Australia's Engagement with International Climate Change Law under the First Rudd Government: A Good International Citizen?

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University

February 2015
I declare that this thesis is my own original work.

Signed

Date
ACKNOWLEDGEMENTS

I would like to express my immense gratitude to several people without whom the completion of this thesis would not have been possible. First, my supervisor, Don Rothwell – thank you for guiding me through my candidature, providing helpful feedback on my work and allowing me considerable scope to pursue my own intellectual curiosity. Second, Emily and Corine – thank you for your love, support and patience throughout this journey.

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I look forward to spending more time with everyone in post-thesis life.

Owen Cordes-Holland
Melbourne, 2015.
ABSTRACT

This thesis examines whether Australia acted as a 'good international citizen' in its engagement with international climate change law (ICCL) during the term of the first Rudd Labor government (3 December 2007 – 24 June 2010). The assessment is undertaken by examining the Rudd government’s engagement with the key development in ICCL during its term of office, namely, the 'post-2012' negotiations under the United Nations Framework Convention on Climate Change and Kyoto Protocol. Launched by the Bali Roadmap, December 2007, the period of negotiations reviewed by this thesis culminated in the adoption of the landmark Copenhagen Accord in December 2009.

Given the complexity and breadth of issues addressed by the post-2012 negotiations, the thesis focuses on one major aspect of the negotiations, namely: the mitigation of greenhouse gas emissions. This was the central issue for the post-2012 negotiations to resolve and the key negotiating priority of the Rudd government. The thesis undertakes its assessment by utilising the concept of good international citizenship – a foreign policy goal first espoused in Australia by former Labor Foreign Minister, Gareth Evans, in the late 1980s – and later endorsed by the Rudd government. While there is no agreed definition of good international citizenship, essentially it requires states to adopt a more ethical approach to foreign policy. This means that states must forego the dogged pursuit of narrow national interests, recognising that they have a responsibility to promote the common good of the international community, not just self-interest. The concept is associated with a number of attributes such as showing respect for international law and providing leadership in the international sphere. The ramifications of good international citizenship for governmental engagement with ICCL have received little attention in the literature, and thus this thesis explores the practical requirements of the concept in this field.
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<table>
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AAU</td>
<td>Assigned Amount Unit</td>
</tr>
<tr>
<td>ALP</td>
<td>Australian Labor Party</td>
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<tr>
<td>AOSIS</td>
<td>Alliance of Small Island States</td>
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<tr>
<td>APEC</td>
<td>Asia Pacific Economic Cooperation</td>
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<tr>
<td>A/R</td>
<td>Afforestation or Reforestation</td>
</tr>
<tr>
<td>AR3</td>
<td>Third Assessment Report, Intergovernmental Panel on Climate Change</td>
</tr>
<tr>
<td>AR4</td>
<td>Fourth Assessment Report, Intergovernmental Panel on Climate Change</td>
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<tr>
<td>AWG-KP</td>
<td>Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol</td>
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<td>AWG-LCA</td>
<td>Ad Hoc Working Group on Long-term Cooperative Action under the Convention</td>
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<tr>
<td>BAP</td>
<td>Bali Action Plan</td>
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<tr>
<td>BASIC</td>
<td>Brazil, South Africa, India and China</td>
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<tr>
<td>BAU</td>
<td>Business-as-usual</td>
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<tr>
<td>CANI</td>
<td>Climate Action Network International</td>
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<tr>
<td>CCS</td>
<td>Carbon capture and storage</td>
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<td>CDM</td>
<td>Clean Development Mechanism</td>
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<tr>
<td>CDM EB</td>
<td>CDM Executive Board</td>
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<tr>
<td>CER</td>
<td>Certified Emission Reduction</td>
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<tr>
<td>CFEG</td>
<td>Coal-Fired Electricity Generator</td>
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<tr>
<td>CMP</td>
<td>Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol</td>
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<tr>
<td>COP</td>
<td>Conference of the Parties to the United Nations Framework Convention on Climate Change</td>
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<tr>
<td>CO2</td>
<td>Carbon Dioxide</td>
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<tr>
<td>CO2-e</td>
<td>Carbon Dioxide-equivalent</td>
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<tr>
<td>CPRS</td>
<td>Carbon Pollution Reduction Scheme</td>
</tr>
<tr>
<td>DCC</td>
<td>Department of Climate Change</td>
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<tr>
<td>DOE</td>
<td>Designated Operational Entities</td>
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<tr>
<td>ECS</td>
<td>Enhancement of Carbon Stocks</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>EU ETS</td>
<td>European Union Emissions Trading Scheme</td>
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<td>ETS</td>
<td>Emissions Trading Scheme</td>
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<td>FCPF</td>
<td>Forest Carbon Partnership Facility</td>
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<td>FIP</td>
<td>Forest Investment Program</td>
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<tr>
<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GNP</td>
<td>Gross National Product</td>
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<td>GEF</td>
<td>Global Environment Facility</td>
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<td>GFC</td>
<td>Global Financial Crisis</td>
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<td>GHG</td>
<td>Greenhouse Gas</td>
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<td>GIC</td>
<td>Good International Citizen</td>
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<tr>
<td>GIFC</td>
<td>Global Initiative on Forests and Climate</td>
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<tr>
<td>GNP</td>
<td>Gross National Product</td>
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<tr>
<td>G8</td>
<td>Group of Eight</td>
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<tr>
<td>G77</td>
<td>Group of 77 and China</td>
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<td>HFC</td>
<td>Hydrofluorocarbon</td>
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<td>HDI</td>
<td>Human Development Index</td>
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<td>HWP</td>
<td>Harvested Wood Product</td>
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<tr>
<td>IAFCP</td>
<td>Indonesia-Australia Forest Carbon Partnership</td>
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<td>ICCL</td>
<td>International Climate Change Law</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Cultural and Social Rights</td>
</tr>
<tr>
<td>IFCI</td>
<td>International Forest Carbon Initiative</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
</tr>
<tr>
<td>IR</td>
<td>International Relations</td>
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<tr>
<td>JI</td>
<td>Joint Implementation</td>
</tr>
<tr>
<td>JUSC</td>
<td>Japan, US, Canada, Australia and New Zealand</td>
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<tr>
<td>JUSSC</td>
<td>Japan, US, Switzerland, Canada, Australia, Norway and New Zealand</td>
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<tr>
<td>KFCP</td>
<td>Kalimantan Forest and Carbon Partnership</td>
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<tr>
<td>LDC</td>
<td>Least Developed Countries</td>
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<tr>
<td>LUCF</td>
<td>Land Use Change and Forestry</td>
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<tr>
<td>LULUCF</td>
<td>Land Use, Land-use Change and Forestry</td>
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MRET – Mandatory Renewable Energy Target
MRV – Measuring, Reporting and Verifying
Mt CO2-e – Megatonnes Carbon Dioxide-Equivalent
NAMA – Nationally Appropriate Mitigation Actions
NEAA – Netherlands Environmental Assessment Agency
NGO – Non-governmental Organisation
OECD – Organisation for Economic Co-operation and Development
PDD – Project Design Document
PNG – Papua New Guinea
PPM – Parts Per Million
RED – Reduced Emissions from Deforestation
REDD – Reduced Emissions from Deforestation and Forest Degradation
REDD+ – Reduced Emissions from Deforestation and Forest Degradation, plus Conservation, Sustainable Management of Forests and Carbon Stock Enhancement
RET – Renewable Energy Target
RMU – Removal Unit
SBI – Subsidiary Body for Implementation
SBSTA – Subsidiary Body for Scientific and Technological Advice
SIDS – Small Island Developing States
SMF – Sustainable Management of Forests
UK – United Kingdom
UN – United Nations
UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC – United Nations Framework Convention on Climate Change
UNHRC – United Nations Human Rights Council
US – United States
YPD – Yayasan Petak Danum Kalimantan Tengah
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INTRODUCTION

'Climate change is the great moral challenge of our generation'. Kevin Rudd, Opposition Leader, March 2007.1

'The new Australian government came to office intent on making a difference as a good international citizen.' Stephen Smith, Australian Foreign Minister, August 2008.2

A Research Question

This thesis examines whether Australia acted as a 'good international citizen' (GIC) in its engagement with international climate change law (ICCL) during the term of the first Rudd Labor government (3 December 2007 – 24 June 2010).3 The assessment is undertaken by examining the Rudd government's engagement with the key development in ICCL during its term of office, namely, the 'post-2012' intergovernmental negotiations under the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and 1997 Kyoto Protocol. The Bali Roadmap, adopted at the Bali Climate Change Conference, December 2007,4 saw Parties to the UNFCCC and Kyoto Protocol launch a historic negotiating process to establish a new global agreement on climate change, with Kyoto’s first commitment period due to expire in 2012.5 The Parties' intention was to complete negotiations by the

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1 Kevin Rudd, 'Opening Remarks' (Speech delivered at the National Climate Change Summit, Canberra, 31 March 2007).
3 The term international climate change law in this thesis is used to refer to the body of international law that specifically seeks to regulate greenhouse gas emissions, namely: the United Nations Framework Convention on Climate Change, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC'); the Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) ('Kyoto Protocol'); and the subsequent decisions that have been made by Parties to those agreements. See overview of ICCL in chapter 4. This thesis was originally submitted in December 2013. The final version has been revised to reflect examiners' comments. The law stands as at the original date of submission.
4 UNFCCC, Now, Up to and Beyond 2012: The Bali Road Map <http://unfccc.int/essential_background/bali_road_map/items/6072.php>. The Bali Conference served as the 13th Conference of the Parties to the UNFCCC and 3rd Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.
5 Kyoto Protocol arts 3.1, 3.7.
While this objective was not met, this round of negotiations was nonetheless highly significant for the development of ICCL, with Parties agreeing to the landmark Copenhagen Accord. Many aspects of the Accord were later formally adopted by the Parties in 2010 in the 'Cancun Agreements'. As of October 2013, Parties were still yet to agree to the new, broader climate agreement envisaged by the Bali Roadmap. However, Parties hoped to establish such an agreement by 2015, to come into effect by 2020. Kyoto Parties had also agreed to a second commitment period for the Kyoto Protocol, from 2013 to 2020.

The post-2012 climate negotiations took place under two negotiating 'tracks', the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) (established by the 'Bali Action Plan' (BAP)) and the Ad Hoc Working Group to Consider Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). The Parties agreed under the BAP to conduct negotiations on the mitigation of greenhouse gas (GHGs) emissions; adaptation; technology development and transfer; and financing for mitigation, adaptation and technology cooperation.

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10 UNFCCC, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Eighth Session: Addendum (Part 2)*, UN Doc FCCC/KP/CMP/2012/13/Add.1 (28 February 2012), decision 1/CMP.8, [1, 4], annex I; UNFCCC, *Doha Amendment* <http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php>. The Doha Amendment had yet to enter into force: see chapter 4.


Given the complexity and breadth of issues discussed under each of these broad topics, this thesis focuses its analysis on the first of these concerns: mitigation. Mitigation was the central issue for the negotiations to address, with the primary objective of the UNFCCC being to reduce GHG emissions.\textsuperscript{13} Furthermore, this issue was the key negotiating priority of the Rudd government. Notwithstanding the intended focus of the thesis, several other topics such as climate finance receive more limited attention where relevant to the analysis of mitigation issues. While largely concerned with the government's activities at the international level, the thesis also examines the government's domestic abatement response – especially the Carbon Pollution Reduction Scheme (CPRS) – this being a crucial part of its engagement with the post-2012 negotiations.

\textbf{B Rationale}

Commenced in 2008, this thesis initially intended to examine the conservative Howard government's engagement with international environmental law during its term in office (1996-2007). However, it soon became apparent that the launch of the Bali Roadmap in December 2007 presented a unique opportunity to study Australia's engagement with a crucial area of international environmental law as it unfolded. Of all the environmental issues on the international legal agenda, climate change also appeared to be particularly worthy of consideration, not least because of Prime Minister Kevin Rudd's personal commitment to the issue. Labelling climate change as the 'great moral challenge' of his generation,\textsuperscript{14} climate change became a 'totemic' and crucial part of Labor's November 2007 election victory,\textsuperscript{15} with Rudd promising to ratify the Kyoto Protocol and introduce an emissions trading scheme (ETS) to reduce Australia's GHG emissions.\textsuperscript{16} This provided a sharp policy difference between the Australian Labor Party (ALP) and the Liberal National government it succeeded, which

\textsuperscript{13} UNFCCC art 2.
\textsuperscript{14} Rudd, 'Opening Remarks', above n 1.
\textsuperscript{16} Kevin Rudd, 'An Action Agenda for Climate Change' (Speech delivered at the Annual Fraser Lecture, Canberra, 30 May 2007); Leslie Nielsen et al, \textit{Bills Digest: Carbon Pollution Reduction Scheme Bill 2009}, No 165 of 2008-09, 15 June 2009, 13.
had steadfastly refused to ratify Kyoto,\textsuperscript{17} and only reluctantly promised to introduce an ETS prior to the 2007 election\textsuperscript{18} in the face of strong domestic political pressure to act on climate change. The post-2012 negotiations also presented a potentially significant period for the development of ICCL, with Parties aiming to have a new agreement in place by the 15\textsuperscript{th} Conference of the Parties (COP 15) in Copenhagen. Spurred into action by the warnings of the Intergovernmental Panel on Climate Change in 2007 that global warming was 'unequivocal'\textsuperscript{19} and would lead to significant environmental, economic and social consequences if GHG emissions were not significantly reduced,\textsuperscript{20} the Parties' commitment to the Bali Roadmap was indicative of the new sense of vigour in the international community to strongly tackle the growing threat presented by human-induced climate change.

The contemporaneous nature of the research topic also meant that there was an opportunity to make a contribution to a new area of scholarship. As would be expected, some legal scholarship has emerged since the thesis was commenced that addresses various aspects of the Rudd government's engagement with the post-2012 negotiations.\textsuperscript{21} However, there remains little comprehensive analysis of the topic, especially from a GIC perspective.\textsuperscript{22} This thesis therefore aims to fill this gap in legal scholarship.

\begin{flushleft}


\textsuperscript{20} Ibid 48-54.

\textsuperscript{21} See, eg, Frank Nicholls, 'Environmental Policy in the Howard and Rudd Eras' (2010) 40 \textit{Environmental Policy and Law} 247; David Leary, 'From Bali to Poznan: An Assessment of Australia's Response to Climate Change in 2008' 26 \textit{Environmental and Planning Law Journal} 190; Ben Saul et al, \textit{Climate Change and Australia: Warming to the Global Challenge} (Federation Press, 2012). See also the literature cited in subsequent chapters.

\end{flushleft}
Given the author's background as a legal scholar, the obvious approach for the thesis was to examine the government's involvement in the climate negotiations from a strictly 'legal' perspective, examining issues such as its compliance with relevant norms and principles of ICCL. However, the thesis instead undertakes the more problematic, but perhaps ultimately more illuminating, task of assessing the Rudd government's performance as a GIC. This was a foreign policy goal first espoused in Australia by former Labor Foreign Minister, Gareth Evans, in the late 1980s. According to Evans, in addition to traditional security and economic interests, every nation has a national interest in being a GIC. While there is no agreed definition of the concept, essentially the practise of GIC involves the pursuit of a more ethical foreign policy. It requires states to forego the dogged pursuit of narrow national interests, recognising that they owe a duty to promote the common good of the international community, not just self-interest. It should be noted that such a brief definition of GIC is not entirely useful on its own. As this thesis will explain, there are many qualities associated with GIC that help to define the concept in more concrete terms, among them, leadership, activism, altruism, and a commitment to multilateralism and international law.

Several factors suggested that employing the concept of GIC to assess the Rudd government's activities would be a worthwhile endeavour. First, it was not clear that a strictly legal analysis of the government's engagement with the climate negotiations would in fact be possible, given that treaty-making – the making of new law – requires many policy issues to be addressed. As participation in treaty negotiations falls within the ambit of foreign policy, it also appeared that a foreign policy concept such as GIC could provide a useful 'lens' or framework from which to assess the government's activities. Ultimately, the research for this thesis found that the legal principles established by the UNFCCC actually provided Parties with very strong legal and ethical guidance as to what was expected of them in negotiating a post-2012 agreement. As such, this thesis chiefly assesses GIC by examining the government's compliance with

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25 The author acknowledges and thanks his supervisor, Professor Donald Rothwell, for proposing the use of GIC for this study.
established principles and provisions of ICCL. However, the concept of GIC was nonetheless found to be highly useful, enabling international legal activities to be assessed within a broader conceptual framework.

Second, GIC – often used interchangeably by governments, scholars and commentators with the term 'good global citizen'—26 has become a notable feature of Australia’s political discourse since first articulated by Evans, being referred to by both sides of politics,27 as well as in the media.28 The term also features in global political discourse, with New Zealand29 and Canada30 providing prominent examples of other states which have adopted the term at various times. Perhaps most notably (because of the global influence of the United States (US)), the term was employed by Republican Presidential nominee, Senator John McCain, during the US 2008 federal election.31

It is worth highlighting that a range of similar terms to GIC are used in domestic and global political discourse to describe 'better' and less nationalistic forms of statecraft, for example: 'effective international citizen',32 'good international environmental
citizen’, ‘good neighbour’, ‘responsible stakeholder’, ‘idealist’, ‘internationalist’, ‘liberal internationalist’ and ‘good state’, among others. GIC, however, appears to have a distinctive meaning within Australia at least, and is the focus of attention of this thesis.

Third, Rudd’s Labor (both in opposition and then government) itself explicitly stated its desire to ‘restore Australia's reputation as a good international citizen’, including on the issue of climate change. The view of the ALP was that Australia's international reputation had been damaged by the Howard government, especially by its rejection of the Kyoto Protocol. Thus the government itself raised GIC as a standard of behaviour by which its actions ought to be judged.

Fourth, at the time the thesis was commenced, analysis existed of GIC by international relations (IR) scholars, but there was a dearth of legal scholarship properly examining the concept. Because of the differences in approach and emphasis of IR and legal scholars, much of the GIC scholarship was difficult to directly apply to the assessment of governmental engagement with international law. Legal scholarship that referred to GIC also generally did so without doing much to define the concept and neglected to

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33 Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2003, 21802 (Kelvin Thompson).
34 The notion of the 'good neighbour' was popularised in the 1930s and 1940s by US President Franklin Roosevelt, who adopted a 'Good Neighbour Policy': see Tom Barry, Laura Carlsten and John Gershman, The Good Neighbour Policy – A History to Make Us Proud (2005) International Relations Centre <http://www.irc-online.org/content/pdf/0503ggn.pdf>, 1-8. This concept is also expressed in the Charter of the United Nations preamble, art 74.
36 Eg 'model citizen', 'model UN member', 'creative middle power', 'middle power internationalist', 'multilateralist', 'global leader', 'responsible member of the international community', 'solidarist', 'good steward'. It is beyond the scope of this thesis to explore the finer differences of these terms but several are discussed in chapter 1.
38 Ibid.
draw upon Evans' statements on GIC or the IR literature. Thus there was a clear need to better define the concept and in a manner relevant to legal scholarship.

The author presented initial findings on GIC in 2009. Pert then made a substantial contribution to scholarship on GIC from an international lawyer's perspective in 2010. This thesis arguably provides a fuller account of the concept than Pert, engaging in a more thorough examination of Evans' account of GIC as well as relevant IR scholarship. The subject matters of the two theses are also substantially different. Pert examined the record of previous Australian governments as a GIC in relation to international law, ending with the Howard government, and provided only limited analysis of climate change issues. More recently, Pert also assessed the Rudd government's record as a GIC, but again only briefly addressed Australia's engagement with ICCL.

C Thesis Outline

The thesis addresses the research question in the following manner.

Chapter 1 examines the concept of GIC in order to address the question: 'what is a GIC?' The chapter outlines the concept of GIC as articulated by Evans, as well as interpretations and critiques of the concept within the 'GIC literature'. The literature review helps to illuminate both the general characteristics of GIC as well as its conceptual basis.

Chapter 1 suggests that Evans' writings and speeches on GIC provide the best starting point for understanding the concept, and identifies a number of attributes or characteristics that Evans associated with the concept. These include:

• an internationalist, cooperative approach to international affairs, rather than an isolationist one;
• an activist, rather than passive or reflexive, approach to addressing international issues;
• the display of leadership;
• 'pitching in' to international tasks – such as contributing to humanitarian or peacekeeping efforts;
• promoting more ethical or moral courses of action – including seeking to advance 'purposes beyond ourselves', not just narrow self-interest;
• practising a values-based foreign policy – especially one influenced by universal values such as human rights;
• embracing a broader or more 'enlightened' approach to determining where the national interest actually lies – that is, advancing 'enlightened self-interest';
• supporting multilateralism and international institutions like the United Nations;
• supporting, and complying with, international law;
• being a good neighbour – that is, being a good citizen within one's own region;
• acting consistently on the domestic front with the GIC values and agendas promoted abroad; and
• striking a defensible balance between idealism and realism – that is, promoting a more idealistic approach to foreign policy, while also being 'realistic' about what can be achieved in international affairs.

While the above attributes can all be indicative of GIC, the qualities that distinguish 'good' from lesser forms of international conduct (and which are most relevant) are impacted by the context in which a government is operating; whether legal, policy, ethical or otherwise. Therefore, an assessment of GIC must always take into account the particular circumstances of the issue on which a government is engaged.

Specifically regarding international law, Evans' writings and speeches indicate that a GIC would be expected to demonstrate ethical or 'good' behaviour in the four major stages of the international legal process, namely by:
• helping to develop international law in a positive direction – such as in negotiating new treaties to tackle global problems;
• adopting relevant international treaties and other instruments such as declarations (through ratification or signature, as required);
• complying with all of its international legal obligations; and
• generally playing a role in the advancement and upholding of international legal norms within the international community, such as by encouraging other nations to adopt treaties or holding them to account for any infractions.

The general attributes of GIC identified above can also be highly relevant when qualitatively assessing a state’s engagement with the international legal system. For example, a GIC may be expected to display activism and leadership in developing new international law, and generally advance its legal interests in a more ethical fashion.

Chapter 2 provides a brief overview of earlier Australian governments' engagement with ICCL, providing useful historical context for the later examination of the Rudd government's activities. Chapter 3 then provides a basic introduction to the Rudd government's general discourse on GIC and climate change.

Chapter 4 expands upon the brief discussion of ICCL in chapters 1, 2 and 3, outlining the basic features of the ICCL regime and the climate negotiations. The chapter then explains how GIC will be assessed by this thesis. It argues that the central task for the government in its international and domestic response was to act consistently with the established principles and provisions of the ICCL regime. This is therefore the primary focus of this thesis.

The remaining chapters examine five key aspects of the Rudd government's engagement with the post-2012 negotiations. The topics were judged to be the most relevant to assessing the government's performance as a GIC in the area of mitigation. The chapters address the following issues:

• chapter 5: the government's preferred long-term global mitigation goal – 450 parts per million carbon dioxide-equivalent/no more than 2°C warming;
- chapter 6: the government's 5 to 25 per cent mitigation target for 2020 and associated conditions;
- chapter 7: implementation – the government's approach to implementing its mitigation targets. This includes analysis of the government's laws and policies for reducing emissions – chiefly the proposed CPRS – and its intention to make significant use of international carbon credits to supplement domestic abatement;
- chapter 8: the government's preference for a market-based mechanism to reduce emissions from deforestation and forest degradation in developing countries (REDD) and its involvement in a REDD demonstration project – the Kalimantan Forest and Carbon Partnership; and
- chapter 9: the government's efforts to reform the rules on land use, land-use change and forestry, especially those relating to forest management.

The conclusion to the thesis provides a holistic assessment of whether the Rudd government's activities were consistent with GIC. While the thesis finds evidence of many positive statements and activities by the Rudd government in its engagement with ICCL, ultimately it is argued that its efforts were insufficient to demonstrate the higher form of conduct associated with GIC.

**D Research Methodology**

The research methodology for chapters 1, 2 and 3 of the thesis involved examining both primary and secondary sources. Primary evidence of Evans' conceptualisation of GIC was collated from his various writings and speeches on the topic. Primary evidence of subsequent governments' views on GIC, including the Rudd government, was also collated from various public documents and speeches. An extensive literature search was also conducted of academic literature examining GIC.

The research methodology for chapters addressing the climate negotiations first involved examining the negotiating positions of Australia and other Parties. Given the impossibility of knowing everything that was said and done by Australia and other
states within the negotiations, evidence of Party positions is chiefly drawn from official submissions to the UNFCCC.\textsuperscript{44} This evidence was supplemented with a range of other primary and secondary sources including the eyewitness record of many negotiating sessions provided by the Earth Negotiations Bulletin\textsuperscript{45} and a variety of government reports, public statements, briefings, and media and academic publications. Second, an extensive literature search was conducted in order to properly understand the issues raised in the negotiations. This allowed for an informed and critical assessment to be made of the Rudd government’s legal and policy positions. The author’s understanding of the subject matter was also enhanced by a field trip to COP 15 in Copenhagen, December 2009, as an accredited observer.

The period of review for this thesis covers the term of the first Rudd government: 3 December 2007 to 24 June 2010.\textsuperscript{46} This incorporates the climate negotiations from COP 13 in Bali (December 2007) to COP 15 in Copenhagen. As noted, the main outcome of this negotiating period was the non-binding Copenhagen Accord. Little further progress was made in the climate negotiations prior to Kevin Rudd being ousted as Prime Minister by Julia Gillard on 24 June 2010. As such, the thesis concentrates on the period between COP 13 and COP 15, except where broader comment is needed for the completeness of the analysis.

\textsuperscript{44} Available at the UNFCCC website: <http://unfccc.int>. Australia government submissions are also available at the Department of Environment website: <http://www.climatechange.gov.au>.
\textsuperscript{45} Available at the International Institute for Sustainable Development website: <www.iisd.ca>.
\textsuperscript{46} The Labor government remained in power after this date but under a new leader, Julia Gillard. Kevin Rudd was later re-elected as Labor leader, becoming Prime Minister for a second time on 27 June 2013 until Labor’s loss at the federal election on 7 September 2013. This thesis only examines the activities of the first Rudd government.
CHAPTER 1. THE MEANING OF 'GOOD INTERNATIONAL CITIZENSHIP'

Australia has a 'national interest in being, and being seen to be, a good international citizen'.

Gareth Evans, Australian Foreign Minister, 1989.¹

'A key aspect of the Government’s recommitment to multilateralism is our strong wish to see Australia speak and act on the world stage as a good international citizen'. Stephen Smith, Australian Foreign Minister, August 2008.²

The aim of this chapter is to examine what is meant by the term 'good international citizenship' (GIC). It does so by outlining GIC as it was first articulated by Gareth Evans as well as the broader literature which has subsequently examined its features. It should be noted that while there are a number of clearly identifiable attributes of GIC, its precise requirements are not settled. Furthermore, what GIC entails always depends to some extent on the subject matter – in the case of this thesis, the Rudd government's engagement with international climate change law (ICCL).³ Thus, while this chapter provides an in-depth examination of the broad features of GIC, this only serves as an introduction to the concept. Later chapters explore in more detail what GIC specifically required of the Rudd government in its engagement with the post-2012 climate negotiations.

A Good International Citizenship according to Gareth Evans

The concept of GIC was first espoused in Australia in the late 1980s by Gareth Evans, Australian Minister for Foreign Affairs from 1988 to 1996 under the Hawke and Keating Labor governments.⁴ It has been suggested that the concept may have originated in

¹ Gareth Evans, Making Australian Foreign Policy (Australian Fabian Society, 1989) 9.
³ All references in this thesis to the Rudd government are to its first term in office (2007-2010).
⁴ Evans appeared to first articulate the idea in the following speech: Gareth Evans, 'Australia's Place in the World: The Dynamics of Foreign Policy Decision-Making' (Speech delivered at the ANU Strategic and Defence Studies Centre Bicentennial Conference, Canberra, 6 December 1988), reprinted and revised in Evans, Making Australian Foreign Policy, above n 1, 7-19.
Canadian political discourse, but Evans certainly did most to popularise it, especially in Australia, and also to flesh out the meaning of the term. Evans elaborated on the concept in a range of writings and speeches as Foreign Minister, as well as in post-political capacities, including while President and CEO of the International Crisis Group (2000-2009). Evans' conception of GIC is the most comprehensive political exposition of the term in Australia and probably still best reflects how it is understood within an Australian political context.
1 The Third Category of 'National Interest'

GIC, as outlined by Evans, is a foreign policy concept that concerns how government pursues the national interests of the state. Evans argued that 'all foreign policy is, or should be, directed at the protection and advancement of the national interest'.

According to Evans, Australia's national interests lay in three key areas: 'geo-political or strategic interests' (especially the defence of Australian sovereignty and political independence); 'economic and trade interests' (especially securing a liberal international trading regime, allowing reasonable access to overseas markets for Australian exports); and 'the national interest in being, and being seen to be, a good international citizen.'

The first two categories identified by Evans – essentially security and economic interests – represent the traditional national interests of the state. According to Gyngell and Wesley, the traditional view is that 'security and prosperity will always be the primary foreign policy motivations of any government elected to protect and advance the interests of its society.' As stated by Evans, most political leaders define national interests 'in quite narrow security and economic terms – what's necessary or desirable to protect the country from threat or attack, and to increase the income and quality of life of its people.'

Australian governments have, however, also long recognised the importance of promoting less self-interested values and concerns in foreign policy 'that are more concerned with a nation's sense of self and responsibilities to people and institutions beyond its borders.' This was evident, for example, in the aftermath of World War II, when Australia, led by Dr Herbert Evatt, Minister for External Affairs in the Curtin and Chifley Labor governments, made a significant contribution to the founding of the United Nations (UN) in 1945 and the

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8 Evans, Making Australian Foreign Policy, above n 1, 9.
9 Evans and Grant, Australia’s Foreign Relations (1995), above n 6, 33-34.
11 Evans, 'Australia’s Foreign Policy Response to Global Challenges', above n 7.
12 Gyngell and Wesley, above n 10, 273.
promotion of universal human rights. The novel contribution of Evans’ was to articulate this more ethical aspect of foreign policy explicitly in terms of GIC, and also to elevate its importance in the discourse and practice of Australian foreign policy. Under Evans’ Foreign Ministership, GIC became an explicit goal of government policy, and was frequently invoked in public, especially by Evans.

What then are the general characteristics of a GIC? Evans generally spoke about GIC in similar terms, however, a range of his writings and speeches need to be considered together in order to fully appreciate his vision of GIC. A number of scholars have analysed Evans’ writings and speeches, yet have often failed to clearly tease out the various elements articulated by Evans. The major exception is Pert, who recently sought to better isolate the various qualities or attributes of GIC. Pert suggests that there are five key attributes of GIC (as outlined by Evans), namely: compliance with international law (or more broadly, ‘engagement’ with international law); support for multilateralism; a willingness to ‘pitch in’ to international tasks; morality or ethics – or ‘international good deeds’; and ‘leadership’ – improving or raising international standards. Evans never specified the requirements of GIC in any formulaic manner, meaning that his conception of GIC is open to interpretation. This thesis agrees that


15 Department of Foreign Affairs and Trade, Annual Report 1993-94 (1994) 14. The department’s international goals were articulated as: increasing Australia’s economic prosperity through trade and investment flows; ensuring a favourable security environment for Australia; advancing Australia’s standing as a good international citizen; promoting global cooperation based on fair rules; and helping Australians overseas.

16 See Evans’ speeches and writings on GIC, above n 6.


18 Pert initially states that ‘compliance’ with international law is an attribute of GIC, but then redefines/ expands compliance to mean ‘engagement’. Thus GIC requires compliance with existing international obligations, adherence to all relevant treaties, exceeding existing obligations, working to create new or better law where necessary; or encouraging other states to do all or any of these things: Pert, above n 5, 1-32. See further discussion of GIC and international law below.

19 Ibid 13.
the attributes of GIC identified by Pert are relevant attributes. However, it is suggested, also based on a primary examination of Evans' writings and speeches, that the qualities or attributes of GIC (many of which overlap) are broader than proposed by Pert.

2 Internationalism – International Cooperation

The most basic attribute of GIC was the practise of 'internationalism' or 'international cooperation'. Rather than being disinterested or 'isolationist'\(^{20}\) in approach, a GIC was prepared to cooperate on the 'new internationalist agenda' which emerged during Evans' stint as Foreign Minister.\(^{21}\) Following the end of the Cold War in the late 1980s – which had greatly hindered international cooperation – a range of global issues, once considered as 'internal matters or nobody's business', began receiving greater international attention.\(^{22}\) These included environmental issues such as climate change, the ozone layer and sustainable development; the advancement of human rights; and health problems like AIDS, among others.\(^{23}\) While GIC is strongly associated with notions of 'activism' and 'leadership' (see below) Evans' statements suggest that, at minimum, a GIC ought to be a constructive participant in world affairs, as opposed to ignoring global concerns or actively blocking international progress.\(^{24}\) Given that a state cannot adopt an activist or leadership position on every issue (due to limited diplomatic resources),\(^{25}\) being a cooperative member of the international community represented the minimum expectation of GIC.


\(^{21}\) See Evans and Grant, Australia’s Foreign Relations (1995), above n 6, 40.

\(^{22}\) Ibid.

\(^{23}\) Other examples included: apartheid in South Africa and racial intolerance more generally; the drug trade; refugee care and resettlement; terrorism; the use of the death penalty; debt, poverty and national calamities in developing countries; security issues like peace-keeping and arms control, especially the threat and proliferation of chemical and nuclear weapons: ibid 34-35, 40.

\(^{24}\) See ibid 40.

\(^{25}\) Ibid. Evans and co-author Grant suggest that Australia must focus on issues in which it has 'a particularly useful contribution to make,’ whether because of its 'established profile, expertise, complimentary policy objectives or some other relevant factor'.
3 Activism, Leadership and 'Pitching in'

Global activism and the demonstration of leadership were particularly important attributes of GIC. Evans commented that the multilateral objectives he advocated as Foreign Minister were 'primarily activist rather than reflective or responsive' and involved 'providing international leadership and constructing a better international environment.' He noted that there was a significant reputational benefit to be gained from 'being regularly willing to pitch into international tasks for motives that appear to be relatively selfless'. The Hawke-Keating governments demonstrated activism, leadership and pitching in on numerous occasions. Prominent examples included Australia's successful efforts, in coalition with other states, to: establish the Antarctic Environmental Protocol; craft a sanctions strategy to end apartheid in South Africa; establish a Chemical Weapons Convention; implement the Cambodian peace plan; launch the Asia Pacific Economic Cooperation forum in 1989; renew the Nuclear Non-Proliferation Treaty in 1995; and establish the 1996 Comprehensive Nuclear Test Ban Treaty, among others.

4 A More Ethical Foreign Policy: Advancing 'Purposes Beyond Ourselves'

GIC was also about acting more ethically or morally in international affairs. This was implied from the placement of the term 'good' before 'international citizen'. But Evans was also explicit that GIC required a commitment to pursuing 'purposes beyond...'

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26 Evans, 'Cooperating With My Critics: A Rejoinder', above n 6, 193.
27 Evans, 'Preventing Deadly Conflict and the Problem of Political Will', above n 7.
30 See Evans, 'The Labor Tradition: A View from the 1990s', above n 7, 18-19; Pert, above n 5, 234, 270.
33 For broader commentary on this aspect see, eg, Pert, above n 5, 19-20; Peter Singer and Tom Gregg, How Ethical Is Australia? An Examination of Australia's Record as a Global Citizen (The Australian Collaboration, 2004) 15; Hanson, 'Australia and Nuclear Arms Control as “Good International Citizenship”', above n 17, 4; Tim Dunne and Nicholas J Wheeler, 'Blair's Britain: A Force for Good in the World?' in Karen E Smith and Margot Light (eds), Ethics and Foreign Policy (Cambridge University Press, 2001) 167, 176; Andrew Linklater, 'What is a Good International Citizen?' in Paul Keal (ed), Ethics and Foreign Policy (Allen & Unwin, 1992) 21, 39.
ourselves', a phrase borrowed from influential international relations (IR) academic, Hedley Bull. Evans characterised issues on the GIC's agenda, such as environmental protection and human rights, as 'ends that are inherently valuable'. Seeking to address such issues was 'proper, if for no other reason than to maintain our own sense of worth'. On issues such as human rights protection, a 'moral obligation' was 'its own justification' for acting as a GIC. For Evans, GIC was about helping to realise an idealistic vision of a 'peaceful and prosperous Australia and a peaceful and prosperous world' and pursuing the 'common good'. Long after leaving public office, Evans stated that pursuing 'global public goods' was 'at the heart' of GIC. One particularly important aspect of this altruism, which itself could be regarded as a significant characteristic of GIC, was the need to maintain a 'credible and effective overseas aid program'.

5 Advancing 'Enlightened Self-interest'

While GIC was in part motivated by altruism, it should be emphasised that ultimately Evans conceptualised GIC as a means of advancing the national interest, albeit in a more ethical fashion. GIC was not just 'the foreign policy equivalent of Boy Scout good deeds.' Rather, it was the practice of 'enlightened self-interest'. In other words, GIC involved taking a broader view of what was actually in the 'national interest', looking beyond narrow security and economic concerns. The motivation for doing so was not merely an idealistic or moral one. Rather, Evans argued that in an increasingly globalised and interdependent world, many so-called 'value' issues (such as addressing human rights or environmental issues) could adversely impact Australia's traditional

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35 Evans, *Making Australian Foreign Policy*, above n 6, 11.
36 Ibid.
38 Evans, *Making Australian Foreign Policy*, above n 6, 46.
39 Ibid 32.
40 Gareth Evans, 'Idealism and Realism in Australian Foreign Policy' (Speech delivered at the Hedley Bull Lecture, University of Sydney, 14 August 2012) <http://www.gevans.org/speeches/speech482.html>.
41 Evans, 'Foreign Policy and Good International Citizenship', above n 6. In practice, the ALP struggled to reach the 0.7 per cent target for development aid set by the UN, being under 0.4 per cent: see Lawler, 'The Good Citizen Australia?', above n 17, 247-48.
42 Evans, *Making Australian Foreign Policy*, above n 6, 42.
43 Ibid 43.
44 See Singer and Gregg, above n 33, 15.
national interests. Being at most a 'middle power', Australia's interest lay in a world governed 'by principles of justice, equality, talent and achievement, rather than status and power'. International cooperation was not 'an idealistic endeavour' but a 'practical necessity'. Evans also argued that Australia stood to gain a 'reputational benefit' (that is, diplomatic capital) from being, and being seen to be, a GIC. This could assist it in pursuing its various national interests at the global level, including traditional interests such as commercial objectives.

6 Blending 'Realism and Idealism'

Evans further characterised GIC as an approach blending 'realism and idealism'. IR scholars have analysed this statement in detail as the terms realism and idealism have specific meanings within this academic discipline. In IR terms, 'realism' often refers to a narrow, self-interested approach to international affairs; the form of behaviour that GIC is intended to counter (see discussion of idealism and realism at section B). Evans, however, appeared to use the term realism in the sense of being 'realistic' or 'pragmatic'. In Evans' words, the conduct of foreign policy was about 'responding realistically to the world as we find it.' Moral concerns had to be balanced against the 'pragmatic acceptance of irreversible fact'. A middle power like Australia also needed to avoid having 'exaggerated ideas of [its] influence'. Instead, it needed to set realistic priorities that were both 'important' and 'achievable'. Governments also

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45 Evans, Making Australian Foreign Policy, above n 6, 42; Evans, 'Australia's Foreign Policy Response to Global Challenges', above n 7.
46 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 42, 344. See further discussion below on middle powers under section A.11.
47 Gareth Evans, 'Foreign Policy and Good International Citizenship', above n 6.
48 Gareth Evans, 'Preventing Deadly Conflict and the Problem of Political Will', above n 7.
49 Evans, Making Australian Foreign Policy, above n 6, 12. Reputational benefit could also assist a nation's 'soft-power', or 'the power of values and ideals to inspire, rather than of force to coerce': Evans, 'Preventing Deadly Conflict and the Problem of Political Will', above n 7. On the concept of 'soft power' see Joseph S Nye Jnr, Bound to Lead: The Changing Nature of American Power (Basic Books, 1991); Joseph S Nye Jnr, Soft Power: The Means to Success in World Politics (2004).
50 Evans, Making Australian Foreign Policy, above n 6, 44.
51 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 179-80.
52 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 41.
53 Ibid.
54 Evans, Making Australian Foreign Policy, above n 6, 30.
55 Ibid.
needed to temper 'what we want with what we can deliver and at what cost — social, economic and political'.

While thus a pragmatist, Evans also argued the 'case for idealism in international affairs', believing that the world could 'be changed — gradually — for the better'.

Rather than seeing realism and idealism as 'competing objectives', Evans believed that the challenge for government was in 'getting the blend right'.

GIC did not require Australia to 'set aside [traditional] national interests, any more than a citizen who lives as a law-abiding, socially cooperative member of a national community, sets aside personal rights'. Instead, GIC was about 'idealistic pragmatism'.

7 Values-based Foreign Policy

It should be evident from the above discussion on 'purposes beyond ourselves' that GIC involved projecting values, not just interests, into the foreign policy realm. Evans made this clear, stating that GIC required 'an extension into our foreign relations of the basic values of the Australian community: values at the core of our sense of self and which a democratic community expects its government to pursue'.

Whereas traditional national interests were said to be more 'objective', existing 'quite independently of community values', GIC flowed from 'the community's self-image, and what it judgementally accepts as its guiding principles'. GIC did not involve 'arrogantly insisting' that the world accept 'Australian' values, but nor did it condone 'crude cultural relativism'. Evans' emphasis was on advancing values that were increasingly being accepted as 'fundamental' and 'universal', such as those widely adopted in international human rights treaties.

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56 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 45.
57 Ibid 42.
58 Ibid 35.
59 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
60 Evans, Making Australian Foreign Policy, above n 6, 43.
61 Ibid 11.
62 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
63 Ibid.
64 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 42.
65 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
8 Support for Multilateralism and International Institutions

In more practical terms, GIC involved a commitment to multilateralism as well as international institutions (through which multilateralism is generally conducted). For Evans, there was a 'direct link' between Australia's pursuit of GIC and its 'long standing support for multilateralism'.66 Because of growing global interdependence and the practical reality that multilateral forums are chiefly responsible for addressing global issues, Evans argued that GICs ought to place 'considerable emphasis' on multilateral diplomacy.67 This did not diminish the need for bilateral diplomacy,68 but Evans had a clear preference for global problems to be addressed multilaterally. Related to this, GICs were expected to be active participants in international institutions and also be engaged in strengthening the institutional architecture,69 particularly the UN.70 Evans regarded the UN as the 'only truly universal organisation' and 'the symbol and the hope of ... international cooperation' which lay at 'the heart of good international citizenship'.71

9 Support for International Law

Of particular interest to this thesis, Evans indicated that a commitment to international law was a fundamental aspect of GIC. Evans, himself a lawyer, strongly defended the value of the international legal order, believing that it served all nations' long-term interests.72 Despite its 'inherent weaknesses'73 – especially its lack of an effective enforcement mechanism74 – international law provided a necessary 'framework for promoting peace, order and predictability in international relations; for promoting co-operation between nations and the resolution of common problems; and for setting new and higher standards of both international and national behaviour.'75

66 Ibid.
67 Ibid.
68 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 59-60.
69 Evans, Making Australian Foreign Policy, above n 6, 42.
70 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
71 Ibid.
72 Evans, 'International Law and Australia's Interests', Australian International Law News, above n 6, 185.
73 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 153.
74 Gareth Evans, 'International Law and Australia's Interests', Australian International Law News, above n 6, 185.
75 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 153.
Various statements by Evans on the Hawke and Keating governments' approach to international law highlighted the types of activities that were expected of a GIC in relation to international law (what might be termed 'good international legal citizenship'). These aspects logically reflected four key phases of the international legal process.

First, Evans suggested that Australia had been 'very active in the negotiation of treaties, declarations and resolutions'.\(^7^6\) This highlighted that GIC required active engagement in the *development* phase of international law. Second, GIC involved the *adoption* of international treaties and other instruments. Evans noted, for example, that Australia had ratified a variety of human rights treaties, and had accepted the compulsory jurisdiction of the International Court of Justice without reservation.\(^7^7\)

Third, GIC involved *compliance* with international law, whether in relation to treaty or customary international law norms. Evans stated that Australia took its 'international obligations very seriously'\(^7^8\) and attached great importance to the fundamental norms of international law such as *pacta sunt servanda*.\(^7^9\) Evans enthused that Australia regarded its international legal commitments to be more than 'just good intentions'.\(^8^0\) Rather overgenerously, he stated that Australia abided by its treaty requirements 'in every detail', and was at 'pains to observe to the full the rules of customary international law.'\(^8^1\)

Fourth, Evans drew attention to the valuable role states can play in *advancing and upholding* international legal norms. For example, Australia had encouraged 'universal adherence' to environmental treaties,\(^8^2\) criticised other states in

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\(^7^6\) Gareth Evans, 'International Law and Australia's Interests', *Australian International Law News*, above n 6, 187.
\(^7^7\) Ibid.
\(^7^8\) Ibid.
\(^7^9\) Ibid.
\(^8^0\) Evans and Grant, *Australia's Foreign Relations* (1995), above n 6, 152.
\(^8^1\) Ibid. This claim was not entirely accurate. For example, the Hawke and Keating governments' record on giving effect to UN human rights treaties in domestic law was far from perfect: see, eg, Elizabeth Evatt, 'Australia's Performance in Human Rights' (2001) 26 *Alternative Law Journal* 11, 11-12.
\(^8^2\) Evans 'Foreign Policy and the Environment', above n 6, 117.
forums like the UN General Assembly when the international legal order was violated, and made 'vigorous' diplomatic protests when human rights were abused.

Evans' statements on GIC in relation to international law also need to be interpreted in light of other general characteristics of GIC. Reflecting the approach of advancing 'enlightened self-interest', for example, Evans noted that Australia would not be shy in 'appealing to self interest' when engaging with international law, but also that the 'force and relevance' of international law lay in it serving 'the long-term interests of all nations' (indicating that a GIC should not advance its interests in an overly nationalistic fashion).

10 Good Neighbourliness/Good Regional Citizenship and Consistent Domestic Behaviour

Evans briefly alluded to the idea that GIC involved 'good neighbourliness' (what could also be termed 'good regional citizenship'). In the context of peace and disarmament issues, for example, Evans noted that GIC required both international and regional endeavours. This aspect of GIC was not particularly fleshed out, but examples of good neighbourliness included cooperating with neighbouring countries on regional issues (such as in the making of regional environmental treaties), presenting a regional perspective in international discussions and treaty making negotiations, and generally being 'a helpful neighbour ready to use our resources for the common good.'

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83 Evans, 'International Law and Australia’s Interests', Australian International Law News, 187. As an example, the Hawke government supported a UN General Assembly resolution in November 1988 criticising the US' refusal to allow Yasser Arafat access to the UN as required by the Headquarters Agreement.
84 Ibid.
85 Ibid 189.
86 Ibid 185.
87 See Evans, Making Australian Foreign Policy, above n 6, 32; Evans, 'Foreign Policy and Good International Citizenship', above n 6.
88 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
89 Evans, 'International Law and Australia's Interests', Australian International Law News, above n 6, 191.
90 Ibid; Evans 'Foreign Policy and the Environment', above n 6, 117.
91 Evans, Making Australian Foreign Policy, above n 6, 32.
Another attribute of GIC highlighted by Evans was the need for domestic behaviour to be consistent with the values that were being espoused abroad.92 According to Evans, the 'most basic obligation' of GIC was 'to ensure that our own house is in order before we raise issues on the international scene'.93 This was important for maintaining international credibility and diplomatic influence.94 If Australia was involved in 'double standards' its influence would be diminished.95 'Hypocrites' were both 'disliked', and if Australia's size, 'ignored'.96 As co-author of the Responsibility to Protect Report by the International Commission on Intervention and State Sovereignty, Evans labelled '[s]overeignty as responsibility' (incorporating internal responsibility to 'respect the dignity and basic rights of all the people' within a state) as the 'minimum content' of GIC.97 In the context of international law, the need for consistent domestic behaviour of course included complying with international legal norms.

11 Effective Diplomacy

It should be noted that Evans associated GIC, for practical reasons, with a particular style of diplomacy. Making an impact as a GIC required influence, something which according to Evans was determined by the combination of a state's diplomatic assets and constraints.98 A key asset was enjoying international credibility.99 Other assets included capitalising on Australia's geographic location within the Asia Pacific (giving Australia practical advantages in seeking to influence regional issues)100 and Australia's status as a western nation (offering opportunities to play the role of an 'honest broker' between Western allies like the US and Australia's regional neighbours).101

The major constraint on Australia's ability to make a difference as a GIC was its relatively small size. Evans considered Australia to be a middle power (as do most

92 Ibid 16.
93 Evans, 'Foreign Policy and Good International Citizenship', above n 6.
94 Ibid.
95 Evans, Making Australian Foreign Policy, above n 6, 16.
96 Ibid.
97 International Commission on Intervention and State Sovereignty, above n 7, 8.
98 See Evans and Grant, Australia's Foreign Relations (1995), above n 6, 35, 343.
99 Evans, Making Australian Foreign Policy, above n 6, 15.
100 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 343, 348-52.
101 Evans, 'International Law and Australia's Interests', Australian International Law News, above n 6, 190.
foreign policy analysts). By this he meant that Australia was not 'a great or even major power' but neither was it 'small or insignificant'. While being relatively weak in terms of material power (especially in comparison to the military and economic strength of the US), Evans argued that middle powers could be 'as well-equipped as any other nation, and in some respects better equipped, to generate acceptable solutions' to global problems. Evans strongly associated GIC with 'middle power diplomacy' – building coalitions with 'like-minded' countries – as well as 'niche' diplomacy – focusing resources on issues likely to generate worthwhile returns. Middle powers could not generally 'impose their will', instead needing to rely on powers of persuasion, a 'degree of intellectual imagination and creativity', and the 'force of ideas'.

Middle power diplomacy is probably best not described as a universal attribute of GIC. All nations, whether large, medium or small, must adopt diplomatic methods that are appropriate to their national circumstances. But middle power diplomacy was the approach Evans regarded as most effective in terms of achieving Australia's GIC objectives.

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103 Evans and Grant, Australia’s Foreign Relations (1995), above n 6, 344.

104 Ibid. Evans argued, for example, that APEC would have had more difficulty coming to fruition if it had been instigated by the US or Japan, as each nation may have 'feared the worst of the other' and smaller powers may have perceived that their interests were at risk: 347.


106 Evans and Grant, Australia’s Foreign Relations (1995), above n 6, 345.

107 Ibid 347. Evans pointed to Labor’s establishment of the Cairns Group, a coalition of nations which fought to keep agricultural issues to the forefront of the international trade liberalisation agenda, as a successful example of middle power diplomacy, along with the establishment of APEC, the UN peace plan for Cambodia, the Antarctic Environmental Protocol, and the establishment of ASEAN: 346.
Finally, something should be said about the role of non-state actors in a nation's efforts to be a GIC. Evans' writings and speeches focused on the role of the state, as represented by the national government, in responding to international issues. However, Evans stated that it was not his 'intention to suggest that good international citizenship is a matter for governments alone', and indeed, the advancement of GIC issues would 'benefit greatly from active and informed public support'.\(^{108}\) Community groups, for example, could also make 'an important contribution to the formulation and achievement of ... national objectives'.\(^ {109}\) This highlights that the performance of a state as a GIC can be seen in broader terms than just the activities of national governments.\(^ {110}\) This is only logical given that various other domestic actors, whether businesses, non-government organisations or individuals, are involved in activities in the international arena and have a role to play in whether or not governments pursue and meet GIC objectives.

Evans' articulation of GIC, however, was heavily focused on the state and intergovernmental activities. This thesis adopts a similar approach, simply because assessing the behaviour of a national government is an important topic of study in its own right. Furthermore, national governments are the most significant players in international law, being responsible for negotiating, adopting, complying with and enforcing a state's legal rights and obligations. Notwithstanding the likely value in assessing GIC from a broader perspective, such an approach is beyond the scope of this thesis.

B Review of Academic 'GIC literature'

Since Evans first spoke about GIC in the late 1980s, scholars have increasingly turned their attention to the topic. As such, a loose body of academic 'GIC literature' now exists beyond Evans' own contribution. Scholarship has chiefly emerged from the IR
discipline, and to a lesser extent, law. This literature review adopts a thematic approach, examining several of the major themes which have emerged in the literature.

1 Explaining the Salience of GIC under Evans

Several scholars have explored why GIC rose to prominence under Evans. Australia has a tradition of 'liberal internationalism' under Labor governments dating back to the post-World War II era (an ideology some scholars regard GIC as emanating from – see below). Yet the explicit notion of GIC only came to prominence in the late 1980s under Evans. Goldsworthy suggests that this is explained by four key factors. First, the elevation of Evans to Foreign Minister was crucial. Evans had a known philosophical enthusiasm for aspects now associated with GIC, strongly favouring the UN and multilateralism. In addition, he had a known 'predilection for imposing greater intellectual coherence on the foreign policy agenda' and a 'compulsive desire to erect intellectual frameworks' to structure decision-making. For Evans, GIC had a codifying function, drawing together disparate policy concerns into 'a coherent theme', which could take their place alongside traditional security and economic interests.

Second, it was significant that Evans was a member of a Labor government. Issues on the GIC agenda are often regarded as more of a Labor than Liberal National government concern, a view apparently confirmed by the Howard government's diminished enthusiasm for the concept and the subsequent re-emergence of GIC under the Rudd government (see chapters 2 and 3).

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111 See also comments by Evans, which generally concur with the list of factors discussed below: Evans, 'Foreign Policy and Good International Citizenship', above n 6; Evans, Making Australian Foreign Policy, above n 6, 22, 30-31.
112 Hanson notes, however, that 'most political leaders would claim a degree of moral basis for foreign policy decisions' and that the importance of humanitarian principles have been implicitly acknowledged by earlier Australian governments: Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 2.
113 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 176.
114 Ibid.
115 Ibid. See also Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 3.
116 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 177.
Third, Evans' approach to foreign policy was influenced by global political circumstances. GIC was in part a response to historical circumstances, both structural and ideological. Following the end of the Cold War, United States (US) and British intentions in the Asia-Pacific region had become ambiguous. Given the involvement of Australia's major allies in the region was no longer guaranteed, supporting a stronger UN and multilateralist norms were seen as a means of creating a more certain security environment. At the same time, the UN was then regaining some legitimacy, which had been diminished during the Cold War. The collapse of Soviet communism also liberated Australia from Cold War preoccupations and 'an excessive sense of clientage towards the United States'. Moreover, the post-Cold War era, no longer dominated by US-Soviet bipolarity, provided an opportunity for middle powers like Australia to adopt a more proactive role in international affairs. Ideologically, liberal internationalist themes – such as interdependence, globalisation and human rights – were also generally becoming more prevalent in global discourse.

Fourth, was Australia's status as a middle power. Goldsworthy draws on Nossal's view that the more activist middle powers like Australia and Canada have a tendency to believe that 'it is right and proper' to be fully involved in the affairs of the international community, and that 'from such a belief, notions such as acting in the 'international

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117 Peter Lawler, 'Constituting the "Good State"' in Nancy Fraser and Paul James (eds), Critical Politics: From the Personal to the Global (Arena Publications, 1994) 153, 178.
118 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 177.
119 Ibid.
120 Ibid 178.
121 Ibid.
122 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 1-2; Fedor Mediansky, 'Introduction' in F A Mediansky (ed), Australian Foreign Policy: Into the New Millennium (Macmillan, 1997) ix, ix. Pertinent in this regard is the work of constructivist theorist, Finnemore, who argues that as internationally held norms and values change, so do state interests and behaviour across the system: Martha Finnemore, National Interests in International Society (Cornell University Press, 1996) 2-6. See also Nicholas J Wheeler and Tim Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy' (1998) 74 International Affairs 847, 848.
123 Lawler, 'Constituting the "Good State"', above n 117, 178.
interest’ or GIC come easily.\textsuperscript{124} It is argued that middle powers like Australia 'seek to make up in diplomatic effort what they lack in political, economic or military clout'.\textsuperscript{125}

2 The Conceptual Basis for GIC: Citizenship, Realism, Idealism and Rationalism

A number of scholars have sought to explain the philosophical or ideological basis for GIC. In particular, it has been suggested that GIC draws upon notions of citizenship (both in its domestic and global forms); realism; idealism (including liberal international and cosmopolitan traditions); and rationalism. While GIC adopts distinctive terminology, Goldsworthy notes that it draws upon 'a multi-dimensional conceptual base.'\textsuperscript{126} Rather than being a relatively recent phenomenon, Wheeler and Dunne suggest that GIC is located within a broader, historic, and continuing debate about the moral responsibilities which derive from membership of the international community.\textsuperscript{127}

a) GIC and the Notion of Citizenship

For Evans, the label 'international citizen' was a convenient way of expressing the idea that the state is a member of the international community. As such, it had both ethical and legal obligations to other states, as well as to humanity more broadly (the latter, as indicated by Evans' strong support for universal human rights norms).\textsuperscript{128} While Evans himself never did so, several scholars have sought to better understand the conceptual links between GIC and broader citizenship discourse.

Before considering this scholarship, it is helpful to outline the basic features of citizenship discourse. Traditionally, citizenship is presumed to occur within the nation-state.\textsuperscript{129} As Bosniak writes, citizenship in the domestic sphere refers to the formal

\textsuperscript{124} Goldsworthy, 'Australia and Good International Citizenship', above n 13, 171, citing Kim Richard Nossal, 'Middle Power Diplomacy in the Changing Asia-Pacific Order: Australia and Canada Compared' in Richard Leaver and James L Richardson (eds), \textit{The Post-Cold War Order: Diagnosis and Prognosis} (Allen & Unwin, 1993) 213.

\textsuperscript{125} Goldsworthy, 'Australia and Good International Citizenship', above n 13, 171. See also Hanson, 'Australia and Nuclear Arms Control as “Good International Citizenship”', above n 17, 1-2.

\textsuperscript{126} Goldsworthy, 'Australia and Good International Citizenship', above n 13, 181.

\textsuperscript{127} Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 854.

\textsuperscript{128} Evans and Grant, \textit{Australia’s Foreign Relations} (1995), above n 6, 40.

