by the Australian government, has found that the ACCU scheme is “essentially sound,” but provides 16 recommendations to avoid potential conflicts of interest and enhance transparency. The ACCU scheme, introduced 11 years ago, was developed by the Australian government to “remove greenhouse gases from the atmosphere, or to prevent their emission.” The scheme “supports carbon farming initiatives leading to the allocation of one ACCU for each ton[] of carbon abatement.” The review explains that the ACCU scheme “also allows some ACCUs to be purchased by the Australian Government, some by emitters to offset a proportion of their continuing emissions, or traded on the domestic market.”

In recent years, the ACCU scheme has been criticized for a lack of transparency. Critics highlight that the supposed reduction in carbon did not reflect reality and the lack of public access to the data was suspicious. In March 2022, Professor Andrew Macintosh, whistleblower and former head of the committee responsible for the integrity of the ERF, the Reduction Assurance Committee, [described](#) the carbon credit scheme as “[largely a sham](#).” Considering the importance of the carbon credit scheme for Australia to meet its net zero obligations, these allegations caused a great deal of controversy. As a result, the Australian government announced a review into the carbon market to assess how the system contributes to emission reduction targets.

The executive summary to the Independent Review of Australian Carbon Credit Units states that: “Notwithstanding the criticisms, the Panel concludes that the scheme was fundamentally well-designed when introduced. Nevertheless, after 11 years of operation, the scheme can be improved – applying knowledge gained through implementation or practical experience is the story of continuous improvement. The Panel makes a number of recommendations. The purpose of each is to improve the scheme: to clarify intention where necessary; to clearly identify (and separate) the key roles of integrity assurance, regulation and administration; to remove unnecessary restrictions on data sharing; to enable free prior and informed consent; and to improve information and incentives, including in relation to non-carbon benefits and attributes. The Panel also observed that it is unwise to assume that what needs to be done can be achieved without adequate resourcing. Given the important role of ACCUs in the suite of climate mitigation policies, and the essential need for their integrity to be unarguable, all the links in the chain need to be able to do the job required of them—and that means resourcing. There is no practical or cheap alternative.”

In a related development, on January 9, 2023, the Australian government opened a consultation on potential reforms to its [Safeguard Mechanism](#). Australia has established a 43% emissions reduction target below 2005 levels by 2030, and net-zero by 2050. The

Safeguard Mechanism, which applies to Australian industrial facilities that emit more than 100,000 tons of greenhouse gases annually, covers approximately 215 facilities accounting for nearly 30% of national emissions. “Emissions limits for individual facilities are known as baselines. The sum of all facilities’ baselines form the overall emissions constraint for the scheme.” Under the reforms, baselines would be “weighted towards site-specific levels at scheme commencement, and transition to industry average benchmarks by 2030.” New facilities, on the other hand, “have the opportunity to use the latest technology and build [the] world’s best practice emissions performance into their design. Their baselines would be set at international best practice, adapted for an Australian context.” As a result of the proposed reforms, “net emissions covered by the Safeguard fall from a projected 143 million ton[]s in 2022-23 before the reforms start to no more than 100 million ton[]s by 2030 and capped at 1,233 million ton[]s between 2021 and 2030. The reformed Safeguard Mechanism is expected to deliver an estimated 205 million ton[]s of abatement by the end of the decade.”

Taking The Temperature: We have [discussed](#) how Australia has been very active in terms of climate change regulation, legislation and enforcement. The proposed Safeguard Mechanism reforms reflect the government’s ongoing assessment of progress toward 2030 and 2050 emissions reduction goals, and the need to require more significant action on the part of facilities that are large GhG emitters. On the carbon credit front, in recent years, there has been a substantial growth in the use of carbon credits as nations and companies look to offset their emissions and achieve net zero and other climate related goals. As highlighted in our recent discussion of carbon credits in the context of John Kerry’s [announcement](#) of the “Energy Transition Accelerator” at COP27, this remains a controversial area. A [UN Report](#), published in November 2022, emphasizes that carbon offsets should be high-quality and used only as a last resort.

Australia was one of the early adopters of carbon offset schemes, but is now joined by the U.S. and many other jurisdictions. Various jurisdictions and international bodies are now developing legislation and rules to better standardize their carbon markets and improve transparency on emissions. Last year, the International Organization of Securities Commissions (IOSCO) [announced](#) consultations into both compliance and voluntary carbon markets. We expect continued debate and further regulatory activity on the operation and standards in the carbon markets during 2023.

Global Food Products Company Sued Over Single-Use Plastics

January 17, 2023



By Jason Halper
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Environmental nonprofit ClientEarth, with support from other activist groups, has **commenced litigation** in a Paris court against a global food-products company. The claimants contend that Danone has breached France's Corporate Duty of Vigilance Law in that the company does not have an adequate plan to reduce its plastic footprint. Prior to filing the claim in Paris, ClientEarth served "legal warnings" on Danone and certain other French companies, including Auchan, Carrefour, Casino, Lactalis, McDonald's France, Les Mousquetaires, Picard and Nestlé France.