\textsuperscript{129} Linda Bosniak, 'Citizenship' in Peter Cane and Mark Tushnet, \textit{The Oxford Handbook of Legal Studies} (Oxford University Press, 2003) 183, 191.
membership of an individual within an organised political community, in modern times represented by the nation-state.\textsuperscript{130} Citizenship in this context has been understood by scholars in different ways. First, as a formal legal category, with citizenship conferring \textit{legal status} upon a person, bringing with it a range of legal rights and responsibilities.\textsuperscript{131} Second, in terms of those \textit{rights} (and freedoms), as citizens of a state are typically granted a range of civil, political and social rights,\textsuperscript{132} and perhaps also economic and cultural.\textsuperscript{133} Third, in terms of \textit{responsibility}, based on republican ideas, with citizens expected to be actively engaged in the political life of the community.\textsuperscript{134} Republican citizenship may also advocate the concept of 'civic virtue', establishing obligations to, for example, foster moral character or a common culture.\textsuperscript{135} Fourth, in terms of the \textit{collective identity} that members of a national community may develop with others beyond the nation-state.\textsuperscript{136} That is, individuals may identify themselves as 'citizens of the world', feeling a sense of solidarity with the broader human community.\textsuperscript{137} While the latter understanding of citizenship is often more psychological than legal or political,\textsuperscript{138} a broader approach to citizenship now exists in the European Union (EU)\textsuperscript{139} in which citizens of member states enjoy a range of rights, albeit more limited, across the EU community.\textsuperscript{140} Some scholars thus see evidence of 'global citizenship' emerging (often also referred to as transnational, post-national or cosmopolitan citizenship),\textsuperscript{141} or at least argue that it ought to occur.\textsuperscript{142}

\textsuperscript{130} Ibid 185.
\textsuperscript{131} Ibid.
\textsuperscript{132} Ibid.
\textsuperscript{134} Bosniak, 'Citizenship', above n 129, 185-86.
\textsuperscript{135} Ibid.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid 186.
\textsuperscript{139} See ibid 191; Tim Dunne, 'Good Citizen Europe' (2008) 84 International Affairs 13, 17-18.
\textsuperscript{140} Dunne, 'Good Citizen Europe', above n 139, 17-18. Europe has deviated from the Westphalian model of exclusive citizenship, with the 1993 Maastricht Treaty codifying the right of EU citizens to reside in the territory of another member state, the right of diplomatic protection from other member states when in a third country, and political rights to vote and stand for office in local and regional elections. However, EU citizenship does not replace national citizenship; rather it is supplementary, being conditional on the individual being a national of a member state, and is also more limited in its breadth than national citizenship.
\textsuperscript{141} Bosniak, 'Citizenship', above n 129, 190.
\textsuperscript{142} Ibid.
As noted, several scholars have discussed the parallels between GIC and broader citizenship discourse.\textsuperscript{143} Needless to say, the analogy is obvious to an international legal scholar. Citizenship as a formal legal category has its parallel in the idea of sovereignty, which grants a state legal and political recognition as a member of the international community by other states. Once recognised as a sovereign member of the international community, states enjoy a host of legal and political rights and responsibilities, with political participation occurring through forums such as the UN General Assembly.

Linklater suggests that it is the republican or civic virtue conception of citizenship that is most relevant to understanding GIC, that is, the idea that GIC involves 'a willingness to place constraints on self-interest because of the duty to promote the more general good'.\textsuperscript{144} The collective identity or cosmopolitan aspect of citizenship is also evident in GIC in the notion that the state owes ethical obligations to both the community of states and the community of humankind (such as to protect human rights or the global environment).\textsuperscript{145} It should be noted, however, that while global citizenship discourse may promote a radical re-organisation of global politics that dispenses with the state system (in favour of global citizenship), GIC seeks to cement the legitimacy of the state system by improving the quality of state conduct. Linklater argues that GICs have an ethical obligation to advance the cause of global citizenship.\textsuperscript{146} However, Williams' view that GICs ought to be regarded as 'allies' in the promotion of global citizenship causes, such as human rights,\textsuperscript{147} more realistically reflects the limits of what GIC is about.

\textsuperscript{143} See, eg, Linklater, 'What is a Good International Citizen?', above n 33, 21; Kimberly Hutchings, 'The Idea of International Citizenship' in Barry Holden (ed), The Ethical Dimensions of Global Change (Macmillan, 1996) 113, 115; John Williams, 'Good International Citizenship' in Nigel Dower and John Williams (eds), Global Citizenship: A Critical Introduction (Taylor & Francis, 2002) 41, 41-42. Williams is doubtful whether 'citizen' is actually an appropriate concept to confer upon the state. This is because citizenship between the state and an individual (in the domestic context) involves a 'central authoritative governing institution with the ability to act coercively' whereas the international community lacks a comparable body such as a world government: 49-50.

\textsuperscript{144} Linklater, 'What is a Good International Citizen?', above n 33, 23.

\textsuperscript{145} See Williams, above n 143, 43.

\textsuperscript{146} Linklater, 'What is a Good International Citizen?', above n 33, 36.

\textsuperscript{147} Williams, above n 143, 42.
Several scholars argue that 'realism' (not to be confused here with simple pragmatism or being 'realistic') is an essential element of GIC. Realists in the academic IR field claim to describe the 'reality' of international relations. As described by Bull, realists generally adopt a very pessimistic view of international affairs, likening the international system to a Hobbesian state of nature – an 'arena of struggle' in which states are pitted against each other in a game of survival. While domestic societies establish governments and law to escape this condition, the international domain is said to be 'anarchic' because it lacks a central enforcement body to maintain law and order. Given this view of the international arena, realists argue that states must always preference national interests – especially security – before legal or ethical/moral considerations. The classical realist position, attributed to Hans Morgenthau, asserts that international politics is governed by laws of human nature, and that human nature (specifically its darker element) causes states to pursue power in international affairs. Thus statespersons ought to be solely concerned with safeguarding and advancing the national interest, understood in narrow strategic and economic terms. While states might frame their behaviour in ethical terms, moral language is said to be used merely as a cloak to justify the advancement of narrow self-interest.

At first glance, a realist approach encouraging the pursuit of what Goldsworthy labels 'naked self-interest', appears to represent the antithesis of GIC. But as Goldsworthy points out, realism is evident in GIC in Evans' self-interest justification for acting as a...
The above literature helps to highlight the point that whether a state meets the standard of GIC will often depend on the extent to which it pursues narrow self-interest over and above the interests of those who reside beyond the national border. As suggested by Goldsworthy, Evans advocated for the pursuit of 'reasonable self-interest', rather than self-interest at any cost.

c) Idealism

Idealism is the second major tradition of IR after realism, and provides a counterpoint to the latter's moral scepticism. As noted, Evans was an idealist, believing that progress in international affairs is possible. Goldsworthy suggests that Evans' idealism was particularly evident in his commitment to promoting justice and equity at the international level while Hanson sees it in GIC's altruism and willingness to place constraints on self-interest in order to promote 'a more general good.' In this vein, Lawler uses the term 'global do-gooders' to describe aspiring GICs.

Beyond the concept of idealism at a basic level (a term not always used consistently in IR discourse), scholars have highlighted the links between GIC and two particular idealistic traditions: liberal internationalism and cosmopolitanism.

i) Liberal Internationalism

Cox, Leaver, Smith and Burchill all strongly associate Evans' approach to foreign policy and GIC with 'liberal internationalism.' Lawler even suggests that GIC is in fact 'simply a pseudonym for a well-established style of moderate liberal internationalism.'

153 Ibid 179-181. Note also Linklater's view that realism actually has its own distinctive ideas on GIC, noting E H Carr's view, for example, that the extension of 'community' should be an aim of foreign policy: Linklater, 'What is a Good International Citizen?', above n 33, 27-28. Hanson also argues that while realists have lower expectations than non-realists, 'realists also encourage the ameliorating influence of international law and diplomacy, seek to strengthen the weight of international norms and look to international institutions to address destabilising developments in world politics': Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 5.

154 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 179.

155 Ibid 181.

156 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 4, 6.

157 Lawler, 'The Good Citizen Australia?', above n 17, 249.

158 Leaver and Cox, 'Introduction: The World According to Gar', above n 14, 6; Gary Smith, Dave Cox and Scott Burchill, Australia in the World: An Introduction to Australian Foreign Policy (Oxford University Press, 1996) 199. See also Dunne and Wheeler, 'Blair's Britain: A Force for Good in the World?', above n 33, 169.
Liberal internationalism is a political and intellectual tradition which, as its name suggests, advocates an internationalist approach to global issues informed by liberal ideals and values. The domestic tradition of liberalism, which dates back to figures such as Rousseau, Kant and Cobden, champions principles such as limited government; scientific rationality; political freedom; democracy; constitutionally guaranteed rights; the liberty of the individual and equality before the law; respect for private property; individual competition in civil society and market capitalism. Liberal internationalism is a continuation of this tradition. It adopts a number of principles, relevant to the international sphere, with the essential aim of helping to realise domestic liberal values on a global scale.

Liberal internationalist principles (then usually labelled idealism, or more pejoratively as 'utopianism') heavily influenced the attempted creation of a new world order following World War I. Idealists led by US President Woodrow Wilson wanted to abolish war as an instrument of statecraft and believed that this was achievable through the implementation of liberal principles. Chief among these were that: self-determination and statehood be made available to all national groups; that 'secret diplomacy' by unelected elites be abolished along with the 'balance of power' principle; that collective security arrangements be created through a League of Nations; that autocratic regimes be replaced by democratically elected governments; the creation of international institutions to facilitate cooperation (such as the League); and the creation of a Permanent Court of International Justice to help peacefully mediate disputes, with respect for the rule of international law being a significant

159 Lawler, 'The Core Assumptions and Presumptions of "Cooperative Security"', above n 5, 39. In a slightly different approach, Nossal suggests that GIC is a defining aspect of internationalism (in addition to multilateralism, the fostering of a global community, and voluntarism): Nossal, 'Pinchpenny Diplomacy: The Decline of 'Good International Citizenship' in Canadian Foreign Policy', above n 20, 98-100.
160 Scott Burchill, 'Liberalism' in Scott Burchill et al, Theories of International Relations (Palgrave, 2nd ed, 2001) 29, 33. The implementation of such principles is argued to provide the best means of maximising human welfare and efficiently allocating society's resources.
162 The former practice in Europe in which military alliances of convenience formed to countervail the dominant state's military power: Burchill, 'Liberalism', above n 160, 33.
aspect of liberal internationalism. Other important aspects included a belief in free trade and universal human rights.\textsuperscript{163}

While suffering a major setback with the onset of World War II, the liberal internationalist project re-emerged stronger in its aftermath, with the creation of the UN, and a host of other international institutions including the International Monetary Fund, the World Bank, an International Trade Organisation (which evolved into the General Agreement on Tariffs and Trade and later the World Trade Organisation), and the International Court of Justice.\textsuperscript{164} Human rights were given much greater expression and legal protection through the 1948 Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights\textsuperscript{165} and International Covenant on Economic Social and Cultural Rights\textsuperscript{166} (and a host of other human rights instruments).

Evans' support for an internationalist approach followed an Australian Labor Party tradition dating back to the post-World War II era, particularly to the Chifley government.\textsuperscript{167} The Labor party (including Evans and later Rudd), as well as various scholars, generally regard internationalism as a significant characteristic of Labor's general approach to foreign policy, as first demonstrated by Dr Evatt while serving as External Affairs Minister under Prime Minister Chifley.\textsuperscript{168} While, as stated above,  

\textsuperscript{163} See Burchill, 'Liberalism', above n 160, 32-34, 41-42, 44-46, 71; Richardson, \textit{Contending Liberalisms in World Politics: Ideology and Power}, above n 161, 55.

\textsuperscript{164} See Gyngell and Wesley, \textit{Making Australian Foreign Policy}, above n 10, 214.


\textsuperscript{167} Christopher Waters, 'Creating a Tradition: The Foreign Policy of the Curtain and Chifley Labor Governments' in David Lee and Christopher Waters (eds), \textit{Evatt to Evans: The Labor Tradition in Australian Foreign Policy} (Allen & Unwin, 1997) 35, 35, 40. Prior to 1941 Australian governments largely left the task of foreign policy to their imperial masters in London. See also David Lee, 'The Curtin and Chifley Governments, Liberal Internationalism and World Organisation' in David Lee and Christopher Waters (eds), \textit{Evatt to Evans: The Labor Tradition in Australian Foreign Policy} (Allen & Unwin, 1997) 48; Gyngell and Wesley, \textit{Making Australian Foreign Policy}, above n 10, 214-217.

several scholars associate Evans’ conception of GIC with liberal internationalism, it should be noted that Labor itself views its internationalism as stemming more from its social democratic beliefs – namely, a commitment to achieving social justice both domestically and internationally.\textsuperscript{169} It is beyond the scope of this thesis to fully assess the role of liberal and social democratic values on Evans’ conception of GIC, suffice to say that it appears to have been influenced by elements of both.

Canada, New Zealand and the United Kingdom (UK) have also been seen as practising a liberal form of internationalism at certain times in the post-world war II era.\textsuperscript{170} This has been contrasted with the conceptually similar 'classical internationalism' practised by the 'like-minded' group of North-West European states (Denmark, the Netherlands, Norway and Sweden), characterised by these states' greater emphasis on meeting or exceeding the UN Official Development Assistance target of 0.7 per cent of GDP; significant contributions to international peacekeeping missions and conflict mediation; and UN activism generally.\textsuperscript{171}

\textit{ii) Cosmopolitanism}

As noted earlier, scholars such as Linklater and Williams believe that GICs can help to promote cosmopolitan ideals. However, while GIC endorses certain cosmopolitan

\textsuperscript{169} See Gareth Evans, ‘Rethinking the Socialist Objective’ in Race Mathews, Gareth Evans and Peter Wilenski, \textit{Labor’s Socialist Objective: Three Perspectives} (Pamphlet 34, Australian Fabian Society, 1981) 15, 20-21. Evans identified Labor’s social democratic values as including a commitment to equality (including to wealth redistribution); democracy; liberty of the individual; and social cooperation (‘both within and between countries, in the solution of common problems and in the achievement of common humanitarian goals’). See later Kevin Rudd, ‘The Global Financial Crisis’ (2008) February \textit{The Monthly} <http://www.themonthly.com.au/monthly-essays-kevin-rudd-global-financial-crisis--1421>. Rudd argued that social democratic states adopt a more interventionist role in managing the national and global economy than neo-liberals (who place their faith in the free market). They are also committed to achieving social justice (through the provision of public goods such as universal education, health, unemployment and disability insurance) and to internationalism. See also Gough Whitlam, ‘Democratic Socialism and International Economics’ in John Langmore and David Peetz (eds), \textit{Wealth, Poverty and Survival: Australia in the World} (1983) 190; Lorraine Elliott, ‘Social Justice in Labor’s Foreign Policy: “Falls the Shadow”’ in David Lee and Christopher Waters (eds), \textit{Evatt to Evans: The Labor Tradition in Australian Foreign Policy} (1997) 181, 182. An example of the liberal influence on Labor’s internationalism has been its strong support for international free trade: see Ashley Lavelle, \textit{The Death of Social Democracy: Political Consequences in the 21st Century} (2008) 12, 49-51.


ideals such as universal human rights, Goldsworthy points out that GIC 'stops well short of cosmopolitanism' proper.172 Belonging more to the liberal internationalist tradition, GIC seeks to 'reinforce the roles and identities of nation-states'.173 By contrast, Linklater describes cosmopolitanism as a form of idealism which ultimately envisages the demise of the state system in favour of a cosmopolitan world order and cosmopolitan citizenship.174 Dunne suggests that GIC advances 'a middle ground' between realism and cosmopolitanism, recognising that 'political actors are neither animated solely by power politics [realism] nor on an irreversible journey towards a post-sovereign universal community.'175

**d) Rationalism**

Several scholars also suggest that rationalism, sometimes referred to as the 'English School' or 'Grotian tradition',176 provides an intellectual underpinning for GIC,177 or at least operates 'within a comparable conceptual ballpark'.178 The English School is most well-known for its analysis of the 'international society of states'.179 The English School accepts the realist view that the international system is ultimately anarchic, but figures like Bull have examined the way in which the rules and institutions of international society have heavily moderated this condition.180 According to Hanson, 'the rationalist paradigm, which sees the preserving of the society of states and a liberal international

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172 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 179. See also Williams, above n 143, 44.
173 Goldsworthy, 'Australia and Good International Citizenship', above n 13, 179.
174 Linklater, 'What is a Good International Citizen?', above n 33, 31.
177 See, eg, Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 856; Linklater, 'What is a Good International Citizen?', above n 33, 29.
178 Lawler, 'The Good Citizen Australia?', above n 17, 245.
179 See generally Hedley Bull, *The Anarchical Society*, above n 148. Bull distinguished 'international society' from a mere 'international system'. A 'system of states' is said to exist when two or more states have sufficient influence on each other to cause them to act as part of a whole. An international society exists when a group of states with common interests regard themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions: 13.
180 Ibid 26-27.
order through rules, norms, institutions and regular dialogue between members of this order, was also an essential foundation of Evans' conception of GIC.181

3 When Must National Interests Give Way to Idealistic/Ethical Concerns?

A key concern of IR scholarship has been to examine the extent to which it is permissible to blend realism (in the self-interested sense) with idealism and still qualify as a GIC; a line of enquiry spurred by Evans' suggestion that GIC involves blending the two. Several scholars, regarding GIC as drawing upon the rationalist approach, have utilised this tradition in seeking to answer this question. These approaches are largely concerned with the tension between security and human rights, and thus are not directly relevant to the present research question. Nonetheless, they do highlight the importance of moderating narrow self-interest for states wishing to be regarded as GICs.

In the seminal IR article on GIC, Linklater drew upon the writings of Emmerich de Vattel (an early figure in both international law and rationalist discourse), to suggest that, '[f]or Vattel, the good international citizen is the state which is prepared to put the welfare of international society [by which is meant the survival of 'order'] ahead of the relentless pursuit of its own national interests.'182 A GIC was not expected to 'sacrifice its own national independence' nor act in a manner that 'would jeopardise its survival or endanger its vital national interests' but it was 'beholden to other states to place the survival of order before the satisfaction of minimal national advantages.'183

181 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 5. See also Williams, above n 143, 46; Goldsworthy, 'Australia and Good International Citizenship', above n 13, 181.

182 Linklater, 'What is a Good International Citizen?', above n 33, 28-29, citing Emmerich de Vattel, The Law of Nations (1796). Rationalists often rely on Bull's definition of international order, namely: 'a pattern of activity that sustains the elementary or primary goals of the society of states or international society.' The primary goals of international society are said to include the preservation of the system and society of states itself; the goal of maintaining the independence or external sovereignty of individual states; the goal of peace; and those which are also common to domestic societies, namely: the limitation of violence, the keeping of promises, and the stabilisation of possession by rules of property: Bull, The Anarchical Society, above n 148, 8, 16-19.

183 Linklater, 'What is a Good International Citizen?', above n 33, 28-29. This formulation of GIC reflects a 'pluralist' rationalist approach which, in the tradition of Vattel, places a heavy emphasis on the rules of international society that help to maintain cooperation and coexistence, especially the norm of sovereignty and non-intervention in internal affairs: Andrew Linklater, 'Rationalism' in Burchill et al, Theories of International Relations (Palgrave, 2nd ed, 2001) 103, 110.
Wheeler and Dunne subsequently developed Linklater’s formulation in a more cosmopolitan direction, suggesting that the 'welfare' of international society should include not just the preservation of order, but also respect for human rights.\textsuperscript{184} As such, more than simply placing 'order before the pursuit of narrow commercial and political advantage', GICs were obligated to forsake such advantages 'where they conflict with human rights'.\textsuperscript{185} The 'guardianship' of human rights was argued to represent the 'litmus test' for the UK's performance as an international citizen (in the context of the ongoing debate on the merits of humanitarian intervention to protect civilians from gross human rights violations).\textsuperscript{186}

In more general terms, Hanson suggests that GIC, as explained by Evans, did 'not imply forfeiting national interests completely for the sake of moral principles, any more than it implied that foreign policy must always be dictated by calculations of self-interest.'\textsuperscript{187} Rather, it 'was a means of aiming for morally acceptable outcomes while working within the constraints inherent in government.'\textsuperscript{188} Hanson suggests that '[u]ltimately, our judgement of GIC will be dependent on the extent to which we concede that foreign policy can indeed claim to be informed by moral and ethical global and

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\textsuperscript{184} Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 855. This formulation of GIC reflects a 'solidarist' rationalist approach, which in the tradition of Hugo Grotius, places more emphasis on the rights of individuals as subjects of international law and international society in their own right, leading to support for norms such as humanitarian intervention: Andrew Linklater and Hidemi Suganami, \textit{The English School of International Relations: A Contemporary Reassessment} (Cambridge University Press, 2006) 227; Dunne, 'Good Citizen Europe', above n 139, 21-22.

\textsuperscript{185} Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 855.

\textsuperscript{186} Ibid 856. Later articles in the rationalist tradition further developed a distinctly rationalist approach to GIC, outlining numerous 'pluralist' and 'solidarist' principles of GIC, drawing upon various rationalist scholarship: see Linklater and Suganami, \textit{The English School of International Relations: A Contemporary Reassessment}, above n 184, ch 7 ('The Good International Citizen and the Transformation of International Society'); Dunne, 'Good Citizen Europe', above n 139, 13. This approach to GIC is particularly discipline specific and removed from Evans’ conception of GIC, and is not drawn upon further by this thesis. Linklater and Suganami suggest (in an approach later extended by Dunne) that GICs must vary their behaviour and pursuit of the national interest depending on whether they are dealing with pluralist or solidarist-leaning countries: 232. The overarching aim of this approach is the 'ethical aspiration to build a global community that institutionalizes respect for the harm principle' – that is, the moral responsibility not to harm other peoples: 233-34.

\textsuperscript{187} Hanson, 'Australia and Nuclear Arms Control as “Good International Citizenship”', above n 17, 4.

\textsuperscript{188} Ibid.
humanitarian considerations while still retaining the right to uphold and at times even favour a particularly national interest.\textsuperscript{189}

More recently, writing from an international lawyer’s perspective, Pert also considers the need to balance pragmatism and idealism when pursuing the national interest. Pert notes that the appropriate balance between pragmatism and idealism (that is, the ethical or moral aspect of a policy or practice) will vary from issue to issue. Thus Pert suggests that ‘the only general conclusion that can be drawn is that an ethical or moral element in a policy or practice is a positive, but not determinative, indicator of good international citizenship while an unethical policy or practice will always be incompatible with good international citizenship.’\textsuperscript{190}

Singer and Gregg’s analysis of this issue is the most directly relevant to the current research question. Singer and Gregg suggest that the difference between a realist and a GIC’s approach to foreign policy chiefly lies in how it interprets the notion of the ‘national interest’.\textsuperscript{191} Rather than focusing on short-term and narrow interests, the authors suggest that GICs will focus on broader and longer-term interests\textsuperscript{192} (what Evans described as ‘enlightened self-interest’). That is: ‘Are we thinking of the security and economic prosperity of Australians over the next ten years? Or do we have a broader and more long-term view of the national interest, which includes a direct concern about the nature of the world in which Australia and Australians will exist for the next century?’\textsuperscript{193} Thus on climate change, for example, Singer and Gregg criticise the Howard government’s emphasis on protecting Australia’s short-term economic interests at the expense of addressing Australia’s longer-term interest in avoiding dangerous climate change (see discussion in chapter 2).\textsuperscript{194} As with Pert, Singer and Gregg also regard acting ethically as fundamental to GIC.\textsuperscript{195}

\textsuperscript{189} Ibid 20.
\textsuperscript{190} Pert, above n 5, 21.
\textsuperscript{191} Singer and Gregg, above n 33, 15. Note that Singer and Gregg use the term ‘good global citizen’ in a manner essentially interchangeable with GIC.
\textsuperscript{192} Ibid.
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid 15, 52-53.
\textsuperscript{195} Ibid 53.
4 Leadership

Several scholars, especially Hanson, have highlighted the importance of leadership in Evans' articulation of GIC. Hanson argues that more than 'merely complying with existing norms and rules', GIC requires 'innovative and active diplomatic ventures to progress those norms and rules,' or 'intellectual, creative and sometimes risk-taking leadership'. Also highlighting this element, Lightfoot compares the leadership approach of the Hawke and Keating governments to the 'veto state' actions of the Howard government at the 2002 World Summit on Sustainable Development, where it attempted to 'block strong international action by forcing conclusions and declarations to be no more than the lowest common denominator' (especially on climate change). Lightfoot contrasts leadership behaviour from mere 'followership'. Nossal also suggests that leadership is particularly important to GIC because a major purpose of GIC is to 'convince others to alter their behaviour and join in what ideally becomes a bandwagon effect, where the cost to recalcitrants goes up sharply.' On the topic of leadership, Pert also notes the weight Evans put on 'raising international standards', especially in relation to human rights.

5 On the Significance of International and Domestic Constraints

As noted, Evans believed that a GIC, while idealistic in outlook, must also be realistic in pursuing its objectives. This could be interpreted as providing an excuse for poor behaviour, but scholars have generally accepted the relevance of constraints upon

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196 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 7. See also Marianne Hanson, 'Regulating the Possession and Use of Nuclear Weapons: Ideas, Commissions and Agency in International Security Politics – the Case of the Canberra Commission' in Ramesh Thakur, Andrew F Cooper and John English (eds), International Commission and the Power of Ideas (Academic Foundation, 2006) 123. On leadership see also Dunne and Wheeler, 'Blair's Britain: A Force for Good in the World?', above n 33, 177.

197 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 7.


200 Kim Richard Nossal, 'Pinchpenny Diplomacy: The Decline of 'Good International Citizenship' in Canadian Foreign Policy', above n 20, 100.

201 Pert, above n 5, 22.
government when assessing GIC. Goldsworthy suggests that 'at the analytical level the obstacles and dilemmas faced by government, and the need for trade-offs which necessarily arise, must be acknowledged'.\(^\text{202}\) GIC activities are not a discrete policy agenda, but an aspect of 'a complex whole'.\(^\text{203}\) He notes that if GIC activities 'appear inadequate, tokenistic, compromised, or whatever, the reasons may not always spring from governmental cynicism'.\(^\text{204}\) Rather, they may 'lie, to quite a large extent, in constraining factors over which the government has little control, such as policy complexity' and 'Australia's relative lack of international clout'.\(^\text{205}\) While constraining factors should be given 'due weight', Goldsworthy nonetheless urges that these 'not be used as a reason for avoiding normative judgement ... or for muting calls upon the government to strive for better GIC outcomes.'\(^\text{206}\)

Scholars have noted that a wide range of domestic and international constraints may be relevant to assessing GIC (which are always context dependent). Lawler highlights the importance of domestic political constraints such as the need for public support for policy initiatives and pressure by lobby groups.\(^\text{207}\) Lawler poses the question: if the voting public 'appears to prefer a government driven by ... more hard-nosed international sensibilities', to what extent is government obliged to 'reproduce these sentiments in its foreign policy, rather than appeal to some transcendent general interest or moral purpose'?\(^\text{208}\) On the domestic front, Pert also recognises the potential challenges for Australia presented by federalism. Pert suggests that 'the particular difficulties faced by Australia as a federal state should be recognised – to a degree – where ... [a violation of international law] is due to State laws or practices.'\(^\text{209}\) This is not an excuse for Commonwealth inaction, but political realities should be acknowledged and the Commonwealth must have a reasonable period in which to

\(^{202}\) Goldsworthy, 'Australia and Good International Citizenship', above n 13, 185.
\(^{203}\) Ibid.
\(^{204}\) Ibid 187.
\(^{205}\) Ibid. See also Dunne and Wheeler, 'Blair’s Britain: A Force for Good in the World?', above n 33, 182.
\(^{206}\) Goldsworthy, 'Australia and Good International Citizenship', above n 13, 187.
\(^{207}\) Lawler, 'The Good Citizen Australia?', above n 17, 249.
\(^{208}\) Ibid 250. Lawler argues that understanding domestic political culture is important to understanding a government's foreign policy and differences between various states' approaches to foreign policy. See also Goldsworthy who raises the question of whether a state may have a limited 'cultural potential' for GIC: Goldsworthy, 'Australia and Good International Citizenship', above n 13, 186.
\(^{209}\) Pert, above n 5, 27.
remedy any violation.\textsuperscript{210} Similarly, difficulties in enacting legislation to comply with international law must be acknowledged where a government does not possess a parliamentary majority. Pert suggests that a government should not be disqualified as a GIC 'by reason of a violation of international law if it has tried, but failed, to enact legislation that would remedy the violation.'\textsuperscript{211}

Internationally, Dunne and Wheeler highlight the challenges for GICs created by the weakness of international institutions such as the UN,\textsuperscript{212} while Williams accepts the difficulties in practising multilateralism 'in the face of powerful states pursuing perceived national interests regardless of international law or the resolutions and declarations of ... [international] organisations.'\textsuperscript{213}

\textbf{6 GIC and International Law}

As noted, it was implicit in Evans' conception of GIC that there are specific activities and types of behaviour that a GIC would be expected to undertake in relation to international law. These include:

\begin{enumerate}
\item contributing positively to the development of international law;
\item adopting relevant instruments of international law, whether treaties or so-called 'soft law' (non-binding instruments such as political declarations);
\item complying with its international legal obligations; and
\item contributing to the advancement and upholding of international legal norms and associated institutions, for example, by encouraging other nations to both adopt and implement their international legal obligations.
\end{enumerate}

A state's activities in relation to these various aspects of the international legal process logically need to be consistent with the broader attributes of GIC, where relevant. Thus, for example, a GIC would be expected to contribute to the development of international law in a manner that does not unreasonably push narrow self-interest at

\textsuperscript{210} Ibid.
\textsuperscript{211} Ibid.
\textsuperscript{212} Dunne and Wheeler, 'Blair's Britain: A Force for Good in the World?', above n 33, 182.
\textsuperscript{213} Williams, above n 143, 44.
the expense of the common good. Or GIC may be demonstrated in the development of international law by playing an activist or leadership role on particular issues.

A number of legal scholars have employed the concept of GIC when examining state engagement with international law, although typically (with the recent exception of Pert) without examining the requirements of GIC in detail.214 Writing in 2008, Rothwell and Rubenstein noted that the standard for assessing what makes a ‘good international law citizen’ (a narrower version of the concept) is not clear.215 As mentioned above, the present author;216 and Pert,217 have more recently explored GIC in relation to international law in greater depth. Notwithstanding the previous lack of critical analysis of GIC with respect to international law, early legal scholarship has generally recognised (albeit, often implicitly) that a GIC must demonstrate satisfactory conduct in relation to the four phases or elements described above.

Regarding the development phase, for example, Evatt regards Australia as having demonstrated GIC by being a founding member of the UN and actively participating in the drafting of the Universal Declaration of Human Rights, other human rights


215 Donald R Rothwell and Kim Rubenstein, ‘Introduction: Australian and International Law during the Howard Years’ (2008) 27 Australian Yearbook of International Law 1, 4. The authors question whether ‘respect for the law’ or ‘acceptance of a court or tribunal’s ruling’ would be minimum requirements. Appearing to answer this in the affirmative, it is further suggested that ‘being an active and positive participant’ in the international law-making phase would be another factor, for example, through the development of international treaties and contributing to ‘international organisations and institutions that consider and assess the development and evolution of international law’: 4-5.


217 Pert, above n 5.
instruments and the Statute of the International Criminal Court. Pert suggests that GIC may require a state to work 'to create new or better law where necessary', a view consistent with statements by Evans.

In relation to the adoption of legal instruments, Evatt approvingly refers to Australia's ratification of many human rights instruments, but criticises the long delays in the ratification of some human rights treaties and complaints procedures. Evatt also refers disapprovingly to several reservations and declarations made in relation to human rights treaties (potentially diminishing their legal effect). Pert suggests that failing to ratify a treaty that benefits developing countries would disqualify a state from being a GIC.

With respect to compliance, Evatt highlights that the UN human rights treaties impose legal obligations to bring domestic laws and practices into compliance with these treaties, which has not always occurred in Australia, with treaties often being given only partial effect in domestic law, or not at all. As such, many international human rights cannot be enforced by Australian courts. Evans and most scholars regard compliance with international law as generally being essential for GIC. Going further, Pert suggests that GIC may even require a state to exceed its legal obligations.

Scholars have also accepted, however, that compliance might not always be necessary for GIC. Wheeler and Dunne argue that GIC may require a state to use military force

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218 Evatt, above n 81, 11. Similarly, Rothwell and Rubenstein approvingly refer to the Howard government's support for the establishment of the ICC and active involvement in the ICC Statute negotiations and support for the establishment of the UN Human Rights Council: Rothwell and Rubenstein, above n 215, 6. See also Alisa Newman Hood, 'Australia Adrift: The Timor Sea Oil and Gas Dispute' (2005-2006) 12 Brown Journal of World Affairs 239, 249. Hood regards the Howard government's strong promotion of Australia's economic interests, at the expense of East Timor's, in negotiations to establish a Timor Sea Treaty (which, in part, divided lucrative petroleum and gas reserves), as having damaged Australia's reputation as a GIC.
219 Pert, above n 5, 31.
220 Pert, above n 81, 11-12.
221 Pert, above n 5, 27.
222 Evatt, above n 81, 11-12.
223 See, eg, Pert, above n 5, 13-15; Goldsworthy, 'Australia and Good International Citizenship', above n 13, 183.
224 Pert, above n 5, 32.
externally in order to prevent or stop mass human rights violations, even in the absence of Security Council authorisation under the UN Charter, and 'even if this weakens the rule of law in the society of states.' Humanitarian intervention, however, is regarded as an exception to the general rule that international law ought to be respected. While regarding compliance with international law as generally necessary for GIC, Pert suggests that exceptions may be possible where a violation is 'minor or technical, or of short duration' or, as noted above, where political realities prevent compliance being possible. Pert also argues that for a violation of international law to disqualify a state from GIC, 'it must be one that is both clear (in terms of degree as well as obviousness) and deliberate.' Further, 'even a clear and deliberate violation must be at the upper end of the spectrum of severity.' [E]gregious violations of international law, however, will disqualify a state from being regarded as a GIC 'in any sphere.'

A relevant question to this thesis, which does not appear to have received much direct attention in the literature, is to what extent must a state 'comply' with, or 'respect', so-called soft law: that is, non-binding norms, principles or provisions of international law. This thesis will argue that compliance with soft law is highly relevant to assessing GIC under ICCL. This is especially so in relation to the negotiation of new agreements under the framework provided by the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which contains a number of non-binding principles to guide the Parties' conduct; for example, that developed countries should

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226 Dunne and Wheeler, 'Blair's Britain: A Force for Good in the World?', above n 33, 183.
227 Pert, above n 5, 27.
228 Ibid.
229 Ibid.
230 Ibid 32.
231 See generally on soft law, Dinah Shelton, Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (Oxford University Press, 2003).
take the lead in addressing climate change (see chapter 4). While violations of binding international obligations would logically tend to carry more weight when assessing GIC, this thesis suggests that a failure to respect non-obligatory principles or provisions of international legal instruments can also be highly relevant to assessing GIC.

With respect to the fourth stage (advancing and upholding international norms and institutions), Evatt notes that Australia has contributed to the promotion of human rights through its work in many UN bodies and specialised agencies. However, the Howard government is criticised for attacking the credibility of the UN treaty bodies in response to criticism regarding its indigenous and asylum seeker policies. Evatt suggests that a GIC would not only fulfil its treaty obligations in good faith, but also show 'respect and due consideration for the comments and recommendations of the monitoring body.' Related to this, Pert also regards 'persistent and strident (as opposed to constructive) criticism of the UN' as an example of bad international citizenship.

7 Methodological Approaches

It is evident from the literature that assessing GIC – what Wheeler and Dunne label the 'good international citizen calculus' – involves two basic steps. First, identifying the characteristics or attributes of GIC. The difficulty in this step is that there is no general agreement on precisely what these characteristics are. Some scholars have emphasised the importance of attributes referred to by Evans, such as leadership, while others such as Linklater, Wheeler and Dunne have proposed their own attributes or tests of GIC, drawing upon their preferred political and academic traditions.

233 Evatt, above n 81, 11.
234 Ibid 12-13. See also Singer and Gregg, above n 33, 41.
235 Evatt, above n 81, 15.
236 Pert, above n 5, 27.
The second step is assessing whether the relevant attributes of GIC have been demonstrated in practice. While these attributes could be assessed 'cumulatively' (with all required to be present for GIC to be satisfied), generally scholars have emphasised certain characteristics of GIC, as relevant to the context. Ultimately, it must be emphasised that assessing GIC is always context dependent; meaning that precisely which attributes of GIC are most relevant will depend on the subject matter at hand.

As practice by states is often mixed in quality, scholars have also highlighted the need to balance the various 'good' and 'bad' activities of a state when assessing overall performance. Rothwell and Rubenstein, for example, highlight the various 'credits and 'debits' on the Howard government's 'good international citizen scoreboard', concluding that its overall performance as an international legal citizen was 'mixed'. Singer and Gregg meanwhile argue that the Howard government performed poorly overall as a GIC by marking its performance on a range of global issues as either 'poor', 'very poor', 'moderate' or 'good'. Similarly, Pert uses the adjectives 'poor', 'average' and 'good'.

Pert's work deserves special mention, being the most similar to the current thesis. Pert's thesis examines Australia's record as a GIC from Federation in 1901 to the fall of the Howard government in 2007. As noted, Pert identifies five attributes of GIC (based on her interpretation of Evans' statements on GIC), namely:

a) compliance/engagement with international law;

b) support for and engagement in multilateralism;

c) willingness to 'pitch in' to international tasks;

d) a moral or ethical dimension – doing 'international good deeds';

e) and an element of proactivity or leadership – seeking to raise international standards.

238 See Pert, above n 5, 24, 26.
239 Rothwell and Rubenstein, above n 215, 5.
240 Singer and Gregg, above n 33, 80.
241 Pert, above n 5, 326.
242 Ibid 31-32. Pert’s study focuses on the first two attributes.
Pert argues that attributes (a) to (d) are necessary, but not in themselves sufficient, attributes of GIC. Additional qualities or factors are needed to demonstrate GIC in relation to each attribute. For example, in the case of compliance with international law, this might comprise: adherence to all relevant treaties, exceeding existing obligations, working to create new or better law where necessary, or encouraging other states to do all or any of these things. Regarding support for multilateralism, additional qualities or factors indicative of GIC might include, for example, active support for and engagement in multilateral institutions and initiatives.

As noted earlier, this thesis argues that the attributes of GIC are broader than those identified by Pert. The thesis also emphasises that determining the precise requirements of GIC is always context dependent. This thesis therefore outlines its general approach to assessing GIC in chapter 4 after first examining the relevant context, namely, the broad features of the ICCL regime and the post-2012 climate negotiations.

8 Critique of GIC: Is it a Normatively and Analytically Useful Concept?

The final significant theme of the literature on GIC has been to explore whether it actually provides a viable analytical and normative concept, and whether it has value in practice for both policymakers and scholars.

a) Major Criticisms

An initial concern has been that the concept is too ambiguous. Hanson suggests that Evans' conception of GIC may be 'too broad and allowing of too many possibilities to have any real credibility.' Goldsworthy sees difficulties in the mixed realist-idealist conceptual basis: realists will reject the idealism of GIC – believing that the state's obligations are owed only to its own citizens, not to those abroad – while

243 Ibid 32.
244 Ibid 31
245 Ibid 32.
246 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 20.
cosmopolitan--leaning idealists will see every government failing as evidence of double standards.\textsuperscript{247}

As noted, the ambiguity of the concept as articulated by Evans prompted scholars such as Linklater and Wheeler and Dunne to propose more definitive principles or attributes of GIC. Scholars, however, have also been dismissive of these attempts. In relation to Linklater’s principle – that GIC requires international order to be placed above the relentless pursuit of narrow national interests, unless \textit{vital} national interests are at stake – Buller and Harrison argue that this formulation is also ‘shot through with ambiguity’.\textsuperscript{248} Indeed, Buller and Harrison, in the constructivist tradition of IR,\textsuperscript{249} question whether notions such as the national interest, integral to understanding GIC, can ever be ‘objectively determined’.\textsuperscript{250}

Other critics have dismissed GIC on the basis that it is overly conservative and state-centric. Williams, a proponent of global citizenship, notes that GIC accepts the reality that the state remains central to the present international political system, and ‘offers a way to protect this privileged position of the state and, hopefully, reinvigorate it as a mechanism for promoting and extending already existing positive trends in international politics.’\textsuperscript{251} GIC is rejected because it fails to ‘suggest much in the way of radical developments in the ways in which international agreements are reached, implemented and policed’.\textsuperscript{252} Williams argues that the state-centricness of GIC may ultimately hamstring its effectiveness ‘in the face of non-state based challenges such

\textsuperscript{248} Jim Buller and Vicky Harrison, ‘New Labour as a "Good International Citizen": Normative Theory and UK Foreign Policy’ in Richard Little and Mark Wickham-Jones (eds), \textit{New Labour’s Foreign Policy: A New Moral Crusade?} (Manchester University Press, 2000) 77, 82.
\textsuperscript{249} Constructivism is a relatively recent tradition of IR scholarship. According to Christian Reus-Smit, constructivism is characterised by ‘an emphasis on the importance of normative as well as material structures, on the role of identity in shaping political action, and on the mutually constitutive relationship between agents and structures’: Christian Reus-Smit, ‘Constructivism’ in Scott Burchill et al, \textit{Theories of International Relations} (Palgrave, 2nd ed, 2001) 209, 209.
\textsuperscript{250} Buller and Harrison, above n 248, 82. Rather than objective realities (as realists believe), national interests are said to be ‘social construct[s], reflecting the various beliefs and interests of state elites and other groups’: 85-86.
\textsuperscript{251} Williams, above n 143, 46.
\textsuperscript{252} Ibid.
as the environment'. Williams is also concerned that GIC reflects a liberal internationalist worldview and approach to addressing global issues. Liberal internationalist approaches such as trade liberalisation and global capitalism are said to be 'inimical, or at least very damaging', to developing countries.

A third criticism, again by Williams, is that it is problematic to conceptualise a state as a 'citizen'. Williams questions whether the state really represents a 'coherent and unified national community', or an 'individual writ large with the unity of identity and purpose we often associate with the individual'. The implication of this is that there may be a degree of unreality about assessing the 'state' as a moral agent.

A fourth criticism, by Linklater, is that language like GIC may be deliberately employed by states to convince others of their 'ethical bona fides' while they are actually pursuing narrow 'self-interested motives'. Similarly, Burchill notes that GIC may be interpreted 'as little more than image-building for liberal democratic states'.

Lastly, some scholars are concerned that GIC, in its liberal conception, can introduce 'the risk of cultural imperialism and excessive interference and interventionism.' Williams suggests that GIC could be regarded as imposing a particular set of Western values on others. GIC appeals 'to a particular view of what constitutes goodness in the conduct of international relations'. To address this, Linklater suggests that the

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253 Ibid 47.
254 Ibid. Williams points to, for example, the failure of liberal democracies to provide adequate development aid and their dominant role in liberal institutions like the WTO, IMF and the World Bank which support trade liberalisation and global capitalism.
256 Ibid.
257 Note, however, Jackson's comment that 'the people who are responsible for acting on ... behalf [of states] are the foremost subject of international ethics.' That is, 'states are not agents or actors in themselves'. Rather, they are 'abstractions' or 'ideas'. It is statespersons, the agents and representatives of the state, who are ultimately responsible for the state's activities: Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford University Press, 2000) 130-32.
258 Linklater, 'What is a Good International Citizen?', above n 33, 38.
259 Scott Burchill, *The National Interest in International Relations Theory* (Palgrave Macmillan, 2005) 183-84. Burchill, however, believes that this view 'may be too harsh', noting that at least some states have redefined the idea of the national interest to include broader obligations to global humanity: 184
260 Linklater, 'What is a Good International Citizen?', above n 33, 39.
261 Williams, above n 143, 50. See also Hutchings, above n 143, 123-24.
262 Williams, above n 143, 42.
focus of GIC ought to be on 'proceeding where there is international consensus' and being 'sensitive to issues of unwarranted exclusion.' In this context, it should be noted that Evans specifically promoted a non-confrontational, dialogic approach to diplomacy, not wishing to force Australian values on others.

b) The Defence of GIC

While criticised by some, the concept of GIC has also been strongly defended. Singer and Gregg reject the realist position that it is acceptable 'for nations to be selfish to a degree that would be wrong if practised by an individual', instead preferring an ethic of 'do unto others as you would have them do unto you'. This is said to justify GIC's recognition of 'duties beyond borders'.

While the normative and analytic value of GIC has been challenged, Wheeler and Dunne support GIC as a 'conceptual rationale' for prioritising between security and human rights goals, and a 'framework' to guide 'ethical audit[s]' of foreign policy. Likewise, Williams, despite his various criticisms, sees appeal in GIC as a 'tool for assessing, and perhaps even formulating, foreign policy'. Hanson also suggests that it offers a 'moral and principled declaratory basis ... [for] policy formulation'. While the practical effect of the concept ultimately depends on the extent to which states seek to apply it, Linklater suggests that if 'taken seriously' and 'invoked frequently' enough over time, the notion may at least 'encourage more sophisticated discussion and debate about the ethical content and purpose of foreign policy'.

Although Williams criticises the state-centric nature of GIC, he also suggests that while delivering less than the cosmopolitan may want, GIC could offer a viable middle path between realist state practice and more revolutionary cosmopolitan approaches. He

263 Linklater, 'What is a Good International Citizen', above n 33, 39.
264 Evans and Grant, Australia's Foreign Relations (1995), above n 6, 156-57.
265 Singer and Gregg, above n 33, 14.
266 This term is borrowed from Stanley Hoffman, Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics (Syracuse University Press, 1981).
267 Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 868.
268 Williams, above n 143, 43.
269 Hanson, 'Australia and Nuclear Arms Control as "Good International Citizenship"', above n 17, 2.
270 Linklater, 'What is a Good International Citizen?', above n 33, 39.
concedes that '[a] world in which the major liberal democratic states adopted a foreign policy of [GIC] would be a better one than that in which we currently live'.  

While more revolutionary proposals to address global issues involving the reordering of international politics 'are often criticised as being 'utopian', 'unrealistic' or 'wishful thinking', GIC may escape this charge.  

Others, who are more supportive of the state system, defend GIC precisely because it seeks to improve the state system, rather than replace it. 

At this point, it is worthwhile highlighting some of Evans' own comments regarding the state-centric approach of GIC. In a post-political interview in 2001, Evans discussed the ongoing significance of sovereignty and realist conceptions of the national interest in international politics. In Evans' words, '[s]overeignty [still] matters to countries... sovereignty is just a given in international discourse and will be for some considerable time to come'. While he accepted that the force of traditional sovereignty was being eroded, developing countries still regarded sovereignty as being 'hard-won' and a 'recent phenomenon'. Thus, the 'passionate commitment to the notion of sovereignty' needed to be respected. By categorising GIC so heavily in terms of self-interest, Evans explained that he was seeking to 'expand the concept of national interest' so that nations might recognise the benefits to be obtained from GIC activities and how it promoted their 'core interests'.  

Finally, scholars have highlighted the value of idealistic language itself in international affairs. While noting that critics argue that 'language is merely ephemeral; what matters are the actions themselves', Wheeler and Dunne suggest that this 'view of language as instrumental has become increasingly discredited by philosophers and sociologists who point to the constitutive aspect of language in the production of

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271 Williams, above n 143, 47-48.  
272 Ibid 51.  
273 Lawler, 'The Good State: In Praise of "Classical" Internationalism', above n 170, 440. Lawler's comments are made in relation to the similar concept of the 'classical internationalist'. See also Linklater, 'What is a Good International Citizen?', above n 33, 39.  
274 Naim and Case, above n 7, 33-34.  
275 Ibid.  
276 Ibid. See also Evans, 'Australia's Foreign Policy Response to Global Challenges, above n 7.
meaning. It is suggested that the 'constitutive role that language plays in international relations can be seen from the fact that other governments take seriously what is said to them and about them.' That is, all 'governments recognise the need to justify their actions and this presupposes a shared language within which these actions are endorsed or contested.' While the content of discourse evolves over time, Wheeler and Dunne believe that 'in every epoch it is central in shaping the range of permissible actions.' The argument being made here is that GIC language has value in itself because it can help to shift the terms of debate in international discourse.

Legal scholars have also recognised the utility of the concept for legal scholarship. Rothwell and Rubenstein, in their introduction to the 2008 *Australian Yearbook of International Law*, which provided a retrospective assessment of the Howard government's engagement with various aspects of international law, suggest that GIC could offer a standard for judging a government's record with respect to international law. Pert, who examines Australia's record as a GIC from Federation to the Howard government, also regards GIC as a useful tool for international lawyers to assess engagement with international law in a more 'qualitative, and perhaps deeper' fashion. Pert also sees the possibility of GIC being adopted by the international community in the same way that business has adopted the notion of the 'good corporate citizen' and suggests that increased use of the term may act as an incentive for states to increase their treaty participation and contribution to multilateral activities.

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277 Wheeler and Dunne, 'Good International Citizenship: A Third Way for British Foreign Policy', above n 122, 851.
278 Ibid.
279 Ibid.
280 Ibid. This view appears to be supported by political practitioners who adopt idealistic language. For example, UK Foreign Secretary Robin Cook argued in 1998 that '[i]nternational debate is shaped by speeches by foreign secretaries and the rhetoric they use': ibid. Kevin Rudd, while in Opposition, asserted that realist language did 'not simply describe a pre-existing reality' but 'actively assists in the construction of that reality', being critical of it on that basis: Kevin Rudd, 'ANZUS and the 21st Century' (2001) 55 *Australian Journal of International Affairs* 301, 309.
281 Rothwell and Rubenstein, above n 215, 5.
282 Pert, above n 5, 329.
283 Ibid 330.
C Summary of GIC

This chapter has provided a detailed examination of the concept of GIC. It has been seen that there is no accepted definition of GIC or means of assessing whether a state has met this standard of behaviour. This makes the concept difficult to apply to an analysis of government activities. The thesis suggests, however, that Evans' articulation of GIC remains the best and most relevant starting point for understanding the concept. In general terms, Evans conceptualised GIC as a more ethical and globally-minded approach to pursuing the national interest. In addition to pursuing traditional security and economic interests, Evans argued that the state has a national interest in pursuing less immediately and directly self-interested objectives. Thus, the state should moderate its traditional, narrow interests in favour of advancing broader global concerns such as the need for a stable rules-based international community, a safe environment for future generations, protecting universal human rights and the like.

This chapter argued, based on a primary examination of Evans' major writings and speeches, that his conception of GIC can be characterised by a number of features. At minimum, a GIC is expected to be internationalist in outlook, being prepared to cooperate with others to address issues of international concern. More than this, however, a GIC is expected to demonstrate activism and leadership in international affairs, and to 'pitch in' to international tasks as required.

While Evans' conceptualised GIC as a means of advancing the national interest, this was at least in part motivated by a sense of altruism, or a commitment to acting ethically. Thus, a GIC is expected to promote 'purposes beyond ourselves', not just narrow self-interest. On the other hand, GIC is not just a matter of 'boy scout good deeds'. Rather than single-mindedly pursuing narrow national interests, such as the protection of the economy and jobs, a GIC is expected to act with 'enlightened self-interest'. Thus on an issue like climate change, a GIC would look beyond its immediate economic interests, recognising the broader and longer-term value to both the nation and the international community of reducing greenhouse gas emissions. Evans also described GIC as blending pragmatism with idealism, emphasising that while a GIC should pursue altruistic or idealistic causes, it is not expected to act without regard for traditional national concerns, or practical limitations. Australia would not, for example,
be expected to completely sacrifice its economic interests in addressing climate change. Rather, the goal would be to find an acceptable balance between protecting the national economy and jobs and achieving the objective of preventing harmful climate change.

In more practical terms, GIC was associated with the liberal internationalist tradition of support for multilateralism, international institutions and international law. Other characteristics of GIC include acting as a good neighbour (in one's immediate region) and acting consistently at home with the values being promoted abroad. While not necessarily a general characteristic of GIC, Evans also linked the concept to Australia's use of middle power diplomacy, this being seen as an effective means of increasing Australia's ability to implement its GIC objectives.

The review of the academic 'GIC literature' helped to clarify the conceptual basis for GIC, the reasons for its emergence under Evans, and further considerations relevant to the assessment of GIC. Scholars have noted the influence of, or links between, citizenship, realist, idealist and rationalist discourse or theories, helping to locate GIC within a broader conceptual framework. Discussion of the link between GIC with realism and idealism also helped to emphasise that whether or not a state meets the standard of GIC is often determined by the extent to which it pursues its narrow self-interest at the expense of the common good.

The review of Evans' statements on GIC in relation to international law also suggested that a GIC would be expected to meet a higher standard of conduct when engaging with the four broad stages of the international legal process, namely: the development of international law; the adoption of international legal instruments; compliance with international law; and more generally, the advancing and upholding of international law within the international community. It was evident that when assessing GIC in relation to these four stages, it is often relevant to examine whether a state has demonstrated the more general attributes of GIC such as activism, leadership, altruism and so forth.
The review of GIC literature also revealed further legal aspects relevant to assessing GIC, such as whether or not a state enters a reservation to a treaty, or whether any violation of international law is substantive or procedural. The chapter also suggested that whether or not a state complies with or respects non-binding international law, such as various principles and provisions of the UNFCCC, is certainly relevant to the assessment of GIC in relation to the ICCL regime. This latter point is elaborated on in chapter 4 which outlines the key elements of the UNFCCC and related instruments.

As noted in the introduction, while there are a number of broad features of GIC, the elasticity of the concept means that any final determination of its requirements must be made in the context of the issue under consideration. This is because the characteristics which are most relevant to assessing GIC will vary according to the factual, legal, policy and ethical context. For example, while a GIC would typically be expected to comply with international law, there may be instances in which non-compliance is the more ethically justifiable course of action (such as when humanitarian intervention is needed to prevent gross human rights violations, but appropriate authorisation under international law cannot be obtained). Similarly, while leadership is often associated with GIC, it would be unrealistic to expect an aspiring GIC to be a leader in all instances, given the significant number of issues on the international agenda. Moreover, the attributes articulated by Evans (and indeed, various scholars) cannot be regarded as fixed, as the qualities of behaviour that will distinguish good from lesser forms of international conduct will not be identical for every issue on the global agenda. As such, this thesis reserves its view on what GIC generally required of the Rudd government until proper consideration has been given to the general features of the ICCL regime and the post-2012 negotiations in chapter 4. Subsequent chapters of the thesis also continue to explore the practical requirements of GIC in relation to the specific topics assessed by each chapter.
CHAPTER 2. GOOD INTERNATIONAL CITIZENSHIP AND CLIMATE CHANGE: FROM HAWKE TO HOWARD

Upon coming to power in March 1996 the Liberal National Coalition removed reference to Australia being a "good international citizen" as an objective of Australian foreign policy. Examination of the Coalition’s 11 years in office confirms that omission was deliberate.1 Robert McClelland, Shadow Minister for Foreign Affairs, March 2007.

This chapter provides a brief historical overview of Australian governmental engagement with international climate change law (ICCL) from the Hawke to Howard governments. This examination draws upon on literature applying the good international citizenship (GIC) concept, as well as these governments' political statements on GIC and climate change. The purpose of this overview is to provide more concrete examples of 'good', 'average' and 'bad' international citizenship in relation to ICCL, as well as essential historical context for the later assessment of the Rudd government.

A The Hawke and Keating Governments

1 The Hawke Government

Gareth Evans has been glowing in his praise of his and the Hawke and Keating governments' achievements with respect to GIC, in particular what he regarded as its leading role on a range of multilateral initiatives (several of which were referred to in chapter 1).2 Evans was not afraid of using the term 'success' in this regard.3 While scholars have identified notable flaws in the Hawke-Keating governments' record, such

as the perceived toleration of widespread human rights violations in East Timor, failure to fully implement human rights conventions in domestic legislation, and a relatively weak commitment to official development assistance, the overall appraisal of Australia's record as a GIC in this period is generally positive.

The issue of climate change, the focus of this thesis, first emerged as a significant topic of international concern during the late 1980s when the Hawke government was in power and Evans was Foreign Minister. The Hawke government framed global warming, and atmospheric protection generally, as 'the biggest ecological problem, the biggest challenge, faced in this or any other age'. Consistent with a GIC's preference for multilateral solutions, the utilisation of international institutions and international law, Evans strongly supported moves to develop a new legal regime to address climate change.

Evans' statements on how Australia should approach the issue were generally consistent with his views on GIC. According to Evans, a new international legal agreement, which was then under discussion, would need to carefully balance

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7 See, eg, Coral Bell, 'Political Objectives' in F A Mediansky (ed), Australian Foreign Policy: Into the New Millennium (Macmillan, 1997) 55, 68; Marianne Hanson, 'From 'Good International Citizen' to 'Regressive' State: Hansonism and Australia's International Reputation' in Michael Leach, Geoffrey Stokes and Ian Ward (eds), The Rise and Fall of One Nation (University of Queensland Press, 2000) 220, 221; Goldsworthy, 'Australia and Good International Citizenship', above n 3, 183; Alison Pert, 'Australia as a Good International Citizen from Barton to Howard: An International Law Perspective' (PhD Thesis, University of Sydney, 2010) 270, 272.

8 The phenomenon of climate change itself first received major global attention as early as 1979 at the first World Climate Conference. Sponsored by the World Meteorological Organisation, this scientific Conference issued a declaration calling upon the international community 'to foresee and to prevent potential man-made changes in climate that might be adverse to the well-being of humanity': UNFCCC, United Nations Framework Convention on Climate Change: Handbook (UNFCCC, 2006) 17.


10 Gareth Evans, 'International Law and Australia's Interests' (1989) Australian International Law News 185, 188.
Australia’s 'national interests and international responsibilities'.

Evans recognised that Australia had plenty of self-interested reasons to be active on the issue, with climate change potentially creating 'massive' long-term ‘economic, social and security costs’. '[L]arge costs' could also be involved in meeting 'new environmental responsibilities', while new international regulations could have 'implications for [Australia’s] ... energy exports, especially coal'. Climate change could also devastate island nations in the South Pacific, destabilising Australia’s immediate region and potentially creating scores of thousands of 'environmental refugees' who would look to Australia for resettlement and place heavy demands on Australia’s aid budget.

Evans’ statements also recognised many of the ethical concerns which Australia and other nations needed to confront. Evans, for example, argued that:

- the possibility of rising sea levels displacing South Pacific peoples – and the associated ‘human misery’ – were ample reasons for concern;
- the international community had a 'responsibility to protect the environment for future generations';
- that for developing countries issues of 'equity, responsibility and development' lay 'at the heart' of the solution to climate change;
- that developing countries could not be expected to meet the costs of new environmental responsibilities 'alone and unaided', requiring the assistance of the developed world; and
- that a 'new environmental order' would have little prospect of success without an 'equitable transfer of resources and technology from the north to the south'.

11 Ibid 191.
12 Evans, 'Foreign Policy and the Environment', above n 9, 113.
13 Ibid 113.
14 Gareth Evans and Bruce Grant, Australia’s Foreign Relations: In the World of the 1990s (Melbourne University Press, 2nd ed, 1995) 164.
15 Ibid.
16 Evans, 'International Law and Australia’s Interests', above n 10, 190.
17 Evans ‘Foreign Policy and the Environment’, above n 9, 114.
18 Evans, 'International Law and Australia’s Interests', above n 10, 114.
19 Evans, 'Foreign Policy and the Environment', above n 9, 114.
20 Ibid.
Several scholars believe that the Hawke government demonstrated leadership in practice on climate change. The Hawke government supported a number of early non-binding intergovernmental political statements on the issue. These included the 'Call for Action' announced at the Toronto Conference on 'The Changing Atmosphere – Implications for Global Security' (June 1988) which urged the international community to reduce carbon dioxide (CO2) emissions by 20 per cent by 2005 (below 1988 levels).

The Hawke government then signed the non-binding Declaration of the Hague, developed at the 1989 Hague Summit, which was generally regarded as significant because it acknowledged the equitable responsibilities of industrialised nations to assist developing countries in addressing climate change.

The first major step of the Hawke government on the domestic front was taken in October 1990, with the government adopting an interim 'planning target' to stabilise CO2 emissions at 1988 levels by 2000, and cutting emissions by 20 per cent by 2005 (consistent with the Call for Action). This was one of the most stringent targets announced by any nation at the 1990 World Climate Conference in Geneva. Notably, however, this announcement came with the caveat that Australia would not adopt emission reduction measures that would have 'net adverse economic impacts nationally or on Australia's trade competitiveness' unless similar action was taken by other major greenhouse gas (GHG) producers – a position that has remained central to all subsequent Australian governments' involvement in international climate negotiations.

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22 McDonald, above n 21, 221. The Conference was attended by scientists and policy-makers from 48 countries. The Conference statement is available at <http://www.cmos.ca/ChangingAtmosphere1988e.pdf>. See also Hamilton, above n 21, 31-34.

23 The Summit was attended by 24 nations. See *The Hague Declaration*, <http://wrmin.nic.in/index3.asp?subsublinkid=292&langid=1&sslid=375>.

24 Cox, above n 21, 220-21; Evans, 'Foreign Policy and the Environment', above n 9, 114.

25 McDonald, above n 21, 221.

26 Ibid.

27 Ibid 222.
While the Hawke government adopted a relatively progressive approach to climate change, notwithstanding its concern to protect Australia's economic interests, its true mettle was never properly tested, with the major legal and policy decisions falling to later governments.

2 The Keating Government

Treasurer Paul Keating deposed Bob Hawke as Australian Prime Minister in December 1991, meaning that the Keating government assumed responsibility for Australia's involvement in the international negotiations to develop a climate change treaty that were then under way. These negotiations resulted in the adoption of the United Nations Framework Convention on Climate Change\(^\text{28}\) (UNFCCC) at the Rio Conference on Environment and Development in 1992 (also known as the 'Earth Summit').

The adoption of the UNFCCC was momentous for the development of ICCL (see detailed discussion of the UNFCCC in chapter 4). Critically, however, it failed to establish legally binding emission reduction targets for developed countries, which had been supported by Australia, the European Community and others, but were opposed by the United States (US).\(^\text{29}\) Article 4 of the Convention instead only committed developed countries to a non-binding goal of stabilising their GHG emissions at 1990 levels by 2000.\(^\text{30}\)

The Keating government characterised Australia as a leader in the UNFCCC negotiations,\(^\text{31}\) with Environment Minister, Ros Kelly, describing Australia as a 'vigorous and respected 'middle' power' on the issue.\(^\text{32}\) According to Kelly, Australia had 'worked and negotiated for stronger outcomes' in the treaty,\(^\text{33}\) and was disappointed that the


\(^{29}\) McDonald, above n 21, 223.

\(^{30}\) UNFCCC arts 4.2(a)(b).

\(^{31}\) Cox, above n 21, 215.


\(^{33}\) Cox, above n 21, 219-20.
agreement had not gone as far as it would have liked. Although expressing dissatisfaction, Kelly did not, however, see the UNFCCC as a failure. Her view was that the non-binding target adopted by developed countries and associated GHG reporting obligations at least represented 'a major opportunity for continued pressure to bring about real action.' To the government's credit, Australia was the eighth country to ratify the UNFCCC and actively called upon other states to both ratify the agreement and meet their new obligations. Several scholars share the Keating government's positive assessment of Australia's performance in the UNFCCC negotiations. McDonald, for example, labels Australia's actions as that of a 'leader', while Lightfoot describes Australia as a GIC, being 'committed to significant reductions in greenhouse gas emissions and more generally [to] multilateralism in environmental policy.'

Cox, however, is more cynical about the Keating government's approach. He suggests that theKeating government took advantage of the US opposition to binding mitigation targets to create a perception that Australia had been 'one of the leading states'. As evidence for this, Cox cites the government's 'no-regrets' policy on climate change – the government's position that Australia would only reduce emissions if economic costs were not involved. The importance of protecting Australia's economic interests in the UNFCCC negotiations was later confirmed by Prime Minister Keating and Minister for Resources, David Beddall, who stated in 1994 that 'there had always been a caveat in our negotiations that ... [the UNFCCC would not] be at an economic cost to Australia'. The implication of Cox's argument is that in order to be regarded as a leader on climate change, Australia actually needed to be prepared to make economic sacrifices for the greater good.

34 McDonald, above n 21, 223.
35 Cox, above n 21, 219-20, citing Kelly, above n 32, 2-3.
36 McDonald, above n 21, 223.
37 Ibid.
39 Cox, above n 21, 220.
40 Ibid 223.
The Keating government's desire to protect Australia's economic interests was also evident in its domestic policies. In 1992 the federal government and Australian states endorsed Australia's first major GHG policy initiative, the National Greenhouse Response Strategy, which focused on greening Australia's energy supply as well as improving energy efficiency.\(^{42}\) Regrettably, the voluntary scheme proved to be a failure in terms of reducing emissions.\(^{43}\) According to the 1994 national GHG inventory, Australia was one of the few developed nations whose emissions had actually increased since the adoption of the UNFCCC,\(^{44}\) with overall emissions expected to rise 7 per cent above the UNFCCC's stabilisation target.\(^{45}\) Also reflecting poorly on the government, Australia was one of the world's five highest emitters on a per capita basis.\(^{46}\)

In March 1995, the Keating government introduced a new voluntary emissions reduction strategy – Greenhouse 21C.\(^{47}\) In doing so, the government rejected introducing both a carbon tax, earlier favoured by Environment Minister John Faulkner, and an emissions trading scheme (ETS), once supported by Kelly.\(^{48}\) Even by September 1995 it had become obvious that Greenhouse 21C would, as with earlier voluntary measures, fail to curb emissions growth.\(^{49}\) With emissions continuing to increase, the government publically downplayed the importance of Australia meeting its UNFCCC obligations. As early as June 1994, the Keating government indicated that Australia may not meet its UNFCCC target\(^{50}\) and in February 1995, Treasurer Ralph Willis stated that the UNFCCC contained 'let-out clauses' and that the government might decide that a less ambitious target was appropriate.\(^{51}\)

\(^{42}\) See Hamilton, above n 21, 34-53.  
\(^{43}\) Ibid 40.  
\(^{44}\) Cox, above n 21, 224.  
\(^{45}\) Ibid 222.  
\(^{46}\) Ibid.  
\(^{48}\) Ibid.  
\(^{49}\) Cox, above n 21, 228.  
The Keating government's desire to protect Australia's economy also had ramifications for Australia's engagement in the new round of international climate negotiations that commenced in 1995. Following the UNFCCC's adoption in 1992, developing countries, supported by the European Union (EU), had begun pushing for the international community to establish a stronger international agreement – this time including binding targets for developed countries. In March–April 1995, Parties to the UNFCCC held their first Conference of the Parties (COP 1). The Alliance of Small Island States (AOSIS) urged Parties to adopt a protocol including a commitment by developed countries to reduce their CO2 emissions by 20 per cent below 1990 levels by 2005 (the same target once endorsed by the Hawke government). Australia refused, however, to support the AOSIS proposal, in part because of this target. While the Keating government agreed that the UNFCCC was too weak and needed strengthening, it argued against the inclusion of the word 'reductions' in conference deliberations, a position eventually relaxed in response to widespread criticism. Ultimately, the Keating government refused to support any future agreement setting targets and timetables to reduce GHG emissions.

At COP 1, the Keating government also argued that while developed countries ought to shoulder the primary burden for emission reductions, developing countries also needed to play a greater role. In coalition with its JUSCANZ partners (Japan, US, Canada and New Zealand) Australia pushed for the major developing countries – Brazil, Korea, Malaysia and China – to also adopt mitigation commitments. Australia's position was ultimately rejected by the COP at Berlin with the 'Berlin Mandate' (launching negotiations for the Kyoto Protocol) deciding that only developed countries would be required to strengthen their mitigation targets. As one of only a few

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52 Cox, above n 21, 226-27.
54 Ibid.
56 Ibid 226.
57 Ibid.
58 Ibid.
59 UNFCCC, Report of the Conference of the Parties on its First Session: Addendum (Part 2), UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995), decision 1/CP.1, [2(a)(b)].
developed countries resisting the adoption of specific mitigation targets and timetables at COP 1, Cox describes the Keating government as a 'spoiler', who attempted 'to undermine the multilateral process'.\(^{60}\) Despite 'wanting to be seen to be a good international citizen', ultimately 'the government perceived that its first priority was the domestic economy.'\(^{61}\) Smith, Cox and Burchill also label the Keating government's approach as 'distinctly realist'.\(^{62}\) Singer and Gregg, however, suggest that unlike the later Howard government, Labor did at least show some restraint in promoting its 'short-term, particularistic national interests', being ultimately unwilling to take the blame for blocking international consensus.\(^{63}\)

**B The Howard Government**

1 *The Howard Government's General Foreign Policy Statements*

The Liberal-National Coalition government led by John Howard was elected in March 1996, bringing to an end almost 13 years of federal Labor government. The Howard government's general political statements on foreign policy and climate change are worth examining in detail as they help to clarify what GIC is not. In essence, the Howard government favoured a narrower, more traditional approach to foreign policy; that which Evans' conception of GIC was intended to counteract.

The Liberal party’s 1996 election manifesto, *A Confident Australia*, directly repudiated its predecessor’s philosophical approach to foreign policy, declaring that: 'We do not subscribe to unrealistic notions of global idealism. Foreign policy must be pursued with a realistic perspective of how to advance Australia’s security and economic interests.'\(^{64}\) Continuing in this vein, Australia's first foreign policy and trade White Paper, *In the National Interest* (1997), proclaimed that preparing for the future was 'not a matter of

\(^{60}\) Cox, above n 21, 215-16.

\(^{61}\) Ibid 222.

\(^{62}\) Gary Smith, Dave Cox and Scott Burchill, *Australia in the World: An Introduction to Australian Foreign Policy* (Oxford University Press, 1996) 199, 199.

\(^{63}\) Singer and Gregg, above n 21, 50. See also McDonald, above n 21, 224.

grand constructs. Rather it was about 'the hard-headed pursuit of the interests which lie at the core of foreign and trade policy: the security of the nation and the jobs and standard of living of the Australian people.' Australian security and economic well-being would become the 'basic test of national interest' which would guide all future foreign and trade policy.

Consistent with this 'hard-headed' approach, the term GIC was absent from the White Paper. Various attributes associated with GIC were also lacking or downplayed. Notably, the government promised a greater emphasis on bilateral over multilateral diplomacy, it being sceptical of the effectiveness of multilateralism. Where Australia was engaged in multilateralism, it would be with a focus on advancing Australia's vital security and economic interests, rather than the broader multilateral/GIC agenda. Activism and leadership would also be directed more narrowly towards advancing Australia's security and economic interests. Similar views were expressed in the government's second White Paper, Advancing the National Interest (2003).

This significant discursive shift has been analysed extensively in the literature. Instead of notions like GIC, Goldsworthy notes that the Coalition emphasised terms

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66 Ibid.
67 Ibid.
68 Note, however, that the Howard government did make some statements far more consistent with GIC. For example, the White Paper acknowledged that Australia's national interest lay in having an 'international reputation as a responsible member of the international community, committed to the rule of law, ready to assist in cases of humanitarian need, and a constructive contributor to the economic development of its neighbourhood': ibid 1-11, 13.
69 Ibid 47.
70 Ibid.
71 Ibid ii, vi, viii,
72 Department of Foreign Affairs and Trade, Advancing the National Interest: Australia's Foreign and Trade Policy White Paper (2003).
like 'realistic', 'hard-headed', 'practical', and the 'national interest'. Gyngell and Wesley suggest the label 'pragmatic bilateralism' as being an apt description of the Howard government's approach.

While GIC was not a feature of the Howard government's foreign policy discourse, it did sporadically argue that Australia was, or at least desired to be, a GIC on a range of global issues including international security and peace enforcement, refugees, war crimes, the environment, human rights and climate change. If nothing else, this probably reflected the growing legitimacy of the concept within Australia's political discourse. That is, while the Howard government did not appear to have a genuine belief in the concept, it did seem to recognise the political appeal of the term within certain sectors of the Australian electorate, and perhaps also with international audiences.

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74 Goldsworthy, 'An Overview', above n 64, 11.

75 Allan Gyngell and Michael Wesley, Making Australian Foreign Policy, above n 10, 217. On the environment, Elliott also suggests that a theme of the Howard government's approach was 'environmental pragmatism', with the government regularly employing the words 'practical' and 'achievable' in its dialogue: Elliott, 'Australia in World Environmental Affairs', above n 73, 241.


77 In 2002, for example, Federal Environment Minister, David Kemp boasted – without foundation – that 'increasingly the international community recognises that although we have taken the view that it is not in Australia's national interests to ratify the Kyoto Protocol, we are actually at the forefront of nations that are taking the responsible attitude,' adding, 'We have to be a good international citizen': ABC, 'Minister Defends Position on Greenhouse Gas Emissions', Insiders, 18 August 2002 <http://www.abc.net.au/insiders/content/2002/s651631.htm>. Prime Minister Howard similarly invoked the concept in 2006 when defending the continuation of Australia's $25 billion per year coal export industry. Supporting the development of carbon capture and storage technology, Howard stated that it was Australia's 'desire to be a good international citizen on greenhouse gas emissions', but it was important that 'we don't damage the great natural advantages that providence has given us': Malcolm Farr, 'Clean Coal Powers Howard', Herald Sun (online), 14 November 2006 <http://www.heraldsun.com.au/news/clean-coal-powers-howard/story-e6frf7jo-1111112518101>. Howard further declared his government's desire to make 'a contribution as a good international citizen' when explaining the 'considered, measured way' in which his government would introduce an emissions trading scheme that would preserve 'the strength and competitiveness of our industry, not least the mining industry': AAP, 'Howard, Rudd Tout Rival Climate Strategies', The Sydney Morning Herald (online), 31 May 2007 <http://news.smh.com.au/national/pm-rudd-tout-rival-climate-strategies-20070530-fr3.html>.

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2 The Howard Government's General Record as an International Citizen

Several scholars believe that Australia's international reputation was damaged during the Howard era. Indeed, Cotton and Ravenhill suggest that for critics of the Howard government, 'the single most deleterious consequence of Australian foreign policies' during this era came 'in the damage that they did to Australia's reputation as a good international citizen'. While the government did undertake some GIC activities, such as the Australian-led INTERFET operation to help secure the independence of East Timor in 1999, and the later RAMSI operation to restore law and order in the Solomon Islands, among others, these were overshadowed by major negatives such as Australia's involvement in the US-led invasion of Iraq in 2003 (likely in breach of international law), arguable violations of international law in relation to asylum seekers, and numerous other acts of poor international citizenship.

Pert suggests that the final years of the Howard government could be described as 'exceptionalism', with the national interest (as narrowly interpreted by the government) prevailing over all other considerations including, at times, international law. While, as noted, the Howard government was involved in various GIC activities, Pert argues that 'these were overwhelmed by its disregard for the rule of law, international law, the United Nations and multilateralism – and this to a degree not

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81 Pert, for example, refers to acts such as the government's efforts to seek better protection for whales, its role as Chair of the UN Human Rights Commission, and its support for nuclear disarmament: Pert, above n 6, 323.
82 See ibid 325; Singer and Gregg, above n 21, 30-39.
83 See, eg, Pert, above n 7, 400; Singer and Gregg, above n 21, 62-78.
84 Pert, for example, lists acts such as the government's low treaty participation rate; explicit intention not to adhere to any multilateral environmental treaty not deemed to be in Australia's national interests (including on climate change); its withdrawal from the jurisdiction of the ICJ and ITLOS in relation to maritime boundary disputes; and disputing decisions of the UN treaty bodies on human rights matters, giving a sense that international law was only valued and adhered to when it suited Australia's national interests and the electoral interests of the government: Pert, above n 7, 324.
85 ibid 326.
exhibited by any other government since Federation. Thus Pert categorised the Howard government's overall record as that of a 'poor international citizen.'

3 The Howard Government's Record on Climate Change

The Howard government's narrower approach to foreign policy was particularly evident in its approach to climate change. While, as has been seen, the desire to protect Australia's economic interests was also a feature of Labor's climate change policies, the Howard government's emphasis on this was far more strident. With the upcoming Kyoto Protocol negotiations in mind, the 1997 White Paper declared that Australia would be prepared to 'stand aside from an international agreement' that did 'not adequately protect Australia's national interests' and if others could not be convinced that Australia's proposals were 'superior in terms of both the environment and the global economy.'

At Kyoto, the government's negotiating strategy clearly reflected a more traditional approach to advancing Australia's national interests. As noted, the Berlin Mandate (establishing the Kyoto negotiations) stipulated that only developed countries would be required to strengthen their emission reduction commitments under a future agreement. Ignoring this, the Coalition sought to have new obligations imposed on developing countries. This was unsuccessful, but the government did win two significant concessions intended to minimise the cost of GHG abatement for Australia.

First, Australia gained a very generous mitigation target under the Kyoto Protocol. Collectively, Annex I countries (the developed countries) agreed to reduce their GHG emissions by at least 5 per cent by 2008-12 (below 1990 levels). Intense negotiations took place concerning the individual contribution each developed country would make

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86 Ibid.
87 Ibid.
88 Department of Foreign Affairs and Trade, In the National Interest, above n 65, 49.
89 Elliott, 'Australia in World Environmental Affairs', above n 73, 249, 251.
to this collective effort.\textsuperscript{91} The EU showed leadership in adopting an emissions reduction target of 8 per cent\textsuperscript{92} and had been prepared to go as high as 15 per cent.\textsuperscript{93} By contrast, the Howard government won Australia the right to increase its emissions by 8 per cent.\textsuperscript{94} The government argued that Australia's special circumstances warranted this target, including the importance of fossil fuels to its export and domestic energy sectors (which made emission reductions relatively more expensive than for many other developed countries and put jobs at risk if strong mitigation targets were adopted).\textsuperscript{95} Although the Berlin Mandate had indicated that Parties 'individual circumstances' would be relevant to the allocation of targets,\textsuperscript{96} it appears that Australia won its very weak target only by threatening to withdraw from the negotiations, not because other Parties regarded it as fair.\textsuperscript{97}

Second, the Howard government gained the inclusion of the so called 'Australia clause'. This provided that emissions of CO\textsubscript{2} caused by land clearing could be included in Australia's 1990 baseline emissions figure.\textsuperscript{98} This increased Australia's baseline by 30 per cent, yet land clearing rates had already dropped – by 33 per cent between 1990-95 – and the government had already committed to phasing it out.\textsuperscript{99} This actually

\begin{itemize}
\item \textsuperscript{91} See International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(76) (1 December to 11 December 1997) 7-8.
\item \textsuperscript{92} \textit{Kyoto Protocol} annex B.
\item \textsuperscript{93} See International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(76) (1 December to 11 December 1997) 3.
\item \textsuperscript{94} \textit{Kyoto Protocol} annex B.
\item \textsuperscript{95} Elliott, ‘Australia in World Environmental Affairs’, above n 73, 250. In developing this position, the Howard government relied heavily on economic modelling undertaken by the Australian Bureau of Agricultural and Resource Economics (ABARE) which concluded that the cost to the Australian economy of reducing GHG emissions would be 22 times higher than the average European country and six times higher than the US. ABARE's economic modelling was later criticised as it did not consider the potential social, environmental and economic cost of climate change for Australia or the possible economic benefits of developing and selling renewable energy technologies. The Commonwealth Ombudsman also criticised the consultation process ABARE used in drawing its conclusions, in part because of the close involvement of industry in its modelling: see Rosemary Lyster, 'Common But Differentiated? Australia's Response to Global Climate Change' (2004) 16 \textit{Georgetown International Environmental Law Review} 561, 564-565. Note, however, that recent studies have confirmed that the cost of reducing emissions in Australia is relatively high compared to most developed countries: see chapter 6.
\item \textsuperscript{96} UNFCCC, \textit{Report of the Conference of the Parties on its First Session: Addendum (Part 2)}, UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995), decision 1/CP.1, [2(a)].
\item \textsuperscript{98} See \textit{Earth Negotiations Bulletin}, vol 12(76), above n 91, 7-8; \textit{Kyoto Protocol} art 3(7).
\item \textsuperscript{99} See The Australia Institute, above n 97, 5, 12-13; Hamilton, above n 21, ch 8. See further discussion of the Australia clause in chapter 9 of this thesis.
\end{itemize}
provided Australia with an opportunity to adopt a far more ambitious target (as the increased baseline made its emissions reduction task easier), but was instead used to reduce the mitigation effort required by Australia relative to other nations.  

Following Kyoto, Federal Minister for Primary Industries and Energy, John Anderson, boasted that Australia’s Kyoto deal would 'preserve the interests of [Australia’s] farmers, miners, manufacturing industry and the economy in general'. The government portrayed Australia's diplomacy as 'forthright [and] realistic', moderate and sensible, and as striking the 'right balance between our national interests and our international responsibilities'. A number of scholars, however, characterise its approach as that of a realist (in the narrow, self-interested sense). In this vein, Hamilton describes Australia as a 'laggard', arguing that its reputation as 'a good global citizen' was sacrificed over Kyoto. Similarly, Elliott likens Australia to an 'environmental criminal' and suggests that the government's fight to protect Australia's narrow economic interests indicated a new style of Australian diplomacy, characterised by caution, or suspicion, of multilateralism 'as well as a dogged pursuit of the national interest that can seem outdated in a globalised world.'

Despite initially labelling Australia's deal at Kyoto as 'an absolutely extraordinary achievement ... against all the odds', the Howard government later refused to ratify the agreement. According to its 2003 foreign policy White Paper, Advancing the National Interest, the government would 'continue to strive for an effective global response' that did 'not unfairly compromise the competitiveness of Australian industry'. The Coalition argued that Australia would lose competitive advantages in

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100 Ibid.
102 Elliott, 'Australia in World Environmental Affairs', above n 73, 250.
103 Singer and Gregg, above n 21, 14; McDonald, above n 21, 231, 232; Cotton and Ravenhill, “Trading on Alliance Security”: Foreign Policy in the Post-11 September Era’, above n 78, 7.
104 Hamilton, above n 21, xiii.
105 Ibid 90.
106 Elliott, 'Australia in World Environmental Affairs', above n 73, 248.
107 Ibid 252. See also Pert, above n 7, 310-11.
108 ABC, AM, 19 December 1997 (Prime Minister John Howard).
109 Department of Foreign Affairs and Trade, Advancing the National Interest, above n 72, x.
emission-intensive and trade-exposed industries like oil, gas, coal and aluminium, unless a global agreement included the US (the only other developed nation not to ratify) and major developing countries like China. Further, it claimed that because Australian emissions only represented 1.5 per cent of global emissions, ratifying Kyoto would have negligible impacts on global warming. This latter argument downplayed the fact that Australia was one of the top emitters on a per capita basis, in the top 15 polluters outright, and as a developed country, was expected to show leadership in reducing emissions.

The government also argued that without emission reduction commitments by the US and major developing country emitters, the Protocol did not provide an 'enduring global response'. To make the point, Downer noted that the Protocol's binding target for developed nations only covered one third of global GHG emissions, meaning that global emissions were projected to rise by 41 per cent over 1990 levels during the Kyoto commitment period. Overall, the government's views were similar to that of the US Senate, which through the Byrd-Hagel Resolution, prevented the US Senate from ratifying any international agreement that did not require developing countries to make emission reductions and that 'would seriously harm the economy of the United States'.

In addition to refusing to ratify Kyoto, the Howard government called for it to be abandoned. In preference, it espoused the virtues of the 2005 Asia-Pacific Partnership on Clean Development and Climate, an emissions reduction technology agreement that included only six nations (Australia, China, India, Japan, South Korea

\[110\] Ibid 67.
\[111\] Department of Prime Minister and Cabinet, Australia’s Climate Change Policy: Our Economy, Our Environment, Our Future (2007) v.
\[114\] Ibid.
Some observers of international climate negotiations that took place in 2006 also argued that Australia's hard-line position undermined efforts by Kyoto Parties to develop a second commitment period for the Protocol beyond 2012. Australia's decision not to ratify Kyoto may have also helped to legitimise the US' decision to do likewise.

The Howard government stated, somewhat paradoxically, that it remained committed to achieving Australia's Kyoto target, even though it was not legally obliged to do so. This likely reflected a political need for the government to allay both domestic and international concerns about its refusal to ratify the Protocol. But its domestic legal and policy response largely continued the light-handed approach of the Keating government. Other than a Mandatory Renewable Energy Target of 10 per cent, the government placed its faith in voluntary programs. These policies did put Australia on track to meet its Kyoto goal – made easy by the 108 per cent target and the Australia clause – but longer-term emissions were predicted to rise to 127 per cent of

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118 See, eg, Friends of the Earth Australia, above n 116.

119 Clive Hamilton, Justin Sherrard and Alan Tate, 'Climate Change Policy Beyond Kyoto: A New Global Plan' (Discussion Paper number 75, Australia Institute, 2005) v.

120 Department of Prime Minister and Cabinet, above n 111, 6.

1990 levels by 2020. Under considerable public pressure, the government belatedly announced prior to the 2007 federal election that it would introduce an ETS, as well as a 15 per cent Clean Energy Target. However, with its electoral loss, the Howard government’s apparent change of heart was never put to the test, leaving it with a poor overall record as an international citizen on climate change.

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122 Australian Greenhouse Office, *Tracking to the Kyoto Target 2006* (2006) 1. Note that based on policies then in place, the Australian Greenhouse Office estimated that Australia’s emissions would also slightly exceed the Kyoto target, reaching 109 per cent of 1990 levels during 2008-2012.

123 Department of Prime Minister and Cabinet, above n 111, 7; Australian Government, 'National Clean Energy Target' (Media Release, 23 September 2007).
CHAPTER 3. AUSTRALIA’S RECOMMITMENT TO GIC AND ACTION ON CLIMATE CHANGE UNDER KEVIN RUDD

'Together we are custodians of the planet. Together we are custodians of the planet’s future. That is why climate change is a top priority of the new Australian Government.' Prime Minister Kevin Rudd, September 2009.¹

This chapter introduces the general political statements of the Australian Labor Party (ALP), under Kevin Rudd's leadership, on good international citizenship (GIC) and climate change. The purpose of doing so is to outline the basic philosophical approach of the Rudd Government to foreign policy and climate change. Later chapters then examine the government's specific policy positions on climate change mitigation in more detail.

A The Rudd Government's Foreign Policy Discourse

The Labor Opposition, led by Rudd, indicated prior to its 2007 election victory that GIC remained an important aspiration of the party.² As Opposition leader, Rudd personally committed Labor to returning Australia to its 'role as a good global citizen and as a creative and active middle power'.³ The ALP’s view of the Howard government’s approach to foreign policy was perhaps best articulated by Rudd's then Shadow Minister for Foreign Affairs, Robert McClelland. In a speech entitled Time to Repair Our Reputation: The Rise and Fall of Australia as a Good International Citizen (March 2007), McClelland argued that Australia's international reputation had been 'tarnished' by a number of policy failures of the Howard government, among them its involvement in

² Kevin Rudd was elected leader of the ALP on 4 December 2006, replacing Kim Beazley.
³ Kevin Rudd, ‘An Action Agenda for Climate Change’ (Speech delivered at the Annual Fraser Lecture, Canberra, 30 May 2007). Several years earlier, as Shadow Minister for Foreign Affairs, Rudd spoke directly on the opposing realist-idealist approach to foreign policy, discussed in chapter 1. Consistent with Evans’ views, Rudd rejected the realist, ‘conservative view’ that foreign policy was ‘an inherently amoral enterprise’ stating that Labor’s view was that domestic ‘interests and values’ were equally applicable internationally: Kevin Rudd, ‘Future Directions in Labor Foreign Policy’ (Speech delivered at the Australian Fabian Society Conference: Ethics, Values, Civil Society and Labor Generations, 2002) <http://www.fabian.org.au/925.asp>.
the United States-led invasion of Iraq in 2003. Coming under particular criticism was the Howard government's nationalistic approach to international climate negotiations, including its failure to ratify the Kyoto Protocol.

Interestingly, the ALP's 2007 National Platform and Constitution neglected to use the term GIC. However, the document's statements on foreign policy were essentially consistent with the GIC agenda earlier espoused by Gareth Evans. The Platform, for example, committed Labor to 'activism in international affairs'; diplomacy 'in favour of our own interests' but also 'the common good'; and recognised the need for multilateralism and the value of international institutions, especially the United Nations (UN). Notably, the Platform identified the avoidance of climate change as a 'vital foreign policy objective' for Australia and expressed Labor's determination to 'rebuild Australia's reputation as a world leader on international environmental issues.'

Once in government, new Foreign Minister Stephen Smith quickly committed Labor to acting as a GIC in a key 2008 foreign policy speech, A New Era of Engagement with the World. Smith declared that '[t]he new Australian government came to office intent on making a difference as a good international citizen'. The government had a 'strong wish to see Australia speak and act on the world stage as a good international citizen.' According to Smith, Labor was 'determined to embark on a foreign policy both shaped by and reflecting our democratic values, and our respect for the rule of law, domestic and international, our tolerance, and our deep-seated belief in a fair go

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7 Ibid 231.
8 Ibid 240.
9 Ibid 241.
11 Ibid.
12 Ibid.
for others. A 2009 government budget document, *Australia's International Development Assistance Program: A Good International Citizen*, further stated that Australia's desire to be a GIC reflected 'a key Australian characteristic: a commitment to help people less fortunate than ourselves, a belief in a fair go for all'.

Smith and other government representatives also employed the concept when speaking about a range of global and domestic issues, for example, in:

- committing to increase official development assistance from 0.3 of gross national income to 0.5 per cent by 2015-16 and providing development assistance to Pacific nations;
- providing humanitarian assistance;
- announcing that Australia would sign or ratify a range of international agreements including the UN Declaration on the Rights of Indigenous Peoples (which the Howard government had refused to support), the Optional Protocol to the UN Convention Against Torture, the UN Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention on the Rights of Persons with Disabilities;
- extending an open invitation for UN officials to visit Australia to monitor human rights;
- diplomatic efforts to clarify and consolidate the authority of the 'responsibility to protect' principle (a principle relating to humanitarian intervention), and

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13 Ibid.
15 Smith, above n 10; ABC, 'New Pacific Partnership Deal for EU and Australia', *ABC* (online), 30 October 2008. See also Kelvin Thomson, 'Australia as a Good International Citizen: Security, Overseas Aid, and Nuclear Disarmament' (Speech delivered at the VCE Foreign Affairs Forum, Melbourne, 7 August 2009).
18 ABC, 'Rudd Government to Ratify Torture Treaty', above n 17.
19 Smith, above n 10.
• delivering a national apology to Australia's Stolen Generation of indigenous peoples.20

Members of the government also used related terms to GIC to describe the sort of behaviour Labor aspired to, such as 'effective international citizenship'21 and 'good international environmental citizenship'.22

Beyond the specific use of the term GIC (often used interchangeably with 'good global citizen'), various statements by Labor and Prime Minister Rudd made clear that the government's philosophical approach to foreign policy and climate change was broadly consistent with that earlier championed by Evans. Notably, the government committed to UN engagement as a fundamental pillar of its general foreign policy approach.23 In Rudd's first address to the UN General assembly in September 2008, delivered in the midst of the 2008 global financial crisis, Rudd remarked that 'we live in a world where our interdependence is now greater than at any time before. An interdependence that therefore demands our international cooperation now, more than at any time before.'24 Of particular relevance to this thesis, Rudd suggested that the globalisation of the environment was now clear with the recognition that 'carbon emissions from one part of the planet affects all parts of the planet – and therefore radically affects the future of the planet itself'. For Rudd, 'interdependence' – in security, economic and environmental terms – no longer represented 'sentimental idealism', but 'the new realism of the 21st century'.

20 Ibid.
21 See Kevin Rudd, 'Advancing Australia's Global and Regional Economic Interests' (Speech delivered at the East Asia Forum in conjunction with the Australian National University, Canberra, 26 March 2008) <http://webdiary.com.au/cms/?q=node/2318>; Robert McClelland (Speech delivered at the Annual Conference of the Australian and New Zealand Society of International Law, Canberra, 26 June 2008). McClelland described effective international citizenship as 'exercising a responsibility to shape, and to help others shape, a stronger, rules-based order for the modern world.'
22 Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2003, 21802 (Kelvin Thompson).
23 The other two stated pillars were Australia's commitment to the US alliance and comprehensive engagement with Asia and the Pacific: Smith, above n 10.
Also in this speech, Rudd mounted a passionate defence of the multilateral system. While acknowledging its imperfections, Rudd argued that it represented 'a necessary democracy of states' that had been let down by a failure of 'political will' rather than the institution itself. Rudd also highlighted his government's renewed commitment to multilateral activism, demonstrated by Australia's new International Commission on Nuclear Non-Proliferation and Disarmament (a joint initiative with Japan), its candidacy for a non-permanent seat on the UN Security Council in 2013-14; and Australia's new Global Carbon Capture and Storage Institute (a project to drive the demonstration and commercialisation of 'clean coal' technology – see further chapter 7).

Also consistent with Evans' statements on GIC, Rudd called upon states to adopt a less nationalistic approach to international affairs, arguing that 'our national interests are invariably best served by the simultaneous prosecution of the international interest. That the purposes of our common humanity should prevail over the narrow interests of the few.' Rudd called upon delegates to 'summon the political faith – and to exercise the political will necessary – to act for the common purposes of the planet we share.' In a separate speech, Rudd re-committed Australia to 'an active, creative middle power diplomacy in partnership with the community of nations', indicating that his government wanted Australia to be 'a greater force for good in the world'.

While the Rudd government's public statements displayed a greater enthusiasm for promoting the global good, the strength of Labor’s commitment to GIC should not be overstated. Indeed, the term GIC only received one explicit mention in Labor's 2009 National Platform and Constitution. As with the Hawke-Keating era, national security and economic interests were still stated to be primary.

Scholars and other commentators quickly identified that the Rudd government's foreign policy approach had picked up where previous Labor governments left off.

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25 Rudd, 'Advancing Australia’s Global and Regional Economic Interests', above n 21.
27 See ibid 119.
Elliott described its approach as 'highly reminiscent of past Labor governments', while Sheridan saw Rudd as belonging to the tradition of 'Labor giants' Evatt and Evans. Elliott also noted the return of GIC, activism in international affairs, middle power diplomacy, multilateralism and support for the UN, to the government's vocabulary. Meanwhile, Gyngell saw Rudd's approach as an attempt to reconcile 'interest-driven realism and values-driven liberal internationalism'.

B The Rudd Government's Climate Change Discourse

A commitment to adopt strong action on climate change was a 'totemic part' of the Rudd Labor government's successful 2007 election campaign. Once in government, Labor quickly sought to paint itself as a GIC on the international stage. Shortly after his election victory, Rudd personally attended the UN Bali Climate Change Conference in December 2007 (the 13th Conference of the Parties to the United Nations Framework Convention on Climate Change), to present Australia's instrument of ratification to Kyoto. This was undoubtedly an act of GIC, recommitting Australia to action on climate change through the international climate change law regime. Rudd used the forum – which adopted the Bali Roadmap to guide the post-2012 climate negotiations – to distance his government from the overtly nationalistic approach of Australia under Prime Minister Howard. According to Rudd, climate change was 'one of the greatest moral, economic and environmental challenges of our age'; 'the defining challenge of

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31 Gyngell, above n 30, 5. Similarly, Sheridan suggests that Rudd sought to 'fuse hard-headed realism with liberal idealism, without doing much to damage either concept': Sheridan, above n 29.
34 Ratified 3 December 2007.
our generation' on which delegates' choices would 'impact all future generations.'\textsuperscript{35} The 'community of nations' were 'custodians of the planet' and its future and Australia would be putting its 'shoulder to the wheel'. Developed and developing nations alike were called upon to move forward as a 'truly "United Nations"', with all contributing their 'fair share'.

In the Prime Minister's second address to the UN General Assembly, in September 2009, Rudd further called on all nations to 'reach beyond their self interests and instead fashion a 'Grand Bargain' between the developed and developing countries of the world.'\textsuperscript{36} Domestically, the government also adopted '[h]elping to shape a global solution' as one of the three pillars of its climate change policy, along with reducing Australia's carbon pollution and adapting to 'unavoidable climate change'.\textsuperscript{37} It also committed to a range of new domestic laws and policies on climate change to reduce Australia's greenhouse gas emissions, including an emissions trading scheme (see chapter 7). Rudd's desire to be a key player in the climate negotiations was rewarded by Danish Prime Minister Lars Lokke Rasmussen who enlisted Rudd as a 'Friend of the Chair' in the lead up to the crucial round of climate negotiations in Copenhagen (December 2009).\textsuperscript{38}

The Rudd government also accepted, to a much greater degree than the Howard government, that acting both domestically and internationally on climate change was actually in Australia's national interest. The government unequivocally accepted that climate change posed 'a substantial threat to Australia's economy and our way of life.'\textsuperscript{39} As a hot and dry country, the government stated that Australia had 'more to lose than any other developed nation'.\textsuperscript{40} The government accepted that if significant

\textsuperscript{35} Kevin Rudd (Speech delivered at the High Level Segment of the 13\textsuperscript{th} Conference of the Parties, United Nations Framework Convention on Climate Change, Bali, 12 December 2007) <http://pmtranscripts.dpmc.gov.au/browse.php?did=15704>.
\textsuperscript{36} Kevin Rudd (Speech delivered at the 64\textsuperscript{th} session of the United Nations General Assembly), above n 1.
\textsuperscript{38} Along with UN Secretary-General, Ban Ki-moon, and Mexican President Felipe Calderon: Michelle Grattan and Tom Arup, 'Rudd Offered Key Copenhagen Role' \textit{The Age} (online), 28 October 2009 <http://www.theage.com.au/national/rudd-offered-key-copenhagen-role-20091027-hj1g.html>.
\textsuperscript{39} Australian Government, above n 37, iii.
\textsuperscript{40} Ibid.
global temperature rise occurred Australia's coastal properties would be threatened by rising sea levels and tidal surges; food production would be reduced as droughts became longer, more frequent and more intense; and 'national treasures' such as the Great Barrier Reef and Kakadu wetlands would be under threat, as well as associated tourism industries.\textsuperscript{41} Simply, Australia needed to act to 'protect our way of life and the Australian economy.'\textsuperscript{42} In addition, the government recognised that the effects of climate change were already being experienced in Australia's Pacific neighbourhood and across the globe.\textsuperscript{43}

It can be seen then that the Rudd government, unlike its Liberal National predecessor, appeared to have a genuine desire to act as a GIC, both generally and on climate change, and politically committed to doing so.

\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Rudd (Speech delivered at the High Level Segment of the 13\textsuperscript{th} Conference of the Parties), above n 35.
CHAPTER 4. LEGAL BACKGROUND TO THE POST-2012 CLIMATE NEGOTIATIONS AND ITS IMPLICATIONS FOR ASSESSING GIC

'The ultimate objective of this Convention and any related legal instruments ... is to achieve ... stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.' United Nations Framework Convention on Climate Change, article 2.¹

'Warming of the climate system is [now] unequivocal. Intergovernmental Panel on Climate Change, 2007.²

This chapter examines the basic features and history of the international climate change law (ICCL) regime, as well as limited aspects of general international law that were potentially relevant to assessing good international citizenship (GIC) in the context of the post-2012 climate negotiations. Following this, the chapter explains the general approach this thesis will adopt in assessing whether the Rudd government's engagement with the negotiations met the standard of GIC.

A The UNFCCC and Kyoto Protocol

As mentioned in chapter 2, the international community adopted the United Nations Framework Convention on Climate Change (UNFCCC) at the Rio Conference on Environment and Development (or 'Earth Summit') in 1992.³ The UNFCCC provides the foundation stone of the ICCL regime. Initially signed by 154 states, including Australia under the Keating government, the Convention now has 195 Parties (194 states and

³ For detailed accounts of the UNFCCC's history, see, eg, UNFCCC, United Nations Framework Convention on Climate Change: Handbook (UNFCCC, 2006); Daniel Bodansky, 'The History of the Global Climate Change Regime' in Urs Luterbacher and Detlef F Sprinz (eds), International Relations and Global Climate Change (MIT Press, 2001) 23.
one regional economic integration organisation, the European Community/European Union (EU)).

The UNFCCC was adopted by the international community in response to growing scientific and political concern regarding the potential ramifications of climate change. The issue of climate change was first placed on the international agenda at the first World Climate Conference in 1979. Sponsored by the World Meteorological Organization, this scientific Conference issued a declaration calling upon the international community 'to foresee and to prevent potential man-made changes in climate that might be adverse to the well-being of humanity.'\(^5\) Several significant developments then took place, culminating in the adoption of the Convention. Among these were the establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988, the main advisory body to the international community on climate science.\(^6\) The IPCC's First Assessment Report\(^7\) then provided the main scientific basis for negotiations on a climate change treaty beginning in late 1990.\(^8\) These negotiations were held under the auspices of the United Nations General Assembly, which established the Intergovernmental Negotiating Committee for a framework convention on climate change to negotiate the terms of the treaty.\(^9\)

1 UNFCCC: Key Provisions

The UNFCCC has a number of noteworthy features. To begin with, it formally accepts the reality of human-induced climate change in the Preamble to the Convention. Recognising that climate change is a 'common concern of humankind', the Preamble


\(^6\) The IPCC was set up by the World Meteorological Organization and the United Nations Environment Programme to provide the world with a clear scientific view on the current state of knowledge on climate change and its potential environmental and socio-economic impact: see IPCC, History <http://www.ipcc.ch/organization/organization_history.shtml#.UHvGNW_Mg4I>; IPCC, Organization <http://www.ipcc.ch/organization/organization.shtml#.UJV4bzbi18E>.


\(^8\) UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 18.

expresses concern that human activities have 'substantially' increased atmospheric concentrations of greenhouse gases (GHGs) – enhancing Earth's natural greenhouse effect – which will result in additional warming of the Earth's surface and atmosphere, potentially having adverse impacts for natural ecosystems and humankind. While accepting the danger presented by global warming, the Preamble also acknowledges the uncertainties in scientific predictions of climate change, particularly with regard to 'timing, magnitude and regional patterns'.

Article 2 importantly establishes the 'ultimate objective' of the Convention and any related legal instruments that the Parties may adopt, namely: to achieve 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic [human-induced] interference with the climate system'. This is commonly referred to as the objective of avoiding 'dangerous climate change'.

Article 3 of the Convention is particularly important to understanding the post-2012 climate negotiations. This sets out the basic 'principles' of the Convention by which Parties 'shall be guided' in their actions to achieve the Convention's objective and to implement its provisions. The main principles include that:

- Parties should act 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities';
- accordingly, developed Parties 'should take the lead in combating climate change and the adverse effects thereof'.

10 The Earth's climate is largely controlled by the flows of heat – caused by the Sun – entering and leaving the planet and the storage of heat in compartments of the Earth System – ocean, land and atmosphere. A very small amount of this heat is stored in the atmosphere. GHGs in the Earth's atmosphere, such as water vapour, carbon dioxide, methane, and nitrous oxide, absorb heat leaving the Earth's surface, helping to control the surface temperature. The amount of GHGs in the atmosphere alters the magnitude of the greenhouse effect and the amount of heat retained in the atmosphere. Human activities have most direct impact on the atmospheric concentration of carbon dioxide, as well as methane and nitrous oxide: Katherine Richardson et al, Synthesis Report from Climate Change: Global Risk, Challenges and Decisions (2nd ed, University of Copenhagen, 2009) 7, 10.

11 UNFCCC preamble.

12 Ibid art 1.3.

13 'Climate change' is defined by the UNFCCC as a 'change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods': ibid art 1.2.

14 Ibid art 3.1.
• Parties should 'protect the climate system for the benefit of present and future generations of humankind' (the principle of 'intergenerational equity');

• the specific needs and special circumstances of developing Parties should be given full consideration, especially those that are particularly vulnerable to the adverse effects of climate change, or those Parties that would bear a 'disproportionate or abnormal burden under the Convention';

• Parties should take 'precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.' Further, 'where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures' (the 'precautionary principle'), although policies and measures should be 'cost-effective so as to ensure global benefits at the lowest possible cost'; and

• Parties 'have a right to, and should, promote sustainable development' (the principle of 'sustainable development').

Article 3 indicates that the principles are limited to 'guiding' the Parties' activities under the Convention. Thus, Parties are not legally obliged to give effect to these treaty principles. This is made clearer still by the use of the word 'should' in the

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15 Ibid. 'Adverse effects' are defined as: 'changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare': art 1.1.

16 Ibid art 3.1. See generally on this principle in international law: Dinah Shelton, 'Intergenerational Equity' in Rudige Wolfrum and Chie Kojima (eds), Solidarity: A Structural Principle of International Law 123.

17 UNFCCC art 3.2.


19 UNFCCC art 3.4. The term 'sustainable development' is not defined by the UNFCCC. The most commonly cited definition is provided by the 1987 Brundtland Report which described it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development, Our Common Future: Report of the World Commission on Environment and Development (United Nations, 1987) ch 2, [1].

20 The US sought to have article 3 deleted from the Convention during its negotiation, being concerned that it could be subject to the Convention’s dispute settlement provisions. This push was unsuccessful, but Parties did agree to insert the term 'guided' to limit article 3 to informing Parties’ actions: see Philippe Sands, Principles of International Environmental Law (2nd ed, Cambridge University Press, 2003) 233-34.
article 3 principles themselves (such as 'should take the lead'; 'should take precautionary measures'). Nonetheless, the use of the word 'shall' prior to 'guided', as well as Parties' re-endorsement of the principles in subsequent legal instruments (such as the Kyoto Protocol\textsuperscript{21} and Bali Action Plan (BAP)),\textsuperscript{22} highlights that the principles are intended to have an important normative effect on Parties' activities under the Convention.\textsuperscript{23} That is to say, while such principles may not be legally binding on Parties, they do establish a clear set of legal expectations. Notwithstanding their non-binding or 'soft law' status, this thesis argues that a GIC would generally need to respect its commitment to be guided by these principles (unless there were compelling reasons not to do so) in order to meet the higher standard of behaviour expected of a GIC (see further discussion below).

Emphasising their role in influencing Parties' negotiating positions, Parties themselves frequently refer to the article 3 principles in their official submissions and statements.\textsuperscript{24} It should be noted, however, that it is often difficult to identify the practical ramifications of these principles for state practice, given their general nature. In common with other legal principles, the article 3 principles do not dictate specific actions to be taken by Parties. As explained by Bodansky, 'principles embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions.'\textsuperscript{25}

\textsuperscript{22} UNFCCC, Report of the Conference of the Parties on its Thirteenth Session: Addendum (Part 2), UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008), decision 1/CP.13, chapeau ('COP 13 Report').
\textsuperscript{23} Several of the article 3 principles are also referred to in the Preamble and the operative provisions of the Convention. See, eg, reference to the leadership principle in UNFCCC art 4.2(a).
\textsuperscript{24} See, eg, statements by the the G77 and China: International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(344) (4 December 2008) 1. Evidence of this is also seen in subsequent chapters outlining Party positions on key issues.
\textsuperscript{25} Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 \textit{Yale Journal of International Law} 451, 501. Another explanation is given by Dworkin who states that both legal principles and legal rules 'point to particular decisions about legal obligations in particular circumstances but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion ... [A principle] states a reason that argues in one direction, but does not necessitate a particular decision': Ronald Dworkin, \textit{Taking Rights Seriously} (Harvard University Press, 1997) 24, 26.
In addition to the formal 'principles' section, other provisions of the Convention also refer to a number of other ethical considerations or factors which were similarly relevant to the post-2012 climate negotiations. Essentially, these elaborate upon the Parties' understanding of equity in the context of addressing climate change. The Preamble recognises that 'the largest share of historical and current global emissions of greenhouse gases ... originated in developed countries' and that the 'per capita emissions in developing countries are still relatively low'.26 To some extent, the recognition of historical responsibility reflects the 'polluter-pays' principle – which stipulates that the costs of pollution should be borne by those responsible for causing it –27 however, the Convention does not go so far as to actually endorse it. It should also be noted that the principles referred to in the Convention's Preamble appear to have diminished normative status vis-a-vis the article 3 principles, as these were deliberately not included in the operative part of the Convention.28

In the Preamble, Parties also accept that developing countries' emissions 'will grow to meet their social and development needs', with these nations having 'legitimate priority needs' for the 'achievement of sustained economic growth and the eradication of poverty'.29 This is reiterated by article 4.7 which states that 'economic and social development and poverty eradication are the first and overriding priorities' of developing countries.

As noted, article 3 recognises that some countries are 'particularly vulnerable' to climate change.30 Article 4 and the Preamble further specify who these vulnerable countries are, namely: the 'developing countries', as well as subgroups including the

26 UNFCCC preamble.
27 The polluter pays principle is a principle of international environmental law and is also found in domestic environmental law instruments in many states: see, eg, Sands, above n 20, 279, 280-81. One formulation of the polluter pays principle is found in the Rio Declaration, principle 16: 'National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.
29 UNFCCC preamble.
30 ibid art 3.2.
'least developed countries' (LDCs) and the 'low-lying small island countries', among others.31

Article 4 of the Convention contains the general legal commitments of the Parties. Notably, the Convention adopts a two-tier system, with the most onerous obligations reserved for developed countries, giving effect to the principles of equity, common but differentiated responsibility and leadership. Under article 4.2, developed country Parties and other Parties listed in Annex I of the Convention (the so-called 'Annex I Parties')32 have more stringent mitigation obligations than 'non-Annex I Parties' (essentially the developing countries). The key commitment of Annex I Parties, albeit a non-binding one, is the collective 'aim' of reducing Annex I Party GHG emissions to 1990 levels by the year 2000.33

In addition to establishing emission reduction requirements (and related aspects such as implementing national inventories of GHGs), article 4 further establishes obligations to provide finance to developing countries, as well as technology transfer and cooperation, for both mitigation and adaptation.34 These obligations chiefly fall to the 'Annex II Parties' (the wealthiest Annex I Parties).35 This again helps to realise the

31 See, eg, ibid arts 4.9, 4.8 and preamble.
32 Annex I of the Convention includes developed countries that were members of the OECD in 1992, the European Economic Community (now represented by the EU), former Soviet Union countries with economies in transition to a market economy (EITs), as well as countries which subsequently joined Annex I. Annex I Parties currently include: Australia; Austria; Belarus*; Belgium; Bulgaria*; Canada; Czechoslovakia*; Denmark; European Economic Community; Estonia*; Finland; France; Germany; Greece; Hungary*; Iceland; Ireland; Italy; Japan; Latvia*; Lithuania*; Luxembourg; Netherlands; New Zealand; Norway; Poland*; Portugal; Romania*; Russian Federation*; Spain; Sweden; Switzerland; Turkey; Ukraine*; United Kingdom of Great Britain and Northern Ireland and the United States. *= EITs.
33 UNFCCC arts 4.2(a)(b). The commitments of the Parties are established in relation to carbon dioxide emissions and other GHGs not controlled by the Montréal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989). The Montreal Protocol regulates GHGs that contribute to the depletion of the ozone layer such as chlorofluorocarbons.
34 For example, article 4.3 requires developed countries to provide 'new and additional financial resources' to enable developing countries to meet their (more limited) obligations under articles 12.1 and 4.1. See also articles 4.5, 4.9.
35 Annex II includes developed countries that were members of the OECD in 1992: UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 46. Annex II Parties currently include: Australia; Austria; Belgium; Canada; Denmark; European Economic Community; Finland; France; Germany; Greece; Iceland; Ireland; Italy; Japan; Luxembourg; Netherlands; New Zealand; Norway; Portugal; Spain; Sweden; Switzerland; United Kingdom of Great Britain and Northern Ireland and the United States.
principle of equity referred to by article 3. A Financial Mechanism was also established
by article 11 to help coordinate the transfer of financial resources,\textsuperscript{36} administered by
the Global Environment Facility.\textsuperscript{37}

2 Kyoto Protocol: Key Features

Article 4.2(d) UNFCCC required the Parties to review, and consider amending, the
adequacy of developed country commitments under articles 4.2(a) and (b) at its first
'Conference of the Parties' (COP).\textsuperscript{38} As noted in chapter 1, in the years following the
Earth Summit, the EU and developing countries pushed for the adoption of a stronger
agreement than the UNFCCC, this time establishing binding mitigation targets for
developed countries.\textsuperscript{39} Such measures were not agreed to at COP 1 (March-April
1995), being opposed by the JUSCANZ countries (Japan, US, Canada, Australia and New
Zealand).\textsuperscript{40} However, the 'Berlin Mandate' established a formal process to guide
further negotiations on this issue.\textsuperscript{41} Again giving effect to the principles of equity and
common but differentiated responsibility, the Mandate provided that only Annex I
Parties would have new mitigation commitments.\textsuperscript{42} Taking its cue from the IPCC's
Second Assessment Report, which provided stronger warnings of the risk posed by
increasing GHG emissions,\textsuperscript{43} Parties agreed to the 1997 Kyoto Protocol at COP 3
(December 1997).\textsuperscript{44} Most importantly, the Protocol established, for the first time, a
binding commitment by Annex I Parties to collectively reduce their GHG emissions –
specifically, by at least 5 per cent below 1990 levels during the treaty's 'first

\textsuperscript{36} UNFCCC art 11.
\textsuperscript{37} UNFCCC, Report of the Conference of the Parties on its Second Session: Addendum (Part 2), UN Doc
FCCC/CP/1996/15/Add.1 (29 October 1996), decision 12/CP.2; UNFCCC, Report of the Conference of the
Parties on its Third Session: Addendum (Part 2), UN Doc FCCC/CP/1997/7/Add.1 (25 March 1998),
decision 12/CP.3.
\textsuperscript{38} Parties must review these commitments at regular intervals 'until the objective of the Convention is
met': UNFCCC art 4.2(d).
\textsuperscript{39} See Dave Cox, 'The Road from Rio: Multilateral Cooperation Gives Way to National Interest' in Richard
Leaver and Dave Cox (eds), Middling, Meddling, Muddling: Issues in Australian Foreign Policy (Allen &
\textsuperscript{40} Ibid 226.
\textsuperscript{41} UNFCCC, Report of the Conference of the Parties on its First Session: Addendum (Part 2), UN Doc
\textsuperscript{42} Ibid [2(b)].
\textsuperscript{43} See IPCC, Second Assessment: Climate Change 1995 (Cambridge University Press, 1995).
\textsuperscript{44} UNFCCC, Report of the Conference of the Parties on its Third Session: Addendum (Part 2), UN Doc
FCCC/CP/1997/7/Add.1 (25 March 1998), decision 1/CP.3.
commitment period' (2008 – 2012).\(^{45}\) Annex I Parties also agreed for the first time to commit to individual mitigation targets, technically known as 'quantified emission limitation and reduction commitments'.\(^{46}\) The detailed rules for the Protocol (such as compliance and reporting requirements) were agreed to several years later at COP 7 (December 2001) – commonly known as the 'Marrakesh Accords'.\(^{47}\)

The entry into force of the Protocol was fraught, with the US and Australia (under the Howard government) opting not to ratify.\(^{48}\) Russia's ratification in 2004 finally satisfied the requirements of article 25.1, bringing the Protocol into force.\(^{49}\) 192 Parties have since ratified the Protocol, including 36 Annex I Parties.\(^{50}\) The Rudd government ratified Kyoto for Australia on 3 December 2007. In 2011, Canada became the first country to withdraw from the treaty, concerned that it would fail to meet its mitigation target and would need to purchase a significant quantity of Kyoto carbon credits to make up the shortfall.\(^{51}\)

In addition to establishing binding mitigation targets for Annex I Parties, the Kyoto Protocol includes a number of important features. First, article 3.3 allows Annex I Parties to account for net changes of GHGs in their land-use change and forestry sector in meeting their mitigation targets. As noted in chapter 2, the related 'Australia clause'

\(^{45}\) Kyoto Protocol art 3.1.
\(^{46}\) Ibid annex B.
\(^{48}\) Article 25.1 Kyoto Protocol specifies that the 'Protocol shall enter into force on the ninety first day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession'.
(article 3.7) also enables land clearing emissions to be included in several Parties' 1990 baselines, which in particular made Australia's emissions reduction task considerably easier in the first commitment period. The Protocol also established so-called 'flexibility' or 'market mechanisms' to allow Annex I Parties to meet their obligations in a more cost-effective manner. Essentially, these mechanisms allow Annex I Parties to purchase emission reduction credits from other Parties in which GHG abatement is cheaper. The mechanisms include international emissions trading, the Clean Development Mechanism (CDM) and Joint Implementation (see further chapter 7). The Protocol also extended the regulation of GHGs beyond carbon dioxide, also including methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. At COP 13/CMP 3 in Bali (December 2007), Kyoto Parties also officially launched an Adaptation Fund, funded by a 2 per cent levy on the CDM, to help fund adaptation in developing countries.

3 UNFCCC and Kyoto Protocol: Institutions and Processes

It is helpful to briefly outline the basic institutions and processes under which the climate negotiations are conducted. A number of institutions, bodies and processes were created by or under the UNFCCC and later the Kyoto Protocol. Together, these create a procedural framework for Parties to conduct their work in relation to the treaties, including the negotiation of new agreements. Most importantly, these include the COP under the UNFCCC, and the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP). These function as the supreme decision-making bodies of the Convention and Protocol, respectively.

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52 Kyoto Protocol art 17.
53 Ibid art 12.
54 Ibid art 6.
55 Ibid annex A.
58 UNFCCC art 7.
59 Kyoto Protocol art 13. The CMP is also commonly abbreviated as COP/MOP.
COPs and CMPs are held annually\(^{60}\) and provide the focal point for the Parties’ negotiations under the Convention and Protocol. Parties to the Convention that are not Parties to the Protocol (notably the US) may participate as observers in the CMP, but cannot participate in decision-making.\(^{61}\) The Rudd government was involved in three COPs/CMPs during the period of review, namely: COP 1/CMP 3 (the Bali Climate Change Conference, December 2007); COP 14/CMP 4 (the Poznan Climate Change Conference, December 2008); and COP 15/CMP 5 (the Copenhagen Climate Change Conference, December 2009). The emphasis of this thesis is on the Rudd government’s engagement with the negotiations from the post-Bali period to Copenhagen, the major period of activity for the government. Although negotiations continued post-Copenhagen, Rudd was deposed as Prime Minister in June 2010 by Julia Gillard, and little progress was made in the negotiations after Copenhagen until COP 16/CMP 6 in Cancun (December 2010).

An important function of the COP and CMP is to make ‘decisions’ necessary for the UNFCCC and Protocols’ effective implementation.\(^{62}\) These decisions are highly important to the ICCL regime. The Marrakesh Accords, for example, established the detailed implementation rules for the Protocol, while the BAP established the negotiating terms to guide discussions on the post-2012 agreement. The UNFCCC Secretariat regards decisions as being binding upon the Parties,\(^{63}\) however, the precise legal status of decisions is in fact uncertain under international law.\(^{64}\) The UNFCCC itself does not explicitly authorise binding law-making by the COP.\(^{65}\) Rather, the establishment of new substantive obligations requires an amendment to the

\(^{60}\) UNFCCC art 7.4; UNFCCC, Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, UN Doc FCCC/CP/1996/2 (22 May 1996) rule 4.2; Kyoto Protocol art 13.6.