The French Corporate Duty of Vigilance Law (*Loi de Vigilance*) came into force in 2017 and requires that companies with over 5,000 employees in France, or 10,000 employees globally, prepare, publish and enact a 'vigilance plan' corresponding with the UN's human rights due diligence procedures on an annual basis. This plan must include social and environmental due diligence measures across the company's entire supply chain. The law is considered by many legal commentators to be a forerunner to the EU's Corporate Sustainability Due Diligence Directive, which we **previously discussed**.

Danone has "**strongly refute[d]**" the accusations and stated that it supports a legally binding international agreement that is currently being negotiated under the auspices of the United Nations. In March 2022, at a UN Environment Assembly in Nairobi, Kenya, 175 nations adopted a **resolution** to end plastic pollution and develop a related international legally binding agreement by 2024. The UN resolution covers the full lifecycle of plastic including its production and disposal.

Rosa Pritchard, a lawyer for ClientEarth, explained the legal filing, by asserting that: "Danone is trudging ahead without a serious plan to deal with plastics, despite clear concern from climate and health experts and consumers, and a legal obligation to face up to the issue. It continues to rely on single-use plastic packaging in the hopes that recycling will miraculously deal with the flood of plastics it puts on the market. But recycling is a limited solution as only 9% of plastics ever made have been recycled. It's unrealistic for food giants like Danone to pretend recycling is the silver bullet."

In a response to the legal filing, Danone argued that: "We are implementing a comprehensive framework of actions aimed at reducing the use of plastic, developing reuse, strengthening collection and recycling schemes, and developing alternative materials. We have already made significant progress on each of these fronts, particularly on plastic reduction, with, for example, a decrease of 12% at global level (60,000 tons in absolute) between 2018 and 2021."

Taking The Temperature: We have **discussed** how regulators globally appear to be taking a relatively more aggressive approach to alleged greenwashing. The type of litigation commenced by ClientEarth represents a different category of climate-related litigation or enforcement activity. Pressure groups are actively seeking to bring claims under newly-established corporate responsibility and climate-focused legislation to target companies that are perceived to be failing to address ESG issues or greenwash practices with an environmental impact. Other examples include *Smith v. Keurig Green Mountain, Inc.*, 18-cv-6690 (N.D. Cal. 2018) (claims against Keurig for wrongfully labeling Keurig pods as recyclable); *Dwyer v. Allbirds, Inc.*, No. 7:21-cv-05238 (S.D.N.Y. 2021) (claiming Allbirds's statements concerning its environmental impacts were false and deceptive and materially misleading); *Swartz v. Coca-Cola Co.*, Case No. 3:21-cv-04643 (N.D.C.A. 2021) (false advertising claims that Coca-Cola advertised that its single-use plastic bottles were 100% recyclable). It remains to be seen how effective such litigation will be in realizing the claimants' ESG goals. Large companies like Danone and other organizations typically targeted in these types of actions already operate within a web of statutory and regulatory requirements, which often differ across multiple jurisdictions. In the case of Danone, the company correctly refers to the UN plastics-reduction initiative. It is not clear that one-off litigation will have a significant effect given the suite of regulation that already exists. Nonetheless, we expect these types of suits be filed with greater frequency in France and other jurisdictions. To prepare, companies and their directors and officers should assess, and if necessary, enhance the quality of their climate-related governance, **taking into account** applicable legal and regulatory requirements and industry best practices. Having sound governance in this area also will enable companies to quickly and accurately disclose their approaches to climate and other ESG issues and, if necessary, push back on unsupported accusations.

South America's Anticipated Offshore Wind Boom

January 17, 2023



By Michael Newell
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Foreign energy companies are taking **initial steps** to develop a large number of offshore wind farms along the coasts of Brazil and Colombia. As governments seek to reduce their carbon emissions to meet climate goals and obligations, they are increasingly turning to new sources of energy. Offshore wind is a technology that historically has mostly been utilized by countries on the North Sea and in China, but others are now entering the space, with the U.S. due to complete its first large-scale offshore wind installation next year. The Biden administration **pledged** in September to develop 30 gigawatts of offshore wind power by 2030, which is enough to power 10 million homes. Until now, South American nations have shied away from large scale offshore wind developments, but this looks set to change. Brazil's government estimates there is potential for up to 700 gigawatts of offshore wind power along its 7,400 km Atlantic coastline. As of December 2022, **over 70 applications** had been filed with Brazil's Institute for the Environment and Natural Resources (IBAMA), representing approximately 176.6 gigawatts in proposed capacity. Shell has submitted **plans** to IBAMA for six offshore wind farms with a planned 17 gigawatts of capacity. It is expected that Brazil's Ministry of Mines and Energy will host its first auction of seabed concessions in early 2023.