\(^{61}\) Kyoto Protocol art 13.2.

\(^{62}\) UNFCCC art 7.2; Kyoto Protocol art 13.4.

\(^{63}\) See, eg, UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 28.

\(^{64}\) See Jutta Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 Leiden Journal of International Law 1, 32-33; Lavanya Rajamani, ‘The Copenhagen Agreed Outcome: Form, Shape and Influence’ (Policy Brief, Centre for Policy Research, 2009) 5. Professor Rajamani suggests that the precise legal status of a decision depends on the enabling clause, the language and content of the decision, and Parties’ behaviour and legal expectations: 5.

\(^{65}\) The Kyoto Protocol does, however, authorise binding law-making in limited areas, namely, in relation to reporting and accounting obligations under articles 7.1 and 7.4: Rajamani, ‘The Copenhagen Agreed Outcome: Form, Shape and Influence’, above n 64, 5; Brunnée, above n 64, 32.
Convention or the adoption of a protocol. Notwithstanding this, the COP often adopts prescriptive language in its decisions (‘shall’), and Parties themselves generally appear to treat decisions as binding.

Regardless of their precise legal status, decisions appear to carry significant normative weight for the Parties. Parties are, for example, expected to comply with the legal mandates established by decisions such as the BAP. The terms of the BAP and other COP or CMP decisions are thus also part of the ICCL framework which a GIC would generally be expected to respect (regardless of whether they technically represent ‘hard’ or ‘soft’ law). It should be noted that decision-making by the COP is highly cumbersome, usually requiring the agreement of all Parties (or at least the absence of a formal objection), except on simple matters of procedure.

The COP also produces other outcomes such as political declarations, conclusions, or resolutions which are not intended to be binding. The main outcome of COP 15, the

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66 UNFCCC arts 15, 17.
67 Rajamani, ‘The Copenhagen Agreed Outcome: Form, Shape and Influence’, above n 64, 5; Brunnée, above n 64, 32.
69 Article 7.3 UNFCCC required the COP to establish its own rules of procedure, which could include specified majorities for the adoption of particular decisions. However, Parties could not agree upon draft rule 42 concerning voting (which included a proposal for decisions to be taken by a two-thirds majority if consensus could not be reached): see UNFCCC, Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, UN Doc FCCC/CP/1996/2 (22 May 1996). The rules of procedure have thus never been formally adopted. Instead, Parties apply the draft rules at each session, with the exception of rule 42.
70 An exception occurred to this at COP 16/CMP 6, with Parties adopting COP decisions despite Bolivia’s formal objection: see International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(498) (29 November – 11 December 2010) 2. While this may mean that the decisions were not formally adopted in a valid manner, in practice Parties (other than Bolivia) have acted on the basis that the decisions were validly adopted: see, Climate Focus, ‘CP16/CMP6: The Cancun Agreements’ (Briefing Note, January 2011) 2-3 <http://climatefocus.com/documents/files/Cancun%20Briefing%20Jan%202011%20v.1.0.pdf>.
72 Ibid 28.
Copenhagen Accord, for example, was not formally adopted by the Parties and thus only enjoyed the status of a political declaration.73

The COP and CMP are assisted by several subsidiary, expert and ad hoc bodies. The two major technical bodies are the Subsidiary Body for Scientific and Technological Advice (SBSTA)74 and the Subsidiary Body for Implementation (SBI).75 Important bodies under the Protocol include the CDM Executive Board,76 the Article 6 Supervisory Committee77 and the Compliance Committee.78

The COP and CMP also establish other ad hoc bodies as necessary.79 Much of the post-2012 negotiations took place in two ad hoc working groups, namely the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) and the Ad Hoc Working Group to Consider Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) (see below). While climate negotiations often occur in these formal settings (such as COP 'plenary' sessions, and 'contact groups'), much of the negotiations take place in 'informals' behind closed doors.80

74 UNFCCC art 9.
79 For example, contact groups, drafting groups and Committees of the Whole: UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 37. The COP has also established several specialist bodies or 'expert groups' to undertake technical work on specific topics, including the Expert Group on Technology Transfer (decision 4/CP.7); the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (decision 8/CP.5); and the Least Developed Countries Expert Group (decision 29/CP.7).
80 See, eg, Greg Picker and Fergus Green, 'Comprehending Copenhagen: A Guide to the International Climate Change Negotiations' (Policy Report, Lowy Institute for International Policy, November 2009) 23. At times, these informal discussions take place in meetings of 'Friends of the Chair' (for example, of the Chair of the AWG-LCA) or 'Friends of the President' (President of the COP). Friends of the Chair or President groups will involve a representative group of nations brought together by the Chair of an AWG to try to resolve disputed issues between the Parties: 24.
Finally, it should be noted that while the UNFCCC provides the focal point for the international community's effort to regulate GHGs, climate negotiations and activities take place within a broader global political, legal and institutional context.\textsuperscript{81} The COP/CMP and subsidiary bodies cooperate with a range of international organisations such as the United Nations; IPCC; other multilateral environmental treaty regimes such as the Convention on Biological Diversity;\textsuperscript{82} the World Bank and regional development banks; the International Civil Aviation Organization and the International Maritime Organization, among others.\textsuperscript{83} Negotiations also occur in other forums that can feed into the official climate negotiations. For example, in the lead up to COP 15/CMP 5, informal negotiations regarding a post-2012 agreement were held, inter alia, by the Greenland Dialogue, and various global bodies such as the Major Economies' Forum on Energy and Climate Change (originally the Major Emitters Forum), the Group of Eight, the Group of Twenty, the Asia-Pacific Economic Cooperation Leaders' Meeting and the Commonwealth Heads of Government Meeting.\textsuperscript{84} While these meetings can provide important input to the UNFCCC process,\textsuperscript{85} this thesis is focused on the official climate negotiations, which are necessarily the focal point of negotiations for the ICCL regime.

4 Party Groupings

It is important to recognise that UNFCCC and Kyoto Protocol Parties often belong, either formally or informally, to particular groups which share common interests and negotiate for similar treaty outcomes. The UNFCCC, in various articles, recognises certain distinctions between Parties, the largest of which is the broad category of 'developed' and 'developing' countries. Broadly, although not absolutely, the

\textsuperscript{81} Keohane and Victor describe the complex array of regulatory regimes for climate change as a 'regime complex': see Robert O Keohane and David G Victor, 'The Regime Complex for Climate Change' (Discussion Paper No 10-33, Harvard Project on International Climate Agreements, 2010) 2.

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\textsuperscript{83} See UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 52.


\textsuperscript{85} The G8 forum, for example, was important in establishing the agreement of the major emitters to a 2°C long-term target: G8, \textit{Leaders Declaration: Responsible Leadership for a Sustainable Future}, G8 Summit, L'Aquila, 8 July 2009, [65] <http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final%2c0.pdf>. See discussion of the 2°C target in chapter 5.
developed and developing country groups correlate to the Annex I and non-Annex I Party groups.\textsuperscript{86} Within the Annex I group, the former Soviet Union 'Economies in Transition' are granted a 'certain degree of flexibility' in meeting their mitigation commitments under article 4.2.\textsuperscript{87} Only the richest developed countries (those listed in Annex II) have financial obligations to non-Annex I Parties.\textsuperscript{88} As noted, the UNFCCC also differentiates between developing countries, chiefly by recognising that some developing countries are particularly vulnerable, such as the low-lying island countries\textsuperscript{89} and the LDCs.\textsuperscript{90}

Parties have also established informal political groups or blocs to better advance their common interests.\textsuperscript{91} Essentially all Parties to the climate negotiations seek to increase their influence by joining negotiating coalitions, some more formal than others. During the post-2012 negotiations, Australia was a member of the Umbrella Group, which evolved from the JUSSCANNZ group (Japan, the US, Switzerland, Canada, Australia, Norway and New Zealand). The Group discusses issues together, but members negotiate independently.\textsuperscript{92} At COP 15, the Umbrella Group's membership included Australia, Canada, Iceland, Japan, Kazakhstan, New Zealand, Norway, Ukraine, and the

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\textsuperscript{86} Note that some non-Annex I Parties are regarded by other Parties to be 'developed' and thus have been pressured to join Annex I: see chapter 6.
\textsuperscript{87} UNFCCC art 4.6. See list of Annex I Parties and EITs, above n 32.
\textsuperscript{88} See list of Annex II Parties, above n 35.
\textsuperscript{89} UNFCCC art 4.8. Parties considered to be particularly vulnerable are: small island countries; countries with low-lying coastal areas; countries with arid and semi-arid areas, forested areas and areas liable to forest decay; countries with areas prone to natural disasters, drought and desertification; countries with areas of high urban atmospheric pollution; countries with fragile ecosystems, including mountainous ecosystems; countries with economies highly dependent on income generated from fossil fuel industries and associated energy-intensive industries (also recognised by art 4.10); and land-locked and transit countries.
\textsuperscript{90} UNFCCC art 4.9.
\textsuperscript{91} These groups operate according to their own rules, but generally speaking will meet to exchange information, share information on common issues, or develop common negotiating positions: UNFCCC, United Nations Framework Convention on Climate Change: Handbook, above n 3, 49. See also UNEP, Guide for Negotiators of Multilateral Environmental Agreements (Environment Canada and University of Joensuu, 2007) 24-28.
\textsuperscript{92} Picker and Green, 'Comprehending Copenhagen: A Guide to the International Climate Change Negotiations', above n 80, A-i.
\end{flushleft}
US. The largest developed country group is the EU-27, which negotiates as a single entity.

The main developing country bloc has long been the 'Group of 77 and China' (G77 and China), presently comprising 132 developing countries, representing the global 'South'. As developing country interests do not always align, it is common for developing countries to belong to more than one political group. Other key groups include the LDCs (48 members), the Alliance of Small Island States (AOSIS) (39 members, most of which are Small Island Developing States) and the African Group (53 members). Members of these groups are typically highly vulnerable to climate change. BASIC (Brazil, South Africa, India and China) is the most recently established group, being instigated by China in the lead up to COP 15. The group, which coordinated their position closely during COP 15, represents four of the most influential major emerging economies which all have rapidly growing GHG levels.

Active non-Annex I country groups also include ALBA (the Bolivarian Alliance for the Peoples of our Americas, a group of Latin American countries); the Rainforest Coalition (40 developing countries primarily from the Amazon, Congo Basin and Southeast Asia); the Organization of Petroleum Exporting Countries (OPEC, 12 oil producing countries); and Central Asia, Caucasus, Albania and Moldova (CACAM, several non-G77 Asian, Central and Eastern European non-Annex I countries).

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94 G77, The Member States of the Group of 77 <http://www.g77.org/doc/members.html>.
100 Of the eight members, Venezuela, Bolivia, Ecuador, Cuba and Nicaragua coordinate their climate change positions: ibid 4.
103 Ibid 50-51. See also Catherine Potvin and Andrew Bovarnick, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries: Key Actors, Negotiations and Actions' (2008) 3 Carbon and Climate Law Review 264, 265.
Uniquely, the Environmental Integrity Group comprises both an Annex I country (Switzerland) and non-Annex I countries (the Republic of Korea and Mexico).104

B The 'Bali Roadmap': The Negotiating Process for a Post-2012 Agreement

Parties to the Convention and Kyoto Protocol agreed at COP 13/CMP 3 in Bali (December 2007), to launch the 'Bali Roadmap', a two-track negotiating process to establish new mitigation commitments for developed countries, and importantly, this time also developing countries.105 The objective was to complete negotiations by COP 15/CMP 5 at the Copenhagen Climate Change Conference (December 2009).106 Parties were unable to meet this deadline, with UNFCCC Parties only agreeing to the non-binding Copenhagen Accord.107 Nonetheless, it will be seen in later chapters that the period from COP 13 to COP 15 was highly significant for the evolution of the ICCL regime with the Accord representing a major stepping stone on the path to a more comprehensive, binding agreement.

The first track of the negotiations mandated by the Bali Roadmap, the 'Bali Action Plan' (BAP), established a new ad hoc body, the AWG-LCA, to conduct negotiations to better implement the Convention, officially: 'to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012.'108 In the BAP, Parties recognised the findings of the IPCC’s Fourth

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104 Picker and Green, above n 80, A-i. Korea and Mexico are members of the OECD and are thus ineligible for the G77.
Assessment Report,\textsuperscript{109} that warming of the climate system was now 'unequivocal', and that any delay in reducing emissions would significantly constrain opportunities to achieve lower GHG stabilisation levels while increasing the risk of more severe climate change impacts.\textsuperscript{110} Parties also recognised that 'deep cuts' in global emissions were required to achieve the ultimate objective of the Convention and emphasised the 'urgency' of addressing climate change.\textsuperscript{111} Notably, the BAP did not prejudge the legal outcome of the negotiations, only calling for an 'agreed outcome'.\textsuperscript{112} Therefore, it was possible that the agreed outcome could take the form of a COP/CMP decision, a new Protocol, an extension of Kyoto, or some other form or combination thereof.

The Parties agreed to address several important topics in their negotiations. These included, among others:

- A 'shared vision for long-term cooperative action, including a long-term global goal for emission reductions, to achieve the ultimate objective of the Convention',\textsuperscript{113}
- 'Enhanced national/international action on mitigation of climate change',\textsuperscript{114} including consideration of:
  - 'nationally appropriate mitigation commitments or actions' by developed countries,\textsuperscript{115}
  - 'nationally appropriate mitigation actions' by developing countries;\textsuperscript{116}
  - 'policy approaches and positive incentives to support reducing emissions from deforestation and forest degradation in developing countries' (so called 'REDD'), as well as 'conservation, sustainable management of forests, and enhancement of carbon stocks' (so called 'REDD+').\textsuperscript{117}

\textsuperscript{110} COP 13 Report, UN Doc FCCC/CP/2007/6/Add.1, decision 1/CP.13, chapeau.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid [1].
\textsuperscript{113} Ibid [1(a)].
\textsuperscript{114} Ibid [1(b)].
\textsuperscript{115} Ibid [1(b)(i)].
\textsuperscript{116} Ibid [1(b)(ii)].
\textsuperscript{117} Ibid [1(b)(iii)].
The second track of the Bali Roadmap, under the AWG-KP, involved a continuation of negotiations first initiated at CMP 1, Montreal, to consider further mitigation commitments by Annex I Parties to the Protocol beyond the first commitment period.\textsuperscript{121} The AWG-KP's 'conclusions' outlined a detailed program of work leading up to CMP 5 in Copenhagen, primarily including consideration of the issues outlined at AWG-KP 2 in Nairobi (2006). These included, among others:

- analysis of the mitigation potentials and range of emission reduction objectives of Annex I Parties;
- analysis of the possible means to achieve mitigation objectives, such as emissions trading, the CDM, LULUCF; and
- consideration of further commitments by Annex I Parties, including the scale of emission reductions to be achieved in aggregate and individually.\textsuperscript{122}

As explained in the introduction to this thesis, the focus of this study is on the mitigation aspect of the Parties' negotiating mandate.

\textsuperscript{118} Ibid [1(c)].
\textsuperscript{119} Ibid [1(d)].
\textsuperscript{120} Ibid [1(e)].
\textsuperscript{121} Report of AWG-KP 4 (Resumed Session), UN Doc FCCC/KP/AWG/2007/5, annex I. Parties agreed at CMP 1, 2005, to initiate a process to consider further commitments for Annex I Parties beyond 2012 in accordance with article 3.9 of the Kyoto Protocol: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum (Part 2, Vol I), UN Doc FCCC/KP/CMP/2005/8/Add.1 (30 March 2006), decision 1/CMP.1. The AWG-KP was originally referred to as the 'AWG'. The AWG agreed to aim to complete its work 'as early as possible' and in time to ensure that there was no gap between the first and second commitment periods: [3].
As of October 2013, several key developments had occurred since COP 15, including the adoption of a second commitment period for the Protocol by Kyoto Parties. UNFCCC Parties had yet to adopt a broader post-2012 agreement as envisaged by the Bali Roadmap, although UNFCCC Parties had agreed to the new aim of establishing such an agreement, with binding commitments for both developed and developing countries, by 2015.

C GIC and Broader International Law

It should be noted that the ICCL regime is not the only potential source of legal obligation or guidance for UNFCCC and Kyoto Parties when conducting climate negotiations. Generally speaking, international law grants states very broad treaty-making powers, as does Australia’s Constitution in respect of Australia’s national government. The capacity to enter into treaties is a basic right of sovereign states, and states have been reluctant to impose rules that might restrict their treaty-making powers. However, treaty-making powers are not absolute. A number of legal requirements establish broad parameters for treaty making. These are only mentioned here in brief, as the research for this thesis did not find any evidence that compliance with them was at issue.

123 Kyoto Parties agreed at CMP 8, Doha, December 2012, to the Doha Amendment, establishing a second commitment period for the Protocol from 2013-2020. Under the Amendment, Annex I Parties agreed to reduce their collective GHG emissions by at least 18 per cent below 1990 levels during this period, as well as to new individual targets: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Eighth Session: Addendum (Part 2), UN Doc FCCC/KP/CMP/2012/13/Add.1 (28 February 2012), decision 1/CMP.8, [1, 4], annex I. As of October 2013, the amendment was yet to enter into force: UNFCCC, Doha Amendment <http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php>. The decision to adopt a second commitment period was made earlier at CMP 7, Durban: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Seventh Session: Addendum (Part 2), UN Doc FCCC/KP/CMP/2011/10/Add.1 (15 March 2012), decision 1/CMP.7, [1, 3].

124 This commitment was made at COP 17, Durban, December 2011: UNFCCC, Report of the Conference of the Parties on its Seventeenth Session: Addendum (Part 2), UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012), decision 1/CP.17, [4].


127 Indeed, states consistently reinforce the importance of sovereignty in treaty-making, as evidenced, for example, by the UNFCCC preamble, which refers to ‘the principle of sovereignty of [s]tates in international cooperation to address climate change’.
First, a treaty negotiated in a fraudulent, corrupt or coercive fashion would be invalid, as clearly recognised by the 1969 Vienna Convention on the Law of Treaties (VCLT). Second, a treaty which conflicts with a norm of *jus cogens*, that is, a fundamental or peremptory norm of international law, will be void. Third, limitations may arise if a treaty permits the making of reservations as reservations may not, for example, conflict with a treaty’s object and purpose. This latter issue is yet to arise in the climate context as the UNFCCC and Kyoto Protocol both disallow the making of reservations.

Fourth, international law may impose a general duty to cooperate on states. The duty of cooperation is regarded by many scholars as a binding principle of customary international law on environmental matters, although its exact requirements are unclear. This appears to be a fairly minimal obligation, however, which, as will be seen, was easily exceeded by the Rudd government’s active and generally cooperative approach to the climate negotiations.

128 VCLT arts 49, 50, 51, 52.
129 Ibid art 53. A treaty will also become void if a new peremptory norm emerges to which that treaty is in conflict: art 64. Of relevance to this thesis, the International Law Commission’s *Draft Articles on State Responsibility* (1980) – which some commentators believe list the major *jus cogens* norms – refers to ‘a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’: art 19(3)(d). However, the *jus cogens* status of a such a norm, generally prohibiting or preventing environmental damage that threatens the international community as a whole, is yet to be widely accepted: see, eg, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Session, UN Doc A/CN.4/L.682 (13 April 2006) 188-89 (‘*Fragmentation of International Law’). See also Eva M Kornicker UhIlmann, ‘State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998) 11 *Georgetown International Environmental Law Review* 101, 135.
130 VCLT art 19.
131 UNFCCC art 24; Kyoto Protocol art 26.
Fifth, Parties to a treaty may have overlapping and coexisting legal obligations under a variety of treaty regimes, the implications of which can be quite complex. Rather than developing one unified body of international law, states have developed a range of 'self-contained regimes', 134 for example, climate change and international human rights law. States have not made clear how obligations under different regimes interact. 135 However, states should be mindful that the subject matter of a new treaty should be consistent with other international norms, unless the new regime is seeking to supersede rules under another regime. 136 Notably the UNFCCC Preamble itself refers to a range of legal principles and instruments which the Parties regard as relevant to that treaty. 137

It is beyond the scope of this thesis to examine whether the Rudd government’s negotiating positions were consistent with all relevant aspects of international law, for example, its general obligation to protect human rights under various treaties, 138 or emerging areas of law such as the 'right to a healthy environment' 139 and the rights of

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134 See Fragmentation of International Law, UN Doc A/CN.4/L.682 (13 April 2006), 65.
135 According to the rule of pacta sunt servanda, treaties are binding on states Parties and must be performed in good faith: VCLT art 26. This means that prima facie a state must comply with its obligations under all treaties. Although see discussion of lex specialis in Fragmentation of International Law, UN Doc A/CN.4/L.682 (13 April 2006), 34-64.
136 The rule of lex specialis suggests that specific rules will displace more general obligations: see Fragmentation of International Law, UN Doc A/CN.4/L.682 (13 April 2006), 34-35.
137 The Preamble ‘recalls’ a range of customary law norms, treaties and soft law instruments that are relevant to the climate change issue including, for example, the Vienna Convention for the Protection of the Ozone Layer; the Montréal Protocol on Substances that Deplete the Ozone Layer; the 1972 Declaration of the United Nations Conference on the Human Environment (‘Stockholm Declaration’); the Ministerial Declaration of the Second World Climate Conference; and several UN General Assembly resolutions.
other species.\textsuperscript{140} However, some overlapping areas of international law were directly raised by the Parties and thus are commented upon in later chapters (see chapters 5 and 8).

Finally, it should be noted that in conducting their negotiations, Parties ought to interpret their existing obligations under the UNFCCC and subsequent agreements consistently with standard approaches to treaty interpretation, the chief principles of which are outlined by the VCLT. The primary rule of interpretation is that: 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.\textsuperscript{141}

**D Implications for GIC**

Chapter 1 highlighted that there are many characteristics or attributes of state behaviour that have been associated with GIC, both by the main proponent of the concept, Gareth Evans, and various scholars. This thesis accepts the broad relevance of the attributes highlighted in chapter 1 and that many are potentially useful when assessing the performance of a state in relation to the development of new international law (the primary focus of this thesis). For example, whether a state has displayed attributes such as activism, restraint on the pursuit of narrow self-interest, and a commitment to 'purposes beyond ourselves', all appear to be reasonable, and ethically appealing, means of distinguishing 'good' from lesser forms of conduct in an international treaty negotiation.

However, while these general attributes of GIC receive consideration in subsequent chapters, the thesis emphasises that assessing GIC is always ultimately context dependent. This thesis argues that given that a clear legal framework existed to guide the post-2012 climate negotiations, in this context, the dominant duty of an aspiring GIC was to act consistently with this framework. For example, a GIC would be expected to put forward or support proposals that were guided by principles such as common


\textsuperscript{141} VCLT art 31.1. See further arts 31.2(a)(b), 31.3(a)-(c) and 32(a)(b)).
but differentiated responsibility and respective capabilities or the precautionary principle, as relevant to the issue.

There may be instances where acting consistently with an existing legal framework in negotiating a new treaty would not necessarily be a useful means of assessing GIC. This may be because established rules or principles may not enjoy widespread support among the international community, either because they are regarded as unethical, unfit for purpose, outdated or inadequate in some other way. Similarly, if Parties are negotiating a treaty on an emerging area of law, established law is unlikely to incorporate the types of ethical concerns that are relevant to that field. Existing law may also be of a more technical nature, and thus provide little guidance regarding what constitutes ethical conduct.

In this instance, however, there are strong reasons to argue that in negotiating the post-2012 agreement, complying with or respecting the established principles and provisions of ICCL (especially the UNFCCC) was essential for states who wished to distinguish themselves as GICs. This is because the international community largely settled which ethical principles ought to guide its activities on climate change in the terms of the UNFCCC – stipulating, for example, that Parties should act consistently with the notion of common but differentiated responsibilities and respective capabilities. Further, the terms of the UNFCCC, including those which reflect ethical concerns, still enjoy the widespread support of the international community, with the treaty being ratified by over 190 Parties and being re-endorsed on a regular basis in subsequent instruments such as the Kyoto Protocol and BAP. While the ethical principles that ought to govern behaviour on climate change are always open to debate, and indeed, continue to evolve (as will be seen in the later examination of Parties' key negotiating positions) the ICCL regime clearly provided a solid ethical (and legal) guide as to how 'good' states would behave in negotiating a post-2012 agreement.

This thesis also focuses on compliance with the existing legal framework when assessing the Rudd government's engagement with the post-2012 negotiations, as it was seen in chapter 1 that compliance with international law is generally seen to be an
essential quality of GIC. Of course, the expectation that international law will be complied with is stronger where such law has a binding character. Yet it is clear that unless Parties who have endorsed the UNFCCC (and related instruments) respect the terms of their agreements – even those elements which are non-binding – then the legitimacy of the ICCL regime, and its ability to help address climate change, will be diminished. This in turn can only serve to erode the value and moral authority of international law, and its role in helping to address global problems. Moreover, it should be remembered that the Vienna Convention on the Law of Treaties stipulates that all treaties are binding upon states Parties and must be performed in good faith (the rule of *pacta sunt servanda*).¹⁴² This rule logically only applies to the elements of treaties which establish hard rather than soft obligations. Nonetheless, it highlights that even non-binding principles and provisions contained in treaties possess some kind of legal character, and arguably a particular moral authority, precisely because they are included in a treaty. Similarly, non-binding principles and provisions contained in 'decisions' such as the BAP possess a type of legal character, and arguably a particular moral authority, precisely because they are made under a treaty.

Some may of course regard a state's failure to implement its soft law commitments as a relatively minor 'breach' of international law (or not a breach at all) and one that should not disqualify a state from being regarded as a GIC (a view implied in Pert's proposition that minor or technical violations of international law may not suffice to diminish a state's standing as a GIC – see chapter 1).¹⁴³ However, for reasons explained above, this thesis would reject such a view, at least in relation to the more crucial soft law elements of the ICCL regime, such as the article 3 UNFCCC principles. Notably, the notion of leadership (a key attribute of GIC according to Evans), also suggests that a GIC would generally seek to adhere to all the terms of its treaty commitments (and related instruments such as decisions), even those that are technically non-binding.

¹⁴² VCLT art 26.
¹⁴³ Notwithstanding that many of the legal provisions described in this chapter, and later in the thesis, are included in a treaty (a binding instrument of international law), much of the UNFCCC's content clearly has a non-binding or 'soft' rather than 'hard' character. As noted by Shelton, the line between hard law and soft law (or 'law' and 'non-law') in international law is often blurred, with many treaty mechanisms, especially in fields such as international environmental law, including 'soft' obligations: see Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 10-11.
Finally it should be noted that this thesis prefers to focus on the Rudd government's compliance with the relevant legal framework in negotiating a new agreement, rather than the general attributes of GIC associated with Evans, as it regards the principles and provisions of the ICCL regime (and broader international law, where relevant) as possessing greater moral authority or importance than principles or norms which have not been similarly endorsed by the international community in instruments of international law. This means, for example, that this thesis places more emphasis on whether or not a Party has acted in accordance with its common but differentiated responsibilities and respective capabilities in reducing GHG emissions, than whether it has acted consistently with non-legal principles associated with GIC such as 'purposes beyond ourselves'.

Interestingly, the notion of leadership (which was strongly associated with GIC by Evans) is specifically endorsed by the UNFCCC in relation to the activities of developed countries. This means that the notion of leadership is both a general attribute of GIC and a legal principle. For this author its express inclusion in the UNFCCC means that it has a higher importance, in the context of the ICCL regime, than other general GIC attributes which are not explicitly referred to by the UNFCCC or related instruments.

At this point it should be noted that while this thesis may appear to be chiefly concerned with whether the Rudd government made a positive contribution to the development of new ICCL (the first phase of the international legal process identified in chapter 1), it can be seen from the above discussion that its primary concern is in fact whether it engaged in this phase in a manner that was consistent with the established legal principles and provisions of the ICCL regime (and thus heavily concerns the third phase of the international legal process – compliance – described in chapter 1). However, given that much of this legal framework did not represent binding law, it would be inaccurate to suggest that this thesis generally aims to assess whether the government complied with its legal obligations in developing new ICCL. Rather, its focus is generally on whether Australia complied with various legal expectations (although on a small number of occasions, questions regarding the government's compliance with binding, or potentially binding, norms of international law, also arise).
Note also that chapter 7, which chiefly concerns the Rudd government's attempt to legislate an emissions trading scheme, is conceptually more concerned with the compliance, rather than development, phase of international law. However, in this case, the government's policy approach also had ramifications for the shape of a post-2012 agreement, and thus also conceptually relates to the development phase.

While choosing to focus on the legal aspects of the Rudd government's engagement with the climate negotiations, this thesis recognises that GIC is a multi-faceted concept and considers that it would be overly narrow to ignore the numerous general attributes associated with GIC by Evans in its analysis. Therefore, while subsequent chapters of the thesis primarily examine the Rudd government’s performance as an international citizen through the lens of the relevant legal framework, each chapter also comments on other GIC attributes highlighted in chapter 1 (that is, in addition to the attributes of compliance with international law and leadership). This ensures that the thesis provides a holistic analysis of the GIC question. Because of the large number of attributes associated with GIC, individual chapters do not mechanically assess the Rudd government's activities against every GIC characteristic identified in chapter 1, instead restricting comment to those that appeared to be particularly relevant to the subject matter. However, the conclusion to the thesis also comments more broadly on the relevance of the various GIC attributes highlighted in chapter 1, to ensure that these receive due consideration.

To conclude this chapter, this thesis contends that the primary obligation of a GIC in negotiating the post-2012 agreement was to comply with or respect the legal framework provided by the ICCL regime (and, as relevant, broader international law), notwithstanding the fact that much of this framework possessed a non-binding character. Because of the varied nature of issues assessed by this thesis, each chapter adopts a slightly different structure in assessing whether the Rudd government met the standard of GIC, especially chapter 7 due to its focus on domestic emission reduction measures. However, in broad terms, each chapter takes the following approach.
First, each chapter outlines the basic legal and (where necessary) policy background to the issue. Second, the negotiating positions of Australia and other Parties are examined and the evidence supporting their approaches assessed. This helps to elucidate the issues that Parties saw as important, the legal principles and provisions that were particularly important for a GIC to respect, and the broader factual matrix that was relevant to assessing whether the Rudd government acted consistently with the range of GIC attributes articulated by Evans. Third, each chapter considers the implications of the Rudd government’s approach for its credentials as a GIC, primarily by assessing its compliance with the relevant legal framework. This is supplemented by discussion of whether its activities were consistent with other GIC attributes identified to have relevance to the issue, based on the subject matter of each chapter. Comment on whether the government’s approach made a positive contribution to the development of ICCL (which chapter 1 identified as an overarching concern in relation to the development phase of international law) is deferred until the conclusion to the thesis, allowing the government’s activities to be considered as a whole in answering this question.
CHAPTER 5. ESTABLISHING A LONG-TERM TARGET TO AVOID DANGEROUS CLIMATE CHANGE

'Ambitious global emission goals are in Australia’s national interest'. *Australia, Submission to the UNFCCC, 2009.*

This thesis now turns to examining the Rudd government’s engagement with five key topics in the post-2012 climate negotiations relating to mitigation. The topics selected were all judged to be particularly crucial to assessing the Rudd government’s performance as a 'good international citizen' (GIC) on the mitigation issue. This chapter assesses the first of these topics, namely, the Rudd government's position on a long-term goal for reducing global greenhouse gas (GHG) emissions.

As explained in chapter 4, this thesis argues that in order for the Rudd government to meet the standard of GIC in its engagement with the post-2012 climate negotiations, it was particularly important that it put forward or support proposals that complied with or respected relevant terms of the international climate change law (ICCL) regime (and where applicable, broader international law). This chapter therefore begins its analysis with a brief overview of the key ICCL principles and provisions underpinning the negotiations on this issue. It then provides a detailed examination of Australia and other Parties’ negotiating positions (including the legal and ethical norms and principles they believed were relevant to this issue), as well as the evidence supporting their preferred approaches. The chapter then provides an assessment of the government's GIC credentials. The analysis is primarily concerned with whether the Rudd government’s position was consistent with the relevant legal framework, especially as outlined by the ICCL regime. However, consideration is also given to whether the government's approach was consistent with a range of broader GIC

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attributes (identified in chapter 1) which appeared to have particular relevance to this issue.

A Legal Background

As outlined in chapter 4, the post-2012 climate negotiations were conducted under two negotiating 'tracks', namely, the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) and the Ad Hoc Working Group to Consider Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). Although relevant to both AWGs, negotiating a long-term mitigation goal for a post-2012 agreement was primarily the task of the AWG-LCA, as mandated by the Bali Action Plan (BAP).²

The BAP, an important part of the legal framework underpinning the negotiations, called for Parties to the United Nations Framework Convention on Climate Change (UNFCCC)³ to consider a long-term global mitigation goal as part of their discussions on a 'shared vision for long-term cooperative action'.⁴ Specifically, the BAP called upon Parties to address 'a long-term global goal for emission reductions, to achieve the ultimate objective of the Convention, in accordance with the provisions and principles of the Convention'.⁵

The 'ultimate objective' of the UNFCCC, to which the BAP referred, is provided in article 2 UNFCCC, namely: the 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.⁶ This is often simply referred to as the objective of avoiding 'dangerous climate change'. The Convention does not quantitatively establish what constitutes 'dangerous' – as opposed to 'safe' or 'moderate' – interference with the climate system. The only guidance provided is that the atmospheric stabilisation of

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⁴ COP 13 Report, UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008), decision 1/CP.13, [1(a)].
⁵ Ibid. Emphasis added.
⁶ The 'climate system' is defined as 'the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions': ibid art 1.3.
GHGs 'should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change' and to 'ensure that food production is not threatened' (article 2). A potential qualifier is that any timeframe should 'enable economic development to proceed in a sustainable manner'.

It is evident from the above that the central obligation of a GIC regarding these negotiations was to put forward or support proposals that would enable Parties to achieve the objective of avoiding dangerous climate change. Additionally, in proposing targets, a GIC needed to take into account other relevant provisions and principles of the Convention. These are outlined in the overview of Parties' negotiating positions below, rather than in this section, as the relevant provisions and principles were all highlighted in Parties' official submissions on this issue.

**B Key Negotiating Positions: Content and Evidence**

Negotiations on a long-term mitigation goal were initially influenced by the findings of the *Intergovernmental Panel on Climate Change Fourth Assessment Report* (IPCC AR4), released in 2007 in the lead up to the 13th Conference of the Parties (COP 13) in Bali, December 2007. The IPCC did not specifically recommend what was necessary to prevent dangerous climate change (and thus achieve the ultimate objective of the UNFCCC), this being beyond its ambit as a non-prescriptive advisory body. However, the GHG stabilisation scenarios it outlined provided an influential starting point for the post-2012 negotiations. The most ambitious scenario modelled by the IPCC indicated that if global warming was to be limited to 2 to 2.4°C above pre-industrial levels,

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7 'Climate change' is defined by the UNFCCC as a 'change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods': ibid art 1.2.
8 See Core Writing Team, Rajendra K Pachauri and Andy Reisinger (eds), *Climate Change 2007: Synthesis Report* (Intergovernmental Panel on Climate Change, 2008); *COP 13 Report*, UN Doc FCCC/CP/2007/6/Add.1, decision 1/CP.13, chapeau. Parties including the EU sought to directly refer to the AR4's long-term stabilisation scenarios in the BAP but this was opposed by others including the US, Canada, Japan and Russia (arguing that this would be overly prescriptive regarding the final post-2012 outcome). As a compromise, the IPCC's work on stabilisation scenarios was referred to in a footnote: see International Institute for Sustainable Development, *Earth Negotiations Bulletin*, vol 12(354) (3-15 December 2008) 15. Parties to the Kyoto Protocol referenced the AR4's work more directly in its 'conclusions' at CMP 3 with the strong support of the Rudd government: see UNFCCC, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its Resumed Fourth Session*, UN Doc FCCC/KP/AWG/2007/5 (5 February 2008) 5.
atmospheric emissions would need to be stabilised at 445-490 parts per million carbon dioxide-equivalent (ppm CO2-e).\textsuperscript{10} Achieving this scenario would likely require global CO2 emissions to peak by 2015 and be reduced by 50 to 85 per cent by 2050 (below 2000 emission levels).\textsuperscript{11}

Parties widely recognised the importance of establishing a long-term mitigation goal. This included the Rudd government who emphasised that it was central to ‘guiding our collective efforts’.\textsuperscript{12} The negotiations on a long-term mitigation goal chiefly addressed the four metrics adopted by the IPCC, namely: a threshold for global average temperature rise; a GHG stabilisation level; a 2050 emission reduction target; and a peak year for global emissions. The Copenhagen Accord, the key outcome of COP 15,\textsuperscript{13} only reached agreement on the first of these metrics.

1 What is a 'Safe' Threshold for Global Temperature Rise

\textit{a) Party Views}

By the time of COP 15/CMP 5 in Copenhagen (December 2009), more than 100 countries had backed the goal of limiting global temperature rise to no more than 2°C,\textsuperscript{14} the target ultimately endorsed by the Copenhagen Accord.\textsuperscript{15} This included the world’s major GHG emitters and most influential nations, both in the developed and developing world, among them, the United States (US), the European Union (EU), the

\textsuperscript{10} Sujata Gupta et al, ‘Policies, Instruments and Co-operative Arrangements’ in B Metz et al (eds), \textit{Climate Change 2007: Mitigation of Climate Change (Contribution of Working Group III to the Fourth Assessment Report)} (Cambridge University Press, 2007) 776. Equivalent to 350-400 ppm CO2 only and assuming a temporary ‘overshoot’ of emissions. Atmospheric concentrations of CO2 were 379 ppm in 2005. CO2-e levels (including aerosols) were 375 ppm: Core Writing Team, Pachauri and Reisinger, above n 8, 67. GHGs differ in their influence on global warming. CO2-e measures the amount of CO2 emissions that would cause the same degree of warming as a given mix of CO2 and other GHGs: 36.

\textsuperscript{11} Core Writing Team, Pachauri and Reisinger, above n 8, 67. These estimates do not fully account for the potential for carbon feedbacks, or contributions to sea level rise from factors other than thermal expansion – namely, melting ice sheets, glaciers and ice caps.


\textsuperscript{13} UNFCCC, \textit{Report of the Conference of the Parties on its Fifteenth Session: Addendum (Part 2)}, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010), decision 2/CP.15 (‘\textit{COP 15 Report}’).


\textsuperscript{15} \textit{COP 15 Report}, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010), decision 2/CP.15, [1, 2].
BASIC developing countries (Brazil, South Africa, India and China), as well as the Umbrella Group of countries – including Australia.\textsuperscript{16}

The EU, the major proponent of the 2°C goal, first advocated this target as far back as 1996.\textsuperscript{17} The EU’s view was that a 2°C goal was consistent with article 2 of the Convention in that it would avoid ‘dangerous climate change while allowing for sustained economic welfare, safeguarding the environment, ensuring that food production is not threatened and strengthening climate resilience’.\textsuperscript{18} It further argued that the 2°C goal was consistent with ‘the science’ – which most Parties accepted was crucial to decision-making in this area – and the aim of avoiding ‘dangerous climate change impacts in particular for the most vulnerable countries, regions, and people.’\textsuperscript{19} The Rudd government and its Umbrella Group partners held a similar view, also suggesting that the 2°C goal was consistent with ‘the scientific view’.\textsuperscript{20}

Notwithstanding the broad level of support for the 2°C goal, it was controversial with many smaller developing countries who considered themselves to be particularly

\begin{itemize}
  \item \textsuperscript{17} European Community, \textit{Climate Change: Council Conclusions 8518/96} (1996). For an overview of how the 2°C target emerged see, eg, Carlo Jaeger and Julia Jaeger, ‘Three Views of Two Degrees’ (2011) 11 \textit{Regional Environmental Change} 16.
  \item \textsuperscript{18} European Community, ‘A Shared Vision for Long-Term Cooperative Action’, above n 16, 4.
  \item \textsuperscript{19} Ibid 4, 6.
  \item \textsuperscript{20} See Australian High Commission Ottawa, above n 16.
\end{itemize}
vulnerable to the impacts of climate change.\textsuperscript{21} In particular, this included members of the Alliance of Small Island States (AOSIS)\textsuperscript{22} and the Least Developed Countries (LDCs).\textsuperscript{23} AOSIS argued as early as COP 13 in Bali that the 2°C goal was insufficient to protect its members.\textsuperscript{24} It suggested that a range of objectives and principles (both legal and non-legal) ought to guide Parties’ considerations, among them, several of the UNFCCC’s article 3 'principles'; various norms and principles of general international law and international environmental law; and various ethical or harm-based considerations.

Specifically, AOSIS argued that any long-term goal needed to:

- reflect 'the best available scientific assessment';\textsuperscript{25}
- respect the precautionary principle (article 3.3 UNFCCC);\textsuperscript{26}

\textsuperscript{21} Note that early on some major emitting developing countries also rejected the 2°C target for a variety of reasons. China, for example, initially opposed any discussion of a long-term goal until Annex I countries had first agreed to a new collective mitigation target under the Kyoto Protocol: see China, 'China’s Views on Enabling the Full, Effective and Sustained Implementation of the Convention through Long-Term Cooperative Action Now, Up to and Beyond 2012' in UNFCCC, \textit{Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan}, UN Doc FCCC/AWGLCA/2008/MISC.5 (28 September 2008) 33, 33; International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(394) (12 December 2008) 2.

\textsuperscript{22} Member states: Antigua and Barbuda; Bahamas; Barbados; Belize; Cape Verde; Comoros; Cook Islands; Cuba; Dominica; Dominican Republic; Fiji; Federated States of Micronesia; Grenada; Guinea-Bissau; Guyana; Haiti; Jamaica; Kiribati; Maldives; Marshall Islands; Mauritius; Nauru; Niue; Palau; Papua New Guinea; Samoa; Singapore; Seychelles; Sao Tome and Principe; Solomon Islands; St. Kitts and Nevis; St. Lucia; St Vincent and the Grenadines; Suriname; Timor-Leste; Tonga; Trinidad and Tobago; Tuvalu; Vanuatu. Observer states: American Samoa; Netherlands Antilles; Guam; US Virgin Islands: AOSIS, Members <http://aosis.org/members/>.

\textsuperscript{23} These include: Africa (Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, São Tomé and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, Zambia; Asia and the Pacific (Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao People’s Democratic Republic, Maldives, Myanmar, Nepal, Samoa, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu, Yemen; Latin America and the Caribbean (Haiti): UN-OHRLLS, \textit{About LDCs} <http://www.unohrrls.org/en/ldc/25/>.


\textsuperscript{26} Ibid. Article 3.3 UNFCCC states that 'Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.' However, policies and measures should also be ‘cost-effective so as to ensure global benefits at the lowest possible cost’. This principle is widely adopted within international environmental legal instruments, see, eg, \textit{Rio Declaration on Environment and Development} in UN,
• respect the principle of prevention;\textsuperscript{27}
• ensure developing countries' sustainable development (article 3.4 UNFCCC);\textsuperscript{28}
• respect the principle of intergenerational equity – the need to protect the global climate for both present and future generations (art 3.1 UNFCCC);\textsuperscript{29}
• respect the principle of state responsibility – that states have the responsibility not to cause trans-boundary environmental harm;\textsuperscript{30}
• respect the sovereignty and 'right to survival' of all countries\textsuperscript{31} (or the 'right to existence');\textsuperscript{32}


\textsuperscript{28} AOSIS, 'Shared Vision', above n 25, 42. Article 3.4 UNFCCC provides that Parties 'have a right to, and should, promote sustainable development'. The term 'sustainable development' is not defined by the UNFCCC. The most commonly cited definition is that of the 1987 'Brundtland Report', namely: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development, Our Common Future: Report of the World Commission on Environment and Development (1987) ch 2, [1] <http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf>.

\textsuperscript{29} Ibid 42-43. This principle is reflected in the UNFCCC Preamble which recognises that states have 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies' but also 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. The principle is also stated in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. The principle (sometimes described as a norm or rule) is regarded as a binding obligation under customary international law: Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226; Sands, above n 27, 232.

\textsuperscript{30} AOSIS, 'Shared Vision', above n 25, 43.

\textsuperscript{31} Ibid 42-43.

• ensure that critical physical, environmental, social and economic thresholds for
small island developing states (SIDS) and other vulnerable countries were not
breached; and
• avoid further negative climate change impacts on SIDS.

AOSIS argued strongly that the 2°C target failed to address these criteria. It stated that
2°C warming would have 'devastating consequences' for SIDS due to various projected
impacts including 'sea level rise, coral bleaching, coastal erosion, changing
precipitation patterns, increased incidence and re-emergence of climate related
diseases and the impacts of increasingly frequent and severe weather events.' It
regarded these climate-related impacts as 'urgent social, economic and survival
threats' to AOSIS countries, threatening their 'sustainable development, territorial
integrity and continued existence as viable dynamic communities.'

The Maldives (an AOSIS member, SIDS and LDC) similarly argued that their 'survival'
was 'non-negotiable' and insisted that 'no poor or vulnerable community ... be left
behind'. The Maldives regarded climate change as 'an existential threat' to it and
other SIDS and 'to the wellbeing of vulnerable communities worldwide'. It thus urged

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33 SIDS include: Antigua and Barbuda; Bahamas; Bahrain; Barbados; Belize; Cape Verde; Comoros*; Cuba; Dominica; Dominican Republic; Fiji; Grenada; Guinea-Bissau *; Guyana; Haiti*; Jamaica; Kiribati*; Maldives*; Marshall Islands; Mauritius; Federated States of Micronesia; Nauru; Palau; Papua New Guinea; Samoa*; São Tomé and Príncipe*; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Seychelles; Singapore; Solomon Islands*; Suriname; Timor-Leste*; Tonga; Trinidad and Tobago; Tuvalu*; Vanuatu*. SIDS also include 14 UN members/Associate Members of the Regional Commissions: American Samoa; Anguilla; Aruba; British Virgin Islands; Commonwealth of Northern Marianas; Cook Islands; French Polynesia; Guam; Montserrat; Netherland Antilles; New Caledonia; Niue; Puerto Rico; US Virgin Islands. *Also LDCs: UN-OHRLLS, Small Island Developing States: Country Profiles <http://www.unohrlls.org/en/sids/44/>.
34 AOSIS, 'Shared Vision', above n 25, 46.
36 AOSIS, 'Shared Vision', above n 25, 46.
37 Ibid 41.
39 Ibid.
Parties to ensure that the post-2012 agreement guaranteed 'the territorial integrity, habitability and ultimately the existence of all States'.

Rejecting the 2°C target, AOSIS called for Parties to limit temperature rise to 'well below' 1.5°C, adopting the mantra of '1.5 to stay alive'. This more ambitious target was supported by the LDCs, as well as several developing Central and South American countries.

In supporting a 1.5°C goal, the Maldives also argued that the Parties had a legal obligation to reduce emissions to levels 'consistent with the full enjoyment of human rights'. It strongly urged that the post-2012 outcome not 'adversely impact upon human rights'. In making this case, the Maldives referred to several resolutions of the UN Human Rights Council (UNHRC) that were issued during the COP 13 – COP 15 negotiating period. In resolution 7/23 (2008), the UNHRC recognised that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights', and requested that the UN High Commissioner for Human Rights conduct a study on the

40 Ibid.
41 AOSIS, 'Shared Vision', above n 25, 46.
42 AOSIS, 'Small Island States Welcome Growing Support for 1.5°C Climate Target' (Media Release, 11 September 2009)
45 Maldives, 'A Shared Vision and Global Goal', above n 38, 11.
46 Ibid.
47 Ibid.
relationship between climate change and human rights. Based on the findings of this report, a further UNHRC resolution (10/4, 2009) recognised that:

climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation.

It also recalled that 'in no case may a people be deprived of its own means of subsistence'.

While most Parties' concerns regarding the temperature target were expressed in anthropocentric terms – focusing on the deleterious impacts of climate change for human welfare – Bolivia also drew attention to the negative implications of 2°C warming for non-human species. Concerned about the likely impact of even 1.5°C warming, Bolivia proposed the most ambitious goal of limiting warming to no more than 1°C, as well as a Universal Declaration of Mother Earth's Rights – to be included in the BAP's 'shared vision' – that would acknowledge 'the rights of Mother Earth and all of its beings'.

b) 2°C and the Negotiation of the Copenhagen Accord

As noted in chapter 4, Parties to the UNFCCC and Kyoto Protocol originally intended to complete their negotiations under the Bali Roadmap at COP 15/CMP 5 in

49 Ibid.
52 Ibid.
Copenhagen. At this point it is necessary to outline the basics of the 'Copenhagen Accord', the key outcome of the Copenhagen conference. Parties were under significant global pressure to 'seal the deal' at Copenhagen, which was given the unofficial title of 'Hopenhagen' by its Danish hosts. 115 world leaders attended the joint COP/CMP high-level segment from 16-18 December 2009, while more than 40,000 people from government, non-governmental organisations, inter-governmental organisations, media, and other organisations applied for accreditation at the Conference.

Despite intense negotiations taking place both prior to and at Copenhagen, Parties failed to deliver the binding legal outcome desired by many Parties. With major differences still dividing Parties on key issues, the lengthy draft decisions presented by the AWG-LCA to the COP on 16 December were too incomplete to provide the basis of a new agreement. As a result, informal negotiations took place in a select 28 member group of Parties – including Australia, the major economies and representatives of regional groups – who negotiated the Copenhagen Accord. The Accord was then presented to COP 15's closing plenary, with the intention that it would be adopted as a COP decision, most likely as a step toward a more comprehensive legal outcome (such as a Protocol). The agreement was strongly opposed, however, by several Parties.

59 Parties reportedly included Algeria, Australia, Bangladesh, Brazil, China, Colombia, Denmark, Ethiopia (on behalf of the African Union), the EU (represented by Sweden), France, Gabon, Germany, Grenada (on behalf of AOSIS), India, Indonesia, Japan, the Republic of Korea, Lesotho (for the LDCs), Maldives, Mexico, Norway, Russia, Saudi Arabia (for the Organisation of Petroleum Exporting Countries), South Africa, Spain, Sudan (for the G77), the United Kingdom, and the US: Bodansky, above n 57, 234; Lavanya Rajamani, 'The Making and Unmaking of the Copenhagen Accord' (2010) 59 International and Comparative Law Quarterly 824, 825.
including Bolivia, Sudan, Venezuela and Nicaragua, both due to its substance and the unorthodox manner in which it had been negotiated.\textsuperscript{60}

To break the deadlock, a compromise was brokered, with the COP agreeing to 'take note' of the Copenhagen Accord and establish a procedure by which Parties could register their support for it.\textsuperscript{61} This meant that the Accord had no official status under the Convention and thus only represented a political agreement.\textsuperscript{62} While not officially adopted by the Parties, the Accord nonetheless represented a significant step in the post-2012 negotiations, with Parties reaching a political consensus on important elements of a post-2012 agreement. 114 Parties signed the Accord at COP 15, including Australia,\textsuperscript{63} a figure which subsequently rose to 141 Parties.\textsuperscript{64} Highlighting the importance of the Accord, many of its features were later endorsed by the Parties (with the exception of Bolivia) in a formal decision at COP 16 in Cancun (December 2010), as part of the 'Cancun Agreements'.\textsuperscript{65} Of most relevance to this chapter, the


\textsuperscript{63} \textit{COP 15 Report}, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010), decision 2/CP.15. The following 114 Parties were listed as agreeing to the Accord at COP 15: Albania, Algeria, Armenia, Australia, Austria, Bahamas, Bangladesh, Belarus, Belgium, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Canada, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Eritrea, Estonia, Ethiopia, European Union, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kiribati, Lao, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mexico, Monaco, Mongolia, Montenegro, Morocco, Namibia, Nepal, Netherlands, New Zealand, Norway, Palau, Panama, Papua New Guinea, Peru, Poland, Portugal, Republic of Korea, Moldova, Romania, Russia, Rwanda, Samoa, San Marino, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Swaziland, Switzerland, The Former Yugoslav Republic of Macedonia, Tonga, Trinidad and Tobago, Tunisia, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, US, Uruguay and Zambia.

\textsuperscript{64} A further 26 Parties agreed to the Accord after COP 15: Afghanistan, Angola, Antigua and Barbuda, Barbados, Belize, Brunei Darussalam, Burundi, Cameroon, Cape Verde, Chad, Comores, Gambia, Guinea-Bissau, Honduras, Jamaica, Kenya, Liberia, Mauritius, Mozambique, Nigeria, Saint Lucia, Tajikistan, Timor-Leste, Togo, Uganda, Ukraine and Viet Nam: UNFCCC, \textit{Copenhagen Accord} <http:// unfccc.int/meetings/copenhagen_dec_2009/items/5262.php>.

Copenhagen Accord endorsed the 2°C target. Specifically, it recognised ‘the scientific view that the increase in global temperature should be below 2 degrees Celsius’ in order to achieve the ultimate objective of the Convention.\(^{66}\)

During COP 15’s closing plenary, Sudan condemned the Accord, stating that it threatened the lives and livelihoods of millions of people in developing countries, including the African continent,\(^{67}\) and labelled it ‘a suicide note for Africa’.\(^{68}\) Many nations who opposed the 2°C goal, however, ultimately signed the Accord, including AOSIS members and LDCs. Indeed, during the closing plenary of COP 15, representatives of AOSIS, the LDCs, the African Group and the African Group all urged other Parties to adopt the Accord.\(^{69}\) This may suggest that the 2°C target ultimately enjoyed the widespread support of the Parties. This was far from being the case, however, with the Accord’s endorsement of the 2°C goal reflecting a range of factors.

First, Parties backing the 1.5°C target, with the strong support of France, won a concession in the Accord to consider strengthening the long-term goal, potentially to 1.5°C, as part of a future review process of the Accord’s implementation.\(^{70}\) Thus, the LDCs saw the Accord as a document that could be improved in the future.\(^{71}\) Second, the Accord included a substantial commitment by developed countries to help finance developing countries’ climate change-related needs (such as urgent adaptation assistance), namely, US$30 billion by 2010-12 and US$100 billion by 2020.\(^{72}\) Tuvalu, who refused to sign the Accord, regarded this financing offer as a bribe, stating that ‘our future is not for sale’.\(^{73}\) Other developing countries, however, appeared to judge


\(^{68}\) Ibid 28.

\(^{69}\) Ibid 8, 28-29.


that this offer of substantial financing was too good to refuse. Third, the endorsement of the 2°C target by many vulnerable countries simply reflected these Parties' lack of political clout vis-a-vis the developed countries and the major developing economies. In other words, they had little choice but to compromise on the issue.

At this point the Rudd government's diplomatic efforts regarding the 2°C goal should be briefly highlighted. During the critical closing days of COP 15, Australian negotiators reportedly pressured many small nations, particularly in the Pacific, to drop the 1.5°C goal. According to Tuvalu's Prime Minister, Apisai Ielemia, Australia encouraged SIDS to drop the 1.5°C target in return for adaptation funding. Ielemia stated that he personally received calls from the Australian delegation, including Prime Minister Rudd's advisers, urging him to drop the 1.5°C target, to which Ielemia responded, 'I won't move anywhere else ... I'm going to keep up the fight.' For its efforts, Australia received the Climate Action Network International's infamous 'fossil of the day award' on 17 December 2009.

c) Assessing the Evidence

Assessing whether the 2°C target was consistent with the objective of avoiding dangerous climate change is not a straightforward task. As highlighted by the IPCC AR4, determining what constitutes 'dangerous' climate change in relation to article 2 UNFCCC ultimately requires 'value judgments' to be made. While a large amount of science (the most objective means of resolving this question) has been conducted on this issue, the Rudd government noted in its submissions that science could, as yet, 'provide no single reference point at which a rise in the average global temperature would cross a boundary between safe and dangerous.' These caveats aside, this section examines whether the 2°C target was backed by the science, as the government claimed. In highlighting this evidence, it is worth noting that the UNFCCC

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77 Core Writing Team, Pachauri and Reisinger, above n 8, 64.
78 Australia, 'Initial Views on a Long-Term Global Goal for Emission Reductions', above n 12, 5.
emphasises the importance of science to decision-making on climate change. The
Preamble, for example, recognises that the 'steps required to understand and address
climate change will be ... most effective if they are based on relevant scientific,
technical and economic considerations'. Similarly, article 4.2(d) UNFCCC stipulates that
in reviewing the adequacy of the Annex I Parties' voluntary mitigation commitment
under articles 4.2(a)(b), Parties 'shall' consider the 'best available scientific information
and assessment on climate change and its impacts' (as well as relevant technical, social
and economic information). As such, the Convention establishes a clear legal
expectation that Parties will be guided by the science, including in determining what
represents dangerous climate change, and what is necessary to avoid it. The
government's claim that its preferred long-term goals were consistent with the science
also indicated that it accepted the importance of science in answering these questions.

i) The IPCC's 'Reasons for Concern'

To help inform the question of what constitutes dangerous climate change, the IPCC
identified 'key vulnerabilities' for human and environmental systems that are sensitive
to climate change. These include food supply, infrastructure, health, water resources,
coastal systems, ecosystems, global biogeochemical cycles, ice sheets and modes of
oceanic and atmospheric circulation.79 The IPCC's Third Assessment Report (AR3)
synthesised this information on climate risks and key vulnerabilities, in order to
identify the major 'reasons for concern'. These were determined to include:

- risks to unique and threatened systems – such as coral reefs, tropical glaciers,
  endangered species, unique ecosystems, biodiversity hotspots, and small island
  states;
- the risk of extreme weather events – such as an increase in the frequency,
  intensity, or consequences of heat waves, floods, droughts, wildfires and
tropical cyclones;
- the distribution of impacts – with some regions, countries, and populations
  (and subgroups such as the poor or elderly) likely to face greater harm from
  climate change than others (while some may actually benefit). The most
  vulnerable regions were identified as the Arctic, Africa (home to many LDCs),

79 Core Writing Team, Pachauri and Reisinger, above n 8, 64.
small islands states (which includes many AOSIS nations), and the Asian and African mega-deltas;

- the aggregate impacts of climate change – such as monetary damages, lives affected, lives lost from impacts such as coastal flooding, increased malnutrition and health impacts; and

- the risk of large-scale discontinuities or 'tipping points' – such as the partial or complete loss of the Greenland ice sheet, the breakup of the West Antarctic Ice Sheet, or the reduction or collapse of the North Atlantic Meridional Overturning Circulation. The occurrence of such events could be accompanied by very large and effectively irreversible impacts.80

The AR3’s 'burning embers' diagram highlighted the IPCC’s reasons for concern in graphic form. An updated version of this graph was published by its authors, Smith et al, in 2009 (see Figure 1).81

80 As summarised in ibid 64-65.
81 See Joel Smith et al, 'Assessing Dangerous Climate Change through an Update of the Intergovernmental Panel on Climate Change (IPCC) "Reasons for Concern"' (2009) 106 PNAS 4133.
Figure 1. IPCC Third Assessment Report 'Reasons for Concern' and Update. The green line represents 2°C warming above pre-industrial levels. Global temperature was about 0.6°C above pre-industrial levels in 1990.

White regions indicate neutral to low impacts or risks; yellow regions indicate negative impacts for some systems or more significant risks; and red regions indicate substantial negative impacts or risks that are more widespread and/or severe. The assessment did not account for proactive adaptation measures that may reduce vulnerability.\textsuperscript{82}

The most serious reasons for concern were the risk to unique and threatened systems and the risk of extreme weather events. Increased risks were expected with temperature rise of between 1.6 to 2.6°C.\textsuperscript{83} In March 2009, the International Alliance of Research Universities (IARU) held a conference in Copenhagen, attended by about 2500 researchers, to provide an authoritative update of climate science to inform the climate negotiations.\textsuperscript{84} Based on the findings by Smith et al, the IARU report made a blunt assessment of the '2°C guardrail', stating that it was 'now inadequate to avoid

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\textsuperscript{82} Ibid 4135.
\textsuperscript{83} Ibid. Figures are converted from 1990 levels.
\textsuperscript{84} See Katherine Richardson et al, \textit{Synthesis Report from Climate Change: Global Risk, Challenges and Decisions} (2\textsuperscript{nd} ed, University of Copenhagen, 2009).
serious risks to many unique and threatened ecosystems, and to avoid a large increase in the risks associated with extreme weather events'. The risk of tipping points occurring were now also considered to be 'moderate' with 2°C of warming, with a major concern being the possibility of 4 to 6 metres of sea level rise due to the melting of the Greenland and West Antarctic ice sheets. Overall, the IARU's view was that the 2°C target carried 'significant risks of deleterious impacts for society and the environment'. A 2009 report funded by Australia's Department of Climate Change similarly interpreted Smith et al's findings as showing that 'smaller increases in global mean temperature lead to significant potential impacts on human well-being, effectively lowering the temperature level for what might be considered dangerous climate change.'

A number of reports have made more specific findings in relation to several of the IPCC's reasons for concern. These are briefly highlighted below.

**ii) The Risk to Unique and Threatened Systems: Biodiversity and Ecosystems**

Several reports have highlighted the risk to biodiversity and ecosystems globally with warming at or below 2°C. According to the 2009 report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change (the 'Expert Group on Biodiversity and Climate Change'), commissioned by Parties to the Convention on Biological Diversity (CBD), some species and ecosystems were already experiencing negative impacts as a result of climate change. 6 to 8 per cent of species assessed to date were estimated to be at higher risk of extinction from current temperature rise (about 0.8°C), and a further 5 to 7 per cent from the additional 0.5°C of temperature rise

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85 Ibid 16.
86 Ibid.
87 See Smith, above n 81, 4136. Scientists had 'medium confidence' that temperature rise of between 1.6 to 4°C could cause at least partial deglaciation of the Greenland ice sheet, and possibly the West Antarctic ice sheet, over a period ranging from centuries to millennia, causing associated sea level rise. Other risks included the disappearance of Arctic summer sea ice, drying of the Asian monsoon, and loss of water storage capacity in Himalayan glaciers.
88 Richardson, above n 84, 16.
90 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('CBD').
expected as a result of GHGs already released into the atmosphere.\textsuperscript{92} The risk of extinction was much higher above 2°C warming (potentially affecting 20 to 30 per cent of species),\textsuperscript{93} but as noted by the IARU, capping warming at 2°C would only lessen the magnitude of biodiversity extinction due to climate change, not eliminate it.\textsuperscript{94} A 2009 report commissioned by the Australian government similarly concluded that a 1.5°C to 2°C temperature rise would 'likely lead to a massive loss of biodiversity worldwide'.\textsuperscript{95}

Negative impacts on biodiversity and ecosystems were also expected within Australia. The \textit{Garnaut Climate Change Review} (Garnaut Review – commissioned by the Rudd Labor Opposition and the Australian states in 2007) reported that about 7 per cent of species in Australia would be at risk of extinction with 2°C warming.\textsuperscript{96} A particular concern was the likely impact of global warming on the World Heritage listed Great Barrier Reef which had already experienced a 14 per cent decline of coral calcification since 1990 due to increased CO2 levels and ocean warming.\textsuperscript{97} According to the Garnaut Review, mass bleaching of the reef could become twice as likely with 2°C temperature rise.\textsuperscript{98}

The Expert Group on Biodiversity and Climate Change further reported that biodiversity loss would likely have a range of impacts globally for human communities such as livelihood impacts for coastal communities dependent on coral reefs and marine and freshwater species.\textsuperscript{99} Certain population groups were likely to be more significantly affected than others including the poor – especially in developing

\textsuperscript{92} Ibid 20.
\textsuperscript{93} Smith, above n 81, 4135; Core Writing Team, Pachauri and Reisinger, above n 8, 65.
\textsuperscript{94} Richardson, above n 84, 13.
\textsuperscript{95} Will Steffen et al, \textit{Australia's Biodiversity and Climate Change: A Strategic Assessment of the Vulnerability of Australia's Biodiversity to Climate Change (Summary for Policy Makers)} (Department of Climate Change, 2009) 12.
\textsuperscript{96} Ross Garnaut, \textit{The Garnaut Climate Change Review: Final Report} (Cambridge University Press, 2008) 87, 102. The Garnaut Review was commissioned to provide independent advice to government on the implications of climate change for Australia and on appropriate policy responses. See further discussion of its recommendations below and in subsequent chapters, especially chapter 7.
\textsuperscript{97} See Steffen, \textit{Climate Change 2009: Faster Change and More Serious Risks}, above n 89, 23. Oceans are becoming increasingly acidic due to increasing CO2 levels in the oceans which impacts calcifying organisms such as corals, sea urchins, oysters, mussels, crustaceans and some forms of plankton: Smith, above n 81, 4136.
\textsuperscript{99} CBD Secretariat, above n 91, 21.
countries – due to their greater reliance on biodiversity and ecosystem goods and services to meet their basic needs (food, fibre, energy, clean water, healthy soils, pollinators, natural medicine, etc).\textsuperscript{100} Indigenous peoples were also likely to be more acutely affected for the above reasons, as well as due to the importance of biodiversity for traditional knowledge and cultural life.\textsuperscript{101} Among states, SIDS and LDCs were the most likely to be negatively impacted.\textsuperscript{102}

\textit{iii) Extreme Weather Events}

As noted, the risk of more frequent extreme weather events occurring was a key concern of AOSIS and the LDCs. A number of reports expressed serious concerns about the ability of the 2°C target to limit this risk. In 2009, Smith et al reported that it was 'more likely than not' that anthropogenic GHGs were already contributing to global increases in heat waves, intense precipitation events, and the intensity of tropical cyclones.\textsuperscript{103} The IARU also reported that current temperature rise was already causing an increasing number of extreme weather events, resulting in a growing toll of deaths and injuries from climate-related natural disasters.\textsuperscript{104} Droughts and drying attributable to climate change were also leading to social instability, food insecurity and long-term health problems in some regions as peoples' livelihoods were damaged or destroyed.\textsuperscript{105} At only 1.6°C of warming, Smith et al reported that increased droughts, heat waves, and floods were projected in many regions with consequent impacts such as increased water stress, wildfire frequency, flood risk, and negative health effects.\textsuperscript{106} The IPCC AR4 also reported that warming of less than 2°C could have impacts such as reduced crop productivity at lower latitudes, increasing the risk of hunger.\textsuperscript{107} Reductions in water supplies could also impact up to 1.7 billion people with less than 1.6°C warming.\textsuperscript{108}

\textsuperscript{100} Ibid 22, 64.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid 22.
\textsuperscript{103} Smith, above n 81, 4135.
\textsuperscript{104} Richardson, above n 84, 12.
\textsuperscript{105} Ibid.
\textsuperscript{106} Smith, above n 81, 4136.
\textsuperscript{107} Core Writing Team, Pachauri and Reisinger, above n 8, 48. Although global food production overall was projected to increase with local average temperature rises of 1.5 to 3.5°C.
\textsuperscript{108} Smith, above n 81, 4136.
iv) The Uneven Distribution of Impacts

Regarding the distribution of impacts, the EU Climate Change Expert Group reported in 2008 that 'serious regional impacts' were already occurring as a result of climate change in highly vulnerable areas such as parts of Africa, Asia and SIDS in the Pacific and the Caribbean,\(^{109}\) appearing to confirm the concerns expressed by AOSIS and the LDCs. SIDS, in particular, were expected to be increasingly impacted by the direct and indirect effects of sea-level rise, even with warming below 2°C.\(^{110}\) A key concern for SIDS was the AR4’s finding that 2°C warming could lead to sea level rise of 0.4 to 1.4 metres and that this could be much higher as a result of poorly understood factors such as 'carbon feedbacks'.\(^{111}\) This was a significant issue for low-lying nations such as Tuvalu which could become uninhabitable with only 20 to 40 cm of sea level rise.\(^{112}\) Commenting on the regional impacts for Australia, the Garnaut Review also highlighted that 2°C warming could see the displacement of people in the South Pacific,\(^{113}\) who would likely turn to Australia for assistance with resettlement. The UNHRC also reported that while the implications of climate change were global, the effects would be felt most acutely by those segments of the population that were already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.\(^{114}\)

d) Was the 2°C Target Consistent with the Scientific View?

The evidence reviewed above needs to be interpreted with caution, as predictions about what climate impacts may occur with certain levels of warming are not foolproof. Well before COP 15, however, much expert opinion appeared to have turned against the view that 2°C represented a 'safe' level of warming. IPCC Chair, Rajendra Pachauri, for example, urged Parties at COP 14 in Poznan (December 2008),


\(^{110}\) Ibid 9.

\(^{111}\) Other poorly understood factors included contributions to sea level rise from melting ice sheets, glaciers and ice caps: Core Writing Team, Pachauri and Reisinger, above n 8, 67. Global average sea levels have risen at an average rate of 1.8 mm per year between 1961 to 2003 and 3.1 mm per year between 1993 to 2003: 30.


to consider whether limiting temperature rise to 2°C was sufficient.\textsuperscript{115} One of the world's most respected climate scientists, James Hansen, of the NASA Goddard Space Institute, also concluded as early as 2005 that more than 1.7°C warming 'would likely' constitute dangerous interference with the climate.\textsuperscript{116} Hansen strengthened this view in 2009 stating that even 1.7°C warming represented a 'disaster scenario'.\textsuperscript{117} By the time of COP 15 many leading scientists (such as those contributing to the IARU science update) had explicitly cast doubt on whether 2°C represented a safe target, despite its popularity with many Parties.\textsuperscript{118} Notably, the Rudd government itself acknowledged that 2°C warming could cause 'widespread global impacts that would alter in severity from region to region.'\textsuperscript{119} The government also accepted that negative impacts of climate change were 'already evident' as a result of existing temperature rise and that projections indicated that impacts would 'become increasingly severe' as the global average temperature rose.\textsuperscript{120} The key proponent of the 2°C goal, the EU, also accepted that negative impacts of climate change were 'already evident and widespread, in particular in vulnerable regions of the world, and ... [were] increasingly posing a risk to ecosystems, food production, the attainment of sustainable development and of the Millennium Development Goals as well as to human health and security.'\textsuperscript{121}


\textsuperscript{117} James Hansen, \textit{Storms of My Grandchildren: The Truth about the Coming Climate Catastrophe and Our Last Chance to Save Humanity} (Bloomsbury USA, 2009) 142.

\textsuperscript{118} In addition to the IARU report, see, eg: Malte Meinshausen, '<2°C Trajectories: A Brief Background Note' (Working Paper, Potsdam Institute for Climate Impact Research, 2006) 2 (stating that the 2°C goal was clearly 'not a "safe" level' as this temperature rise already implied 'serious adverse climate impacts in various regions'); Meinshausen et al, 'Greenhouse-Gas Emission Targets for Limiting Global Warming to 2°C', above n 14, 1159 (stating that 2°C 'cannot be regarded as a "safe level"'); EU Climate Change Expert Group, above n 109, 9 (stating that 2°C 'cannot be considered to be entirely "safe", as severe impacts were likely to occur as the global mean temperature rise approached 2°C'); Johan Rockstrom et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 \textit{Ecology and Society} 32, 41 (stating that if the 2°C line could be held, society and the environment still faced 'significant risk of deleterious climate impacts').

\textsuperscript{119} Australia, 'Initial Views on a Long-Term Global Goal for Emission Reductions', above n 12, 5.

\textsuperscript{120} Ibid.

\textsuperscript{121} European Community, 'A Shared Vision for Long-Term Cooperative Action', above n 16, 5.
While it seems clear that some impacts associated with climate change are unavoidable, and may not be significant enough to warrant being classified as 'dangerous', it is highly questionable whether the 2°C goal was supported by the science as claimed by the Rudd government. In particular, the associated risk of more frequent extreme weather events and sea level rise suggests that this level of warming could indeed constitute a dangerous level of climate change for the most vulnerable countries. Further analysis of whether the 2°C goal was consistent with the objective of avoiding dangerous climate is provided at section C, after first examining the other long-term metrics considered by the Parties.

2 GHG Concentration Goal

a) Party Views

The second key metric discussed in relation to a long-term goal was that of an atmospheric GHG stabilisation goal. This metric was the key focus of the Rudd government who argued that GHGs ought to be stabilised at 450 ppm CO2-e or lower. Indicating the strength of the government's desire to see this target adopted, this was the only long-term metric included by the government in its proposed post-2012 framework agreement, and was included in the domestic Carbon Pollution Reduction Scheme Bill, the government's major legislation to reduce Australian emissions. The upper end of the government’s 5 to 25 per cent national emission reduction commitment was also made conditional upon a post-2012 outcome being consistent with a 450 ppm CO2-e or lower agreement. The government stated that the 450 ppm CO2-e goal 'would reduce the risks associated with severe climate

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123 Carbon Pollution Reduction Scheme Bill 2009 (Cth) cl 3(4)(a). One of the stated objects of the Bill was: 'if Australia is a party to a comprehensive international agreement that is capable of stabilising atmospheric concentrations of greenhouse gases at around 450 parts per million of carbon dioxide equivalence or lower—to take action directed towards meeting Australia’s target of reducing net greenhouse gas emissions to 25% below 2000 levels by 2020’. See later chapters for discussion of the CPRS, especially chapter 7.
change' and be 'consistent' with the aim of keeping warming below 2°C. In adopting this target, the government was influenced by the Garnaut Review, stating that it accepted its recommendation that a 'fair and effective agreement' aimed at stabilising GHG concentrations at around 450 ppm CO2-e or lower 'would be in Australia's interests.'

A number of Parties supporting the 2°C threshold also expressed support for the 450 ppm CO2-e goal, among them New Zealand, Indonesia and the EU. However, several Central American Parties (Nicaragua, Guatemala, Honduras, and Panama), as well as the Caribbean nation of the Dominican Republic, stated that a more ambitious 400ppm CO2-e target was necessary to achieve the 2°C goal. Meanwhile AOSIS argued that a 450 ppm CO2-e target would see all AOSIS countries 'challenged to survive and provide a livelihood for their population.' AOSIS instead called for atmospheric emissions to be stabilised 'well below' 350 ppm CO2-e in order to achieve its preferred temperature threshold of 1.5°C or below. This position was supported

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125 Ibid.
131 AOSIS, ‘Shared Vision’, above n 25, 47.
132 Ibid 47.
by the LDCs, as well as Uruguay, Panama and Costa Rica, Ecuador, Paraguay and El Salvador.

b) Assessing the Evidence

During the pre-industrial era, atmospheric concentrations of CO2 were about 280 ppm. Primarily due to the burning of fossil fuels by human societies in order to produce energy, atmospheric CO2 levels – the most significant GHG for global warming – rose to about 386 ppm in 2009 and continue to rise by about 2 ppm each year. As of 2009, the concentration of all atmospheric GHGs was approximately 465 ppm CO2-e, already above Australia’s preferred goal. Adjusted to account for the temporary cooling effect of aerosols, however, CO2-e concentrations were approximately 396 ppm.

As noted, the Rudd government referred to the Garnaut Review when justifying its preferred 450 ppm CO2-e goal which had concluded that this target was in Australia’s 'long-term interests. Critically, however, the Review acknowledged that the 450 goal only offered a 50 per cent chance of actually keeping warming below 2°C, a finding

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137 Panama, Paraguay and El Salvador, ‘Proposing Text for Six Different Sections: Preamble, Shared Vision, Mitigation, Adaptation, Technology, Finance, REDD’, above n 44, 60. This submission called for Parties to prevent atmospheric GHG concentrations from rising above 450 ppm CO2-e with the ultimate aim of reducing emissions to 350 ppm CO2-e.
139 Ibid 33. CO2 is the most abundant GHG in the atmosphere and also one of the most long-lived.
141 Richardson, above n 84, 18.
143 Richardson, above n 84, 18. CO2-e is calculated to include the combined warming effects of CO2 and non-CO2 GHGs (excluding water vapour) as well as the net cooling effect of aerosols in the atmosphere (small particles that reflect the sun’s incoming radiation, primarily sulphate, organic carbon, black carbon, nitrate and dust): 18; Core Writing Team, Pachauri and Reisinger, above n 8, 38.
145 Ibid 89.
later confirmed in the 2009 IARU report. The study by Hare and Meinshausen, from which this figure was derived, found that a more ambitious stabilisation target was actually needed to provide good odds of limiting warming to 2°C. The 400 ppm CO2-e target, called for by Nicaragua and others, reduced the odds of exceeding 2°C to about 25 per cent (or 'unlikely'). Meanwhile, the 350 ppm CO2-e target, promoted by AOSIS and the LDCs, reduced the risk of exceeding 2°C to less than 10 per cent. In Meinshausen and Hares' view, a 400 ppm CO2-e stabilisation target provided 'reasonable certainty' that global warming would be restricted to 2°C, however, only the 350 ppm CO2-e target provided a 'high probability' of doing so (90 per cent). In a separate study, Meinshausen reported that the 350 ppm CO2-e target was also 'very likely' (greater than 90 per cent) to keep warming below 1.5°C in the long-term, while the 400 ppm CO2-e target provided a 'medium likelihood' (33 to 66 per cent) of doing so. Notably, then IPCC chair, Pachauri, expressed his personal conviction that the world needed to move towards a 350 target.

There is much uncertainty in this type of climate modelling, particularly due a lack of precise understanding of how sensitive the Earth's temperature is to increasing GHG concentrations. Given such uncertainty, Meinhausen and Hare called for a precautionary approach to be adopted, consistent with the precautionary principle, a key principle of the UNFCCC (article 3.3). As will be discussed further in section C,

146 Richardson, above n 84, 18. The 50 per cent figure was derived from a 2006 study by Hare and Meinshausen. Specifically, this study found that the 450 ppm CO2-e target carried a 'medium likelihood' (or median 47 per cent risk, with a band of 26 to 78 per cent) of exceeding 2°C: Bill Hare and Malte Meinshausen, 'How Much Warming Are We Committed to and How Much Can Be Avoided?' (2006) 75 Climatic Change (2006) 111, 131. See also Meinshausen, 'Greenhouse Gas Emission Targets for Limiting Global Warming to 2°C', above n 14, 1158.
147 Hare and Meinshausen, above n 146, 131. Specifically, 2 to 57 per cent, with a mean of 27 per cent.
148 Ibid. Specifically, 0 to 31 per cent, with a mean of 8 per cent.
149 Ibid 136. Other studies have asserted that a CO2 only figure is more significant than a CO2-e figure as CO2 is the main determinant of warming: see Hansen et al, 'Target Atmospheric CO2: Where Should Humanity Aim?', above n 116, 226 (proposing a 350 CO2 or lower target). See also Rockstrom, above n 118, 42. This chapter focuses on CO2-e targets as this is the metric that has been adopted by the UNFCCC.
150 Hare and Meinshausen, above n 146, 142. See also: Meinhusen, '<2°C Trajectories: A Brief Background Note', above n 118, 4; EU Climate Change Expert Group, above n 109, 4.
151 Meinshausen, '<2°C Trajectories: A Brief Background Note', above n 118, 4.
152 AOSIS, 'Small Island States Welcome Growing Support for 1.5°C Climate Target', above n 42.
153 Hare and Meinshausen, above n 146, 139.
154 Ibid.
this thesis argues that respecting the legal principles and provisions of the Convention (including the precautionary principle) was particularly important to the Rudd government’s credentials as a GIC. While the government stated that a 450 ppm CO2-e goal was consistent with the aim of limiting warming to 2°C, Parties such as Micronesia justifiably argued that this claim was inaccurate. Of course, while the precautionary principle does not dictate precisely what would constitute a precautionary approach – for example, adopting a target with 66, 75 or 90 per cent odds of achieving the desired temperature threshold – logic clearly indicates that a target would need to provide more than a fifty-fifty chance. A common analogy adopted to illustrate this point is that a person would be unlikely to fly in an aeroplane if he or she knew that it had even odds of crashing.

The Rudd government’s preferred stabilisation target of 450 ppm CO2-e thus appeared to be at odds with the precautionary principle, simply on the basis that it did not enjoy even reasonable odds of achieving its intended aim. Furthermore, this target only aimed to limit warming to 2°C, which as found above, did not appear to represent a safe level of global warming for the most vulnerable countries.

3 2050 Emission Reduction Target and Peak Year for Global Emissions

The other metrics considered by Parties for inclusion in a post-2012 agreement were a 2050 global GHG emission reduction target and a peak year for global emissions, neither of which were ultimately agreed to by the Copenhagen Accord. The only statement made by the Accord in this regard was that Parties should cooperate to achieve a peak in their ‘national emissions as soon as possible’, although the time frame for developing countries would be longer due to equity considerations.

a) 2050 Target

Most Parties supporting the 2°C temperature threshold proposed that global GHG emissions should be at least halved by 2050. Confusing the matter, however, Parties

157 Ibid.
expressed this aim with various base years or no base year, impacting its stringency. Proposed base years (from most to least stringent) included 1990 (the EU and Madagascar); 158 2000 (Australia); 159 and 2005 (Canada). 160 The G8 countries backed the goal of halving emissions by 2050 but failed to nominate a base year. 161 Stronger emission cuts to achieve the 2°C goal were proposed by Nicaragua, Guatemala, Honduras, Panama and the Dominican Republic (71 to 81 per cent below 1990 levels) 162 and Norway (more than 85 per cent below 1990 levels). 163 AOSIS also supported an 85 per cent reduction below 1990 levels in order to achieve its preferred 1.5°C/350 ppm CO2-e goal. 164

As highlighted earlier, the IPCC AR4 reported that in order to achieve a 445-490 ppm CO2-e stabilisation scenario, global CO2 emissions would need to be reduced by 50 to 85 per cent by 2050 (below 2000 levels). 165 The Rudd government's goal of reducing emissions by 50 per cent (below 2000 levels), which had again been proposed by the Garnaut Review, 166 was thus broadly consistent with the IPCC scenario, albeit sitting at the bottom end. Several later reports issued in 2008 and 2009, however, found that a 50 per cent reduction needed to occur in relation to a 1990 base year, not 2000. 167 This

159 Australia, 'Initial Views on a Long-Term Global Goal for Emission Reductions', above n 12, 7.
160 Ibid.
161 G8, Leaders Declaration: Responsible Leadership for a Sustainable Future, above n 16, [65]. The significance of these different base years is that halving emissions by 2050 from a later base year (for example, 2005) would result in less emission reductions than from an earlier base year (for example, 1990), because emissions have increased since 1990. Meanwhile, the stringency of an emission reduction target that does not include a base year is unknown, because without a defined base year it cannot be quantified.
162 Nicaragua et al, 'Shared Vision', above n 130, 43. This was deemed necessary in relation to a 400 ppm CO2-e GHG stabilisation target.
164 AOSIS, Declaration on Climate Change, above n 27.
165 Core Writing Team, Pachauri and Reisinger, above n 8, 67. This estimate did not properly account for the potential for carbon feedbacks, or contributions to sea level rise from factors other than thermal expansion—namely, melting ice sheets, glaciers and ice caps.
implied that Australia's target was insufficient – as greater cuts from 2000 levels would be required to achieve an equivalent reduction from 1990 levels. The EU Climate Change Expert Group also reported that a 50 per cent reduction target from 1990 levels only provided a 50 per cent chance of achieving the 2°C target (as with the 450 ppm CO2-e goal). According to a 2009 study by Schaeffer and Hare, emissions would need to be reduced by at least 80 per cent by 2050 (from 1990 levels) to provide a 75 per cent or greater chance of limiting warming to below 2°C. As with the GHG stabilisation models, these estimates need to be treated with care, as they depended on various assumptions and uncertainties, such as the speed at which emissions could be reduced post-2050. Notwithstanding this, the above studies clearly indicate that the Rudd government’s preferred 2050 target was, again, inconsistent with a precautionary approach. A further weakness was that its preferred 2050 emission target only aimed to limit warming to 2°C.

b) Proposed Year for Global Emissions to Peak

Various peak years for global GHG emissions were proposed by the Parties. In relation to a 2°C goal, preferred years included: 2013 (Nicaragua, Guatemala, Honduras, Panama and the Dominican Republic); 2015 (Norway); 2020 (Australia, the EU, Canada, and Madagascar); and 2025 (Japan). The US argued that there were 'multiple emission pathways' to reach 450 ppm CO2-e, indicating a reluctance to support any specific year. Believing that the 'window of opportunity for preventing

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168 See EU Climate Change Expert Group, above n 109, 31.
169 Ibid. See also Michiel Schaeffer and Bill Hare, How Feasible Is Changing Track? Scenario Analysis of the Implications of Change in Emission Tracks after 2020, from an Insufficient Global Deal on 2020 Reductions to 2°C and 1.5°C Pathways (PIK-PRIMAP Team and Climate Analytics, 2009) 4.
170 Schaeffer and Hare, How Feasible Is Changing Track?, above n 169, 4.
171 Nicaragua et al, 'Shared Vision', above n 130, 44.
172 Norway, 'Shared Vision for Long-Term Cooperative Action Including a Long-Term Goal for Emission Reductions', above n 163, 70. Expressed in relation to CO2 only.
runaway climate change’ was small, AOSIS argued that emissions needed to peak by 2015 in order to achieve its preferred 1.5°C goal.179

The IPCC AR4 referred to a 2015 peak year in relation to a 445-490 ppm CO2-e stabilisation scenario.180 Thus, on its face, the Rudd government’s proposed peak year of 2020 appeared to be inconsistent with the science. However, the IARU and EU Climate Change Expert Group reports both indicated that 2020 was the absolute latest that emissions could peak if ambitious climate goals were to remain within reach.181 Thus, while Australia’s proposed 2020 peak year lay at the outer bounds of what the science suggested was necessary, it was not without a scientific basis. It was, however, clearly less consistent with the precautionary principle. The target assumed that emissions could be reduced by 5 per cent or more per annum after 2020 – as against historic GHG growth rates of 2 per cent – in order to retain a reasonable chance of achieving the 2°C182 or 1.5°C goal.183 This rate of emissions reduction represented the absolute limit, however, of what was regarded as feasible from an economic and technological perspective.184 Given the significant turnaround required from historic growth rates, arguably a 2015 peak year represented the more sensible, precautionary target, allowing Parties to reduce emissions at slightly less optimistic rates.

4 Broader Considerations: Technological, Economic and Political Feasibility

Judged from an ideal or optimum standpoint, the Rudd government’s preferred long-term goals appeared to fall short of what was necessary to avoid dangerous climate change for all Parties. A major flaw was that the government’s preferred targets were not sufficiently precautionary, being rather optimistic about their chances of achieving their intended aims. Having said this, it needs to be appreciated that the government’s thinking on a long-term goal, while informed by the science,185 needed to factor in other considerations. Specifically, the government referred to the importance of

179 AOSIS, Declaration on Climate Change, above n 27.
180 Core Writing Team, Pachauri and Reisinger, above n 8, 67.
181 EU Climate Change Expert Group, above n 109, 4; Richardson, above n 84, 18.
182 Richardson, above n 84, 18.
184 Meinshausen, <2°C Trajectories: A Brief Background Note’, above n 118, 9.
"[s]ocial and economic conditions' and 'the availability of affordable low emissions technologies." These were valid considerations as the long-term goal clearly needed to be technically, economically and politically achievable if it was to serve more than just a symbolic purpose. As noted earlier, the UNFCCC specifically acknowledges that technical and economic considerations are relevant concerns for Parties (conversely, no mention is made of political considerations).

a) Technical Feasibility

The IPCC was confident that the stabilisation scenarios it assessed (445 ppm CO2-e and higher) were technically attainable with the deployment of a portfolio of technologies that were currently available or were expected to be commercialised in the coming decades. This was dependent upon governments providing significant incentives for the development, acquisition, deployment and diffusion of technologies, and addressing various other barriers to commercialisation. Achieving more ambitious stabilisation goals (such as 350 ppm CO2-e or 400 ppm CO2-e) would of course be even more technically challenging.

Regarding a temperature threshold, the IARU reported that limiting temperature rise to lower than 2°C would be 'very difficult' due to the fact that temperature rise was already about 0.8°C above pre-industrial levels, and GHGs were still increasing. As a result of GHGs already emitted into the atmosphere (and the inertia of the climate system), global temperature rise of about 1.4°C above pre-industrial levels was already inevitable.

Highlighting the immensity of the challenge, studies have shown that achieving ambitious emission reduction scenarios will likely require emissions to be reduced to near zero in the long-term and negative emissions growth may even be necessary.

186 Ibid 6.
187 Core Writing Team, Pachauri and Reisinger, above n 8, 68.
188 Ibid.
189 Richardson, above n 84, 21.
190 Ibid 18.
From a technical perspective, this appears to be possible if a range of strategies are employed such as reforestation, direct CO2 capture from the air, and the use of bioenergy and carbon capture and storage in power plants.\textsuperscript{192} If technical and social/economic barriers are too great, geo-engineering of the climate may also be possible – in which humanity would deliberately manipulate global-scale climate processes to achieve planetary cooling \textsuperscript{193} although this is undoubtedly an option of last resort.\textsuperscript{194}

A further technical problem is that the more ambitious stabilisation scenarios, even Australia’s preferred 450 CO2-e goal, assume that emissions can temporarily and safely ‘overshoot’ their eventual level.\textsuperscript{195} It is not certain, however, that overshooting approaches will actually be effective\textsuperscript{196} although Meinhausen and others assume that due to the inertia of the climate system (the time lag between the output of emissions into the atmosphere and when temperature levels rise), such strategies are technically feasible.\textsuperscript{197}

\textit{b) Economic Feasibility}

The next question is whether ambitious long-term targets are economically feasible. This is a subjective question, as the notion of feasibility depends upon the level of economic cost individual societies and the global community as a whole are prepared to accept in order to avoid dangerous climate change. Economic studies, however,

\begin{itemize}
\item \textsuperscript{193} Richardson, above n 84, 20; David Keith, ‘Climate Engineering as Risk Management’ (2009) 6 IOP Conference Series: Earth and Environmental Science 452002.
\item \textsuperscript{194} See, eg, Clive Hamilton, \textit{Requiem for a Species: Why We Resist the Truth About Climate Change} (Allen & Unwin, 2010) 174-182.
\item \textsuperscript{195} See, eg, Garnaut, \textit{The Garnaut Climate Change Review: Final Report}, above n 96, 192. The proposed 450 ppm CO2-e scenario would involve a temporary overshoot to 500 ppm CO2-e.
\end{itemize}
have tended to show that the costs would not be unrealistically high, especially with policies in place such as global and domestic emission trading systems (ETS).

By way of example, the Garnaut Review modelled the cost to the Australian economy of imposing mitigation policy (chiefly through an ETS), as well as the economic benefits of avoiding climate change. The lowest scenario modelled was 450 ppm CO2-e/2.1°C. 'Standard', 'enhanced' (more rapid technological progress) and 'backstop' (atmospheric sequestration or recycling of CO2) technology pathways were modelled. The Review estimated gross costs of mitigation for Australia of about 2.5 per cent of GDP by 2050. The net mitigation costs by 2100 (economic costs minus the measurable market benefits of avoided climate change) were estimated at 4 per cent of GDP. While this figure may sound large, the annual cost to GDP would average just 0.05 percent. Garnaut did not assess the costs of lower stabilisation scenarios, but the very minor cost associated with the 450 ppm CO2-e target suggests that more ambitious mitigation scenarios were also likely to be economically feasible.

Various studies have modelled the global costs of mitigation, although again generally at less ambitious levels than sought by AOSIS and the LDCs. The IPCC AR4 reported that 445-535 ppm CO2-e stabilisation scenarios would involve global average macroeconomic costs of about 3 per cent of global GDP by 2030 and up to 5.5 per cent by 2050. This meant slowing average annual global GDP by just 0.12 per cent through to 2050. As AOSIS pointed out, this minor reduction in global growth would occur in the context of continuing average global growth of 3 per cent. Health co-benefits

199 Ibid 270. This ignored non-market impacts such as species extinction and damage to the Great Barrier Reef. The Garnaut Review identified four types of costs that could arise from climate change: type 1 (market impacts, such as on infrastructure, exports such as coal, agriculture, mining and health impacts); type 2 (market impacts that were too uncertain to be modelled, such as increased building construction costs, road and bridge maintenance costs, international tourism, geopolitical instability/defence spending); type 3 (market costs of catastrophic climate change (not modelled), such as the large-scale melt of the Greenland ice sheet); and type 4 (non-market costs, such as the loss of biodiversity, destruction of the Great Barrier Reef or Kakadu wetland system): 253, 259-62. The net calculations took into account both the gross costs of mitigation and the benefits of impacts avoided (type 1 costs, with an adjustment for type 2 costs). Types 3 and 4 were not modelled.
200 Core Writing Team, Pachauri and Reisinger, above n 8, 69.
201 AOSIS, 'Shared Vision', above n 25, 47.
from reduced air pollution, which were not factored in by the IPCC, could also offset a substantial fraction of mitigation costs.\textsuperscript{202}

In 2009, the Grantham Institute on Climate Change and the Environment reviewed a range of modelling efforts, also reporting that mitigation costs were expected to be low. While 2°C/450 CO2-e and lower scenarios were expected to be demanding, these were judged to be economically feasible with well-designed policies applied consistently across countries, industries and GHGs.\textsuperscript{203} The studies estimated a range of costs, but overall indicated that mitigation costs need not be more than a few percentage points of GDP. Furthermore, the benefits of avoiding climate change impacts were likely to be much greater, making the investment worthwhile.\textsuperscript{204} Co-benefits would also result from mitigation efforts, for example, in the form of reduced local pollution and increased energy security.\textsuperscript{205} The highest cost estimate was 5 per cent of GDP, but this was in the context of continued global economic growth.\textsuperscript{206} Other studies have found that achieving a 400 ppm CO2-e target could cost as little as 2.5 per cent of GDP aggregated to 2100.\textsuperscript{207} Notably, mitigation costs are likely to be less than current global spending by governments on fossil fuel subsidies.\textsuperscript{208}

It has been seen that the precise cost of achieving ambitious mitigation scenarios is difficult to ascertain. However, while costs will certainly be involved – and these will be higher the more ambitious the stabilisation scenario – the evidence appears to indicate that an ambitious 2050 mitigation goal in the range sought by AOSIS and the LDCs is not infeasible.

\textsuperscript{202} Core Writing Team, Pachauri and Reisinger, above n 8, 59.
\textsuperscript{204} Ibid 2.
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid 26.
\textsuperscript{208} Project Catalyst, ‘Towards a Global Climate Agreement’ (Proposal, ClimateWorks, 2009) 10.
c) Political Feasibility

A further consideration for the Rudd government was the political feasibility of any long-term goal. It needs to be appreciated that the more ambitious the goal, the greater the mitigation that would be expected of Australia – and thus the greater the economic cost. While costs would be involved, however, the Garnaut Review’s findings above demonstrated that these would be low for Australia under a 450 ppm CO2-e scenario (see further discussion of Australian mitigation costs in chapter 6). This suggests that greater ambition by Australia was also possible in the context of a stronger global agreement, although the Rudd government would certainly have faced domestic political difficulties if it had sought to increase its upper target for 2020 above 25 per cent (see further discussion of the politics of Australia’s 5 to 25 per cent target in chapter 6).

At the global level, the ambitious scenarios promoted by AOSIS and the LDCs were clearly not politically feasible leading up to COP 15, lacking the support of the major developed countries, including the US and EU, and the major developing countries including BASIC members. Indeed, the Garnaut Review advised the Rudd government that only a 550 CO2-e goal was likely to be politically feasible for Copenhagen. This pessimism proved to be warranted with Parties not agreeing to any CO2-e target, and the mitigation pledges made in the Copenhagen Accord likely to result in 2 to 5°C warming by the end of the century, notwithstanding Parties’ commitment to a 2°C threshold. This arguably gave some credence to the Rudd government’s preferred targets, as they were at least in the realm of political possibility at COP 15, unlike those put forward by AOSIS and the LDCs. The government did not, however, justify its position on pragmatic grounds. Rather, its clearly stated view was that its preferred long-term goals were in Australia’s national interest and consistent with the scientific

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evidence. Publicly, the government also appeared to express little sympathy for the targets put forward by AOSIS and the LDCs.211

C Implications for GIC

As noted above, the Convention and the BAP provided broad legal guidance to Parties regarding the type of long-term mitigation target that would be necessary in a post-2012 climate agreement. Although the Convention and BAP did not of course specify what the numeric target should be, they made clear that a long-term goal needed to be directed toward avoiding dangerous climate change, and also be consistent with other provisions and principles of the Convention. As stated earlier, this chapter suggests that the key test of the government's credentials as a GIC was whether or not it put forward or backed proposals that complied with this legal framework.

While assessing what constitutes dangerous climate change is a complex, value-laden question, the Convention provides some guidance. Most directly, article 2 indicates that the ultimate objective of the Convention should be achieved in 'a time-frame sufficient to allow ecosystems to adapt naturally to climate change' and 'to ensure that food production is not threatened' (while also allowing 'economic development to proceed in a sustainable manner'). Also relevant are several article 3 principles (as highlighted by AOSIS), which make clear that any long-term goal should:

- give 'full consideration' to 'the specific needs and special circumstances of developing country Parties', 'especially those that are particularly vulnerable to the adverse effects of climate change', or those that would bear a 'disproportionate or abnormal burden' (article 3.2);
- respect all Parties' right to sustainable development (article 3.4); and
- protect the global climate for both present and future generations (article 3.4).

The precautionary principle (article 3.3), also indicates that Parties should 'take precautionary measures to anticipate, prevent or minimize the causes of climate

211 This was evident, for example, in a seminar presented by a senior Australian climate negotiator following COP 15, attended by the author. The session was conducted under Chatham House rules and thus more specific details are not provided.
change and mitigate its adverse effects' where there are 'threats of serious or irreversible damage' and that 'lack of full scientific certainty should not be used as a reason for postponing such measures'.

The evidence reviewed by this chapter strongly suggests that Australia's preferred long-term targets did not give sufficient consideration to the above provisions of the UNFCCC. As compared to the more ambitious targets proposed by AOSIS and the LDCs, Australia's targets were likely to result in some ecosystems being unable to naturally adapt to climate change, resulting in higher rates of species extinction. Food production was also more likely to be threatened, especially in the most vulnerable countries. The specific needs of the most vulnerable developing countries also appeared to be given insufficient consideration by the Rudd government, with AOSIS members and LDCs predicted to experience more frequent and extreme weather events and rising sea levels under the targets it backed. Similarly, Australia's preferred targets seemed less likely than those proposed by AOSIS and the LDCs to ensure that vulnerable developing countries could realise their right to sustainable development – with their ongoing economic development likely to be adversely affected by climate impacts – or to protect the global climate for future generations.

A particularly obvious deficiency of the Rudd government's preferred targets is that they did not appear to be consistent with the precautionary principle. Several reputable scientific studies and reports indicated that the 2°C threshold was no longer considered capable of preventing many negative climate impacts, for example, biodiversity loss and extreme weather events, and of preventing major climate tipping points from being crossed. Most problematically, the 450 ppm CO2-e goal and 50 per cent reduction target for 2050 only enjoyed a 50 per cent chance of actually limiting warming to Australia's favoured 2°C threshold. Similarly, Australia's proposed 2020 peak year for global emissions appeared to adopt a less than precautionary view about the rate at which nations were likely to be able to reduce their emissions in future years. By contrast, the targets supported by AOSIS and/or the LDCs (a 1.5°C threshold, 350 ppm CO2-e stabilisation target, 85 per cent reduction target for 2050 and a 2015 peak year for emissions) appeared to offer much better odds of avoiding dangerous climate impacts for all UNFCCC Parties.
It should also be pointed out that, as a developed country, Australia was expected to show leadership in addressing climate change, as required by article 3.1 UNFCCC. As explained in chapters 1 and 4, leadership is also a key general quality associated with GIC, however, arguably has even greater moral weight in the context of the ICCL regime, due its inclusion in the UNFCCC. Given the insufficient ambition in the targets proposed by the Rudd government, it would be difficult to characterise Australia as a leader on this issue. While Australia’s preferred targets were backed by other nations – especially the 2°C goal which enjoyed widespread support – Australia arguably needed to lend its weight to the targets proposed by AOSIS and the LDCs in order to show genuine leadership by a developed country on this issue. Far from doing so, the Rudd government actually pressured AOSIS nations to drop their preferred long-term goals in return for adaptation funding.

Leaving aside the specific terms of the UNFCCC, Australia’s position also arguably failed to properly acknowledge many of the legal considerations highlighted by AOSIS, the LDCs, and the Maldives. It is difficult to argue, for example, against the proposition that any long-term mitigation goal must respect the right of all sovereign countries to survival as well as all countries’ legal responsibility under international environmental law not to cause trans-boundary environmental harm to other states or to the global commons. A further legitimate consideration was the need to prevent climate impacts from adversely affecting individuals’ enjoyment of human rights protected by international law, which appeared to be a greater concern under Australia’s targets than those proposed by AOSIS and the LDCs. It should be highlighted that – to its detriment – the Rudd government actually opposed the LDCs’ proposal to recognise that climate change would likely have adverse impacts on various human rights (such as the right to life, and the right to health) in the official negotiating text. This was despite Australia being a Party to the major international human rights conventions.

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212 This indicates that ‘developed country Parties should take the lead in combating climate change and the adverse effects thereof’. This is to give effect to the article 3.1 principles of equity and common but differentiated responsibility and respective capabilities.

213 The LDCs sought recognition in the ‘shared vision’ section of the text that the adverse impacts of climate change ‘have a range of direct and indirect implications for the full and effective enjoyment of human rights including the right to self-determination, statehood, life, food, health and the right of a people not to be deprived of its own means of subsistence, particularly in developing countries’.
Turning to the broader attributes of GIC identified in chapter 1, the Rudd government’s approach also appeared to be inconsistent with various attributes articulated by Gareth Evans. Aside from the issue of leadership (discussed above), it would be difficult to argue that Australia’s position was consistent with the notions of promoting ‘purposes beyond ourselves’, pursuing Australia's 'enlightened self-interest', or that of being a 'good neighbour'. While the Rudd government's behaviour was nowhere near as blatantly nationalistic as the earlier Howard government in the Kyoto Protocol negotiations, the Rudd government's preferred targets clearly fell short of altruistically promoting the interests of the most vulnerable countries. Similarly, the government's approach arguably did not go far enough in advancing Australia’s 'enlightened' self-interest given that its 450 ppm CO2-e stabilisation target did not actually provide strong odds of preventing dangerous climate change for Australia, let alone other more vulnerable nations. Instead, the government appeared to preference Australia’s narrow self-interest, namely a desire to protect Australia’s economy in the near-term, which could be harmed by more ambitious targets (see further discussion in chapter 6). Given that AOSIS represented the interests of a number of Australia’s regional neighbours (Papua New Guinea, East Timor, Tuvalu, Kiribati and the Solomon Islands, among others – many of which are LDCs), the government’s position also appeared to be inconsistent with the notion of acting as a good neighbour, which would imply promoting the broader interests of the region, not just those of Australia.

The major defence for the Rudd government’s preferred targets, from a GIC perspective, was that they undoubtedly reflected a more pragmatic or realistic understanding of the level of ambition that was politically feasible at COP 15. Its preferred targets were also likely to be more feasible from a technological and


economic perspective. Thus it could be argued that the government adopted a reasonable balance between what Evans referred to as idealism (namely, achieving an optimal climate outcome) and realism (what was likely to be possible). This is in contrast to AOSIS and the LDCs' preferred targets which, while better reflecting what was necessary to avoid dangerous climate change, would be even more challenging to implement from a technological and economic perspective, and politically, were never likely to be adopted at Copenhagen (not being supported by the most influential nations). Indeed, in one sense it could be argued that the Rudd government’s efforts to have the 1.5°C goal dropped by some of its proponents was actually a positive move in that it helped to ensure consensus around the 2°C target ultimately adopted by the Copenhagen Accord. While not ideal, this was surely preferable to a situation in which Parties did not agree to any numeric target at all.

In relation to other relevant GIC attributes identified in chapter 1, it is clear that the Rudd government took an internationalist, activist and multilateral approach. Its active contribution to the negotiations also demonstrated a general willingness to 'pitch in' to global efforts to address climate change. In a broad sense, the government's active engagement with the negotiations also demonstrated that it was committed to international law as the best mechanism for addressing global climate change, as well as to the UNFCCC as the international institution with primary responsibility for addressing this issue (the UNFCCC is both a treaty and a treaty body). These were all positives for the government from a GIC perspective, although this chapter (and the thesis in general) does not give the above attributes significant weight – being fairly minimal obligations, they clearly did not go to the heart of what distinguished 'good' from lesser forms of international conduct on this issue.

Overall, this chapter argues that the failure of the Rudd government to promote numeric targets that were clearly consistent with achieving the ultimate objective of the Convention makes it difficult to classify it as a GIC on this issue. This was plainly the dominant consideration in assessing whether its activities displayed the 'higher' or 'better' standard of conduct associated with GIC, as the adoption of an inadequate long-term target in a post-2012 agreement would undermine the central purpose of the ICCL regime. The government’s approach also failed to give proper effect to several
key principles of the Convention including the precautionary principle (undoubtedly an important guiding principle on this issue) and the need for developed country leadership. It would be unfair to categorise the government’s behaviour as ‘poor’ on this issue, a description best reserved for Parties such as Saudi Arabia who, for example, argued against adopting any numerical target.\textsuperscript{215} However, for this author, the evidence suggests that Australia could at best be described as an ‘average’ international citizen in relation to its efforts to establish a long-term mitigation goal under a post-2012 climate agreement.

CHAPTER 6. THE RUDD GOVERNMENT'S NATIONAL MITIGATION TARGET

'The legitimacy of Australia’s role and its reputation as a principled good international citizen will ultimately depend on what it does not just what it says or how it says it.' Lorraine Elliot, Australian Foreign Policy Futures, 2008.¹

'Well, the bottom line is this. ... Australia will do no more and no less than what the rest of the world does.' Prime Minister Kevin Rudd, December 2009.²

This chapter examines the national emission reduction target range committed to by the Rudd government during the post-2012 climate negotiations: 5 to 25 per cent below 2000 levels by 2020. This was perhaps the most significant policy decision of the government during the negotiations and the most important issue in terms of assessing its credentials as a 'good international citizen' (GIC). This is because more than any other issue in the negotiations, the mitigation target offered by each Party represented what it was prepared to do in practice to help avoid dangerous climate change. Given the significance and complexity of this issue, this chapter is the most detailed of the thesis.

The chapter examines the merits of the Rudd government's mitigation target, and its implications for its GIC credentials, in the following manner. First, the basic legal background to the issue is outlined. For reasons explained in previous chapters, this chapter argues that in order for the Rudd government to meet the standard of GIC in its engagement with the post-2012 climate negotiations, it was particularly important that it put forward a mitigation target that complied with the legal expectations established of it by the international climate change law (ICCL) regime (and broader international law, where relevant). Second, the chapter outlines the specifics of the

¹ Lorraine Elliott, 'Introduction' in Lorraine Elliott et al, Australian Foreign Policy Futures: Making Middle-Power Leadership Work? (Department of International Relations, Australian National University, 2008) 1.
Rudd government’s target, including its associated conditions. Third, the chapter considers the sufficiency of the government’s 25 per cent target, its ‘headline’ emission reduction figure, vis-à-vis other Parties. Fourth, the chapter comments on the merits of the government adopting a conditional target range. Sixth and seventh, the chapter considers the appropriateness of the conditions attached to the 25 per cent target and whether these conditions were satisfied. The chapter concludes with a detailed assessment of the government’s performance as an international citizen on this issue. The chapter primarily judges the government’s behaviour by examining whether it complied with or respected the relevant legal framework, but also comments on the broader range of GIC attributes identified in chapter 1.

A Legal Background

1 The UNFCCC and Kyoto Protocol

As outlined in chapters 2 and 4, the 1992 United Nations Framework Convention on Climate Change (UNFCCC)\(^3\) was the first international agreement to establish greenhouse gas (GHG) emission reduction commitments for the international community. Under articles 4.2(a)(b) of the Convention, Annex I Parties (essentially, the developed countries)\(^4\) agreed to adopt national mitigation policies and measures with the non-binding ‘aim’ of reducing their GHG emissions to 1990 levels by 2000, while developing countries made more general mitigation commitments without specifying particular targets.\(^5\) The fact that only developed countries adopted a quantified mitigation target reflected a number of principles established in article 3 UNFCCC, namely that the Parties should act ‘on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities’ (CBDR&RC) and

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\(^3\) United Nations Framework Convention on Climate Change, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) (‘UNFCCC’).

\(^4\) Annex I Parties include developed countries that were members of the OECD in 1992, the European Economic Community (now represented by the EU), former Soviet Union countries with economies in transition to a market economy (EITs), as well as countries which have later voluntarily joined Annex I. Annex I currently includes: Australia; Austria; Belarus*; Belgium; Bulgaria*; Canada; Czechoslovakia*; Denmark; European Economic Community; Estonia*; Finland; France; Germany; Greece; Hungary*; Iceland; Ireland; Italy; Japan; Latvia*; Lithuania*; Luxembourg; Netherlands; New Zealand; Norway; Poland*; Portugal; Romania*; Russian Federation*; Spain; Sweden; Switzerland; Turkey; Ukraine*; United Kingdom and the United States.* = EITs.

\(^5\) UNFCCC art 4.1.
that, accordingly, developed countries 'should take the lead in combating climate change and the adverse effects thereof'.

While significant for the development of ICCL, the Annex I Parties' target was weak, only having an aspirational character. The later 1997 Kyoto Protocol was thus more significant as it established a binding commitment by Annex I Parties to collectively reduce their GHG emissions, specifically, by at least 5 per cent below 1990 levels during the treaty's first commitment period (2008 – 2012). Kyoto Annex I Parties also committed to individual mitigation targets (listed in Annex B), technically known as 'quantified emission limitation and reduction commitments'.

Under Kyoto, the Annex I Parties (also referred to as Annex B Parties) adopted individual commitments that varied significantly in percentage terms. Most ambitiously, the European Union (EU) agreed to reduce emissions by 8 per cent (below 1990 levels). This was followed by the United States (US) with 7 per cent – although the US subsequently refused to ratify the agreement. Least ambitiously, Iceland won the right to increase its emissions by 10 per cent, which was followed closely by Australia (+8 per cent). As outlined in chapter 2, the Howard government argued that an emissions increase was warranted for Australia due to its national circumstances, especially the importance of fossil fuels to Australia's export and domestic energy sectors, both of which were crucial for the economy and jobs.

2 The Bali Roadmap

National mitigation targets were discussed under both negotiating tracks of the post-2012 climate negotiations, namely, the Ad Hoc Working Group to Consider Further

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6 Ibid art 3.1.
8 Kyoto Protocol art 3, annex B.
9 Ibid annex B. The EU is officially a Party as the 'European Community'.
10 Ibid.
11 Ibid.

a) Negotiations under the Kyoto Protocol

Kyoto Parties instigated their negotiations on mitigation targets for a second commitment period of the Protocol at the first Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP 1, December 2005).\(^\text{13}\) These discussions had yet to be resolved at the time of the 2007 Bali Climate Change Conference, resulting in an agreement to continue these negotiations under the Bali Roadmap. Kyoto Parties' conclusions outlined a detailed program of work leading up to CMP 5 in Copenhagen (December 2009). Relevantly, this included analysis of the mitigation potentials and range of emission reduction objectives of Annex I Parties and the consideration of further commitments by Annex I Parties, including the scale of emission reductions to be achieved in aggregate and individually.\(^\text{14}\)

b) Negotiations under the UNFCCC and Bali Action Plan

Parties to the UNFCCC also discussed national mitigation targets under the terms of the Bali Action Plan (BAP). This was the more important negotiating forum as the BAP specifically authorised discussion of mitigation targets by both developed and developing countries, including non-Kyoto Parties (namely, the US). This was significant as many developed countries, including Australia, were unwilling to commit to ambitious – or any – mitigation targets in the absence of an agreement that included both developing countries and the US.\(^\text{15}\)

\(^{13}\) UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum (Part 2, Vol 1), UN Doc FCCC/KP/CMP/2005/8/Add.1 (30 March 2006), Decision 1/CMP.1. The AWG agreed to aim to complete its work 'as early as possible' and in time to ensure that there was no gap between the first and second commitment periods: [3].


\(^{15}\) See section B and table 3 in this chapter.
Respecting the principles of CBDR&RC and developed country leadership, the BAP established differentiated expectations for developed and developing countries. Under paragraph 1(b)(i) developed countries agreed to consider:

Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances.\(^{16}\)

Meanwhile, under paragraph 1(b)(ii), developing countries agreed to consider:

Nationally appropriate mitigation actions ... in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner.\(^ {17}\)

The BAP left open the possibility that developed countries could adopt 'actions' (the legal status of which was uncertain) as opposed to legally binding, economy-wide 'commitments' (as under Kyoto). However, most Parties, including Australia,\(^ {18}\) expected developed countries to adopt legally binding commitments.\(^ {19}\) The terms of the BAP also left open the legal form that developing countries' 'nationally appropriate mitigation actions' (NAMAs) could take, although most developing countries strongly argued that these should be non-binding.\(^ {20}\)

The BAP’s recognition that developing countries needed to adopt stronger mitigation measures under a post-2012 agreement reflected the generally accepted scientific view that achieving the Convention's objective — namely, avoiding 'dangerous

\(^{16}\) UNFCCC, Report of the Conference of the Parties on its Thirteenth Session: Addendum (Part 2), UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008), decision 1/CP.13, [1(b)(i)] ('COP 13 Report').

\(^{17}\) Ibid [1(b)(ii)].


anthropogenic interference with the climate system'\textsuperscript{21} – was no longer possible without developing countries finally joining Annex I Parties in abating emissions, especially the major developing economies.\textsuperscript{22} Indeed, the absence of mitigation targets for the major developing country emitters under Kyoto (as well as the US), meant that this agreement only accounted for about 30 per cent of global emissions.\textsuperscript{23} Going forward, the 2007 \textit{Intergovernmental Panel on Climate Change Fourth Assessment Report} (IPCC AR4) estimated that GHG emissions would rise by 25 to 90 per cent between 2000 and 2030 in the absence of global mitigation measures.\textsuperscript{24} Two thirds to three quarters of this increase was expected to occur in developing countries.\textsuperscript{25}

It is evident from the above that in order to be consistent with the established legal framework, Australia's target needed to respect a range of ICCL principles including CBDR&RC, developed country leadership and comparability of effort (a conceptually similar principle to CBDR&RC). It was also clear that the government's mitigation target needed to be consistent with the Convention's ultimate objective, that of avoiding dangerous climate change.

\textbf{B Specifics of the Rudd Government's Target}

\textit{1 Principles and Factors Reflected in the Target}

The Rudd government outlined a range of principles or considerations that would influence Australia's final post-2012 mitigation target. At a general level, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} UNFCCC art 2.
\item \textsuperscript{22} See, eg, D P van Vuuren, A F Hof and M G J den Elzen, \textit{Meeting the 2°C Target: From Climate Objective to Emission Reduction Measures} (Netherlands Environmental Assessment Agency, December 2009) 67.
\item \textsuperscript{24} IPCC, \textit{Working Group III Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report: Summary for Policymakers} (2007) 4.
\item \textsuperscript{25} Ibid 4.
\end{itemize}
\end{footnotesize}
government committed to making a 'full' and 'fair' contribution to the global mitigation effort,\textsuperscript{26} as well as adopting a target that was 'fully cognisant of the science'.\textsuperscript{27}

The government also proposed a range of principles that it believed should guide all Parties' approaches to setting their targets.\textsuperscript{28} These included several of the UNFCCC's article 3 principles, namely, CBDR&RC and developed country leadership.\textsuperscript{29} The government elaborated upon its understanding of the CBDR&RC principle, as well as that of 'comparability of effort' (referred to in the BAP), stating that:

- all Parties should 'aim to undertake a similar level of effort to others at a similar level of development and with similar national circumstances';
- 'Parties whose national circumstances reflect greater responsibility or capability should make a greater contribution to the global effort'; and
- 'Parties whose national circumstances reflect the least capability should be prioritised for support in their efforts to mitigate climate change'.\textsuperscript{30}

While the government referred to the principle of leadership, its major aim was to make a proportionate or 'fair', rather than leading, contribution to the global mitigation effort. Prime Minister Kevin Rudd made this clear in the lead up to COP 15, stating that Australia was prepared to do 'no more and no less than … the rest of the world'.\textsuperscript{31}

2 Targets and Conditions

The Rudd government put forward a conditional target range in the negotiations, rather than a single target, reflecting its belief that Parties should act in accordance with the principles of CBDR&RC and comparability of effort. Australia's initial offer,
announced in March 2009, was to reduce its GHG emissions by 5 to 15 per cent below 2000 levels by 2020 (or 4 to 14 per cent when measured against Kyoto's 1990 base year).\textsuperscript{32} The upper target was subsequently increased, in May 2009, to 25 per cent below 2000 levels (24 per cent below 1990 levels).\textsuperscript{33} According to the government, this higher offer was made due to its belief that an ambitious global agreement was 'closer now than ever', with the major emitting countries providing 'encouraging signs' regarding the mitigation pledges that they were prepared to adopt.\textsuperscript{34} It hoped that Australia's increased pledge would encourage 'more ambitious commitments from others'\textsuperscript{35} and called for other Parties to adopt similarly ambitious targets.\textsuperscript{36} The increased target was likely also influenced by pressure from both Australian environmental groups and developing countries, who viewed the original upper target as being too weak.\textsuperscript{37}

The specifics of the Rudd government's target range were set out in several international submissions to the post-2012 negotiations, as well as in its domestic Carbon Pollution Reduction Scheme Bill 2009 (CPRS Bill) and Explanatory Memorandum.\textsuperscript{38} At minimum, the government made an unconditional commitment to reduce Australia's GHG emissions by 5 per cent by 2020 (below 2000 levels).\textsuperscript{39} The 15 per cent target would then be adopted if two broad conditions were met in the post-2012 agreement, namely:

1. 'commitments by all major economies, including key developing countries, to substantially restrain emissions'; and

\textsuperscript{32} Australia, 'Australia's National Ambition', above n 26, 3.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid 4.
\textsuperscript{36} Ibid 3, 4.
\textsuperscript{38} Carbon Pollution Reduction Scheme Bill 2009 (Cth) cl 3(4) ("CPRS Bill"); Explanatory Memorandum, CPRS Bill 15-16. The broad features of the CPRS Bill are discussed in greater detail in chapter 7.
\textsuperscript{39} Australia, 'Australia's National Ambition', above n 26, 3.
2. commitments 'by all developed countries to take on comparable emissions reduction targets' to Australia.\textsuperscript{40}

The circumstances in which these two broad conditions would be satisfied were later expanded by the CPRS Bill Explanatory Memorandum. These included:

1. global action to put Parties on track to stabilise emissions between 510-540 parts per million carbon dioxide-equivalent (ppm CO2-e);
2. an aggregate emission reduction by advanced economies of 15 to 25 per cent (below 1990 levels);
3. substantive measurable, reportable and verifiable commitments and actions by major developing economies, in the context of a strong international financing and technology cooperation framework, but which may not deliver significant emissions reductions until after 2020;
4. progress toward inclusion of forests (reducing emissions from deforestation and forest degradation in developing countries (REDD)) and the land sector; and
5. deeper and broader carbon markets and low carbon development pathways.\textsuperscript{41}

Most ambitiously, the Rudd government committed Australia to reducing its emissions by 25 per cent by 2020 if the global agreement met a number of conditions, namely:

1. commitments by all economies sufficient to deliver long-term stabilisation of GHGs at 450 ppm CO2-e or lower;
2. a peak year for global emissions of no later than 2020;

\textsuperscript{40} Ibid. The government's CPRS Bill Explanatory Memorandum adopted slightly different language, indicating that the 15 per cent target was conditional upon a 'global agreement under which all major developing economies commit to substantially restrain emissions and advanced economies take on reductions comparable to Australia': Explanatory Memorandum, CPRS Bill 17.