Currently neither Brazil nor Colombia have announced plans to offer financial subsidies to encourage the development of offshore wind installations. Instead, they are relying on the continued fall of technology costs to make offshore wind competitive with more traditional sources of energy.

Elbia Gannoum, CEO of the Brazilian wind energy association ABEEólica, who advised recently elected President Lula on energy policy during his first government **stated** that "Lula began the wind boom in 2003/04 and they believe it is an important [sector] for investment."

Taking The Temperature: Brazil and Colombia both have enormous potential to develop renewable energy and become regional leaders in the sector. Like many countries across the globe, countries in LatAm are looking to reduce carbon output and adhere to their international agreements such as the Paris Agreement. We recently outlined the ambitious environmental policies of the new Brazilian government. If Brazil can overcome political opposition and address deforestation in the Amazon region, it stands to benefit from significant inflows of foreign investment targeted at green projects. The Brazilian Real's current weak standing against the U.S. Dollar is likely to make these

investment opportunities attractive. However, in attracting international investors to such large scale energy and infrastructure projects, Lula will also have to convince the international markets that these high-profile Brazilian tender and contracting processes will be transparent and subject to high-quality governance. International investors are likely to be cautious due to significant irregularities that occurred under Lula's previous administrations, particularly the "Car Wash" corruption case involving offshore oil projects for the state-owned oil company, Petrobras.

BEIS Commissioned Review of UK Delivery of Net Zero

January 17, 2023



By Duncan Grieve

Special Counsel | White Collar Defense and Investigations

On January 13, an independent report was **published** into the UK government's approach to delivering on its net zero obligations. The review, commissioned by the Department for Business, Energy & Industrial Strategy (BEIS), was carried out over three months with the objective of looking into how the UK might meet its net zero obligations "in a more affordable and efficient manner, one which is pro-business, pro-enterprise and pro-growth." The chair of the review, Member of Parliament Chris Skidmore, oversaw the consultation of a broad range of stakeholders including investors, industry participants and experts. This review follows the UK Government's **strategy** on achieving net zero greenhouse gas emissions by 2050, first published in October 2021.

The **review**, which included over 1,800 responses to a call for evidence and 50 roundtable discussions, concluded that:

- Net zero is creating a new era of change and opportunity
- The UK must act decisively to seize the economic opportunities and smooth the transition
- The benefits of investing in net zero today outweigh the costs
- Unlocking the ambition of places and communities will deliver the most successful version of net zero
- Net zero can materially improve people's lives – now and in 2050 – but work is needed to secure the benefits and minimize costs
- Net zero by 2050 remains the right target for the UK: it is backed by the science, widely followed, and is creating real opportunity
- Significant additional government action is required to ensure that the UK achieves net zero in the best way possible for the economy and the public

The report criticizes the government in several areas, including the slow pace of change, policy inconsistencies and the lack of long-term planning. The report also highlighted concern over how to fund a green transition, opining that the lack of certainty and government commitment likely are restraining the deployment of green technologies. In its response to the call for evidence, the Confederation of British Industries highlighted these types of concerns, stating: "Inconsistency in policy [...] lag time to get projects up and running due to slow and inconsistent approaches to planning and consenting across technologies and regions [and] lack of clarity over clear delivery pathways and interim targets with key milestones for adoption." The report includes examples of other countries' steps to achieve net zero, including the United States'

\$370 billion commitment to clean energy as part of its 2022 Inflation Reduction Act. The report warned that without significant action, the UK could fall behind.

The report concludes by stating:

“The Review recommends that ... the Government meet the net present danger of not acting fast enough by taking forward a series of no regrets and no excuses policy recommendations that can be delivered now, as soon as possible ... The ‘25 by 2025’ set out twenty-five policies that the Review believes that the Government can take forward now, to deliver meaningful change that will have a positive impact on the UK’s net zero ambitions. Of course, other recommendations must be taken forwards, but we recognise the need to above all build long term certainty and stability for these measures to succeed. The ‘25 by 2025’ can provide an immediate signal of the Government’s intent to deliver on net zero, but also to remove the barriers that are preventing business and industry going further, faster.”

The recommended 25 policies to be implemented by 2025 include the phasing out of residential gas boilers, increased building standards, including the requirement for new homes to be built with solar, and providing longer-term funding to reassure market participants.

Taking The Temperature: The BEIS Review highlights that for the UK to meet its obligations it must take significant steps in the short term to maximize the opportunities offered by a net zero future and that, as stated in the report, “delay is a significant risk.” The UK, along with many other countries, has made a great number of climate-related promises in recent years, including the Paris Agreement. The policies set out in the ‘25 by 2025’ suggest various improvements to residential properties, greater cooperation among regulators to provide a stable and coherent investment environment along with additional investments in hydrogen and nuclear technologies. The real challenge of meeting these obligations has yet to be reached. It remains to be seen if any of these policies, including the ‘25 by 2025’ as set out in the report, will be implemented by the government.