\textsuperscript{41} Explanatory Memorandum, CPRS Bill 17-18. Records from the Department of Climate Change further indicated that the commitment was conditional on an agreement retaining: the Kyoto Protocol rules that allowed Parties to include land clearing emissions in their base year (article 3.7); voluntary activities under article 3.4; no restriction on the use of LULUCF sinks; and unrestricted access to flexibility mechanisms such as the Clean Development Mechanism (article 12): Australian Government, \textit{FOI Australia's Target Conditions – Where Do We Stand?} (2009) 2 <http://www.climateinstitute.org.au/articles/publications/foi-original-documents-regarding-australian-emission-reduction-targets.html/section/478>.
3. aggregate advanced economy reductions of at least 25 per cent below 1990 levels by 2020;
4. major developing economy commitments to slow growth and then reduce absolute emissions over time;
5. a collective reduction by major developing economies of at least 20 per cent below business-as-usual (BAU) by 2020;
6. a nomination of an emissions peak year for individual major developing economies;
7. global action to mobilise greater financial resources, including from major developing economies;
8. comprehensive coverage of gases, sources and sectors, with inclusion of forests (eg REDD) and the land sector (including soil carbon initiatives (eg biochar) if scientifically demonstrated); and
9. fully functional global carbon markets.\textsuperscript{42}

The government indicated that up to 5 percentage points of this target could be met by purchasing international emission credits under the Kyoto Protocol.\textsuperscript{43}

Longer-term, the Rudd government also committed to reducing Australia's emissions by 60 per cent by 2050 (below 2000 levels).\textsuperscript{44} The focus of this chapter is on assessing Australia's 2020 mitigation target, as the Rudd government had little realistic influence over whether a 2050 target would be met. Briefly, however, it should be noted that the 2050 target was undoubtedly too weak (see table 2 below for a comparison to other developed country targets).\textsuperscript{45} The government, however, indicated that it was open to increasing its 2050 target in future if this was necessary to play Australia's 'full and fair part'.\textsuperscript{46}

\textsuperscript{42} Australia, 'Strengthening Australia's National Ambition for 2020', above n 33, 3. Note that the government presented these as five conditions. These have been separated and reordered to assist with their analysis.
\textsuperscript{43} Explanatory Memorandum, CPRS Bill 83. See discussion of this issue in chapter 7.
\textsuperscript{44} Australia, 'Australia's National Ambition', above n 26, 3.
\textsuperscript{46} Australia, 'Australia's National Ambition', above n 26, 3. See also Explanatory Memorandum, CPRS Bill 18.
C Sufficiency of the 25 Per Cent Target

This section now examines the sufficiency of the Rudd government's upper 2020 target in percentage terms. By 'sufficiency', this chapter is referring to whether the target would make an adequate contribution to a global agreement aiming to avoid dangerous climate change, and was consistent with relevant principles of the UNFCCC and BAP, especially CBDR&RC, leadership and comparability of effort. This is followed by an analysis of the appropriateness of setting a conditional target range and the various conditions attached to the target, as well as whether those conditions were satisfied, at sections D, E and F. An informed analysis of the GIC issue, drawing upon this legal and factual matrix, is then provided at section G.

1 Burden-sharing Between Developed and Developing Country Groups

The first issue for many Parties, particularly the developing countries, concerned the quantum of emission reductions that would represent an equitable or comparable contribution by developed countries to the global mitigation effort.

As noted, the Kyoto Protocol saw Annex I Parties adopt a collective target of reducing their GHG emissions by at least 5 per cent below 1990 levels during the first commitment period (2008-12). Developing countries called upon Annex I Parties to again set a collective target under a new agreement (see details below). Individual targets could then be allocated according to an agreed formula, or through political negotiations. These discussions had an important bearing on the sufficiency of the Rudd government's mitigation target. This is because the higher the collective level of mitigation deemed necessary for the Annex I group, the higher the individual targets of developed countries needed to be.

a) The IPCC AR4

Negotiations regarding 'burden-sharing' were initially influenced by the IPCC AR4. According to the IPCC, if global emissions were to be stabilised at 450 ppm CO2-e (the lowest scenario it assessed), Annex I Parties would need to collectively reduce their
GHG emissions by 25 to 40 per cent by 2020 (below 1990 levels). This would need to be accompanied by a '[s]ubstantial deviation' in non-Annex I Party emissions as against a BAU scenario, specifically in the higher emitting regions. Longer-term, Annex I Parties would need to collectively reduce their emissions by 80 to 95 per cent by 2050, while non-Annex I Party emissions would need to substantially deviate from BAU levels in all regions. In 2008, the authors' of the original IPCC advice reported that a 'substantial deviation' in non-Annex I Party emissions for 2020 equated to a 15 to 30 per cent reduction below BAU.

b) Party Views

Parties to the UNFCCC referred to the findings of the IPCC in a footnote to the BAP, while Kyoto Parties referred to them in their Bali conclusions. While this provided some endorsement of the IPCC's view, Parties ultimately expressed a diverse range of opinions regarding the level of burden-sharing that was necessary between developed and developing countries. Many Parties questioned the merits of the IPCC figure, with India and Brazil, for example, emphasising the need to examine the assumptions underlying the studies on which the IPCC work was based. China and Micronesia also emphasised that burden-sharing was a political issue for the Parties, not the responsibility of the IPCC.

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48 Namely, Latin America, the Middle East, East Asia and Centrally-Planned Asia: ibid.
49 Ibid.
Developing countries proposed a range of collective mid-term targets for the Annex I group. These were all at the top-end or higher than those proposed by the IPCC. Proposed targets (below 1990 levels) included, inter alia:

- at least 40 per cent by 2020: BASIC countries (Brazil, South Africa, India and China) et al\(^{55}\) and the African group,\(^{56}\)
- at least 45 per cent by 2020: Alliance of Small Island States (AOSIS)\(^{57}\) and the Least Developed Countries (LDCs),\(^{58}\) and
- at least 49 per cent by 2013-2017: Bolivia, Malaysia, Paraguay and Venezuela.\(^{59}\)

Some developing countries also argued that these targets should be even higher if developed countries used international offsetting mechanisms like the Clean Development Mechanism (CDM) to help achieve their national targets, as this would require less domestic mitigation effort.\(^{60}\)

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\(^{55}\) UNFCCC, Proposal from Algeria, Benin, Brazil, Burkina Faso, Cameroon, Cape Verde, China, Congo, Democratic Republic of the Congo, El Salvador, Gambia, Ghana, India, Indonesia, Kenya, Liberia, Malawi, Malaysia, Mali, Mauritius, Mongolia, Morocco, Mozambique, Nigeria, Pakistan, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sri Lanka, Swaziland, Togo, Uganda, United Republic of Tanzania, Zambia and Zimbabwe for an Amendment to the Kyoto Protocol, UN Doc FCCC/KP/CMP/2009/7 (15 June 2009) 3, 5.


\(^{59}\) Bolivia et al, 'Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change' in UNFCCC, Proposal from the Plurinational State of Bolivia on behalf of Malaysia Paraguay and the Bolivarian Republic of Venezuela for an Amendment to the Kyoto Protocol, UN Doc FCCC/KP/CMP/2009/12 (17 June 2009) 4, 4.

\(^{60}\) See, eg, China, 'Emissions Trading and Project Based Mechanisms under AWG-KP' in UNFCCC, Views on Possible Improvements to Emissions Trading and the Project-Based Mechanisms, UN Doc
Several developed countries also proposed a new collective target for the Annex I group, with the main proponents being the EU and Norway. These Parties both favoured setting a 30 per cent Annex I reduction target for 2020 (below 1990 levels). Other developed countries, however, rejected the 'top-down' approach of Kyoto altogether, preferring that the aggregate reduction of developed countries simply reflect their national mitigation pledges (a 'bottom-up' approach). For its part, the Rudd government stated that it was 'desirable' for developed countries to agree on a mid-term ambition, of which an 'integral part' should be a collective target for developed countries. However, overall the government did not appear overly concerned as to whether or not a specific target was actually established in a new agreement.

Parties also suggested a range of targets for 2050 which they believed were necessary for the Annex I group. Developing countries proposed the following goals (below 1990 levels):

- more than 80 per cent: Cuba;

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64 See Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 3 (Blair Comley, Deputy Secretary, Department of Climate Change). Notably, the condition attached to the 25 per cent target requiring the advanced economies to collectively reduce their emissions by 25 per cent did not need this ambition to be reflected in a formal target. Furthermore, the government's own approach of announcing a fixed target range prior to any decision by the Parties on a collective Annex I target was more consistent with a bottom-up approach.

• at least 85 per cent: LDCs,\textsuperscript{66} Guyana\textsuperscript{67} and Indonesia;\textsuperscript{68}
• at least 90 per cent: Nicaragua, Guatemala, Dominican Republic, Honduras and Panama;\textsuperscript{69} and
• at least 95 per cent: AOSIS,\textsuperscript{70} the African Group,\textsuperscript{71} Costa Rica and Panama,\textsuperscript{72} Uruguay,\textsuperscript{73} Philippines,\textsuperscript{74} Colombia,\textsuperscript{75} Ecuador,\textsuperscript{76} and Pakistan.\textsuperscript{77}

Micronesia\textsuperscript{78} and Pakistan\textsuperscript{79} also suggested that in the longer-term Annex I Party emissions may need to fall by more than 100 per cent.

Developed countries also proposed 2050 targets for the Annex I group. These included:
• at least 80 per cent: the G8 countries (no base year specified);\textsuperscript{80} and
• 80 to 95 per cent (below 1990 levels): the EU.\textsuperscript{81}

\textsuperscript{66} Least Developed Countries, ‘Fulfilment of the Bali Action Plan and the Components of the Agreed Outcome to be Adopted by the Conference of the Parties its Fifteenth Session’, above n 58, 6.
\textsuperscript{69} Nicaragua et al, ‘Mitigation’, above n 56, 38.
\textsuperscript{71} African Group, above n 56, 12.
\textsuperscript{72} Costa Rica and Panama, ‘Draft Negotiating Text on Shared Vision’, above n 58, 81.
\textsuperscript{73} Uruguay, ‘Shared Vision’, above n 58, 117.
\textsuperscript{75} Colombia, ‘Elements of a Negotiating Text on the Bali Action Plan’, above n 58, 69.
\textsuperscript{78} Micronesia, above n 54, 36.
\textsuperscript{79} Pakistan, above n 77, 46.
\textsuperscript{80} G8, \textit{Leaders Declaration: Responsible Leadership for a Sustainable Future}, G8 Summit, L’Aquila, 8 July 2009 <http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final%2c0.pdf>.
\textsuperscript{81} European Community, ‘A Shared Vision for Long-Term Cooperative Action’, above n 61, 6. These longer-term targets are not considered in detail here, being less relevant to the assessment of the Rudd government’s 2020 target.
c) Why Were Developing Countries’ Expectations so High?

The high level of ambition sought by developing countries from the Annex I group reflected a number of factors. First, it must be noted that there was a degree of self-interest in the developing country position. This is because the higher the level of mitigation undertaken by Annex I Parties, the less that would be required of developing countries. Second, the AOSIS and LDC targets reflected their belief that in order to avert dangerous climate change atmospheric emissions needed to be stabilised at 350 ppm CO2-e, not 450 ppm CO2-e (on which the IPCC estimates were broadly based). In order to achieve this more ambitious global goal, studies indicated that Annex I Parties likely needed to reduce their emissions by 45 per cent by 2020, as AOSIS and the LDCs proposed.82 Third, non-Annex I countries highlighted that a deep Annex I target was necessary to ensure that sufficient demand continued to exist for the carbon credits generated by the CDM and any new flexibility mechanisms (such as REDD) that may be established under a post-2012 agreement (see further chapters 7 and 8).83 The fourth and perhaps most dominant factor, was the belief of developing countries that an ambitious Annex I target was justified by various international law norms or principles, especially those established by the UNFCCC.

i) UNFCCC Principles: Equity, CBDR&RC and Leadership

As outlined earlier, article 3.1 of the Convention stipulates that Parties should protect the climate system on the basis of equity and in accordance with their common but differentiated responsibilities. Accordingly, developed countries are expected to take the lead in combating climate change. These principles were cited by both developing84 and developed countries (including Australia)85 in their submissions on

82 See, eg, Michiel Schaeffer and Bill Hare, How Feasible Is Changing Track? Scenario Analysis of the Implications of Change in Emission Tracks after 2020, from an Insufficient Global Deal on 2020 Reductions, to 2°C and 1.5°C Pathways (PIK-PRIMAP Team and Climate Analytics, 2009) 6. This would need to be accompanied by a 20 per cent reduction from BAU emissions by non-Annex I Parties.
85 See Australia, ‘Legal Architecture for a Post-2012 Outcome’, above n 18, 3.
burden-sharing, although Parties interpreted their practical implications quite differently.

The principles of equity, CBDR&RC and leadership are not defined by the Convention. General comments, however, can be made about their meaning. Equity has many different uses in domestic and international law. Under international law, the term is often used as a synonym for 'fairness' or 'justice', especially 'distributive justice'. CBDR&RC is essentially an emanation of the general equity principle, while the principle of developed country leadership is a further emanation of both the equity and CBDR&RC principles. The CBDR&RC principle implies three elements, namely that: protecting the climate is a common responsibility of all Parties; Parties' responsibilities are differentiated (that is, they are not necessarily equal); and Parties possess differing capacities to reduce emissions. It is accepted that Parties have differentiated responsibilities due to the fact that developed countries have greater economic and technological capacity to address climate change. It also arises from the greater historical responsibility of developed countries for carbon pollution and their higher per capita emissions (as accepted in the UNFCCC Preamble). The principles of equity, CBDR&RC and developed country leadership are given direct legal effect in the Convention and Protocol through establishing commitments of varying stringency for developed countries, the former Soviet economies in transition to a market economy, and the developing countries.

The developing countries high expectations of Annex I Parties in large part reflected their view on the practical implications of the above principles. Many developing

87 Ibid.
88 That is, distributing goods and burdens of society according to criteria such as prior entitlement, just desserts or need: see ibid 647.
89 See ibid 656.
91 UNFCCC arts 4.1, 4.2, 4.6, 4.7; Kyoto Protocol art 3.7.
countries were critical of what they perceived as an ongoing failure of leadership by developed countries in reducing emissions. India, for example, highlighted that Annex I Parties had still failed to fulfil their non-binding commitment under article 4.2(a)(b) UNFCCC to return their emissions to 1990 levels by the year 2000. Some Kyoto Parties were also criticised for not being on track to meet their binding national targets under that treaty.

ii) Other Relevant Norms, Principles and Provisions

Various other international law norms, principles and treaty provisions were highlighted by developing countries to support their position. Under the Convention, these included developing countries' right to 'sustainable development' (article 3.4); that Parties must 'take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties' (article 4.7); and that developing countries have 'legitimate priorities of sustainable development and poverty eradication' (preamble). In this regard, Brazil argued that while developed countries had 'the essential needs of their societies fully satisfied', developing countries did not and therefore faced 'the challenge and extra burden of combining economic growth and mitigation actions.'

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92 India, 'MRV – BAP 1 (b)(i)' in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 1, UN Doc FCCC/AWGLCA/2008/MISC.5/Add.1 (17 October 2008) 34, 34. Annex I Party emissions rose from 16 527 Tg CO2-e in 2000 to 16 748 Tg CO2-e in 2005 (without LULUCF), or 2.6 per cent.
95 G77 and China, 'Mitigation and Means of Implementation' in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 2 (Part 2), UN Doc FCCC/AWGLCA/2008/MISC.5/Add.2 (Part 2) (6 December 2008) 48, 48. The Preamble also states that 'the share of global emissions originating in developing countries will grow to meet their social and development needs'.
In addition to citing the right to 'sustainable development' the G77 and China also insisted on their broader 'right to development'\(^{97}\) (without the sustainability qualifier). China regarded this as a 'basic human right' that was 'undeprivable'\(^{98}\) and insisted that developing countries be allowed adequate 'carbon space' for their industrialisation and urbanisation.\(^{99}\) Argentina similarly stated that 'developing countries should not have to compromise their growth and development as a result of climate change.'\(^{100}\) India also stated that 'rapid development' was 'not only an economic and social imperative' for poorer countries but 'an essential requirement' for building adaptation capacity to climate impacts,\(^{101}\) as well as the 'Right to Life and basic issues of survival.'\(^{102}\)

These developing country statements, especially that of Argentina, reflected a belief that developing countries essentially had an unfettered right to development. Regarding this point, it should be noted that an unfettered right to development is not supported by the terms of the UNFCCC,\(^{103}\) which limits the right to development to that which is 'sustainable'.\(^{104}\) While the notion of sustainable development is open to interpretation, at the very least it can be assumed that the Convention only supports Parties' right to development to the extent that it is compatible with achieving the

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\(^{97}\) G77 and China, 'Mitigation and Means of Implementation', above n 95, 48.


\(^{101}\) India, 'Long-Term Co-Operative Action', above n 94, 31-32.

\(^{102}\) Ibid 32.

\(^{103}\) The right to development is founded in international human rights law: see Declaration on the Right to Development, GA Res 41/128, UN GAOR, 3rd Comm, 41st Sess, Supp 53, UN Doc A/41/53 (4 December 1986) annex.

treaty's ultimate objective. This would rule out unconstrained development, as dangerous climate change cannot be avoided unless developing countries also restrain their emissions.\footnote{See IPCC, above n 24, 4.}

Developing countries further argued that their proposed Annex I targets were justified by the principle of historical responsibility. The G77 and China and AOSIS, among others, insisted that Annex I countries reduce their emissions consistent with their 'level of historical responsibility for climate change' since industrialisation.\footnote{G77 and China, 'Mitigation and Means of Implementation', above n 95, 48; AOSIS, 'Enhanced Action on Mitigation on Climate Change', above n 70, 33; Brazil, 'Views and Proposals on Paragraph 1 of the Bali Action Plan' (30 September 2008), above n 96, 26.} China argued that developed countries had occupied more than their fair share of the 'atmospheric space', an 'injustice' that must be remedied.\footnote{International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(414) (5 June 2009) 2.} Bolivia similarly suggested that developed countries had accrued a 'historical ... emissions debt' that must be repaid.\footnote{Bolivia, 'Commitment for Annex I Parties under Paragraph 1 (B) (I) of the Bali Action Plan: Evaluating Developed Countries' Historical Climate Debt to Developing Countries' in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Part 1, UN Doc FCCC/AWGLCA/2009/MISC.4 (Part 1) (25 April 2009) 44, 46.} It accused developed countries of contributing 'disproportionately to the causes of climate change' and seeking 'to appropriate a disproportionate share of the Earth's remaining environmental space.'\footnote{Ibid.} Developing countries also highlighted the historic inequity in the per capita emissions of the developed and developing world.\footnote{Ibid.}

Some developing country groups further linked the principle of historical responsibility to broader legal principles under international environmental law. AOSIS, for example,
linked historical responsibility to the 'polluter pays' principle,\textsuperscript{111} as well as the principle of state responsibility, that is, that states have the responsibility to prevent harm to the environment of other states and to the global commons.\textsuperscript{112}

The Preamble to the Convention notes the factual situation that 'the largest share of historical and current global emissions of greenhouse gases ... originated in developed countries'.\textsuperscript{113} Developed countries continued their past practice,\textsuperscript{114} however, of rejecting historical responsibility as a basis for apportioning responsibility for future emissions abatement.\textsuperscript{115} This included the Rudd government who in part rejected the principle of historical responsibility on the basis that 'large uncertainties' existed in the data on historical emissions, especially due to patchy information on land use, land-use change and forestry (LULUCF) emissions.\textsuperscript{116} A further complication with this principle is that Parties have only been properly aware of the consequences of emitting GHGs since the late 1980s. Thus it is not clear that is fair or equitable to apportion legal or

\textsuperscript{111} AOSIS, ‘Shared Vision’ in UNFCCC, \textit{Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 2, Part 1, FCCC/AWGLCA/2008/MISC.5/Add.2 (Part 1)} (2 December 2008) 40, 42. On this principle see, eg, Philippe Sands, \textit{Principles of International Environmental Law} (2nd ed, Cambridge University Press, 2003), 279, 280-81. One formulation of the polluter pays principle is found in the Rio Declaration, principle 16: ‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment’: \textit{Rio Declaration} annex I.

\textsuperscript{112} AOSIS, ‘Shared Vision’, above n 111, 42-43. The UNFCCC Preamble recognises that states have 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies' but also 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. The principle is also stated in principle 21 of the \textit{Stockholm Declaration on the Human Environment} (in \textit{Report of the United Nations Conference on the Human Environment}, UN Doc A/CONF.48/14 (1972)) and principle 2 of the \textit{Rio Declaration}. The principle (sometimes described as a norm or rule) is regarded as comprising a binding obligation under customary international law: \textit{Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)} [1996] ICJ Rep 226; Sands, above n 111, 232.

\textsuperscript{113} For emission figures see, eg, United Kingdom, \textit{Results of the Work on Scientific and Methodological Aspects of the Proposal by Brazil}, UN Doc FCCC/SBSTA/2008/MISC.1 (10 March 2008) 2, 2.

\textsuperscript{114} Bodansky, above n 90, 480, 487.


moral culpability for emissions prior to 1990, given the international community's lack of knowledge regarding the ramifications of burning fossil fuels.\footnote{117}

d) Quantifying Responsibility: Approaches in the Literature

The various legal principles highlighted by developing countries, notwithstanding the contentious nature of some, meant that it was well accepted that the greater responsibility for emission reductions belonged to developed countries, a view shared by the Rudd government. It was controversial, however, how to translate these principles into a quantitative Annex I target (and for that matter, individual Annex I targets). A range of studies prior to COP 15 sought to do so by drawing upon various metrics or criteria that were thought to enable future emission entitlements to be allocated with a degree of fairness or objectivity. Among the metrics proposed were:

- equal percentage reduction below a base year (for example, 1990) or BAU emissions;
- equal marginal abatement costs – the cost of reducing emissions per tonne of CO2;
- abatement costs as a percentage of gross national product (GNP) or gross domestic product (GDP);
- the contraction and convergence of per capita emissions – equalising per capita emissions by a specific year such as 2050;
- GHG emission intensity targets – for example, emissions intensity per GDP;
- a triptych approach – allocating reductions based on converging technological standards or targets in specific sectors;
- a multi-criteria approach – applying a combination of various metrics; and
- historical responsibility – since 1900, 1990 or other base year.\footnote{118}


While each approach has its pros and cons, the broad array of metrics proposed in the literature highlights that it is difficult to determine that one approach is fairer than another. As such, the IPCC's suggested 25 to 40 per cent target range represented an average of the mitigation reductions proposed by the various studies.\textsuperscript{119} Notably, the authors' of the IPCC figure reassessed the 25 to 40 per cent figure in 2008 and confirmed that it remained the best available estimate of what was needed by Annex I Parties in relation to a 450 ppm CO2-e stabilisation goal.\textsuperscript{120}

e) Implications for Australia's 25 per cent Target

The above material was set out in detail because it has a bearing on whether the individual targets proposed by Annex I Parties were sufficient. As noted, the Rudd government premised its 25 per cent target on a minimum 25 per cent reduction by the advanced economies.\textsuperscript{121} The Rudd government was not entirely clear on which countries it regarded as 'advanced'. But for present purposes it is sufficient to assume that this included the industrialised countries plus several other more advanced non-Annex I Parties (see further discussion at section E).

Many environmental and other civil society groups backed the developing countries' call for an Annex I target of 40 per cent or higher,\textsuperscript{122} or at the very least, the EU's proposal for a 30 per cent reduction.\textsuperscript{123} The above discussion makes clear, however, that it is ultimately a matter of judgement as to whether or not the Rudd government ought to have premised its upper national target on an advanced economy reduction of 25 per cent, or whether it should have instead increased its upper target – accepting

\textsuperscript{119} Gupta, above n 47, 776. See further den Elzen and Höhne, above n 50.
\textsuperscript{120} den Elzen and Höhne, above n 50, 270.
\textsuperscript{121} The advanced economy group is slightly broader than the Annex I group (see discussion below) but essentially includes the Annex I Parties.
\textsuperscript{123} See, eg, The Climate Institute, \textit{Adequacy of Current Target Pledges and Emission Reduction Actions} (2009) 1.
that a higher collective level of ambition was required of Annex I Parties. Several points are worth mentioning in this regard.

First, the collective economic cost of mitigation for the Annex I group was not prohibitive, even at the higher ranges sought by developing countries. A 2008 study by the Netherlands Environmental Assessment Agency (NEAA), for example, projected the following costs for a collective 2020 Annex I reduction target (below 1990 levels, with approximately 20 per cent achieved using flexibility mechanisms):

- 20 per cent: 0.22 per cent of GDP;
- 30 per cent: 0.54 per cent of GDP; and
- 40 per cent: 1.47 per cent of GDP.  

124

These aggregated costs could appear large, but are small when viewed on a yearly basis (approximately 0.03, 0.07 and 0.18 per cent of GDP, respectively). In 2009, the NEAA revised down its estimated cost range for a 30 per cent reduction target to 0.15 to 0.54 per cent of GDP.  

125 Other credible studies published following COP 15 also suggested that the costs of a 30 and 40 per cent collective Annex I reduction were likely to be lower again.  

126

Second, it must be appreciated that the suggested IPCC target range (25 to 40 per cent) related to a 450 ppm CO2-e long-term stabilisation target. As discussed in chapter 5, this goal appeared to be insufficient to prevent dangerous climate change for all Parties. Thus, even if it was reasonable to premise Australia's upper target on a collective 25 per cent reduction by the advanced economies, this was only the case under a 450 ppm CO2-e scenario. As such, there is clearly an argument that the Rudd government’s upper national target was premised on an aggregate reduction by

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125 M G J den Elzen et al, Sharing Developed Countries’ Post-2012 Greenhouse Gas Emission Reductions Based on Comparable Efforts (Netherlands Environmental Assessment Agency, December 2009) 36, 37. The band reflected which economic model was used and whether or not flexibility mechanisms could be used.
126 Joachim Schleich, Vicki Duscha and Everett B Peterson, 'Environmental and Economic Effects of the Copenhagen Pledges and More Ambitious Emission Reduction Targets: Interim Report' (Interim Report, German Federal Environment Agency, May 2010) 23. The study estimated costs of 0.2 per cent of GDP for a 30 per cent Annex I target and 0.4 per cent for a 40 per cent Annex I target.
advanced economies that was too weak. See further discussion of the implications of this for the government's credentials as a GIC at section G.

2 Burden-sharing Between Developed Countries: Assessing Comparability of Effort

The previous section examined the issue of burden-sharing between developed and developing country groups. This section now turns to addressing whether the Rudd government's upper target involved a sufficient level of effort, relative to other developed countries. The focus here is on Australia and other Parties' 'headline' targets, with these reflecting the highest degree of ambition each Party was prepared to adopt.

a) Developed Country Pledges: Comparison of Percentage Targets

In the lead up to COP 15/CMP 5, Copenhagen, Annex I countries pledged a range of national mitigation targets. These are set out below (in approximate order of stringency as a percentage from 1990).

<table>
<thead>
<tr>
<th>Party</th>
<th>Official Pledge</th>
<th>Conversion to 1990 Base Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>17 per cent below 2005 levels</td>
<td>0 per cent (no change from 1990 levels)</td>
</tr>
<tr>
<td>US</td>
<td>17 per cent below 2005 levels</td>
<td>3 per cent above 1990 levels</td>
</tr>
<tr>
<td>Belarus</td>
<td>5 to 10 per cent below 1990 levels</td>
<td></td>
</tr>
<tr>
<td>New Zealand</td>
<td>10 to 20 per cent below 1990 levels</td>
<td></td>
</tr>
<tr>
<td>Ukraine</td>
<td>20 per cent below 1990 levels</td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>5 to 15 to 25 per cent below 2000 levels</td>
<td>4 to 14 to 24 per cent below 1990 levels</td>
</tr>
<tr>
<td>Russia</td>
<td>15 to 25 per cent below 1990 levels</td>
<td></td>
</tr>
</tbody>
</table>
Developed countries also announced a range of 2050 national mitigation targets (and in some cases 2030 targets).

<table>
<thead>
<tr>
<th>Party</th>
<th>Official Pledge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>60 per cent below 2000 levels by 2050</td>
</tr>
<tr>
<td>Canada</td>
<td>60 to 70 per cent below 2006 levels by 2050</td>
</tr>
<tr>
<td>Japan</td>
<td>60 to 80 per cent below current emissions by 2050</td>
</tr>
<tr>
<td>US</td>
<td>42 per cent below 2005 levels by 2030 and 83 per cent by 2050</td>
</tr>
<tr>
<td>EU</td>
<td>80 to 95 per cent below 1990 levels by 2050</td>
</tr>
<tr>
<td>Iceland</td>
<td>Carbon neutrality by 2050</td>
</tr>
<tr>
<td>Norway</td>
<td>Carbon neutrality by 2030</td>
</tr>
</tbody>
</table>

Table 2. Annex I Parties’ 2050 or 2030 pledges announced prior to COP 15.128

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In basic percentage terms, it can be seen that the Rudd government's 2020 target was comparatively weak, average or relatively strong, depending on the final target Australia and other Parties with conditional target ranges ultimately adopted. As stated by the Rudd government, however, a straight comparison of the Parties' percentage targets was 'not necessarily informative about the degree of effort required' to achieve those targets.\(^{129}\) Indeed, under the terms of the BAP, developed countries were not expected to adopt uniform percentage targets. Rather, the expectation was that individual targets would reflect a 'comparability of effort' (relative to other developed countries), 'taking into account differences in their national circumstances.'\(^{130}\)

### b) The Rudd Government's Preferred Metrics

Developed countries highlighted a range of criteria or metrics in order to demonstrate why their particular targets involved a comparable level of effort. The Rudd government justified Australia's target range chiefly on the basis of 'aggregate mitigation costs', 'per capita effort', and reductions from Kyoto's first commitment period (2008-12).\(^{131}\)

#### i) Aggregate Mitigation Costs

The Rudd government emphasised that Australia faced higher aggregate mitigation costs than most other developed countries.\(^{132}\) Mitigation costs varied across countries 'due to differences in national circumstances, including industry profile, resource endowment and mitigation potential.'\(^{133}\) The 'mitigation potential' of each country varied according to factors such as total GHG emissions and trends; GDP and GDP


\(^{130}\) COP 13 Report, UN Doc FCCC/CP/2007/6/Add.1, decision 1/CP.13, [1(b)(i)].

\(^{131}\) Australia, 'Mitigation', above n 63, 77; Australian Government, FOI Supplementary Brief: Comparability of Effort, above n 127, 1.

\(^{132}\) Australia, 'Economic Cost as an Indicator for Comparable Effort', above n 129, 22.

\(^{133}\) Ibid 21.
growth; population and population growth; the production of energy; and relative
natural resource endowments.\textsuperscript{134} Australia's relatively high aggregate mitigation costs
were chiefly due to its large share of emission and energy-intensive industries and the
dominance of low-cost coal in electricity generation.\textsuperscript{135} Given Australia's relatively high
cost of mitigation, the government believed that its target range involved a level of
mitigation effort that was 'realistically attainable in Australia in the current
circumstances while maintaining economic growth, job creation [and] improved
standards of living'.\textsuperscript{136}

The government backed its view with the results of economic modelling undertaken by
the Australian Treasury in its report, \textit{Australia's Low Pollution Future: The Economics of
Climate Change Mitigation}.\textsuperscript{137} Treasury estimated the following aggregate economic
costs for the 5 to 25 per cent target (cumulative to 2020):

- 2.1 per cent of GNP (25 per cent reduction target);
- 1.6 per cent of GNP (15 per cent target);
- 1.1 per cent of GNP (5 per cent target).\textsuperscript{138}

\textsuperscript{134} Australia, 'Views on the Means to Achieve Mitigation Objectives of Annex Parties for the Ad Hoc
Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol' in UNFCCC,
\textit{Views and Information on the Means to Achieve Mitigation Objectives of Annex I Parties: Addendum 2,
UN Doc FCCC/KP/AWG/2008/MISC.1/Add.2} (March 2008) 2, 5.

\textsuperscript{135} Australia, 'Economic Cost as an Indicator for Comparable Effort', above n 129, 22. Australia's
abundance of cheap domestic thermal coal and its lack of nuclear power were the main drivers behind
the high carbon intensity of Australia's power sector, which was on par with China, ranked in the top five
worldwide, and was much higher than other developed nations such as Germany, the US and UK: see
ClimateWorks Australia, \textit{Low Carbon Growth Plan for Australia} (March 2010) 35.

\textsuperscript{136} Senate Select Committee on Climate Policy, above n 127, 193.

\textsuperscript{137} Treasury, \textit{Australia's Low Pollution Future: The Economics of Climate Change Mitigation} (2008).

\textsuperscript{138} Ibid 110. Applying the CPRS-5, CPRS-15 and Garnaut-25 scenarios. GTEM model. Note that Treasury
did not factor in the economic cost of climate change impacts, or the economic benefits of reducing
climate change risks. Mitigation costs vary across economies, both in terms of aggregate economic costs
(as a share of GNP) and the marginal cost of abatement for each tonne of emissions. Both aggregate and
marginal costs in Australia were found to be relatively high: Treasury, \textit{Australia's Low Pollution Future: The
Economics of Climate Change Mitigation (Summary)} (2008) 24. Several studies have suggested that
Treasury may have overestimated the cost of Australian abatement. This is because Treasury assumed
that the existing LULUCF rules would apply; however, these were still under negotiation and several rule
changes proposed in the negotiations had the potential to allow Australia to increase its LULUCF
abatement (from the projected 6 per cent of total emissions), which was a less expensive mitigation
option than reducing fossil fuel-based emissions: see Andrew Macintosh, \textit{LULUCF Offsets and Australia's
2020 Abatement Task} (ANU Centre for Climate Law and Policy, 2011) 4-5, 27. See also den Elzen, \textit{Sharing
Developed Countries' Post-2012 Greenhouse Gas Emission Reductions Based on Comparable Efforts},
above n 125, 11, 24, 35. However, the LULUCF rules ultimately adopted by Kyoto Parties were generally
not expected to significantly increase Australia's LULUCF abatement potential (although there was some
risk that it could earn 'windfall' credits from activities like forest management: see further chapter 9).
These costs were relatively higher than most developed nations which generally faced lower aggregate economic costs even with higher emission reduction targets, for example:

- Japan: 0.4 per cent of GNP (41 per cent target);
- EU-25: 0.4 per cent of GNP (30 per cent target); and
- US: 0.6 per cent of GNP (28 per cent target).  

Canada was projected to have similar costs to Australia's 25 per cent target only with a much higher target of 45 per cent (2.3 per cent of GNP). However, Russia and the Commonwealth of Independent States faced much higher costs even with a low target of 8 per cent (6 per cent of GNP).

**ii) Per Capita Effort**

The Rudd government also believed that targets should involve comparable reductions on a per capita basis. Its target range (5, 15 or 25 per cent) represented a 34, 41 or 48 per cent reduction in per capita terms. This matched or was higher than the per capita effort implied by most other developed nations' pledges. Only Norway's upper target was higher in this regard (at 51 per cent).

**iii) Effort Relative to 2008-12**

Parties' targets are often compared by examining the percentage reduction from Kyoto's base year (1990). The Rudd government, however, was keen to highlight that its target range represented a 'very strong reduction' relative to Kyoto's first commitment period (2008-12); namely, 12, 22 or 32 per cent. Only Iceland and Norway's upper targets involved a larger percentage reduction from 2008-12 (40 and

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140 Ibid.
141 Ibid.
143 Ibid: Japan (25 per cent); Canada (27 per cent); US (29 per cent); EU-27 (24 to 34 per cent); New Zealand (35 to 42 per cent); UK and Iceland (41 per cent) and Norway (43 to 51 per cent).
144 Ibid.
145 Ibid 1.
146 Ibid.
41 per cent respectively).\textsuperscript{147} By comparison, the EU's upper 30 per cent reduction target only represented a 22 per cent reduction from 2008-12.\textsuperscript{148}

Based on the above metrics, the Rudd government's upper target appeared to make a strong and broadly comparable contribution to the developed countries' mitigation effort. It should be pointed out, however, that Australia's preferred metrics tended to put its target in a positive light. Per capita emission reductions, for example, appear larger in countries with growing populations, which was the case in Australia, whereas Parties such as the EU and Japan had relatively stable populations.\textsuperscript{149} Moreover, the population growth anticipated for Australia was due to government policies favouring high levels of immigration, meaning that the Rudd government had options available to it to reduce Australia's per capita mitigation effort.\textsuperscript{150} Further, while Australia's target appeared ambitious when measured against Kyoto's first commitment period, this argument implied that Parties should have a 'clean slate' in a post-2012 agreement. Early movers like the EU – which led the mitigation effort under Kyoto's first commitment period – argued that they, rather than laggards like Australia, ought to be rewarded in a future agreement for their past mitigation efforts.\textsuperscript{151}

\textit{c) Other Proposed Metrics}

Parties proposed a range of other metrics or considerations relevant to assessing comparability of effort. Developing countries suggested criteria such as: economic and technological capacity,\textsuperscript{152} historical responsibility,\textsuperscript{153} per capita emission levels (both historic and current),\textsuperscript{154} equity,\textsuperscript{155} sustainable development\textsuperscript{156} and the demands of science\textsuperscript{157} (not all of which were easily quantifiable). It was also highlighted that

\begin{footnotesize}
\textsuperscript{147} Ibid 3: Canada (+6 per cent) and the US targets (+4 per cent) represented an increase from 2008-12. Others, like Australia, would decrease: Japan (19 per cent); New Zealand (10 to 20 per cent); EU-27 (12 to 22 per cent); UK (26 per cent); Iceland (40 per cent) and Norway (31 to 41 per cent).
\textsuperscript{148} Ibid.
\textsuperscript{150} See John C V Pezzey, Salim Mazouz and Frank Jotzo, 'The Logic of Collective Action and Australia's Climate Policy' (Research Report No 24, ANU Crawford School of Economics and Government, May 2009) 10; Senate Select Committee on Climate Policy, above n 127, 229.
\textsuperscript{151} See European Community, 'Enhanced Action on Mitigation', above n 19, 11.
\textsuperscript{152} G77 and China, 'Mitigation and Means of Implementation', above n 95, 48.
\textsuperscript{153} Ibid; India, 'Long-Term Co-Operative Action', above n 94, 31; Brazil, 'Views and Proposals on Paragraph 1 of the Bali Action Plan' (30 September 2008), above n 96, 26.
\end{footnotesize}
targets should be legally comparable in terms of form (that is, they should be legally binding and use the same base year).\textsuperscript{158} The G77 and China also urged Annex I Parties to define their national targets based on objective criteria rather than political negotiation.\textsuperscript{159}

Developed countries referred to a large range of metrics in justifying their proposed targets. The EU, for example, put forward a multi-criteria approach involving GDP per capita; GHG emissions per unit of GDP; reward for early action in reducing emissions since 1990; population trends/growth; and total GHG emissions.\textsuperscript{160} Other metrics proposed by developed countries included, inter alia, reductions from BAU (US)\textsuperscript{161} and sectoral energy efficiency (Japan).\textsuperscript{162} Russia also proposed less economically orthodox metrics such as population-weighted heating degree days and average distance between ten major cities.\textsuperscript{163} As with Australia, the variety of metrics being proposed reflected the fact that each measure of comparability had different characteristics making them more, or less, attractive to particular countries (in terms of highlighting the level of effort required in their proposed targets).\textsuperscript{164}

\textsuperscript{154} India, 'Long-Term Co-Operative Action', above n 94, 31; Bolivia, above n 108, 44.
\textsuperscript{156} Ibid.
\textsuperscript{160} European Community, 'Enhanced Action on Mitigation', above n 19, 11.
Rejecting the wishes of developing countries, Australia, the US, EU and others, ultimately refused to set their national targets according to a negotiated formula, stating that this needed to be a national decision.\textsuperscript{165} While there is an argument that Australia and others ought to have set their targets according to an objective, internationally agreed formula, this did not appear to be a realistic option for many, particularly with countries like the US and Australia facing stiff domestic political opposition to introducing carbon reduction measures.\textsuperscript{166} Indeed, the Rudd government cautioned that imposing targets according to a top-down formula could jeopardise the participation of some Parties.\textsuperscript{167} A further problem with a top-down approach was that Parties could not agree on which criteria best measured CBDR\&RC and comparability of effort, with all Parties putting forward their own preferences.\textsuperscript{168} The Rudd government thus saw the role of metrics as helping to inform the Parties' target-setting, rather than defining the outcome.\textsuperscript{169}

d) Party Views of Australia's Target

Several proposals regarding individual developed country targets were made in the negotiations. Under the EU’s proposed burden-sharing formula, Australia was expected to cut its emissions by 24 per cent (below 1990 levels, excluding LULUCF), or 27 per cent (including LULUCF) (in the context of a 30 per cent EU and Annex I group reduction).\textsuperscript{170} In late 2008, China also called for all developed nations to reduce their emissions by a minimum of 25 per cent (the bottom end of the IPCC’s proposed Annex


\textsuperscript{168} Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 3 (Blair Comley, Deputy Secretary, Department of Climate Change).

\textsuperscript{169} Ibid.

I range),\textsuperscript{171} while South Africa called for all developed countries to submit targets within the 25 to 40 per cent IPCC range.\textsuperscript{172} Meanwhile, AOSIS called for all Annex I Parties to pledge targets consistent with those of Norway (30 to 40 per cent).\textsuperscript{173}

During 2009, South Africa also submitted a more detailed proposal that allocated targets among Annex I countries according to the criteria of ‘responsibility and capability’. This proposal allocated Australia a target of roughly 31 per cent by 2020 (below 1990 levels), excluding the use of offsetting mechanisms like the CDM, and in the context of a 40 per cent Annex I reduction.\textsuperscript{174} A proposal by the Philippines went even further, allocating Australia a 41 per cent reduction target by 2020 (in the context of a 42 per cent Annex I reduction).\textsuperscript{175} A further submission by a large group of developing countries including the BASIC group, allocated targets according to historical responsibility only (since 1850 – roughly reflecting responsibility for

\begin{footnotesize}
\begin{enumerate}
\item Lenore Taylor, ‘International Pressure on Rudd to Cut Emissions by 25pc’, The Australian (online), 4 December 2008 <http://www.theaustralian.com.au/archive/business-old/pressure-to-cut-emissions-by-25pc/story-e6frg976-1111118218866>. It should be noted that while some developing countries argued that developed country targets should all be within the IPCC target range, this did not actually reflect what was proposed by the IPCC AR4. As discussed earlier in the chapter, the IPCC target concerned what was necessary by the Annex I group, not what was necessary by Annex I Parties individually.
\end{enumerate}
\end{footnotesize}
emissions since industrialisation).\textsuperscript{176} Under this approach, Australia was allocated a much smaller 11 per cent reduction target by 2020.\textsuperscript{177}

e) Evidence from the Literature

Leading up to, and in the aftermath of Copenhagen, numerous studies attempted to assess the percentage targets that would reflect a comparable level of effort by developed countries. The 2008 \textit{Garnaut Climate Change Review} (Garnaut Review), commissioned by the Rudd Labor Opposition and Australian state governments in 2007, provided the most detailed independent assessment of this issue from an Australian perspective.\textsuperscript{178} The Garnaut Review allocated emission entitlements according to a relatively simple per capita contraction and convergence approach, believing that a per capita-based approach – with the aim of moving towards equal entitlements of per capita emissions by 2050 – had the most potential to be perceived as fair.\textsuperscript{179} The Review noted that Australia was a poor performer from a per capita perspective, with its per capita emissions the highest in the OECD and the sixth highest in the world, largely due to its heavy reliance on coal for electricity.\textsuperscript{180} Specifically, Australia’s per capita emissions – roughly 28.1 tonnes of CO2-e per person (including LULUCF) – were approximately twice the OECD average, and four times the global average.\textsuperscript{181}

\textsuperscript{176} Algeria et al, ‘Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change’ in UNFCCC, \textit{Further Views and Proposals Relating to a Proposal for Amendments to the Kyoto Protocol Pursuant to its Article 3, Paragraph 9…}, UN Doc FCCC/KP/AWG/2009/MISC.14 (11 June 2009) 3, 5-7. Colombia submitted the same table individually. Its proposal stated that the targets did not include the use of offsetting mechanisms or LULUCF and that the targets were premised on a 45 per cent Annex I reduction by 2020: Colombia, \textit{Proposal from Colombia for Amendments to the Kyoto Protocol}, UN Doc FCCC/KP/CMP/2009/8 (15 June 2009) 4-5.

\textsuperscript{177} Algeria et al, above n 176, 5-7.

\textsuperscript{178} Treasury also considered this issue but only assessed 510 ppm CO2-e and 550 ppm CO2-e scenarios, proposing 15 and 5 per cent Australian targets, respectively: Treasury, \textit{Australia’s Low Pollution Future: The Economics of Climate Change Mitigation}, above n 137, 91-93. CPRS-5 modelled a 550 ppm CO2-e scenario and CPRS-15 a 510 CO2-e scenario.

\textsuperscript{179} Ross Garnaut, \textit{The Garnaut Climate Change Review: Final Report} (Cambridge University Press, 2008) 202. Developed and developing countries were allocated emission entitlements that were initially equal to current levels. Over time, per capita entitlements decreased for countries above the global average, and increased for countries below the global average, although middle income developing countries like China were given temporary headroom to increase their emissions. Emissions entitlements were also tradable, increasing flexibility: 203, 207-08.

\textsuperscript{180} Ibid 159. Five non-Annex I Parties had higher per capita emissions: Bahrain, Bolivia, Brunei, Kuwait and Qatar.

\textsuperscript{181} Ibid 153. As of 2006.
Under Garnaut’s contraction and convergence model Australia was allocated a 25 per cent reduction target (below 2000 levels) under a 450 ppm CO2-e global agreement – the upper target ultimately adopted by the Rudd government. This was below the developed country average of 31 per cent and lower than the targets proposed for many other developed countries (for example, Canada – 45 per cent; Japan – 41 per cent; EU – 30 per cent and US – 28 per cent). However, Garnaut believed that a 25 per cent target was justified when measured against the criteria of per capita effort and effort relative to 2008-2012.

Various international studies applied a much broader range of metrics (with a stronger emphasis on relative economic costs) to allocating targets. The wide range of metrics applied (see details in the footnotes), highlights that there is no agreement on precisely which metrics best assess fairness or comparability of effort. As such, many studies address this question by examining a range of metrics, and thus suggest a target range, rather than a single target. Briefly, targets allocated to Australia (below 1990 levels) included:

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182 Ibid 209. Under weaker GHG stabilisation scenarios, Garnaut proposed less ambitious reduction targets for Australia ranging from 0 per cent (no global agreement); 5 per cent (a successor agreement to Kyoto for Annex I countries and some actions by developing countries); to 10 per cent (550 ppm CO2-e global agreement): 209, 282, 285

183 Ibid 209.

184 Ibid 209-210. In per capita terms, the 25 per cent target implied a 40 per cent reduction relative to both 2000 and 2012 levels – above the developed country average of 37 per cent from 2000, and 34 per cent from 2012. From a 2000 base year, the target was less than Canada (54), but above EU-25 (33) and equal to the US and Canada (40). From a 2012 base year, the target was above Canada (36), EU-25 (32), Japan (30) and the US (37).

185 Ibid 209. In absolute terms measured from 2012, the 25 per cent target (32 per cent below 2000 levels) equalled the developed country average, and individual nations including Japan and the US. It was slightly above Canada (30) and EU-25 (31).

• Ecofys 2007: 22 to 29 per cent (in the context of a 30 per cent Annex I group target/450 ppm CO2-e global mitigation scenario);^187

• NEAA 2008: +9 (an emissions increase) to 25 per cent (30 per cent Annex I target/450 ppm CO2-e).^188 This did not account for LULUCF. The Climate Institute calculated that including LULUCF would increase the bottom end of this range from +9 to 20 per cent;^189

• NEAA 2009: +15 (an emissions increase) to 18 per cent (30 per cent Annex I target/450 ppm CO2-e);^190

• Energy Research Centre 2009: 18 or 24 per cent (25 and 30 per cent Annex I targets, respectively);^191 and

• Climate Action Tracker 2009: rated Australia’s 25 per cent target ‘medium’, falling short of the ‘sufficient’ and ‘role model’ categories (2°C temperature threshold scenario).^192

While the above studies varied considerably in their assessment of what was ethically required of Australia, overall they broadly confirmed that the Rudd government’s 25 per cent target (24 per cent from 1990 levels) was at least within an appropriate

[^187]: Höhne, Phylipsen and Moltmann, above n 118, 207. The range of targets reflected the application of different metrics. Metrics applied: equal percentage reduction of CO2-e emissions; GHG intensity targets (equal percentage reduction of emissions per GDP); convergence of CO2-e emissions per capita by 2050; convergence of CO2-e emissions per GDP by 2050; the Brazilian historical responsibility proposal (historical emissions since 1900 – proposed by Brazil during the Kyoto negotiations in 1997, excluding LULUCF); triptych; and sectoral targets: ii, 31-33.

[^188]: This target was for ‘Oceania’ (Australia and New Zealand, of which Australia was the predominant emitter): den Elzen, Exploring Comparable Post-2012 Reduction Efforts for Annex I Countries, above n 118, 62, 15, 48. Metrics: equal percentage reduction below BAU emissions; equal marginal abatement costs; equal abatement costs as a percentage of GNP and GDP (excluding the use of flexibility mechanisms); equal per capita emissions by 2050; triptych approach (allocation based on converging technological standards or targets at the sectoral level).

[^189]: The Climate Institute, ‘Australian Climate Policy and its Role in the Global Climate Agreement’ (Briefing, May 2009) 3.

[^190]: Den Elzen, Sharing Developed Countries’ Post-2012 Greenhouse Gas Emission Reductions Based on Comparable Efforts, above n 125, 34. Metrics: equal reduction from baseline; equal MAC; equal costs (excluding flexibility mechanisms); equal costs (including international emissions trading and CDM); converging per-capita emissions; EU Commission principles (GDP per capita, GHG emissions per GDP, percentage change in emissions 1990 to 2006, and population growth 2006 to 2020); EU Council principles; and equal marginal cost plus GDP per capita. LULUCF included in Kyoto base year.

[^191]: Winkler, Marquard and Letete, above n 174, 6, 7, 13. The study applied various burden-sharing approaches developed in the literature or by Parties, namely, the Greenhouse Development Rights framework; the Wuppertal Institute for Climate, Environment and Energy proposal; the European Commission approach; and its own method.

[^192]: See Climate Action Tracker, above n 127. The other rating was ‘inadequate’.
ballpark for Australia. Notably, several of these studies premised their allocations on a collective 30 per cent reduction by Annex I Parties while the Rudd government indicated that it was prepared to adopt its upper target if the advanced economies reduced their collective emissions by only 25 per cent. As such, the Rudd government’s target actually went slightly further than what several studies suggested was necessary from Australia. Having said this, it needs to be remembered that the above allocations were only premised on a 450 ppm CO2-e or 2°C scenario (and a maximum 30 per cent Annex I reduction). Several studies allocated targets under more ambitious atmospheric stabilisation and Annex I scenarios. These allocated Australia the following targets:

- NEAA 2008: 2 to 35 per cent (40 per cent Annex I target/400 ppm CO2-e global scenario).193 According to the Climate Institute, this equated to 25 to 30 per cent including LULUCF;194 and
- ERC 2009: 29 to 42 per cent (40 per cent Annex I target).195

These studies, although limited, demonstrated that while the 25 per cent target may have broadly represented a comparable level of effort by Australia under a 450 ppm CO2-e/2°C scenario and a 30 per cent Annex I reduction, it likely needed to be increased to make a sufficient contribution to the more ambitious mitigation scenarios called for by AOSIS and the LDCs (350 ppm CO2-e/1.5°C target with a 45 per cent Annex I reduction). See further discussion of this issue at section G.

**D Appropriateness of Setting a Conditional Target Range**

The Rudd government’s upper mitigation target appeared to make a broadly sufficient, if not leading, contribution to a 450 ppm CO2-e long-term goal, however, the government itself accepted that the lower 5 and 15 per cent reduction targets were not scientifically credible. Rather, these lower targets were only offered in the event that Copenhagen delivered a sub-optimal climate agreement. It needs to be questioned whether this was an appropriate policy approach.

193 Den Elzen, Exploring Comparable Post-2012 Reduction Efforts for Annex I Countries, above n 118, 68.
194 The Climate Institute, ‘Australian Climate Policy and Its Role in the Global Climate Agreement’, above n 189, 3.
195 Winkler, Marquard and Letete, above n 174, 9, 11, 14, 28.
1 The Government's Rationale

According to the Department of Climate Change (DCC), there were three major factors behind the government's decision to set a conditional target range. First, was the belief that emission reductions by Australia would have little global impact unless comparable action was taken by other Parties. As stated by the DCC, 'Given that Australia emits around 1 ½ per cent of global emissions, if we act unilaterally and no-one else does anything, then there is very little impact on the prospects for a sound environmental outcome.'196 The department's view, which was reflected in the conditions attached to the 25 and 15 per cent targets, was that a global agreement needed to involve at least 'the key major emitters that make up most of the emissions' in order to be effective.197

Second, the conditional approach was viewed as an important negotiating tactic, what the DCC labelled 'the negotiating dynamic of having a quid pro quo'.198 In other words, Australia would do more, if others did more.199 Thus the conditional target range was designed to leverage greater action by other Parties, as well as to bring other Parties 'to the [negotiating] table.'200

The third, and likely dominant concern, related to the potential economic impact of undertaking higher levels of mitigation than Australia's key economic competitors.201 In particular, the DCC highlighted the potential commercial impact on Australia's trade-exposed emissions-intensive industries (EITEs)202 – the same argument once made by the Howard government in securing a weak mitigation target for Australia under Kyoto and in refusing to ratify that agreement. The DCC noted that if Australia adopted a comparable target to its major competitors, this would lessen any competitiveness

196 Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 11 (Blair Comley, Deputy Secretary, Department of Climate Change).
197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid.
201 See ibid.
202 Ibid.
issues that would otherwise arise. While competitiveness issues could be addressed by other means such as financially compensating trade-exposed industries, this was economically inefficient as it would simply shift a larger emission reduction burden to other sectors of the economy.

The CPRS Bill Explanatory Memorandum further explained that while the government's 25 per cent target was conditional upon a 450 ppm CO2-e climate agreement being adopted, it accepted the Garnaut Review's finding that it was better to adopt some, rather than no mitigation, in the event that an optimal agreement was not reached. This would still reduce the risk of dangerous climate change occurring while building 'confidence that deep cuts in emissions [were] ... compatible with continuing economic growth and improved living standards.' Even a commitment to a lower target could help to bring about 'stronger global reductions in emissions over time' and would position Australia 'to make deeper and more rapid reductions in emissions' if global momentum grew after 2020.

2 Approaches of Other Parties

Developing countries such as the Philippines called for all developed countries to commit to unconditional targets. Many Annex I Parties, however, preferred to put forward conditional target ranges. This included the EU, Belarus, Liechtenstein, New Zealand, Norway, Russia and Switzerland. Others offered single pledges, though still with conditions attached, including Canada, Croatia, Iceland, Japan, Monaco, Ukraine and the US (see examples in table below).

203 Ibid.
204 Ibid.
205 Explanatory Memorandum, CPRS Bill 17.
206 Ibid.
207 Ibid.
208 Ibid 15. Treasury similarly stated that adopting even sub-optimal mitigation targets was advantageous to Australia as economies that deferred mitigation in the short-term were likely to face higher long-term costs, as more emission-intensive infrastructure was locked in place and global investment was redirected to early movers: Treasury, Australia’s Low Pollution Future: The Economics of Climate Change Mitigation, above n 137, 89.
<table>
<thead>
<tr>
<th>Party</th>
<th>Target or Target Range</th>
<th>Conditions</th>
</tr>
</thead>
</table>
| EU      | 20 to 30 per cent below 1990 levels | 20 per cent: unilateral  
- as part of a global and comprehensive agreement for the period beyond 2012  
- provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities |
| Japan   | 25 per cent below 1990 levels | Conditional on the establishment of a fair and effective international framework in which all major economies participate and on agreement by those economies on ambitious targets |
| New Zealand | 10 to 20 per cent below 1990 levels | Adopt a target within this range if there is a comprehensive global agreement. This means:  
- the global agreement sets the world on a pathway to limit temperature rise to no more than 2°C  
- developed countries make comparable efforts to those of New Zealand  
- advanced and major emitting developing countries take action fully commensurate with their respective capabilities  
- there is an effective set of rules for LULUCF  
- there is full recourse to a broad and efficient international carbon market |
| Norway  | 30 to 40 per cent below 1990 levels | 30 per cent: unilateral  
40 per cent:  
- as part of a global and comprehensive agreement for the period beyond 2012 where major emitting Parties agree on emissions reductions in line with |
Table 3. Select Annex I Party targets and conditions pledged under the Copenhagen Accord.

<table>
<thead>
<tr>
<th>Country</th>
<th>Target Ranges</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russian Federation</td>
<td>15 to 25 below 1990 levels</td>
<td>- appropriate accounting of the potential of Russia's forestry in meeting its emission reduction obligations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- legally binding obligations by all major emitters to reduce anthropogenic GHG emissions</td>
</tr>
<tr>
<td>US</td>
<td>17 per cent below 2005 levels</td>
<td>To be adopted in conformity with anticipated US energy and climate legislation, recognising that the final target will be reported to the Secretariat in light of enacted legislation</td>
</tr>
</tbody>
</table>

The above table illustrates that Australia's general approach was consistent with that of many other developed countries. It will be seen below that many developing countries also offered conditional target ranges. However, while the focus of this chapter is not on assessing the comparability of Australia's sub-optimal targets to other developed countries, it should be highlighted that Australia's unilateral target was far less ambitious than the leading nation in this regard, Norway, who made a unilateral commitment to reduce emissions by 30 per cent by 2020.211

3 The Economics and Politics of Unilateral Versus Collective Action

It was noted above that the main driver of Australia's conditional approach was likely the government's concern about the domestic economic (and related political) consequences of adopting mitigation targets that were out of step with Australia's

211 As well as being less ambitious than Norway's unilateral target in percentage terms, Australia's target was also lower according to the government's preferred metrics of per capita effort and effort from Kyoto's first commitment period: see Australian Government, FOI Supplementary Brief: Comparability of Effort, above n 127, 3.
competitors. The two major policy inputs to the Rudd government's climate change policy, Treasury's Low Pollution Future Report and the Garnaut Review, both advised the government to adopt proportional, rather than leading mitigation targets. Similar to what was stated by the DCC, Treasury saw unified global action as 'more attractive because of its environmental and economic benefits.'\textsuperscript{212} Coordinated global action would minimise competitiveness distortions.\textsuperscript{213} Without unified global action, however, the international competitiveness of Australia's EITE sectors would be impacted by a relatively higher domestic carbon price.\textsuperscript{214} Treasury warned that as well as losing Australian industries and jobs, associated emissions would simply shift to other countries which had lower or non-existent carbon prices, potentially increasing global emissions where industries moved to more carbon-intensive economies (a process called 'carbon leakage').\textsuperscript{215} In light of these concerns, Treasury recommended that Australia adopt a 5 per cent target by 2020 under a 550 ppm CO2-e agreement, and 15 per cent under a 510 ppm CO2-e agreement.\textsuperscript{216}

The Garnaut Review similarly advised that '[s]trong Australian mitigation outside an effective international agreement' was 'deeply problematic'.\textsuperscript{217} According to Garnaut, one of the key benefits of acting collectively was that an international agreement would allow Parties to trade in emissions entitlements, helping to equalise costs across countries and remove distortions associated with EITE industries (such as the shielding of these industries from carbon pricing by national governments).\textsuperscript{218} Under a strong global framework, Australia could maintain its comparative advantage in EITE industries by purchasing emission entitlements to allow these industries to continue to expand.\textsuperscript{219} For similar reasons to Treasury, Garnaut recommended that the Rudd

\textsuperscript{212} Treasury, \textit{Australia's Low Pollution Future: The Economics of Climate Change Mitigation}, above n 137, 103.
\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid 167. On carbon pricing, see chapter 7.
\textsuperscript{215} Ibid 169.
\textsuperscript{216} Treasury, \textit{Australia's Low Pollution Future: The Economics of Climate Change Mitigation (Summary)}, above n 138, 8.
\textsuperscript{218} Ibid 285-86. Many other studies have reached similar conclusions regarding the economic benefits of collective action: see, eg, The Climate Group, \textit{Breaking the Climate Deadlock: Cutting the Cost (The Economic Benefits of Collaborative Climate Action)} (2009).
\textsuperscript{219} Ibid 286.
government put forward a conditional target range, in this case: a minimum 5 per cent target in the absence of a comprehensive agreement, 10 per cent under a 550 ppm CO2-e agreement and 25 per cent under a 450 ppm CO2-e agreement.\textsuperscript{220}

Not all economists shared the view, however, that Australia's economic interests were best served by adopting a proportional response. Pezzey, Mazouz and Jotzo, for example – the latter author being a key contributor to the Garnaut Review – argued that a strong unilateral target was actually in Australia's long-term self-interest. The authors' argued that because stringent emission reduction measures were 'likely inevitable' in the long-term, early movers would ultimately benefit by avoiding the lock-in of carbon-intensive industries.\textsuperscript{221} Furthermore, the longer significant mitigation action was delayed, the higher the ultimate economic cost of decarbonising Australia's economy.\textsuperscript{222}

While not all economists thus shared the mainstream economic view that it was better to act in step with other nations, the government also faced domestic political realities, namely, that it was under considerable pressure by many in the influential business sector not to act ahead of other nations. Industries that would be most affected by carbon pricing strongly argued that it was environmentally ineffective for Australia to unilaterally reduce its emissions,\textsuperscript{223} and warned of job losses if Australia's competitors did not face similar carbon costs.\textsuperscript{224} One mainstream business advocate, the Australian Industry Group, supported the government's 25 per cent target (bearing in mind the strong conditions attached), but was opposed to even a 5 per cent target in the absence of comparable action by other economies.\textsuperscript{225} Many large businesses and industry groups also highlighted the potential consequences for the economy and

\textsuperscript{220} Ibid 277.
\textsuperscript{221} Pezzey, Mazouz and Jotzo, above n 150, 10.
\textsuperscript{222} Ibid 11.
\textsuperscript{224} Ibid 28-29 (Chamber of Commerce and Industry, Western Australia). See further regarding industry concerns about the potential loss of jobs: Senate Select Committee on Climate Policy, above n 127, 104-07.
\textsuperscript{225} Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 60 (Peter Burn, Australian Industry Group).
jobs of adopting even the 5 per cent target. The Cement Industry Federation, for example, warned that Australia would 'see [cement] plants progressively shutting down ... in Australia'.\(^{226}\) Similarly, Woodside Energy argued that the competitiveness of Australia's liquefied natural gas industry would be threatened,\(^{227}\) while Rio Tinto stated that half of its open-cut coalmines could close by 2020.\(^{228}\) The above statements provide just a snapshot of the significant political pressure the government was under from the carbon-intensive business sector to adopt a proportional mitigation target – if any. As noted by Pezzey, Mazouz and Jotzo, these types of arguments were regularly repeated by the 'carbon lobby', weakening public support for any given level of cuts.\(^{229}\)

A further political reality for the government was that it did not have sufficient votes in the federal Parliament to legislate targets that were not viewed as being proportional to Australia's competitors. The Rudd government possessed the constitutional authority to adopt mitigation targets at the international level (as part of the executive government's treaty making power),\(^{230}\) but any policy measures to allow Australia to achieve its targets, such as an emissions trading scheme, needed to be legislated. While the minority Australian Greens party called for the adoption of an unconditional 25 per cent target or higher, and 40 per cent in the context of a global treaty,\(^{231}\) the government needed the support of the Liberal National Opposition in the Senate to pass its legislation. The Coalition offered bipartisan support for Australia's target range,\(^{232}\) but held even stronger views than Labor that Australia's mitigation targets

\(^{226}\) Senate Select Committee on Climate Policy, above n 127, 22.

\(^{227}\) Ibid.

\(^{228}\) Ibid.


\(^{230}\) Australian Constitution s 61. The Australian Executive's power to enter into treaties (for practical purposes the relevant Ministers and Cabinet) is considered to be absolute: Commonwealth v Tasmania (1983) 158 CLR 1, 303 (Dawson J). See generally, George Winterton, 'Limits to the Use of the "Treaty Power"' in Philip Alston and Madeline Chiam (eds), Treaty-Making and Australia: Globalisation Versus Sovereignty (Federation Press, 1995) 29.

\(^{231}\) Senate Select Committee on Climate Policy, above n 127, 229.

\(^{232}\) This was offered under two successive Opposition leaders, Malcolm Turnbull and then Tony Abbott: Senate Economics Legislation Committee, Parliament of Australia, Carbon Pollution Reduction Scheme Bill 2009 and Related Bills (2009) 54, 71; James Grubel, 'Australia Carbon Laws in Doubt, Election Possible', The Guardian (online), 1 December 2009 <http://uk.reuters.com/article/2009/12/01/uk-australia-carbon-idUKTRE5B00XJ20091201>.
and associated legislation needed to align with Australia's major competitors (see further discussion of the politics of legislating the CPRS Bill in chapter 7). Reflecting the concerns of carbon-intensive industries, Opposition leader, Tony Abbott, insisted that acting ahead of the international community would 'damage the Australian economy' and put Australia at a 'competitive disadvantage vis-a-vis the rest of the world'. As such, there were clearly strong political barriers to the Rudd government adopting an ambitious unilateral target in the post-2012 negotiations. See further discussion of this political reality for the government at section G.

E Were the Rudd Government's 25 Per Cent Target Conditions Appropriate?

This chapter now turns to examining the conditions attached by the Rudd government to the 25 per cent target. The Rudd government regarded these conditions as 'the sorts of conditions that would have to be met in order to be on the path to a 450 parts per million agreement.' The implications of these conditions from a GIC perspective are considered fully at section G. Broadly speaking, however, this chapter suggests that in order to be acceptable from a GIC perspective, these conditions needed to be reasonable and proportionate, in the sense that they did not establish unrealistic expectations of other Parties or be so stringent as to make the upper target illusory. They also needed to be consistent with the relevant legal framework (where this was relevant).

1 Commitments by all economies sufficient to deliver long-term stabilisation of greenhouse gases at 450 ppm CO2-e or lower

This was certainly a reasonable condition for the 25 per cent target. Given that Australia's upper target represented a broadly proportionate contribution to a 450 ppm CO2-e agreement, it was reasonable to condition this target on other Parties similarly adopting mitigation commitments that were consistent with a 450 ppm CO2-e scenario.

233 See, eg, Senate Economics Legislation Committee, above n 232, 71.
234 Tony Abbott and Julie Bishop, 'Transcript of Joint Doorstop Interview' (Canberra, 2 December 2009).
235 Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 5 (Blair Comley, Deputy Secretary, Department of Climate Change).
2 A peak year for global emissions of no later than 2020

This was also a reasonable expectation. As explained in chapter 5, the literature indicated that it would be extremely difficult, both economically and technologically, for Parties to achieve the 450 ppm CO2-e goal if global emissions did not peak by 2020 at the latest.

3 Aggregate advanced economy reductions of at least 25 per cent below 1990 levels by 2020

As outlined above, the IPCC AR4 estimated that in order to achieve a 450 ppm CO2-e target developed countries would need to collectively reduce their emissions by 25 to 40 per cent by 2020 (below 1990 levels). On its face, therefore, this condition also appeared to be reasonable. Indeed, as seen above, the Rudd government could have conditioned its upper target on a 30 per cent Annex I reduction and still have been regarded as acting reasonably. Assessing the merits of this condition, however, was complicated by the fact that the government tied the upper target to a 25 per cent aggregate reduction by the 'advanced economies', rather than the Annex I group. The government indicated that its reference to the 'advanced economies' included the Annex I Parties but also 'at least some other high/middle income economies'. This raised the question as to whether it was appropriate to condition Australia's 25 per cent target on a specific reduction by the advanced economies, rather than just the Annex I group.

a) The Issue of Differentiation

This condition reflected a broader debate taking place within the post-2012 negotiations on how best to differentiate between treaty Parties. As noted earlier, only Annex I Parties agreed to adopt policies and measures to reduce their GHG emissions under the UNFCCC, reflecting the article 3 principles of equity, CBDR&RC and developed country leadership. This situation was repeated under the Kyoto Protocol, with only Annex I Parties agreeing to binding emission reduction commitments. This was despite arguments by Australia – under both the Keating and Howard

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governments – as well as other JUSCANZ nations, that some developing countries also needed to adopt emission reduction commitments (see chapter 2).

The debate regarding which Parties ought to adopt binding mitigation targets raised its head again in the post-2012 negotiations. The Rudd government's position was that all advanced economies – a category not defined by the UNFCCC or Protocol – should adopt legally binding, economy-wide mitigation targets (under paragraph 1(b)(i) of the BAP) or at least a blend of actions under paragraphs 1(b)(i) and (ii).\(^\text{237}\) It also called upon advanced economies which had not yet joined Annex I to do so.\(^\text{238}\) Believing that the existing membership of Annex I no longer reflected 'current realities',\(^\text{239}\) the Rudd government proposed the adoption of an 'objective basis' to graduate non-Annex I Parties to the Annex I group, replacing the current voluntary system, so that all advanced economies adopted comparable mitigation commitments under a post-2012 agreement.\(^\text{240}\) This was a view generally shared by other developed countries such as the US and Russia.\(^\text{241}\)

Annex I Parties proposed a range of metrics to assist in determining which Parties were in a position to graduate to Annex I, or at least adopt legally comparable targets to non-Annex I Parties. The Rudd government highlighted the metrics of GDP per capita and the UN Human Development Index (HDI) (a more holistic assessment of human well-being than GDP).\(^\text{242}\) It noted that as of 2007, 44 non-Annex I Parties had a higher

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\(^{237}\) Australia, 'Mitigation', above n 63, 74.

\(^{238}\) Ibid.

\(^{239}\) Ibid 76.


Several Parties were singled out by the Rudd government as being especially good candidates to join Annex I, namely, Singapore, South Korea and Malta\(^{245}\) (the latter subsequently joined both Annex I of the UNFCCC and Annex B of the Protocol for its second commitment period).\(^{246}\) These countries were regarded as advanced economies under the International Monetary Fund's (IMF) classification system, probably the most accepted list of advanced economies.\(^{247}\) Notably, however, the government's proposal also referred to many countries (among them Brazil, China and South Africa) who were still generally regarded as emerging or developing economies. The government's list even included several LDCs (Equatorial Guinea, the Maldives and Samoa).\(^{248}\)

Other developed countries also made proposals to broaden the Annex I group, but the EU, for example, limited its suggestions to countries that were more widely accepted as being advanced, namely: existing Annex I Parties; EU member states; EU candidate

\(^{243}\) Australia, 'Mitigation', above n 63, 78. Namely: Antigua and Barbuda; Argentina; Bahamas; Bahrain; Barbados; Bosnia and Herzegovina; Botswana; Brazil; Brunei Darussalam; Chile; China; Colombia; Costa Rica; Cyprus; Dominican Republic; Equatorial Guinea; Grenada; Iran; Israel; Kazakhstan; Korea; Kuwait; Libya; Malaysia; Maldives; Malta; Mauritius; Mexico; Namibia; Oman; Panama; Qatar; Saudi Arabia; Seychelles; Singapore; South Africa; St Kitts and Nevis; St Vincent and the Grenadines; Thailand; Trinidad and Tobago; Tunisia; Turkmenistan; United Arab Emirates; Uruguay.

\(^{244}\) Ibid 78-79. Namely: Albania; Antigua and Barbuda; Argentina; Bahamas; Bahrain; Barbados; Belize; Bosnia and Herzegovina; Brazil; Brunei Darussalam; Chile; China; Colombia; Costa Rica; Cyprus; Dominica; Dominican Republic; Grenada; Israel; Kazakhstan; Korea; Libya; Macedonia FYR; Malaysia; Malta; Mauritius; Mexico; Oman; Panama; Qatar; Samoa; Saudi Arabia; Seychelles; Singapore; St Kitts and Nevis; St Vincent and the Grenadines; Tonga; Thailand; Trinidad and Tobago; United Arab Emirates; Uruguay; Venezuela.

\(^{245}\) Ibid 74.

\(^{246}\) See UNFCCC, Appendix I – Quantified Economy-wide Emissions Targets for 2020, above n 127; UNFCCC, Doha Amendment <http:// unfccc.int/kyoto_protocol/doha_amendment/items/7362.php>.

\(^{247}\) See International Monetary Fund, Country Composition of WEO Groups (October 2012) <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/groups.htm#ae>. Namely: Australia; Austria; Belgium; Canada; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hong Kong SAR; Iceland; Ireland; Israel; Italy; Japan; Korea; Luxembourg; Malta; Netherlands; New Zealand; Norway; Portugal; San Marino; Singapore; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; Taiwan Province of China; United Kingdom; United States.


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countries and potential candidate countries; OECD member countries and candidate countries.\textsuperscript{249}

Non-Annex I Parties, however, were generally opposed to expanding the membership of Annex I, other than on a voluntary basis.\textsuperscript{250} The G77 and China, among others, firmly rejected all proposals to more precisely differentiate between non-Annex I Parties.\textsuperscript{251} Brazil insisted that the UNFCCC defined developed countries as 'Annex I Parties' and developing countries as 'non-Annex I Parties', and that the BAP did not authorise Parties to renegotiate these categories, nor the 'graduation' of Parties from one category to another.\textsuperscript{252}

\textit{b) Implications for Australia's Condition}

The Rudd government's desire to encourage newly advanced economies such as South Korea and Singapore to adopt Annex I-level commitments was perfectly legitimate, as these countries were widely regarded to be developed economies. However, while the government's focus was on graduating these Parties to Annex I, it was certainly questionable why it thought it appropriate to include poorer developing countries, especially the LDCs, on its lists of those who could potentially join Annex I. Under the Convention principles of equity, CBDR&RC and developed country leadership, poorer

\textsuperscript{249} European Community, 'Enhanced Action on Mitigation', above n 19, 10. OECD countries include: Australia; Austria; Belgium; Canada; Chile; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Korea; Luxembourg; Mexico; Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; Turkey; United Kingdom; United States: OECD, Members and Partners <http://www.oecd.org/about/membersandpartners/>. For a more expansive proposal see, eg, Japan, 'Japan's Proposal for AWG-LCA: For Preparation of Chairs document for COP 14' in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan, UN Doc FCCC/AWGLCA/2008/MISC.5 (30 September 2008) 40, 41. See further Katia Karousakis et al, Differentiating Countries in Terms of Mitigation Commitments, Actions and Support (2008) (OECD).


\textsuperscript{251} G77 and China, 'Mitigation and Means of Implementation', above n 95, 48.

countries like the LDCs were certainly not expected to adopt equivalent mitigation targets to developed countries.

Given the controversy regarding which countries ought to adopt the most stringent form of mitigation commitments under the ICCL regime, it is certainly doubtful whether it was appropriate to condition Australia's 25 per cent target on a collective reduction by the advanced economies. In doing so, the government provided itself considerable discretion to determine whether this condition was fulfilled given that it was not settled which countries were actually advanced. Ultimately, very few of the Parties which Australia identified on its target lists agreed to adopt Annex I-style commitments, with most (including Singapore and Korea) only pledging voluntary actions to reduce their emissions below BAU. While the government's approach on this issue was understandable (at least as far as countries like Singapore and South Korea were concerned), it certainly would have been more consistent with the terms of the Convention to have made the 25 per cent target conditional upon a collective reduction by the Annex I group; a well-established group under the Convention.

4 Major developing economy commitments to slow growth and reduce absolute emissions over time

The Rudd government attached several conditions to its upper target relating to the major developing economies (see also conditions 5 and 6 below). In contrast to its position on the advanced economies, the government was more specific on who these conditions related to. Specifically, the government indicated that the 'major developing economies' referred to the non-Annex I members of the Major Economies Forum; that is, China, India, Brazil, Indonesia, South Korea, Mexico and South Africa (several of which it also believed could be categorised as advanced economies). The

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253 See UNFCCC, Appendix II – Nationally Appropriate Mitigation Actions of Developing Country Parties, UNFCCC, Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties not included in Annex I to the Convention, UN Doc FCCC/AWGLCA/2011/Inf.1 (18 March 2011) 42; Climate Action Tracker, above n 127. Singapore, for example, agreed to reduce its emissions by 7 to 16 per cent below BAU by 2020 and Korea 30 per cent below BAU by 2020. Countries such as Cyprus and Malta (as part of the EU commitment) and Kazakhstan did, however, pledge binding, economy-wide targets as part of the Copenhagen Accord: UNFCCC, Appendix I – Quantified Economy-wide Emissions Targets for 2020, above n 127.

254 Explanatory Memorandum, CPRS Bill 16.
The significance of this group was that it represented the seven largest emerging economies who were all in the top 20 group of global GHG emitters. Most notable in the group was China, the world’s largest CO2 emitter since 2006.

The requirement that the major developing economies slow their growth and reduce absolute emissions over time was a very general expectation; one that was likely to be easily satisfied given that all major developing countries had indicated a willingness to adopt mitigation actions under paragraph (ii) of the BAP. The more controversial aspect of condition 4 was that it called for the major developing economies to adopt 'commitments' as opposed to 'actions' under a new agreement. Similar to condition 3, this condition needs to be interpreted in the context of a broader debate in the negotiations, this time regarding the legal form that new developing country mitigation measures ought to adopt.

a) The Issue of 'Commitments' Versus 'Actions'

As noted earlier, under the BAP, developed countries were expected to adopt either mitigation 'commitments' or 'actions' (paragraph 1(b)(i)), while developing countries were only called upon to adopt 'nationally appropriate mitigation actions' (NAMAs, paragraph 1(b)(ii)). The BAP was unclear on the nature of the legal distinction between 'commitments' and NAMAs, but the developing countries, and most Annex I countries including Australia, expected the developed countries to again adopt legally binding, economy-wide targets as per the Kyoto Protocol.

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256 Ibid.
257 See, eg, G77 and China, 'Shared Vision', above n 19, 50; AOSIS, 'Enhanced Action on Mitigation on Climate Change', above n 70, 33. Least Developed Countries, 'Fulfilment of the Bali Action Plan and the Components of the Agreed Outcome to be Adopted by the Conference of the Parties its Fifteenth Session', above n 58, 6.
As noted, the legal nature of NAMAs was also unclear in the BAP. The Rudd government's position was that whether or not the developing countries' mitigation measures were ultimately called 'commitments' or NAMAs, these needed to be legally binding. This view was shared by various developed countries, among them, Russia, Canada and the US. Recognising that adopting binding, economy-wide targets was a challenging proposition for developing countries, Australia and Japan both suggested that the major developing economies could adopt sectoral targets as a first step (which would only apply to specific sectors of the economy such as energy production).

Related to this discussion, the Rudd government proposed a unified format for developed and developing countries to register their commitments and NAMAs in a post-2012 agreement, which it referred to as 'national schedules'. The schedules would be legally binding, with developed countries outlining their economy-wide commitments. Meanwhile developing countries would list their NAMAs or in some cases commitments (whether economy-wide or sectoral).

The developed country position was controversial with most developing countries, who generally rejected the need for developing countries to adopt legally binding commitments, or even binding actions. Brazil, for example, insisted that developing countries would only adopt voluntary actions under paragraph 1(b)(ii) of the BAP, which it interpreted as possessing a different intensity and legal nature than measures...
under paragraph 1(b)(i). This view was shared by India and China, among others. Developing countries also rejected proposals by Australia and other developed countries to register their commitments and actions in a common framework, with the G77 and China believing that this would blur the legal distinction between developed country commitments and developing country NAMAs.

**ii) Was the Condition Appropriate?**

There are several considerations relevant to this issue. First, the Rudd government’s call for the major developing economies to adopt commitments as opposed to NAMAs was undoubtedly inconsistent with the terms of the BAP. Moreover, the evolution of the ICCL framework tended to support the developing country position. As outlined earlier, the first step taken by developed countries to mitigate their GHG emissions under the UNFCCC only involved a non-binding aim, namely, to reduce emissions to 1990 levels by 2000. It took developed countries a further seven years to finally adopt binding mitigation commitments under the Kyoto Protocol. Even then, the US failed to ratify this agreement, meaning that the largest developed country emitter has never adopted a binding legal commitment to reduce its emissions. Given the precedent set by developed countries, it is understandable why the major developing economies believed that they were entitled to only adopt non-binding NAMAs. Indeed, given the previous focus of the ICCL regime on abatement by developed countries (giving effect to the principles of equity, CBDR&RC and developed country leadership),

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272 UNFCCC arts 4.2(a) and (b).
it was a significant step for developing countries to agree to any mitigation targets at the international level, voluntary or otherwise.

As noted earlier, however, it was well accepted by the time of the post-2012 negotiations that from a scientific perspective, the emissions of the major emitting developing economies needed to be constrained if the world was to avoid dangerous climate change, especially with China being the world’s largest emitter. Furthermore, it goes without saying that all Parties to the UNFCCC are expected to act in a manner consistent with achieving the Convention’s key objective, as well as relevant principles such as CBDR&RC, the precautionary principle (article 3.3), the need to protect the climate system for future generations (article 3.1) and the needs of the most vulnerable countries (article 3.2). While it could not be guaranteed that Parties would respect their commitments simply because they were legally binding at the international level, Parties clearly viewed legally binding commitments as a more serious obligation than those which were voluntary. A further advantage of the major developing economies adopting binding commitments was that it would allow these Parties to more fully participate in international emissions trading, helping to reduce global mitigation costs.

As such, it is certainly understandable why the Rudd government expected the major developing economies to adopt binding commitments, even if only at the sectoral level. Indeed, given that a post-2012 agreement would be ineffective unless both developed countries and the major developing economies adopted binding commitments, the government’s condition was both sensible and reasonable. Ultimately, however, no developing country agreed to adopt binding commitments under the Copenhagen Accord, with all non-Annex I Parties announcing voluntary NAMAs (see table 4 below).

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5 A collective reduction by major developing economies of at least 20 per cent below business-as-usual by 2020

a) Party Views

As noted above, the IPCC recommended that under a 450 ppm CO2-e agreement the emissions of the major emitting developing regions would need to 'substantially deviate' by 2020 (adding to the 25 to 40 per cent reduction required of Annex I Parties). As also stated, the authors' of this recommendation later clarified that a 'substantial deviation' equated to a 15 to 30 per cent reduction below BAU emission levels by 2020.275

Developed countries generally shared Australia's view that the major developing economies needed to significantly reduce their emissions from BAU levels as part of the post-2012 agreement.276 The EU also proposed a specific figure, backing the 15 to 30 per cent range.277 Not surprisingly, the issue was controversial with many non-Annex I Parties.278 However, the most vulnerable developing countries also pressured the major developing economies to take on a larger mitigation role. AOSIS, for example, endorsed the need for these Parties' emissions to significantly deviate from BAU levels,279 while Madagascar specifically backed the 15 to 30 per cent reduction range.280

275 Den Elzen and Höhne, above n 50, 271.
277 European Community, 'Mitigation, Including Technology and Finance', UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan, UN Doc FCCC/AWGLCA/2008/MISC.2, 4, 5. This suggestion specifically applied to 'advanced developing countries and major emerging economies'.
278 See International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(395) (13 December 2008) 18. Note that early on this issue was controversial partly for procedural reasons, with developing countries insisting that developed countries be the first to put ambitious mitigation targets on the table.
279 AOSIS, 'Shared Vision', above n 111, 43; AOSIS, 'Enhanced Action on Mitigation on Climate Change', above n 70, 33.
The initial reluctance of many developing countries to adopt mitigation targets (in the form of non-binding NAMAs) weakened over time, particularly as developed countries began announcing their firm mitigation pledges. This was illustrated in June 2009 when the MEF countries (which as noted, includes the major developing economies as member states) agreed that these countries needed to undertake mid-term actions that represented a 'meaningful deviation' from BAU.281

b) Major Developing Economy Pledges

All of the major developing economies, as well as many other non-Annex I Parties, ultimately indicated that they were prepared to adopt voluntary mitigation targets under a post-2012 agreement. These were expressed in a variety of ways, including pledges to reduce GHG intensity as well as emissions from BAU.282 Many of these had conditions attached. Some were 'conditional on support' by developed countries (as was envisaged by the BAP and article 4.7 UNFCCC), however China, Indonesia and South Korea offered unilateral targets, either in full or in part.

<table>
<thead>
<tr>
<th>Party</th>
<th>NAMA/Target</th>
<th>Base Year</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>Reduce CO2 intensity per unit of GDP by 40 to 45 per cent by 2020</td>
<td>2005</td>
<td>- voluntary&lt;br&gt;- to be implemented in accordance with the provisions and principles of the UNFCCC, especially article 4.7&lt;br&gt;- unilateral (not conditional on international support)</td>
</tr>
<tr>
<td>Brazil</td>
<td>36.1 to 38.9 per cent reduction in BAU emissions by 2020</td>
<td>Not stated</td>
<td>- voluntary&lt;br&gt;- to be implemented in accordance with the principles</td>
</tr>
</tbody>
</table>

281 MEF, Declaration of the Leaders of the Major Economies Forum on Energy and Climate, First Leaders Meeting, L'Aquila, 9 July 2009 <http://www.majoreconomiesforum.org/past-meetings/the-first-leaders-meeting.html>. This was stated to be in the context of sustainable development, supported by financing, technology, and capacity-building (as envisaged by paragraph 1(b)(ii) of the BAP).

282 BAU targets require emissions to be reduced below a BAU emission baseline. The veracity of BAU targets depends heavily on the accuracy of projected emission levels. See further den Elzen, above n 124, 28.
<table>
<thead>
<tr>
<th>Country</th>
<th>Target Description</th>
<th>Year</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>Reduce emissions intensity of GDP by 20 to 25 per cent by 2020 (excluding agriculture)</td>
<td>2005</td>
<td>- voluntary, to be implemented in accordance with national legislation and policies and the principles of the UNFCCC, especially art 4.7</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Reduce emissions by 26 per cent by 2020 from BAU levels; or Reduce emissions by 41 per cent from BAU levels</td>
<td>Not stated</td>
<td>- voluntary, unilateral</td>
</tr>
<tr>
<td>Mexico</td>
<td>Up to 30 per cent reduction in GHG emissions below BAU by 2020</td>
<td>Not stated</td>
<td>Actions beyond 2012 conditional on international finance and technological support</td>
</tr>
<tr>
<td>South Africa</td>
<td>Reduce GHG emissions by 34 per cent by 2020 and 42 per cent by 2025 below BAU</td>
<td>Not stated</td>
<td>- to be undertaken in accordance with UNFCCC art 4.7, conditional on international finance, technology and capacity-building support, conditional on an ambitious, fair, effective and binding multilateral agreement under the UNFCCC and Kyoto Protocol</td>
</tr>
</tbody>
</table>
Table 4. Major developing economy pledges to the Copenhagen Accord.283

| South Korea | Reduce emissions by 30 per cent below BAU by 2020 | Not stated | - voluntary | - unilateral |

283 See UNFCCC, *Appendix II – Nationally Appropriate Mitigation Actions of Developing Country Parties* above n 253; UNFCCC, *Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties not included in Annex I to the Convention*, above n 53; Climate Action Tracker, above n 127. Only the Parties' mitigation targets are reproduced. Other actions announced by Parties (such as renewable energy measures) are not listed.

284 Note that measuring BAU emission reductions is far more complex than measuring absolute emissions reductions from a given base year (as per Annex I Party targets), relying on the quality of estimates regarding projected emissions. Thus the Parties' stated BAU targets would not necessarily translate into these exact BAU reductions in practice: see Jotzo, above n 127, 29.

285 See ibid 17.


288 Jotzo, above n 127, 18.

c) Was the Condition Appropriate?

In light of the above discussion, it is clear that it was reasonable for Australia to expect the major developing economies to adopt significant mitigation measures under a post-2012 agreement. It is less obvious, however, whether it was appropriate to condition the 25 per cent target on a 20 per cent BAU reduction. Notably, while the Rudd government was prepared to accept a reduction by the advanced economies at the bottom end of the IPCC’s range, it expected the major developing economies to collectively mitigate their emissions at a level above the minimum suggested in the scientific literature.

Examining the individual pledges of the major developing economies helps to shed further light on this issue. The pledges of Brazil, Indonesia, Mexico, South Africa and South Korea were all above the target suggested by Australia. This in itself suggests that Australia’s condition was not unreasonable.284 China and India's targets were not stated in BAU terms, however, and therefore are more difficult to assess.285 Studies have estimated that China's target equated to a BAU reduction of as little as 0 per cent286 or 6 per cent,287 but as high as 27 per cent.288 Estimates of India's target as a
BAU reduction have also varied from approximately 0,289 3,290 9,291 and +7 per cent (an increase from BAU).292

Studies have also estimated what the major developing country pledges represented as an aggregate BAU reduction. These have varied from 11 to 14 per cent;293 5 to 20 per cent;294 22 to 27 per cent;295 and 25 per cent (including LUCF) or 21 per cent without LUCF (both excluding Indonesia).296

The collective reduction implied by the major developing economies pledges is thus not easy to determine. The individual ambition shown by most major developing economies, however, arguably suggests that Australia’s condition, while stringent, was not unreasonable. This is particularly the case when it is remembered that most of these Parties made their targets conditional on international support being provided by developed countries, as they were entitled to do under the terms of the BAP, significantly reducing the cost for these countries of meeting their mitigation targets.297

6 Nomination of a peak year for individual major developing economies

The final condition directly concerning the major developing economies required these Parties to nominate an individual peak year for their emissions. This issue received

290 Den Ezlen, Evaluation of the Copenhagen Accord: Chances and Risks for the 2°C Climate Goal, above n 186, 23.
292 Jotzo, above n 127, 33.
293 Den Ezlen, Evaluation of the Copenhagen Accord: Chances and Risks for the 2°C Climate Goal, above n 186, 10. The uncertainty reflected the conditionality of several pledges and China and India setting emissions intensity targets.
294 The Climate Institute, ‘Australia’s 2020 Carbon Pollution and Productivity Target’ (Briefing, The Climate Institute, January 2010) 9.
295 Jotzo, above n 127, 33.
296 Moltmann, above n 291, 182.
297 See, eg, den Ezlen, Evaluation of the Copenhagen Accord: Chances and Risks for the 2°C Climate Goal, above n 186, 11. This study estimated the abatement costs for the seven major developing economies at about 0.15 to 0.2 per cent of GDP for the low and high pledge scenarios respectively. This assumed that about 50 per cent of the abatement costs for South Africa, South Korea, Indonesia, Brazil and Mexico would be financed by Annex I countries. Costs are expected to be particularly low in China and India: 27
very little attention in the submissions of the Parties. Only South Africa nominated a peak year for its emissions (2020 to 2025).²⁹⁸

While the Rudd government’s wish to see the major developing economies nominate a peak year for their emissions was understandable, in hindsight this condition appears to have been overly stringent, with only one major developing economy being prepared to make such an announcement.

7 Global action to mobilise greater financial resources, including from major developing economies

This condition tied the Rudd government’s 25 per cent target to the broader outcome on climate financing in a post-2012 agreement. The chief issue raised by this condition was whether or not it was appropriate to make the 25 per cent target contingent upon the major developing economies contributing to climate financing, which has historically only been a responsibility of developed countries.²⁹⁹

a) Legal Background

Under the UNFCCC, the wealthiest Annex I Parties (the members of the OECD) agreed to provide finances to support the climate-related activities of developing countries under the Convention. Parties which adopted financing responsibilities were listed in Annex II.³⁰⁰ This approach again helped to implement the Convention’s principles of equity, CBDR&RC and developed country leadership.

²⁹⁸ This was conditional upon international support: UNFCCC, *Appendix II – Nationally Appropriate Mitigation Actions of Developing Country Parties*, above n 253.
²⁹⁹ Financing was a significant issue in its own right in the post-2012 negotiations with Parties needing to resolve many complex issues. Discussion here is limited to those issues raised by the Rudd government’s target condition. For general analysis of the broader financing issue, see, eg, Eric Haites, ‘Negotiations on Additional Investment and Financial Flows to Address Climate Change in Developing Countries’ in Chad Carpenter, *The Bali Road Map: Key Issues under Negotiation* (UNDP, 2008) 161; Jennifer Frankel-Reed, *Financing under the Bali Road Map: Designing, Governing, and Delivering Funds* (UNDP, July 2009); UNFCCC, *Investment and Financial Flows to Address Climate Change: An Update*, UN Doc FCCC/TP/2008/7 (2008).
³⁰⁰ Current Annex II members include: Australia; Austria; Belgium; Canada; Denmark; European Economic Community (EU); Finland; France; Germany; Greece; Iceland; Ireland; Italy; Japan; Luxembourg; Netherlands; New Zealand; Norway; Portugal; Spain; Sweden; Switzerland; UK; and US.
The major obligations of Annex II Parties are listed in article 4 UNFCCC. Under article 4.3, Annex II Parties are required to:

- provide 'new and additional' financial resources, including for the transfer of technology, to meet the agreed 'full incremental costs' of developing countries (minimal) mitigation obligations (such as establishing GHG inventories),³⁰¹
- provide the agreed 'full costs' incurred by developing countries in providing their national communications (as required by article 12.1),³⁰² and to
- 'take into account the need for adequacy and predictability in the flow of funds' as well as 'the importance of appropriate burden sharing among the developed country Parties.'

Article 4.4 further requires Annex II Parties to assist the particularly vulnerable developing countries to meet their adaptation costs. Article 4.5 also outlines obligations in relation to the financing and transfer of environmentally sound technologies and know-how.

Perhaps most significantly, article 4.7 provides that the 'extent to which' developing countries 'effectively implement their commitments under the Convention will depend on the effective implementation' by developed countries of their financing and technology commitments. Similar obligations were later accepted by Annex II Parties under article 11 of the Kyoto Protocol.

Parties to the Convention and Kyoto Protocol established a range of institutional arrangements to govern climate financing. The Global Environment Facility (GEF)

³⁰¹ UNFCCC art 4.3. The term 'incremental' costs refers to the additional costs of a project designed to reduce GHG emissions (for example, installing a more costly renewable energy plant over cheaper conventional sources of energy). While developing countries did not adopt specific mitigation commitments under the UNFCCC, all Parties have common mitigation-related obligations under article 4.1, although subject to the principle of CBDR&RC. Common obligations include, for example, establishing national inventories of anthropogenic emissions and promoting and cooperating in the development, application, diffusion and transfer of clean technologies.

³⁰² Article 12.1 requires all Parties to communicate information to the COP regarding implementation of their obligations under the UNFCCC.
operates as the main financial entity under article 11 of the UNFCCC,\textsuperscript{303} and also administers the Special Climate Change Fund and the Least Developed Countries Fund.\textsuperscript{304} Importantly, Annex II Parties only provide voluntary donations to the GEF. Parties to the Kyoto Protocol further established the Adaptation Fund,\textsuperscript{305} which is financed by a share of proceeds from the CDM.\textsuperscript{306}

Existing financial arrangements under the Convention and Protocol have been widely recognised to be insufficient, especially with respect to the quantum of finances available. Prior to Bali, only US$3.3 billion had been allocated by the GEF from voluntary developed country contributions, although this helped to leverage a further US$14 billion in co-financing.\textsuperscript{307} Adaptation funding under the UNFCCC was even less, only representing hundreds of millions of dollars.\textsuperscript{308} This was also the case with the Kyoto Protocol's Adaptation Fund.\textsuperscript{309}

Recognising the deficiencies of existing financial arrangements, paragraph 1(e) of the BAP agreed that Parties to the UNFCCC would consider '[e]nhanced action on the provision of financial resources and investment to support action on mitigation and adaptation and technology cooperation', with the focus being on providing finances for developing countries.\textsuperscript{310} Notably, the BAP did not specify which Parties would provide


\textsuperscript{304} See UNFCCC, \textit{Finance}<http://unfccc.int/cooperation_and_support/financial_mechanism/items/2807.php>. Parties later also established the Green Climate Fund at COP 16, Cancun 2010, as part of the post-2012 negotiations.

\textsuperscript{305} See UNFCCC, \textit{Adaptation Fund}<http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php>.


\textsuperscript{308} Ibid 8.

\textsuperscript{309} Ibid 8, 9. Tens of billions of dollars were also generated by the Kyoto Protocol's CDM, but the emissions reductions achieved by these projects contribute to Annex I Parties' GHG accounts, not those of host developing countries, and thus do not directly contribute to mitigation by developing countries.

\textsuperscript{310} COP 13 Report, UN Doc FCCC/CP/2007/6/Add.1, decision 1/CP.13.
this funding under a post-2012 agreement, for example, only Annex II Parties, all
Annex I Parties, or both developed and developing countries.

b) The Rudd Government and other Developed Country Views on Financing
Responsibility

The Rudd government recognised that developed countries had 'a responsibility to
show leadership by providing substantially scaled-up public funding up to and beyond
2012.'\(^{311}\) However, the government also argued that 'future climate finance
arrangements should be responsive to future changes in the global economy'.\(^{312}\) The
government expected that under new financing arrangements '[d]eveloping countries
would ... be expected to mobilise domestic resources to help to finance their own
effort, subject to their respective capabilities.'\(^{313}\) Australia also argued that any new
financial mechanism should contain objective criteria to guide financial contributions
from Parties, reflecting their 'relative capabilities and national circumstances.'\(^{314}\) It also
believed that one major developing economy, South Korea, ought to join Annex II.\(^{315}\)

Other developed countries shared Australia’s view that it was necessary for developing
countries, especially the major developing economies, to mobilise domestic climate
finance (with the exception of the LDCs), among them the UK and Norway,\(^{316}\) the
US,\(^{317}\) Canada\(^{318}\) and the EU.\(^{319}\)

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\(^{311}\) Australian Government, Finance (2009) Department of Climate Change (Australia at Copenhagen)

\(^{312}\) See Australia, UK, Mexico and Norway, Climate Finance: Proposals on Governance (11 December
index/climate-finance.aspx>. See also UNFCCC, Notes on Sources for FCCC/AWGLCA/2009/INF.1 (Part 2)
(2009) 158.

\(^{313}\) Australia, UK, Mexico and Norway, above n 312.

\(^{314}\) Australia, ‘Enhanced Action on Financial Resources and Investment’ in UNFCCC, Ideas and Proposals
on the Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 1, UN Doc

\(^{315}\) Ibid. The government noted that 15 countries now had a higher GDP per capita than Portugal, which
had set the benchmark for inclusion in Annex II in 1992. Other than South Korea, these countries
included: Bahrain, Brunei Darussalam, Czech Republic, Cyprus, Israel, Kuwait, Malta, Oman, Qatar, Saudi
Arabia, Slovenia, Singapore, Bahamas, and United Arab Emirates.

\(^{316}\) Australia, UK, Mexico and Norway, above n 312.

\(^{317}\) United States, ‘Copenhagen Agreed Outcome’, above n 276, 109; United States, ‘Finance and
Technology’ in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action

\(^{318}\) UNFCCC, Notes on Sources for FCCC/AWGLCA/2009/INF.1 (Part 2), above n 312, 154.
c) Developing Country Views

The G77 and China strongly rejected the push to extend financing obligations to developing countries, instead calling for only Annex I Parties to provide funding under a new agreement.\textsuperscript{320} The G77 and China strongly criticised what they perceived as an emphasis by developed countries on shifting financing responsibilities to developing countries.\textsuperscript{321} Other major groups, including the LDCs and AOSIS, also regarded financing as chiefly a developed country responsibility,\textsuperscript{322} although these latter groups saw a role for voluntary contributions by developing countries.

A number of principles and provisions of the UNFCCC were cited by these groups to support their view. Among these were the principles of equity, CBDR&RC and historical responsibility, and the developed countries' existing financing commitments under article 4.\textsuperscript{323} The developing countries also referred to broader international legal principles or norms such as the polluter pays principle and the responsibility not to cause damage to the environment of other states. Believing that such principles and norms had been breached, the LDCs and AOSIS framed climate finance as a form of reparation for climate change damage.\textsuperscript{324} Similarly, Bolivia regarded climate finance as payment for 'the debt owed to us by developed countries' as a result of 'threatening
the integrity of the Earth’s climate system, for over-consuming a shared resource ... and for maintaining lifestyles that continue to threaten the lives and livelihoods of the poor’.

While most non-Annex I Parties regarded financing as chiefly a developed country responsibility, many also envisaged a more limited role for developing countries. The influential Mexican proposal for a World Climate Change Fund (or Green Fund), for example, envisaged contributions being made by all Parties in accordance with the principle of CBDR&RC, although developing countries’ participation would be voluntary and LDCs would not be expected to contribute. Mexico noted that other multilateral institutions such as the UN, World Bank and IMF, already determined member contributions according to their capacity to pay.

*d) How Much Financing Was Needed?*

Significant finances were likely required to support developing countries’ future mitigation and adaptation needs, which helps to explain why Parties such as Australia did not accept that financing should only be a developed country responsibility. Estimates regarding the required quantum of finances varied widely, but were vast by previous standards. In 2007, the UNFCCC Secretariat estimated that an additional US$200-210 billion of investment and financial flows would be needed *per annum* by

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325 Bolivia, above n 108, 47.
2020 for mitigation alone, of which approximately 46 per cent would go to non-Annex I Parties (about US$92-$97 billion). In 2008 the UNFCCC Secretariat estimated that this figure was likely 170 per cent higher. Significant finances would also be needed for adaptation, with about US$28-67 billion needed for non-Annex I Parties. Other studies produced differing estimates of mitigation and adaptation costs, but generally estimated higher costs than the UNFCCC. The World Bank, for example, estimated that developing countries' mitigation costs could be as high as US$565 billion per year by 2030, while the IEED and Grantham Institute for Climate Change estimated that developing countries' adaptation costs were likely 2 to 3 times higher than suggested by the UNFCCC. In GDP terms, the various estimates represented about 0.3 to 2 per cent of global GDP and about 1.1 to 5 per cent of global investment. A key problem during the negotiating period was also the onset of the 2008 Global Financial Crisis (GFC), which put significant pressure on developed countries' domestic budgets (many of which had significant debts) and weakened their economic and political capacity to raise finance for less immediate concerns like climate change.

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328 UNFCCC, *Investment and Financial Flows to Address Climate Change* (2007), above n 307, 7, 22. This was in order to achieve a goal of returning global GHG emissions to 2004 levels by 2030. 'Investment flow' refers to the initial (capital) spending required for a physical asset. 'Financial flow' refers to ongoing expenditure related to mitigation or adaptation that does not involve investment in physical assets: 22, 34.


330 UNFCCC, *Investment and Financial Flows to Address Climate Change* (2007), above n 307, 8. This was for areas such as agriculture, forestry and fisheries; water supply infrastructure; treatment of diseases, malnutrition and malaria; infrastructure etc.


e) Party Proposals

The Parties themselves made a number of proposals regarding the magnitude of financing that was needed under a post-2012 agreement. The G77 and China, for example, called for developed countries to provide 0.5 to 1 per cent of their GNP to support both mitigation and adaptation in developing countries – roughly US$150-300 billion per year,\(^\text{335}\) while the African Group called for US$200 billion annually by 2020 (0.5 per cent of Annex II Parties’ GDP) and at least $67 billion per year for adaptation.\(^\text{336}\)

The Rudd government did not publically suggest any particular sum for climate finance leading up to COP 15.\(^\text{337}\) Other Annex I Parties, however, did propose specific figures, namely:

- €90 billion per annum by 2020 for mitigation, and €24-54 billion per year for adaptation by 2030 (EU);\(^\text{338}\) and
- US$100 billion for all climate change financing by 2020 (UK).\(^\text{339}\)

f) Was the Condition Reasonable?

It should be noted that while the Rudd government clearly wished all developing countries, except the LDCs, to contribute to raising climate finance,\(^\text{340}\) the major expectation was that the major developing economies would contribute to funding their own domestic mitigation actions. Ultimately, the Copenhagen Accord saw only the developed countries agree to provide '[s]caled up, new and additional, predictable and adequate funding' to developing countries for action on mitigation, adaptation,

\(^{335}\) G77 and China, ‘Financial Mechanism for Meeting Financial Commitments under the Convention’, above n 320, 36; Frankel-Reed, Financing under the Bali Road Map: Designing, Governing, and Delivering Funds, above n 299, 7-8.

\(^{336}\) African Group, above n 56, 12-13.

\(^{337}\) Australian Government, Finance, above n 311.

\(^{338}\) See Frankel-Reed, above n 299, 9.

\(^{339}\) Ibid. Note that Parties made various proposals on where new finance could be sourced from such as auctioning Annex I Parties’ AAUs, or a global CO2-e levy. For overviews see, eg, ibid 7-8.

\(^{340}\) See Australian Government, FOI Australia’s Target Conditions – Where Do We Stand?, above n 41, 2.
technology development and transfer and capacity-building.\textsuperscript{341} The specific commitment was to provide new and additional resources ‘approaching’ US$30 billion from 2010 to 2012 (so-called ‘fast start finance’)\textsuperscript{342} and US$100 billion dollars per annum by 2020.\textsuperscript{343} The latter figure would be sourced from a range of sources, both public and private (especially the carbon market),\textsuperscript{344} as per the wishes of Australia and other developed countries.\textsuperscript{345}

The Accord’s financing outcome, later formally endorsed in the Cancun Agreements at COP 16 in 2010,\textsuperscript{346} was a victory for developing countries who had opposed attempts to formally extend financing obligations to developing countries. However, this did not tell the whole story on the issue. Most of the major developing economies indicated that their targets would be fully or partly self-funded, including China, India, Indonesia, Mexico (up to 2012) and South Korea.\textsuperscript{347} China and others also indicated that they would not seek a share of the fast-start finance believing that this was best reserved for the LDCs.\textsuperscript{348}

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\textsuperscript{342} Ibid.

\textsuperscript{343} UNFCCC, \textit{Report of the Conference of the Parties on its Fifteenth Session: Addendum (Part 2)}, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010), decision 2/CP.15, [8].

\textsuperscript{344} The Accord agreed that climate finance could come from a variety of sources including public, private, bilateral, multilateral and alternative sources: ibid.

\textsuperscript{345} The G77 and China insisted that the ‘major source’ of funds come from public resources: G77 and China, ‘Financial Mechanism for Meeting Financial Commitments under the Convention’, above n 320, 36. However, Australia and other Parties equally insisted that the private sector play a large part in climate financing, for mitigation if not adaptation. This is because the private sector constitutes the largest share of investment and financial flows in the global economy (86 per cent): UNFCCC, \textit{Investment and Financial Flows to Address Climate Change}, above n 307, 28. See, eg, Australia, ‘Enhanced Action on Financial Resources and Investment’, above n 314, 58-59; Australia, UK, Mexico and Norway, above n 312; United States, ‘Copenhagen Agreed Outcome’, above n 276, 109; European Community, ‘Enhanced Action on the Provision of Financial Resources and Investment to Support Action on Mitigation and Adaptation and Technology Cooperation’ in UNFCCC, \textit{Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 2 (Part 1)}, UN Doc FCCC/AWGLCA/2008/MISC.5/Add.2 (Part 1) (21 November 2008) 120, 121.

\textsuperscript{346} UNFCCC, \textit{Report of the Conference of the Parties on its Sixteenth Session: Addendum (Part 2)}, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), decision 1/CP.16, [95-109].

\textsuperscript{347} See Climate Action Tracker, above n 127.

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That some major developing economies agreed to fully or partly self-fund their domestic mitigation action tends to indicate that the Rudd government’s condition was perfectly reasonable. What needs to be appreciated is that the major developing economies had over the past decade already begun investing domestic resources in mitigation activities such as clean energy projects. China, India and Brazil, for example, had become major producers of renewable energy equipment and products (photovoltaic cells/solar power, wind turbines, and ethanol, respectively). Many of the more advanced developing countries had invested in large-scale mitigation efforts simply for their non-climate-change benefits: for example, energy savings, improved energy security, and reduced local pollution. The leader in this regard, China, invested US$3.1 billion in the renewable energy sector in 2008, and US$46.9 billion in clean energy technology, energy efficiency and grid infrastructure development in 2009, as a form of economic stimulus during the GFC. Furthermore, through the government owned China Development Bank, China had already invested in clean energy projects in other developing countries, such as REDD+ projects in Guyana.

The fact that many major developing economies were already investing in abatement-related activities further suggests that the Rudd government’s condition, requiring major developing economies to financially contribute to their own mitigation efforts, was entirely reasonable.

8 Comprehensive coverage of gases, sources and sectors, with inclusion of forests (eg Reducing Emissions from Deforestation and Forest Degradation (REDD)) and the land sector (including soil carbon initiatives (eg biochar) if scientifically demonstrated)

349 UNFCCC, Investment and Financial Flows to Address Climate Change (2007), above n 307, 42.
350 Project Catalyst, ‘Scaling up Climate Finance’, above n 332, 11. China, for example, has heavily invested in nuclear, wind, and energy efficiency.
351 Global Climate Network, ‘Investing in Clean Energy: How Can Developed Countries Best Help Developing Countries Finance Climate-Friendly Energy Investments?’ (Discussion Paper No 4, Global Climate Network, November 2010) 15-16. Other major developing economies have also invested in mitigation, although at much lower levels: 17.
352 Secretary General’s High-Level Advisory Group on Climate Change Financing, above n 334, 53-54.
The first aspect of this condition – requiring the comprehensive coverage of gases, sources and sectors – was very general and not particularly controversial. The two important aspects concerned the requirement that both forests (namely, a REDD mechanism) and the land sector be included in a new climate agreement. The Rudd government’s broader negotiations on these issues are discussed at length in chapters 8 and 9, respectively. As such, the analysis here is kept brief.

a) Inclusion of Forests

This requirement related to the negotiations on the possible inclusion of a new REDD mechanism in the post-2012 agreement. In broad terms, it appeared reasonable for the government to condition the 25 per cent target on the inclusion of REDD. This is because forestry-sector emissions in developing countries, especially from deforestation, were known to be a major cause of global CO2 emissions and it was widely accepted that the inclusion of some form of REDD mechanism was an essential component of a post-2012 outcome.353

Although this was not mentioned in the main condition’s official wording, DCC records indicated that the government specifically required the inclusion of a market-based REDD mechanism.354 Similar to the CDM, this type of REDD mechanism would generate certified carbon credits which could then be purchased by developed countries to assist them in meeting their post-2012 mitigation targets. A market-based mechanism was opposed by some Parties for several reasons including that it was not clear that REDD could actually generate credible emissions abatement.355 However, the significant amount of finances required for REDD meant that it was a practical necessity for Parties to seek to design a mechanism that was at least partly funded by the market.356 Notably, the market-linked model was supported by many of the

354 See Australian Government, FOI Australia’s Target Conditions – Where Do We Stand?, above n 41, 2.
355 See, eg, AOSIS, ‘Enhanced Action on Mitigation on Climate Change’, above n 70, 36.
356 See, eg, Eliasch, above n 353, xviii.
developing countries that were anticipating hosting such projects\textsuperscript{357} (see further discussion of these issues in chapter 8). As such, while tying Australia’s target to the inclusion of a market-based REDD mechanism was somewhat controversial, it was not an unreasonable demand.

\textit{b) Inclusion of the Land Sector}

In broad terms, the requirement that the land sector, or LULUCF, be included in a post-2012 agreement was also reasonable. The Kyoto Protocol authorised Annex I Parties to account for both emissions and removals in the land sector, enabling mitigation efforts in this sector to contribute toward meeting their mitigation targets (articles 3.3, 3.4 and 3.7). It was legitimate for the Rudd government to expect this situation to continue given that the land sector represents a genuine source of emissions and has relatively inexpensive abatement opportunities (see further chapter 9). The government’s call for soil carbon initiatives such as biochar to be included was also reasonable, especially as it only called for this activity to be included if it could be scientifically demonstrated.\textsuperscript{358}

DCC records indicated that the Rudd government’s general condition on the land sector was supplemented by several more specific demands. In order to adopt the 25 per cent target, the government indicated that it required:

- adequate treatment of natural disturbances in LULUCF accounting;
- the continuation of the voluntary article 3.4 activities;
- the continuation of the rule allowing land clearing emissions to be included in Australia’s base year (article 3.7); and
- no restrictions on the use of LULUCF sinks.\textsuperscript{359}


\textsuperscript{359} See Australian Government, FOI Australia’s Target Conditions – Where Do We Stand?, above n 41, 2.
As will be seen in chapter 9, the requirement for improved treatment of natural disturbances in accounting was an essential reform if Parties like Australia (which experience significant emissions from major natural causes such as wildfires) were to begin accounting for several voluntary LULUCF activities, especially forest management. It was also reasonable that the voluntary LULUCF activities continued to be available to Annex I Parties as an abatement option.

The requirement that article 3.7 continue, commonly referred to as the 'Australia clause', was more controversial but also a broadly reasonable expectation. As noted in chapter 2, this clause allowed the Howard government to unfairly inflate Australia's 1990 baseline emissions figure, effectively converting Australia's already generous Kyoto target of 108 per cent of 1990 levels by 2008-12 to 142 per cent. While the Howard government's motives for negotiating this clause were certainly unethical, it would be demonstrably unfair to Australia to retrospectively alter how its baseline emissions figure is calculated many years after Kyoto was agreed to. Having said this, the government could certainly have demonstrated leadership by voluntarily agreeing to forego the windfall gain the Howard government earned for Australia by virtue of this article (see discussion at section G).

The requirement that there be no restriction on the use of LULUCF sinks was the most problematic of the above LULUCF conditions. Because of the potential for developed countries to make windfall gains from LULUCF activities, especially forest management, Parties included a restriction on the use of this activity in Kyoto's first commitment period. While Australia wished to remove LULUCF caps so it could increase its level of abatement in this sector, doing so had the potential to undermine the environmental effectiveness of LULUCF abatement if the new accounting methods being discussed for forest management in the post-2012 negotiations did not prove to

360 Andrew Macintosh, LULUCF Offsets and Australia’s 2020 Abatement Task (ANU Centre for Climate Law and Policy, 2011) 2.
361 The cap applied to Parties for whom article 3.3 activities represented a net source of emissions. Both general and individual caps were set: see UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum 3 (Part 2), UN Doc FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), decision 16/CMP.1, annex [10, 11], appendix. See further chapter 9.
be reliable. Thus it was clearly not a responsible position to tie Australia's 25 per cent target to the unrestricted use of LULUCF sinks (see further discussion of LULUCF issues in chapter 9).

9 The Requirement for 'fully functional global carbon markets'

The Rudd government's desire to have full access to the global carbon market, reducing Australia's mitigation costs, is discussed fully in chapter 7. Thus, discussion of this issue here is also kept brief.

As will be seen in chapter 7, it was broadly reasonable for the government to condition the 25 per cent target on having access to some kind of global carbon market, given that there were significant economic and technological barriers to Australia achieving such a target from domestic abatement alone. There were, however, a number of problematic aspects to the government's condition.

First, the condition provided the Rudd government with significant discretion to determine whether a post-2012 agreement actually established a 'fully functional' carbon market (similar criticisms could be made of several of the other more vague conditions examined above). In the Senate Select Committee on Climate Policy in May 2009, then Deputy Leader of the Australian Greens, Senator Milne, rightly questioned whether the condition was realistic given that '[w]e are nowhere near a global carbon market now'. The DCC indicated, however, that the condition was not necessarily as onerous as it appeared on paper. According to the Department, the condition meant that Australia would need access 'to a broad range of international trading mechanisms'. This needn't require the participation of every country so long as 'a deep and liquid market [was] available.' Although it was not clear at what point the government would regard the global carbon market as being 'fully functional', the condition would not be met where the existing global carbon markets or 'the expected growth of those [markets] disappeared' so that 'all abatement had to occur

362 Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 20 May 2009, 4 (Blair Comley, Deputy Secretary, Department of Climate Change).
363 Ibid.
364 Ibid.
domestically'. The Department's statements on the condition thus indicated that the government's major concern was not that an optimal global carbon market existed, but simply one that provided a sufficient quantity of permits to meet Australia's needs and at a reasonable price. As such, this appeared to be a fairly reasonable condition for the 25 per cent target.

Departmental records indicated that the government also attached more specific elements to the general condition. These included:

- having unrestricted access to the Kyoto market mechanisms like the CDM;
- an agreement to develop new mechanisms, broad coverage (sector and technologies); and
- links between a new post-2012 agreement and the Kyoto flexibility mechanisms.366

As will be seen in chapter 7, the requirement for unrestricted access to the Kyoto mechanisms was clearly not a reasonable request, being inconsistent with the Protocol's principle of 'supplementarity' which provides that the Parties' use of international offsets should only be supplemental to domestic abatement367 (ensuring that Annex I Parties do not outsource all of their emissions reduction responsibilities to developing countries through mechanisms like the CDM).

The expectation that new mechanisms be developed, and to have broad coverage of sectors and technologies, also appeared quite stringent, especially as there was no clear agreement among Parties on whether to establish new flexibility mechanisms under a post-2012 agreement (see discussion of sectoral crediting and trading mechanisms in chapter 7). However, while strict, it will be seen in chapter 8 that Parties did broadly agree on the need to establish a new REDD flexibility mechanism, meaning that at least one new market mechanism was likely to be established in the post-2012 agreement. As such, depending on how strictly or generously the

366 Australian Government, FOI Australia's Target Conditions – Where Do We Stand?, above n 41, 2.
367 Kyoto Protocol arts 6.1(d), 17.
government ultimately interpreted this condition, it was not necessarily an unreasonable expectation.

It was also reasonable for the government to condition its 25 per cent target on links being established between a post-2012 agreement and the Kyoto flexibility mechanisms, this being necessary to ensure that the existing Kyoto mechanisms could continue to be used by Annex I Parties in meeting their future mitigation obligations under a broader post-2012 outcome.

F Were the Conditions for the 25 Per Cent or 15 Per Cent Targets Satisfied?

Ultimately, none of the headline conditions attached to the 25 per cent target appeared to be fulfilled by the Copenhagen Accord. Of particular interest for both Australia and the Parties generally was the level of ambition adopted by developed countries (condition 3). Some estimates suggested that the developed country pledges added up to a reduction of 17 to 26 per cent by 2020 (excluding LULUCF) or 16 to 24 per cent (including LULUCF); potentially exceeding or being close to satisfying Australia’s 25 per cent reduction requirement for advanced economies. However, other studies estimated the developed country ambition to be as low as 13 to 20 per cent. Moreover, given the discrepancy in emission estimates, there was clearly insufficient clarity on this issue for the government to regard this condition as being fulfilled.

368 Note that to its credit, the Rudd government made a policy commitment to establish a transparent process to determine whether the government’s target conditions were met, including analysis by an independent Ratification Review panel, which would table its response to Parliament: Explanatory Memorandum, CPRS Bill 16-17, 78-79. Note also that while developing countries’ collective ambition may have exceeded Australia’s target (although estimates varied on this) these were stated to be non-binding actions, rather than legally binding commitments as required by Australia. 369 International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(421) (1-12 June 2009) 12. 370 Schaeffer and Hare, above n 82, 2. Estimates were difficult as some Parties, including Australia, submitted target ranges rather than single targets. The exact stringency of individual targets were also dependent on the final rules on LULUCF and the use of surplus emission units in future commitment periods: see further Michel den Elzen et al, The Emissions Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2°C or 1.5°C? (UNEP, November 2010) 10, 14.
Post-Copenhagen, the Rudd government announced that based on the Accord, Australia would stick with its minimum 5 per cent target. It also announced new conditions for moving beyond this target, namely that:

- ‘the level of global ambition becomes sufficiently clear, including both the specific targets of advanced economies and the verifiable emissions reduction actions of China and India’;
- ‘the credibility of those commitments and actions is established, for example, by way of a robust global agreement at .... [COP 16], or commitment to verifiable domestic action on the part of major emitters including the United States, India and China’; and
- ‘there was clarity on the assumptions for emissions accounting and access to markets’.

Some commentators argued that the outcome in the Copenhagen Accord was at least sufficient to trigger the 15 per cent target. While it was correct that more of the conditions to the 15 per cent target could be regarded as being fulfilled, or close to fulfilled, at face value, it must be remembered that the Accord only represented a political agreement with no formal status under the Convention. In the absence of a legally binding post-2012 outcome, it was understandable that the Rudd government was not prepared to move beyond the 5 per cent target until the Parties' commitments were sufficiently clear and formalised at the international level.

**G Implications for GIC**

As explained previously, this thesis argues that if the Rudd government was to qualify as a GIC in its engagement with the post-2012 climate negotiations, it was particularly important that it put forward or support proposals that were compliant with the legal framework provided by ICCL, and broader international law, where relevant. In this case, the BAP made clear that developed countries were to consider adopting nationally appropriate mitigation targets that ensured 'the comparability of efforts

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371 Penny Wong, 'Australia's Submission to Copenhagen Accord' (Media Release, 27 January 2010).
372 Ibid. The rules on emissions accounting and carbon markets are discussed in chapters 6 and 9.
373 The Climate Institute, 'Australia’s 2020 Carbon Pollution and Productivity Target', above n 294, 8-9.
among them', while taking into account differences in their national circumstances. Also of particular relevance were several of the article 3 UNFCCC principles, especially that Parties should act on the basis of equity and CBDR&RC and that developed countries should take the lead in combating climate change.

As noted, the Rudd government accepted the importance of the above principles to the issue of target-setting, specifically highlighting these in its international submissions. The basic approach of the Rudd government toward target-setting was that it wished to make a fair or proportionate contribution to the global mitigation effort. Thus its general intention was essentially to act consistently with the notions of equity, CBDR&RC and comparability of effort. Based on Australia's higher aggregate mitigation costs, and the metrics of per capita effort and effort relative to 2008-12, the government believed that its 25 per cent target would make a fair or proportional contribution to a 450 ppm CO2-e agreement.

As the UNFCCC Party with the 13th highest GHG emissions (about 1.5 per cent of global emissions), and one of the largest per capita emissions, there was clearly a need for Australia to adopt a strong target if it was to make an equitable or comparable contribution to a new global agreement. It was seen above, however, that Parties could not agree on precisely which metrics were best suited to determining whether developed countries' targets represented a fair or comparable level of effort. Numerous metrics were also applied in the literature. As such, it was difficult to assess whether Australia's target represented a proportionate response with any level of precision. However, the various studies, which applied a range of metrics, generally indicated that Australia's 25 per cent target was within the ballpark of what was

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375 Note that only domestic emissions are accounted for under the UNFCCC and Kyoto Protocol accounting framework. A criticism often expressed is that because of its large coal exports, Australia's emissions would be much higher (6th) if it was required to account for emissions generated overseas from burning Australian coal: see Michael Bachelard, 'Old King Coal', The Sydney Morning Herald (online), 8 November 2009 <http://www.smh.com.au/national/old-king-coal-20091107-i2w7.html>. Note, however, that other Parties' emissions would also be much higher if they needed to factor in the emissions caused by their exports; for example, if China needed to account for the life-time emissions of the consumer electronic goods it manufactures and exports to other countries. Therefore, this thesis assesses the government's behaviour in relation to the agreed accounting framework.
required of Australia under a 450 ppm CO2-e agreement (if Annex I Parties reduced their collective emissions by about 30 per cent). To this extent, the government’s approach to target-setting could be commended as the 25 per cent target did appear to make a broadly proportionate contribution to a 450 ppm CO2-e agreement, as it intended, thus respecting the comparability of effort principle.

It does not necessarily follow, however, that the 25 per cent target was consistent with the behaviour expected of a GIC. This is for several reasons. First, the 25 per cent target only represented a broadly sufficient contribution to a 450 ppm CO2-e agreement. Yet as argued in chapter 5, the 450 ppm CO2-e goal did not appear to be ambitious enough to achieve the ultimate objective of the Convention, namely, to avoid dangerous climate change, especially for the most vulnerable developing countries. Thus the 25 per cent target was premised on a long-term goal that was inconsistent with achieving the ultimate objective of the Convention. As such, there is a strong argument that the Rudd government needed to put forward a higher upper target – one that made a sufficient contribution to a global agreement that was genuinely capable of avoiding dangerous climate change (such as the 350 ppm CO2-e goal advocated by AOSIS and the LDCs). Indeed, by only being prepared to pledge a target that was consistent with a 450 ppm CO2-e goal, the government arguably failed to respect a number of UNFCCC principles, among them the precautionary principle; the developing countries' right to sustainable development; the need to protect the climate system for future generations; and the needs of the most vulnerable countries. Because the 25 per cent target was premised on a 450 ppm CO2-e agreement, it also failed to properly give effect to the principles of equity and CBDR&RC, which needed to be interpreted in light of the Convention’s ultimate objective.

Second, the 25 per cent target only made a broadly sufficient contribution to a 450 ppm CO2-e agreement in which Annex I Parties collectively reduced their emissions by about 30 per cent. As detailed in this chapter, developing countries were strongly of

376 Article 3.3 UNFCCC states that 'Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.'
the view that this did not represent a sufficient collective emission reduction by developed countries, who argued for a 40 per cent or higher collective reduction by this group. This was for several reasons, including to meet more ambitious stabilisation goals (such as the 350 ppm CO2-e target) and to ensure that there was sufficient demand for carbon credits generated by the CDM and future market mechanisms like REDD. Developing countries also believed that a 40 per cent or higher reduction by the Annex I Party group was necessary to give effect to various UNFCCC principles including equity, CBDR&RC, and developed country leadership, as well as broader international legal principles such as the obligation to prevent harm to the environment of other states and to the global commons. More controversial principles such as historical responsibility, polluter pays and the right to development (which are not strictly supported by the Convention) were also said to warrant a 40 per cent or higher target. While it is difficult to determine precisely what the collective ambition by developed countries ought to have been, there is certainly an argument that a GIC would have listened to the demands of developing countries and accepted the equitable and scientific basis for a 40 per cent or higher reduction by the Annex I Party group.

Third, Australia's target clearly needed to give effect to the principle of leadership, which is both an expectation of developed countries under the UNFCCC, and a general attribute of GIC. This chapter would suggest that fulfilling the principle of leadership was particularly important on this issue, as leadership in the form of ambitious targets was desperately needed to encourage similar actions from other Parties and provide momentum to the negotiations. Thus the adoption of a higher target by Australia would have done much to help distinguish itself as a 'good' rather than 'average' or 'poor' international citizen.

While the 25 per cent target represented a broadly proportionate contribution to a 450 ppm CO2-e goal, it certainly did not position Australia as a leader on this issue. Indeed, the government never intended it to do so, with Prime Minister Rudd stating
that Australia’s goal was to ‘do no more and no less’ than the rest of the world.\footnote{ABC, ‘Rudd Says Abbott Wrong Again’, above n 2. This comment was reiterated by Prime Minister Rudd and the Minister for Climate Change after COP 15, see, eg, AFP, ‘Australia Pledges “No More, No Less” on Climate Change’, 21 December 2009 <http://www.google.com/hostednews/afp/article/ALeqM5i0FVYue_kdlVdQgr2FRIxv9RMdU1w>; Samantha Maiden and David Nason, ‘Kevin Rudd Faces New Emissions Trading Scheme Demand’, The Australian (online), 22 December 2009 <http://www.theaustralian.com.au/news/nation/kevin-rudd-faces-new-emissions-trading-scheme-demand/story-e6frg6nf-1225812590079>.) Of course, Australia was by no means one of the worst performers on this issue, with Parties such as Canada, the US and Russia making pledges that were unquestionably too weak.\footnote{See, eg, den Elzen, Exploring Comparable Post-2012 Reduction Efforts for Annex I Countries, above n 118, 62; den Elzen, Sharing Developed Countries’ Post-2012 Greenhouse Gas Emission Reductions Based on Comparable Efforts, above n 125, 12, 34; Winkler, Marquard and Letete, above n 174, 9-14; Climate Action Tracker, above n 127.} Russia’s 25 per cent target, for example, was likely to be achieved under a BAU scenario (that is, with no additional mitigation effort).\footnote{See, eg, den Elzen, Exploring Comparable Post-2012 Reduction Efforts for Annex I Countries, above n 118, 16, 54.} The EU’s upper target also only appeared to make a barely adequate contribution to a 450 ppm CO2-e mitigation scenario.\footnote{Ibid 62; den Elzen, Sharing Developed Countries’ Post-2012 Greenhouse Gas Emission Reductions Based on Comparable Efforts, above n 125, 12, 34; Winkler, Marquard and Letete, above n 174, 9-14; Climate Action Tracker, above n 127.} Nonetheless, Australia’s target fell short of the leading nations on a range of metrics, especially Norway and Iceland.\footnote{Ibid.} While it is difficult to state precisely what target would have positioned Australia as a leader on this issue, it is clear that it needed to be higher than 25 per cent.

Turning to other GIC attributes (other than leadership, discussed above), it was clear that Australia’s position (as with many other Parties) was heavily influenced by self-interest. As explained in chapters 1 and 2, it is inconsistent with GIC for a nation to advance its national interests in an overly narrow, or self-interested fashion. It has been seen that the Rudd government’s approach to target-setting, as with earlier Australian governments, was influenced by its desire to minimise impacts on the Australian economy and jobs. In this case, the government’s actions were far removed from the blatantly short-term, nationalistic approach of the Howard government in the Kyoto Protocol negotiations. This is because while the government was concerned to protect Australia’s national economic interests it also displayed a genuine willingness to adopt a reasonable mitigation target, so long as other nations were prepared to do
likewise. However, the Rudd government's failure to pledge an upper mitigation target that was consistent with the objective of avoiding dangerous climate change (and hence the interests of the most vulnerable developing countries) ultimately indicated that it was not prepared to moderate narrow self-interest to the extent that would be expected of a GIC.

The weakness of its target was also arguably inconsistent with a range of other general GIC attributes. Most clearly, this included the notion of advancing 'purposes beyond ourselves'. Similarly, its 25 per cent target undoubtedly failed to give effect to Australia's 'enlightened self-interest'. This is because Australia's long-term interest undoubtedly lay in avoiding dangerous climate change, not in seeking to protect its short-term economic advantages. Given that many of Australia's regional neighbours called for a 350 ppm CO2-e agreement to ensure their survival, it was also at odds with the notion of good neighbourliness to only pledge a target that was consistent with a 450 ppm CO2-e agreement.

A potential defence for the Rudd government from a GIC perspective was that the 25 per cent target likely represented the upper limit of what was politically feasible in Australia at the time. In this sense, it balanced what Gareth Evans referred to as idealism with realism. As noted earlier, the government was under significant political pressure from the carbon-intensive business sector to act in sync with other nations, rather than as a leader, due to concerns about the ramifications of acting unilaterally for the economy and jobs. The government also lacked Parliamentary backing for targets higher than 25 per cent. Given that there was little likelihood of Parties adopting a 350 ppm CO2-e agreement at COP 15, or Annex I Parties agreeing to collectively reduce their emissions by more than 30 per cent, a pledge by the government to a target higher than 25 per cent would have been purely symbolic (given its conditional approach to target-setting). Thus it could be argued that the government struck a defensible balance between setting a reasonable target (albeit

\footnote{This would have been clear to the government based on the global mitigation goals backed by the majority of Parties (see chapter 5) and the national mitigation targets pledged by developed countries in the lead up to COP 15.}
not a leading one), and a target that reflected both domestic and international realities.

Turning to the merits of setting a conditional target range, this chapter accepts that the Rudd government had sound policy and political reasons for doing so. The dominant consideration for the government was that Australia needed to act in concert with other nations, rather than unilaterally, in order to prevent causing unnecessary harm to Australia's economy and jobs. Doing otherwise would clearly have been politically unpopular at the domestic level. However, while perhaps understandable from a domestic perspective, the government's approach appeared to be at odds with the principle of leadership. This is because in order to show genuine leadership it was arguably incumbent upon the government to put forward a single, scientifically credible target, not one which balanced economic and political considerations.

Some may regard this as an overly idealistic view of what was politically possible for the Rudd government. Indeed, it needs to be remembered that dangerous climate change can only be averted through the collective action of the UNFCCC Parties, especially the major global emitters. While putting forward a single ambitious target would certainly have carried symbolic weight, it was unlikely to have influenced major emitters like the US and China whose national targets – like that of Australia – were heavily influenced by domestic considerations. Furthermore, it would have had little effect on preventing dangerous climate change given the relatively small contribution Australia makes to global GHG emissions. The government's approach of setting a conditional target range was thus not necessarily unreasonable from a policy perspective. But genuine leadership clearly required Australia to adopt a target that positioned it as front runner, not a follower.

Regarding the conditions attached to the 25 per cent target, the above analysis found that many of these were generally reasonable. However, there were certainly problematic aspects to several of the government's conditions – for example, linking the upper target to a 25 per cent collective reduction by the 'advanced economies', rather than the settled category of Annex I Parties; the requirement that the major
developing economies nominate a peak year for their emissions; and especially demanding unrestricted access to LULUCF sinks and the international carbon market. The fact that most of the 25 per cent target conditions were ultimately not satisfied by the Copenhagen Accord, may also suggest that the conditions were overly stringent. Some commentators were critical of the 25 per cent target on this basis, with Greenpeace, for example, suggesting that it was possibly 'illusory'. China also criticised the conditions as being unrealistic. Yet while certainly stringent, the conditions by and large involved reasonable expectations of other Parties regarding the elements that were necessary to deliver a 450 ppm CO2-e outcome. This chapter is of the view, however, that requiring unlimited access to LULUCF sinks and the international carbon market were not consistent with the principle of leadership, in light of environmental effectiveness concerns regarding LULUCF accounting and carbon credits, which are detailed further in chapters 7, 8 and 9. It is also strongly arguable that while most of the conditions had a reasonable policy basis, a genuine leader would have adopted less stringent conditions in order to demonstrate that it was prepared to take strong action, regardless of the actions of others.

Ultimately, the true test of the Rudd government's conditions would have occurred at the point in time in which it was required to fully determine whether they had been satisfied. The government could have interpreted these conditions strictly – so as to avoid adopting the 25 or 15 per cent targets – or generously, demonstrating leadership by not seeking to shirk its commitments. The Rudd government was not tested on this front, however, with the Copenhagen Accord only delivering a weak, non-binding outcome. Indeed, the Accord's status as a non-binding political agreement meant that it was entirely appropriate for the government to wait for further legal developments,

385 Note that the government appeared to have some flexibility in this regard. While some of the conditions were indicated to be essential, others only reflected a strong preference: see Australian Government, FOI Australia’s Target Conditions – Where Do We Stand?, above n 41, 2.
such as the adoption of a formal COP decision or new Protocol, before moving beyond its unilateral 5 per cent commitment.

More positively for the Rudd government, a number of its actions were consistent with other attributes of GIC identified in chapter 1. As with chapter 4, it is clear that Australia took an internationalist and activist approach (generally working cooperatively with other nations and providing detailed submissions about its targets relatively early on in the negotiations) and was generally committed to multilateral diplomacy and the relevant international institutions (chiefly the UNFCCC). Its activism and upper 25 per cent target also demonstrated a willingness to 'pitch in' (although probably not to the extent necessary to genuinely demonstrate GIC). In a broad sense, its cooperative engagement with the negotiations also demonstrated its general commitment to international law as the key international mechanism for addressing climate change (although as concluded above, it could have significantly bolstered this commitment by adopting a national target that gave proper effect to the provisions and principles of the ICCL regime). As argued in chapter 5, however, the above attributes were relatively easy to satisfy, and are not viewed as being decisive for distinguishing 'good' from average or poor behaviour in this instance.

Overall, it must be acknowledged that the issue of target-setting was an extremely difficult and complex issue, not least because of the economic risks for Australia, and political risks for the government, in acting ahead of other nations. Indeed, much of the government's approach was perfectly understandable and reasonable in light of the various factors it needed to balance. It must be reiterated, however, that GIC requires a higher standard of behaviour from governments. For this author, the major shortfall in the Rudd government's approach was that it failed to pledge an upper target that was genuinely capable of helping to realise the Convention's central objective, that of avoiding dangerous climate change for all Parties. Additionally, its upper target was demonstrably insufficient to truly show leadership or give effect to other UNFCC principles such as equity and CBDR&RC. This chapter thus suggests that while Australia met the standard of at least an 'average' international citizen on the issue of target-setting, it ultimately needed to pledge a higher conditional target than
25 per cent, and additionally relax several of its more onerous conditions, in order to qualify as a GIC.
CHAPTER 7. IMPLEMENTING THE RUDD GOVERNMENT’S MITIGATION TARGET

Australia's mitigation targets will be both 'real' and 'robust'. Prime Minister Kevin Rudd, December 2007.¹

'With Kyoto we were negotiating an environment treaty. Now, we're negotiating a deal about the economic structure of the planet.' Erwin Jackson, The Climate Institute.²

The previous two chapters of this thesis examined the goal-setting aspects of the Rudd government's approach to mitigation, namely, its preferred long-term global mitigation target and its conditional 5 to 25 per cent emission reduction target for 2020. To some extent these goal-setting aspects represented the easy part of the Rudd government's engagement with the post-2012 climate negotiations on the mitigation issue. The larger test of the Rudd government's resolve to act on climate change would lie in how it approached the challenge of implementing Australia's future international emission reduction obligations.

A key commitment of the Rudd Labor Opposition in the lead up to the 2007 federal election was to introduce a comprehensive domestic legal and policy framework to reduce Australia's growing greenhouse gas (GHG) emissions. At the heart of Labor's approach was its pledge to introduce an emissions trading scheme (ETS).³ This would be supplemented by various 'complementary' policies, most notably a mandatory 20 per cent Renewable Energy Target (RET) for 2020.⁴ Once in government, Labor sought

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³ Kevin Rudd, 'An Action Agenda for Climate Change' (Speech delivered at the Annual Fraser Lecture, Canberra, 30 May 2007).
to legislate its ETS, the Carbon Pollution Reduction Scheme (CPRS),\(^5\) which was
spruiked internationally as proof that Australia was serious about delivering on its
2020 and longer-term mitigation targets.\(^6\) Ultimately, however, the government was
unable to secure parliamentary backing for the Scheme.

The aim of this chapter is to assess whether the Rudd government's approach to
implementation was consistent with the standard of good international citizenship
(GIC). It does so in the following manner. First, the major features of the government's
domestic legal and policy response are outlined, with a focus on the CPRS. Second, an
overview is provided of the key criticisms of the government's domestic legal and
policy response, especially the CPRS. As noted in chapter 1, a GIC is generally expected
to comply with its legal obligations under international law. While Australia had not
agreed to new international targets at the time the CPRS and other measures were
proposed, this chapter argues that it is important to assess whether the government's
approach was legally effective, in that it would likely position Australia to meet its
post-2012 obligations. Third, the chapter considers the government's contentious
decision to allow 'liable entities' under the CPRS unlimited access to international
emission credits, which could not be guaranteed to result in genuine emission
reductions.\(^7\) As will be explained, such an approach was potentially at odds with
various principles and provisions of the international climate change law (ICCL) regime.
Fourth, the chapter examines the government's efforts to legislate the CPRS. The
chapter concludes with a detailed assessment of whether the government's approach
to implementation met the standard of GIC, drawing upon both a legal analysis of the
government's approach and consideration of the broader attributes of GIC identified in
chapter 1.

\(^5\) Carbon Pollution Reduction Scheme Bill 2009 (Cth) (’CPRS Bill’); Carbon Pollution Reduction Scheme Bill
[No 2] 2009 (Cth) and later the Carbon Pollution Reduction Scheme Bill 2010 (Cth).
\(^6\) See, eg, Australia, ’Strengthening Australia’s National Ambition for 2020’ in UNFCCC, Ideas and
Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 3, UN Doc
\(^7\) Note that two particularly complex issues concerning implementation – namely, the use of emission
permits from a REDD mechanism and Australia’s approach to land-based emission accounting – are
considered separately in chapters 8 and 9, respectively.
A The Rudd Government's Domestic Legal and Policy Framework: The CPRS and Complementary Measures

1 Historical Background: The Howard Government’s GHG Abatement Laws and Policies

The Rudd government inherited a range of emission reduction laws and policies from its predecessor, the Liberal National Howard government, when it won office in December 2007. As discussed in chapter 2, the Howard government chose not to ratify the Kyoto Protocol but nonetheless committed to achieving Australia's mitigation target of 108 per cent by 2008-12 (above 1990 levels). The most notable feature of the Howard government's emission reduction policy was its Mandatory Renewable Energy Target (MRET) of 9500 gigawatt hours by 2010 (approximately 2 per cent of Australia's electricity needs). Otherwise, the government largely put its faith in voluntary programs to encourage Australian businesses and individuals to reduce their emissions and improve efficiency. While the Howard government did manage to put Australia on track to meet its Kyoto goal, this was considerably aided by the inclusion of the so-called 'Australia clause' in the Protocol (providing Australia with a windfall gain from reduced land clearing), and the fact that Australia's Kyoto target allowed it to increase emissions by 8 per cent. Longer-term, Australia's emissions were expected to rise by 27 per cent above 1990 levels by 2020, meaning that Australia needed a

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9 Department of Prime Minister and Cabinet, Australia’s Climate Change Policy: Our Economy, Our Environment, Our Future (2007) 6.

10 The MRET was established by the Renewable Energy (Electricity) Act 2000 (Cth) and supported by the Renewable Energy (Electricity) (Charge) Act 2000 (Cth) and Renewable Energy (Electricity) Regulations 2001 (Cth). It came into force on 1 April 2001. The MRET required electricity generators to surrender Renewable Energy Certificates (RECs) each year equivalent to their obligations or face a penalty ($40 per REC owing if the REC shortfall was 10 per cent or more of its liability). RECs were tradeable, establishing a market mechanism. The main concern with the MRET was that it was not expanded or extended by the Howard government, as recommended by the Tambling Report, in order to encourage ongoing investment in renewable energy beyond 2010: see Grant Tambling, Renewable Opportunities: A Review of the Operation of the Renewable Energy (Electricity) Act 2000 (Australian Greenhouse Office, 2003) xxi.


12 Kyoto Protocol art 3.7. See previous discussion of the Australia clause in chapter 2 and further discussion in chapter 9.

more comprehensive legal and policy response for the post-2012 era. Relenting to growing public pressure, in 2007 the Howard government belatedly joined Labor in promising to introduce an ETS if re-elected,¹⁴ as well as a modified MRET in the form of a 15 per cent Clean Energy Target by 2020.¹⁵ Neither policy was introduced, however, due to its loss at the November 2007 federal election.

2 The CPRS and Complementary Measures: Overview

a) Background

The federal Labor party promised under the leadership of Kim Beazley in 2004 to introduce an ETS by no later than 2010.¹⁶ This commitment was confirmed by Labor under the leadership of Kevin Rudd during the 2007 federal election campaign. Demonstrating how seriously Rudd appeared to take the issue, the then Opposition leader, aided by the state and territory governments, commissioned the independent Garnaut Climate Change Review (Garnaut Review) in April 2007 to advise on the implications of climate change for Australia and an appropriate policy response.¹⁷ With rising public awareness and desire for action on climate change,¹⁸ Rudd’s commitment to introduce an ETS became one of Labor’s core promises during its successful election campaign.

In office, the Rudd government immediately undertook detailed policy work on the possible design of an ETS, including extensive consultations with industry, community groups and other stakeholders. This culminated in the release of the Carbon Pollution Reduction Scheme Green Paper,¹⁹ followed by the Carbon Pollution Reduction Scheme

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¹⁴ Department of Prime Minister and Cabinet, above n 9, 7. The commitment to introduce an ETS was influenced by Howard’s Prime Ministerial Task Group on Emissions Trading which concluded that it was in Australia’s interests to introduce an ETS by 2011 or 2012, even if a post-2012 climate agreement had not been reached: see Prime Ministerial Task Group on Emissions Trading, above n 11, 9, 13.
White Paper, by the newly created Department of Climate Change. This was complemented by Treasury's report, Australia's Low Pollution Future: The Economics of Climate Change Mitigation. The CPRS was designated as the central mechanism to reduce domestic emissions and to position Australia to achieve its international obligations under an anticipated post-2012 climate agreement. Overall, the government's domestic legal and policy response was 'designed to transform ... [Australia's] economy, putting it on a low-emissions path', as well as building Australia's international credibility and strengthening its ability to influence the post-2012 climate negotiations.

An exposure draft of the Carbon Pollution Reduction Scheme Bill (CPRS Bill) was released in March 2009. After receiving further comment from stakeholders, and taking into account the economic impacts of the 2008 Global Financial Crisis (GFC), the government announced a number of changes to the Bill on 4 May 2009, including the delay of the scheme by 1 year from 2010 to 2011. The CPRS Bill, and other Bills necessary to implement the scheme, were then introduced to Parliament on 14 May 2009.

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22 Explanatory Memorandum, Carbon Pollution Reduction Scheme Bill 2009 [No 2] (Cth) 14 ("Explanatory Memorandum, CPRS Bill [No 2]").
24 See Senate Standing Committee on Economics, Parliament of Australia, Exposure Draft of the Legislation to Implement the Carbon Pollution Reduction Scheme (2009).
26 CPRS Bill; Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009 (Cth); Australian Climate Change Regulatory Authority Bill 2009; Carbon Pollution Reduction Scheme (Charges — General) Bill 2009 (Cth); Carbon Pollution Reduction Scheme (Charges — Customs) Bill 2009 (Cth); Carbon Pollution Reduction Scheme (Charges — Excise) Bill 2009 (Cth); Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009 (Cth); Customs Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009 (Cth); Carbon Pollution Reduction Scheme (CPRS Fuel Credits) Bill 2009 (Cth); Carbon Pollution Reduction Scheme (CPRS Fuel Credits) (Consequential Amendments) Bill 2009 (Cth). The Carbon Pollution Reduction Scheme (Household Assistance) Bill 2009 (Cth) was introduced separately.
b) Key Features of the CPRS Bill

The original CPRS Bill 2009 was intended to establish a national ETS effective from 1 July 2011.27 The major objects of the Bill included:

- giving effect to Australia's obligations under the United Nations Framework Convention on Climate Change (UNFCCC)28 and the Kyoto Protocol;
- supporting 'the development of an effective global response to climate change'; and
- taking action directed towards meeting Australia's 2020 and/or 2050 international mitigation targets in a 'flexible and cost-effective way' and in accordance with the Kyoto rules or any successor agreement.29

The Scheme, a 'cap and trade' ETS, would aim to reduce emissions by setting a national emissions target for 2020 (within the government's 5 to 25 per cent range),30 a 'scheme emissions cap' as well as national 'gateways' (an emission cap range, with an upper and lower figure) which would increase in stringency over time.31 A limited number of Australian emissions units – commonly known as emission permits – would be issued to 'liable entities' each year, in accordance with the scheme cap.32 As a market-based mechanism, these permits would be tradable between liable entities.33

The tradable nature of emission permits under the CPRS was designed to encourage emission reductions to be achieved at 'least cost'.34 As explained by the Garnaut Review, allowing permits to be traded between liable entities would allow permits to be used where they had most economic value, encouraging the least expensive abatement options to occur first. As permits were traded, the carbon price would

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27 CPRS Bill cl 4.
29 CPRS Bill cls 3(1)-(5).
30 Ibid cl 3.
31 Scheme caps and gateways were to be set by the responsible Minister with regard to Australia’s obligations under the UNFCCC and Kyoto Protocol and various other domestic and international factors: see ibid cl 14(5).
32 Ibid pts 3, 4.
33 Ibid pt 4.
come to reflect the balance between the scarcity of permits and options for abatement.\textsuperscript{35} The carbon price established by the CPRS would change the relative prices of goods and services, making emissions-intensive goods more expensive, thus establishing an incentive for both individuals and businesses to adjust their choices and practices in favour of lower emission goods and services.\textsuperscript{36}

Each year, liable entities would compete to purchase the quantity of permits they required (equivalent to their expected emissions), either at auction or on the secondary carbon trading market, although permits would have a fixed price of $10 in the first year.\textsuperscript{37} Full trading of permits was to commence in 2012-13, although with a capped permit price for the first three years, initially set at $40.\textsuperscript{38} Liable entities were to report their emissions under the existing \textit{National Greenhouse and Energy Reporting Act 2007} (Cth) and surrender permits equal to their liabilities at the end of each financial year.\textsuperscript{39} Penalties would apply for any shortfall (initially $11 per unit) and additional units would need to be surrendered in future years to 'make good' any shortfall.\textsuperscript{40}

In order to spread the costs of carbon pricing across the economy, the CPRS was designed to cover a broad range of emissions sources, namely, stationary energy, transport, fugitive emissions, industrial processes and waste sectors, and the six GHGs regulated by the Kyoto Protocol.\textsuperscript{41} The Scheme was to cover approximately 75 per cent of Australia's emissions and 1000 of Australia's largest emitting entities.\textsuperscript{42}

\textsuperscript{35} Garnaut, \textit{The Garnaut Climate Change Review: Final Report}, above n 17, 309.


\textsuperscript{37} CPRS Bill pts 4, 6. See Explanatory Memorandum, CPRS Bill [No 2] 20-21, 104-05. Note that this chapter refers to first CPRS Bill, but the second version of the Explanatory Memorandum, as this later version contained additional information on the scheme. Dollar references in this chapter are to Australian dollars unless indicated otherwise.

\textsuperscript{38} CPRS Bill pts 4, 6. See Explanatory Memorandum, CPRS Bill [No 2] 105.

\textsuperscript{39} CPRS Bill pt 6.

\textsuperscript{40} Ibid cl 133.

\textsuperscript{41} See Explanatory Memorandum, CPRS Bill [No 2] 27; \textit{National Greenhouse and Energy Reporting Act 2007} (Cth). The six GHGs were carbon dioxide; methane, nitrous oxide; hydrofluorocarbons; perfluorocarbons and sulphur hexafluoride.

\textsuperscript{42} Australian Government, \textit{Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 1)}, above n 20, xxviii. Liable entities were generally restricted to entities emitting or responsible for 25 000 tonnes CO2-e or more per year: CPRS Bill pt 3.
(approximately 15 per cent of Australia's emissions)\textsuperscript{43} was initially excluded due to the complexity of accurately estimating its emissions and including a sector with more than 100 000 small emitters.\textsuperscript{44} The government wished to include the sector, however, by 2015.\textsuperscript{45}

While most liable entities would have been obliged to purchase permits under the CPRS, certain high-emitting sectors of the economy were to be provided with free permit allocations to shield them from the full impact of the carbon price. Initially, the government proposed to provide emissions-intensive trade-exposed (EITE) industries with free permits equivalent to either 90 or 60 per cent of their baseline emissions, depending on their emissions intensity.\textsuperscript{46} This assistance would decrease by 1.3 per cent each year so that EITE industries were also contributing to carbon abatement.\textsuperscript{47} The initial assistance rates were subsequently increased, as part of the May 2009 modifications, to 94.5 and 66 per cent, respectively. This was to provide a 'global recession buffer' for EITE industries in light of the GFC.\textsuperscript{48} Coal-fired electricity generators (CFEGs), Australia's major source of electricity,\textsuperscript{49} were also to be granted 130 million free permits, again over a five year period.\textsuperscript{50} To offset expected increases in fuel prices, households and businesses were also to receive 'cent-for-cent' fuel tax reductions.\textsuperscript{51} To cushion the financial impact on low and middle income households, these groups were also to receive full or partial compensation for expected increases in the cost of living, such as higher power bills.\textsuperscript{52}

\textsuperscript{44} Australian Government, \textit{Carbon Pollution Reduction Scheme: Australia's Low Pollution Future (White Paper, Vol 1)}, above n 20, 6-44.
\textsuperscript{45} Supplementary Explanatory Memorandum, Carbon Pollution Reduction Scheme Bill [No 2] (Cth) 13 (\textit{Supplementary Explanatory Memorandum, CPRS Bill [No 2]}).
\textsuperscript{46} Explanatory Memorandum, CPRS Bill [No 2] 116.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} See section B.3 below.
\textsuperscript{50} CPRS Bill pt 9. See Explanatory Memorandum, CPRS Bill [No 2] 143.
\textsuperscript{51} Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009 and Customs Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009; Carbon Pollution Reduction Scheme (CPRS Fuel Credits) Bill 2009; Carbon Pollution Reduction Scheme (CPRS Fuel Credits) (Consequential Amendments) Bill 2009.
\textsuperscript{52} Explanatory Memorandum, Carbon Pollution Reduction Scheme (Household Assistance) Bill 2009 [No 2] (Cth) 2; Revised Explanatory Memorandum, Carbon Pollution Reduction Scheme (Household
In addition to Australian emissions units, eligible emission permits under the CPRS included approved 'international emissions units' (commonly known as international permits).\textsuperscript{53} Liable entities were to have unlimited access to international permits from 2012-13, such as those generated by the Kyoto Protocol's Clean Development Mechanism, which could be purchased to help meet their Scheme liabilities.\textsuperscript{54} As with domestic trading, providing access to the international trade in permits was intended to allow liable entities to 'access lower cost abatement opportunities' and Australia's national mitigation target 'to be achieved in a flexible and cost-effective way'.\textsuperscript{55} So-called 'carbon credits' or 'carbon offsets' could also be generated under the Scheme, with emission permits to be awarded for reforestation and synthetic GHG destruction activities.\textsuperscript{56}

c) Coalition Amendments to the CPRS Bill

The CPRS Bill, and related Bills, were passed with minor amendments by the House of Representatives, in which Labor held a majority, on 4 June 2009.\textsuperscript{57} However, the Bills were rejected in the Senate on 13 August 2009, by 42 votes to 30, with the Rudd government failing to gain the seven votes it needed from non-Labor Senators.\textsuperscript{58} The CPRS Bill and related Bills were then reintroduced to the Parliament on 22 October, 2009 (as CPRS Bill 2009 [No 2]). In a renewed attempt to pass the Bill, the government agreed to a series of amendments with the Liberal National Opposition, then led by Malcolm Turnbull, on November 24.\textsuperscript{59} This deal almost saw the CPRS Bill approved in the Senate and become law. However, Turnbull's personal support for the amended CPRS was not shared by many within the Coalition, resulting in a Liberal leadership spill.

\textsuperscript{54} Ibid. See further discussion at section C.
\textsuperscript{55} Explanatory Memorandum, CPRS Bill [No 2] 77-78.
\textsuperscript{56} CPRS Bill cls 191, 245.
\textsuperscript{57} Amendments related mainly to reforestation activities: see Supplementary Explanatory Memorandum, Carbon Pollution Reduction Scheme Bill 2009 (Cth) ch 1.
\textsuperscript{58} Parliament of Australia, Journals of the Senate (13 August 2009) 2291.
before the vote on the amended Bill was taken.\textsuperscript{60} Under new leader, Tony Abbott, the Coalition reneged on its agreement with Labor, voting to defeat the CPRS Bill in the Senate for a second time on 2 December 2009.\textsuperscript{61} The CPRS Bill was introduced for a third time on 2 February 2010, but still lacking parliamentary support, Prime Minster Rudd announced on 27 April 2010 that the government would defer the implementation of the CPRS until 2013 (see further discussion at section D).\textsuperscript{62}

This chapter assesses the Rudd government’s approach to implementation on the basis of the original CPRS Bill (and identical ‘No 2’ version), which represented the government’s preferred Scheme. However, the key Coalition amendments agreed to by Labor in November should be briefly highlighted. Notably, these amendments significantly expanded the compensation and assistance provided to carbon-intensive industries. Among the amendments included:

- greater assistance to EITE industries – through keeping the global recession buffer in place beyond the first five years – and CFEGs – increasing the allocation of free permits from 130 million free permits over five years to 270 million permits over 10 years;\textsuperscript{63}
- the indefinite exclusion of agriculture;\textsuperscript{64}
- a Coal Sector Adjustment Scheme to assist operators of pre-CPRS coal mines – providing almost 50 million free permits over five years;\textsuperscript{65}
- additional free permits for liquefied natural gas projects at an ongoing effective assistance rate of about 50 per cent – bolstering the free permits these entities

\textsuperscript{61} Parliament of Australia, \textit{Journals of the Senate} No 105 (2 December 2009) 3048. 41 votes to 33.
\textsuperscript{62} Australian Government, ‘Carbon Pollution Reduction Scheme’ (Media Release, 5 May 2010).
\textsuperscript{63} Supplementary Explanatory Memorandum, CPRS Bill 2009 [No 2] 5, 7; Department of Climate Change, \textit{Carbon Pollution Reduction Scheme: Details of Proposed CPRS Changes} (2009) 3.
\textsuperscript{64} Supplementary Explanatory Memorandum, CPRS Bill [No 2] 13.
\textsuperscript{65} Ibid 3, 17. Originally, free permits were not provided to coal mines. Instead, operators were to be provided up to $750 million from the Climate Change Action Fund ($500 million in transitional assistance to the gassiest mines and $250 million for abatement measures): Australian Government, \textit{Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future} (\textit{White Paper, Vol 2}), above n 20, 18-8, 18-9. The new allocation of permits (worth approximately $1.2 billion) replaced the $500 million of transitional assistance: Supplementary Explanatory Memorandum, CPRS Bill [No 2] 3, 18-19.
were already to receive as an EITE sector;\(^{66}\)

- new assistance for the primary food processing sector;\(^{67}\)
- the expansion of carbon crediting to a broader range of abatement projects including in the agriculture sector;\(^{68}\)
- a stronger policy commitment to take into account voluntary abatement activities by individuals and business when setting the Scheme cap – such as the purchase of 'GreenPower';\(^{69}\) and
- the inclusion of a Transitional Electricity Cost Assistance Program to reduce the impact of the CPRS on electricity prices paid by medium and large enterprises.\(^{70}\)

\(d\) Complementary Measures

In addition to the CPRS, the Rudd government recognised the need for complementary measures to assist in reducing Australia's emissions, especially in the short to medium-term. These would help to address market failures that a carbon price alone could not overcome, as well as ameliorating the distributional consequences of the Scheme (in terms of cost and impact on jobs).\(^{71}\) These policies were primarily focused on expanding the use of renewable energy, improving energy efficiency, and research, development and demonstration programs.\(^{72}\) Some of these programs had their funding increased, or redirected, in response to the GFC so as to simultaneously operate as economic stimulus measures. Among the key complementary measures included:

\[^{66}\] Department of Climate Change, *Carbon Pollution Reduction Scheme: Details of Proposed CPRS Changes*, above n 63, 5.

\[^{67}\] Ibid 6. Initial priority was to be given to dairy processing, meat processing and malt production facilities.

\[^{68}\] Supplementary Explanatory Memorandum, CPRS Bill [No 2] 3-4.

\[^{69}\] The original Bill allowed for the government to consider voluntary actions in setting the Scheme cap (CPRS Bill cl 14) and the government had a policy commitment to take into account the purchase of GreenPower (Explanatory Memorandum, CPRS Bill [No 2] 82). However, in its agreement with the Coalition the government made it clear that the 5 to 25 per cent target was exclusive of voluntary action: Supplementary Explanatory Memorandum, CPRS Bill [No 2] 4, 51-52.

\[^{70}\] Department of Climate Change, *Carbon Pollution Reduction Scheme: Details of Proposed CPRS Changes*, above n 63, 16. This was targeted at companies in the manufacturing and mining sectors that were not already receiving free permits or other assistance.


• a $2.75 billion Climate Change Action Fund – funded by CPRS permit revenue – which was to provide assistance to business, community sector organisations, workers, regions and communities in the transition to a low carbon economy;\textsuperscript{73}

• a Renewable Energy Target (RET) of 20 per cent/45 000 gigawatt hours by 2020 – expanding the Howard government’s MRET;\textsuperscript{74}

• a $4.5 billion Clean Energy Initiative including, inter alia, a $1.5 billion Solar Flagships Program to support up to four solar power generation projects; $465 million for a new body, Renewables Australia, to help bring renewable technologies to market at lower cost; and a $2 billion Carbon Capture and Storage Flagships Program to assist in bringing industrial scale carbon capture and storage (CCS) projects forward in Australia;\textsuperscript{75}

• a $3.9 billion Energy Efficient Homes Program to improve the energy efficiency of Australian homes through the installation of insulation and increased rebates for solar and heat pump water systems;\textsuperscript{76}

• the $300 million Solar Homes and Communities Plan, providing rebates to home-owners to install solar photovoltaic energy systems;\textsuperscript{77}

• the Green Loans Program for low-interest loans to home-owners for solar, water and energy efficiency products;\textsuperscript{78}

• a National Clean Coal Fund of $500 million over seven years to help bring forward the commercialisation and deployment of clean coal technologies (later re-badged under the Clean Energy Initiative as the National Low Emissions Coal Initiative);\textsuperscript{79} and


\textsuperscript{75} Department of Climate Change, \textit{Climate Change Budget Overview 2009-10} (2009) iv, 8, 17. Funding for the Solar Flagships Program and Renewables Australia was redirected from the $500 million Renewable Energy Fund which had been announced in 2008.

\textsuperscript{76} Ibid 22. This was both a climate change and national economic stimulus measure in response to the GFC.


\textsuperscript{78} Department of Climate Change, \textit{Climate Change Budget Overview 2008-09}, above n 77, 13.

\textsuperscript{79} Ibid 26; Department of Climate Change, \textit{Climate Change Budget Overview 2009-10}, above n 75, 17.
• a Green Car Innovation Fund of $1.3 billion over ten years to encourage the local automotive industry to develop and manufacture low emission cars.\textsuperscript{80}

B Implementation Part I: Overview of Key Concerns and the Issue of Legal Effectiveness

Unlike other chapters in this thesis which conceptually relate more to the development phase of international law (although still involving compliance questions) – implementation falls more within the compliance phase of the international legal process.\textsuperscript{81} As discussed in chapter 1, compliance with binding international law is generally regarded as a key obligation for a GIC. The Rudd government’s primary responsibility in this regard during the period of review was to ensure that Australia complied with its Kyoto Protocol target for the first commitment period (2008-12).\textsuperscript{82} This target became legally binding for Australia as a result of the Protocol being ratified by the Rudd government on 3 December 2007. As previously noted, by the time the Rudd government came to office, sufficient laws and policies were already in place to enable Australia to satisfy its Kyoto obligations.\textsuperscript{83} As such, there was no major action required on the government’s behalf to achieve the first commitment period target. It is clear, however, that the Rudd government acted as a GIC in relation to Australia’s 2008-12 target, given that it opted to make this commitment binding by ratifying the Protocol, and avoided undertaking any measures which may have compromised Australia’s ability to achieve this goal. This issue is not considered in further detail by this chapter, it having little real bearing on the government’s GIC credentials in relation to the post-2012 period.

\textsuperscript{80} Department of Climate Change, \textit{Climate Change Budget Overview 2009-10}, above n 75, 20. This Fund was initially to be given $500 million over five years: Department of Climate Change, \textit{Climate Change Budget Overview 2008-09}, above n 77, 26.

\textsuperscript{81} Note, however, that this chapter is also concerned with the development phase of ICCL. As will be examined below, the implementation issue saw the Rudd government involved in negotiations regarding the use and development of the international flexibility mechanisms under a post-2012 agreement.


\textsuperscript{83} See Department of Climate Change and Energy Efficiency, above n 43, 1.
The concern of this chapter is instead whether the Rudd government’s emission reduction policies – chiefly the CPRS – would likely have enabled Australia to comply with its future international obligations under a post-2012 agreement. That is, was its legal and policy response likely to be legally effective? It should be recognised that there was no legal requirement as such for the Rudd government to establish new emission reduction laws and policies, with the post-2012 agreement yet to be established. But to its credit, Labor made this a policy and political priority. In doing so, the government made this a key test of its GIC credentials on the implementation issue.

A wide-ranging debate was held within Australia on the merits of the CPRS and the government’s complementary emission reduction laws and policies. Numerous criticisms were made regarding the design of the CPRS. Several of the more significant concerns – those with the most relevance to the question of legal effectiveness – are outlined below. This is followed by a brief review of the effectiveness of the government’s complementary measures.

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84 The major concerns regarding the CPRS were examined by several Senate Committees, especially the Senate Select Committee on Climate Policy, Parliament of Australia, Select Committee on Climate Policy Report (2009). See also: Senate Select Committee on Fuel and Energy, Parliament of Australia, The CPRS: Economic Cost without Environmental Benefit: Interim Report (2009); Senate Standing Committee on Economics, Parliament of Australia, Exposure Draft of the Legislation to Implement the Carbon Pollution Reduction Scheme (2009); Senate Economics Legislation Committee, Parliament of Australia, Carbon Pollution Reduction Scheme Bill 2009 and Related Bills [Provisions] (2009). Note that a major concern of commentators and stakeholders related to the adequacy of the 5 to 25 per cent mitigation target, addressed in chapter 5. The focus of this chapter is on the broader design features of the CPRS and complementary measures.

85 It is beyond the scope of this chapter to examine all the criticisms made of the CPRS. Other concerns included, for example, that measures to encourage reforestation would perversely encourage the planting of non-native forests and the logging of native forests; that the CPRS did not adequately encourage voluntary emission reductions by households and businesses (criticism the government responded to by strengthening measures to factor voluntary measures in to the setting of the Scheme cap); whether compensation provided to households was adequate or appropriate; whether it was appropriate to cut fuel taxes to offset the price impact of the CPRS on fuel prices; and the impact of the CPRS on jobs: see, eg, Senate Select Committee on Climate Policy, above n 84, 72-76, 89-98, 100-07, 165-67. Of more international relevance was that all revenue generated by the CPRS (over $17 billion by 2013) was to go to domestic compensation and emission reduction activities: Explanatory Memorandum, Carbon Pollution Reduction Scheme (Household Assistance) Bill 2009 [No 2] (Cth) 3. This arguably missed an opportunity to establish a reliable source of funding for increased financing obligations under a post-2012 agreement.
1 The Merits of a Cap and Trade ETS

An initial concern regarding the CPRS was whether the policy instrument it adopted – a cap and trade ETS – provided the optimal means of reducing Australia's GHG emissions. Various commentators in Australia called for alternative mechanisms to be adopted, among them:

- a carbon tax – establishing a fixed rather than market price on carbon emissions – that would increase over time as determined by the government;\(^{86}\)
- a baseline-and-credit scheme (an alternative form of ETS);\(^{87}\)
- the McKibbin hybrid model (a hybrid cap and trade ETS and carbon tax);\(^{88}\)
- 'command and control'-style regulatory approaches – such as a moratorium on building coal-fired power stations or a higher renewable energy target; and
- incentive-based regulatory approaches such as feed-in tariffs which could encourage the installation of renewable energy.\(^{89}\)

The cap and trade ETS model was the approach adopted by the European Union (EU) in January 2005, the first Kyoto Party to establish an ETS.\(^{90}\) Various deficiencies in the design and implementation of the EU ETS saw the effectiveness of the EU Scheme, and this type of policy mechanism more generally, called into question. In brief, phase I of the EU ETS (2005-07) was compromised by a significant over-allocation of emission permits (European Union Allowances), caused by the Scheme being implemented before reliable emissions data was available for liable entities. This, and the inability of emissions permits to be carried over to phase II, caused the carbon price to fall to as

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\(^{86}\) See Senate Select Committee on Climate Policy, above n 84, 46-52. Taxes on both producers and consumers were proposed.

\(^{87}\) See ibid 52-57. A baseline and credit approach was adopted by the New South Wales Greenhouse Gas Abatement Scheme (applying to electricity retailers). This approach sets a benchmark emissions level for each liable entity in a base year, and thereafter requires entities which increase emissions to purchase credits from entities which have reduced emissions. This approach can also set the benchmark based on emissions intensity rather than absolute emissions.

\(^{88}\) See ibid 57-59.

\(^{89}\) See ibid 61. Feed-in-tariffs pay a premium electricity tariff to individuals or businesses that install renewable energy, such as solar, on homes or buildings and sell their excess energy to the electricity grid.

\(^{90}\) European Commission, *The EU Emissions Trading Scheme*, <http://ec.europa.eu/clima/policies/ets/index_en.htm>. Originally including 15 nations, the EU ETS has since expanded to the 28 EU member countries plus Iceland, Lichtenstein, Norway and Croatia.
low as zero in 2007, muting any incentive for abatement by liable entities.91 While phase I was only intended as a pilot phase, similar issues regarding surplus allowances, price volatility and a depressed carbon price arose in phase II (2008-12), this time caused by a larger than expected drop in emissions as a result of the GFC. This again undermined the price signal for businesses to reduce emissions and created ongoing problems for the integrity of the Scheme with phase II’s large surplus of permits being bankable for use in Phase III (2013-2020).92 Another major criticism of the EU ETS was that it appeared to deliver 'windfall profits' to electricity generators, who were accused of unfairly increasing profits by passing on to consumers the market cost of permits which they had received for free.93

Notwithstanding various issues regarding the design and implementation of the EU ETS, the Scheme has also had its successes with phase I resulting in a 2 to 5 per cent decline in emissions.94 It also needs to be remembered that the EU ETS was the first, and most ambitious ETS implemented to date, involving multiple countries. As such, it is not surprising that difficulties were experienced in its early years of operation. Furthermore, as noted, problems in phase II were largely caused by the GFC, an event outside the scope of the usual economic cycle. Importantly, the EU has continued to refine the design of the ETS in response to lessons learned during the first two phases.95

The various policy mechanisms available to Australia to reduce emissions were comprehensively canvassed by the Garnaut Review. All policy options were found to have their pros and cons, with a carbon tax, for example, potentially offering a simpler

93 See, eg, Ellerman and Joskow, above n 91, 24-32.
94 Kossoy and Ambrosi, above n 92, 6.
95 See European Commission, 'The EU Emissions Trading Scheme (EU ETS)' (Fact Sheet, January 2013).
and less volatile means of pricing carbon. Garnaut concluded, however, that a well-designed cap and trade ETS provided the best policy instrument for Australia. This was due to a number of benefits including the ability of an ETS to:

- more reliably constrain emissions within a desired emission reduction objective – unlike a tax which would not set an overall cap on emissions;
- provide for the trade in permits, both domestically and internationally, helping to deliver emission reductions at 'least cost'; and
- best integrate with the international carbon market which under the Kyoto Protocol has come to be based on emission reduction targets and tradable permits.

These views appeared to strongly influence the Rudd government, who cited similar reasons for adopting the cap and trade model for the CPRS. Garnaut and Labor’s view was also shared by the earlier Prime Ministerial Task Group on Emissions Trading, commissioned by the Howard government in late 2006, who likewise recommended adopting a cap and trade ETS. Notably, other national and sub-national jurisdictions overseas have also preferred the cap and trade approach with the Obama administration in the United States (US) attempting, unsuccessfully, to enact a national cap and trade scheme in 2008. New Zealand adopted the first national ETS outside Europe in November 2008, although it lacked a specific cap on emissions. Various US states and Canadian provinces have also participated, or made plans to participate, in regional cap and trade ETSs including the Regional Greenhouse Gas Initiative and the Western Climate Initiative.

97 Ibid 309, 311; Senate Select Committee on Climate Policy, above n 84, 45.
100 American Clean Energy and Security Act, HR 2454, 111th Congress (2009).
102 See Regional Greenhouse Gas Initiative, Program Overview <http://www.rggi.org/design/overview>; Western Climate Initiative, History <http://www.westernclimateinitiative.org/history>. See generally regarding existing and proposed ETSs: Hood, above n 92.
The above discussion highlights that while various policy mechanisms were available to the Rudd government to reduce emissions, the model it selected was undoubtedly a legitimate policy choice, being backed by mainstream economic opinion. In general terms, therefore, the CPRS appeared to adopt an emission reduction mechanism with good potential to be legally effective in assisting Australia to meet its post-2012 mitigation targets.

2 Compensation for Australia’s Most Emissions-Intensive Industries

While championing a cap and trade ETS, the Garnaut Review cautioned that this instrument only provided a better alternative to a carbon tax (the next best alternative) if it was well-designed.103 Probably the biggest controversy relating to the design of the CPRS concerned the substantial quantity of free permits it allocated to Australia’s highest GHG emitters, especially EITE industries104 and CFEGs.105

a) EITE industries

Garnaut advised the Rudd government that in principle ‘freely allocating permits to some emitters but not others’ would only serve to safeguard 'the profits of the fortunate recipients while imposing even greater adjustment costs on other emitters and on the community' thus undermining the economic efficiency of an ETS.106 Garnaut did, however, recognise that there was a special case for providing some compensation to EITE industries due to the risk of 'carbon leakage’ – that is, the risk that these enterprises would simply relocate offshore if faced with higher emission prices in Australia than overseas.107 This could actually result in global emissions increasing if such enterprises moved to more emissions-intensive countries.108 While thus supporting some assistance for EITE's, Garnaut suggested that a carbon tax without exemptions could offer a better policy instrument if the political pressure to

104 See Senate Select Committee on Climate Policy, above n 84, 76-86.
105 Ibid 86-89.
107 Ibid 316.
108 Ibid.
provide ad hoc and overly generous assistance to EITE industries could not be resisted.  

As foreshadowed by Garnaut, EITE industries heavily lobbied the government for generous compensation under the CPRS, warning about the risk of carbon leakage and associated job losses. In response to this lobbying, as well as the GFC, the assistance offered to EITE industries was bolstered several times, with the government’s final EITE formula projected to allocate free permits worth more than $15 billion over the first five years of the Scheme. In providing this free allocation, the government indicated that it had accepted industry arguments regarding the risk of carbon leakage. Its stated aim was to provide transitional assistance that would accommodate the growth of EITE industries without muting their incentive to reduce emissions. The level of assistance provided under the CPRS would be reviewed every five years in light of the mitigation measures adopted by Australia’s competitors.

The extent of the EITE industry assistance package was heavily criticised by some. The Grattan Institute, for example, argued that the allocation of free permits was generally far more than was necessary to prevent carbon leakage, and, by protecting these companies’ profits, would reduce their incentive to abate emissions. The Australian Greens were also particularly critical, labelling the CPRS a ‘pay-the-polluter’ scheme – not a ‘polluter pays’ one. Garnaut also argued that EITE enterprises should only be compensated for the disadvantage they suffered from the absence of comparable carbon constraints in other countries and did not support the government’s allocation.

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109 Ibid 316-17.
110 Senate Select Committee on Climate Policy, above n 84, 46, 77-78, 81-83.
111 Australian Conservation Foundation, 'Projected Financial Impact of Expanded Compensation under the Carbon Pollution Reduction Scheme (CPRS)' (Research Note, 15 October 2009) 2. This was calculated based on Australia’s six largest EITE industries: aluminium smelting, cement, steel, alumina refining, LNG and petroleum refining: 4.
112 See Explanatory Memorandum, CPRS Bill 2009 [No 2] 120.
113 See ibid 113-14.
114 CPRS Bill cl 353(1)(h).
115 John Daley and Tristan Edis, Restructuring the Australian Economy to Emit Less Carbon (Grattan Institute, 2010) 14, 19, 32, 44, 64.
116 Senate Select Committee on Climate Policy, above n 84, p 83-84
of free permits to achieve this.\textsuperscript{117} In his view, the government's approach was unprincipled, with political bargaining resulting in 'unexpectedly high payments'.\textsuperscript{118}

This view was by no means universal, however. As noted above, the Turnbull-led Opposition pushed for and won even higher compensation for the EITE sector in its agreement with the government on the CPRS Bill. Both the EU ETS and proposed US cap and trade scheme also included up to 100 per cent free allocation of permits to EITE industries until 2020 and 2025, respectively, meaning that the CPRS's generous compensation of EITE industries was not unusual from an international perspective.\textsuperscript{119}

\textit{b) CFEGs}

As noted, the Rudd government also committed to providing 130 million free permits to CFEGs (under the Electricity Sector Adjustment Scheme).\textsuperscript{120} This had a projected cost of $3.8 billion.\textsuperscript{121} The allocation to CFEGs was subject to a 'windfall gain' test, enabling free permits to be withheld in future if these entities were later found to have been overcompensated.\textsuperscript{122} The government's rationale for providing compensation to CFEGs, also after intense lobbying by the sector,\textsuperscript{123} was that the carbon price may otherwise cause these businesses 'to lose profitability', with CFEGs being relatively emissions-intensive compared to other sources of energy generation such as natural gas.\textsuperscript{124} It believed that any 'extreme losses' attributable to the CPRS (affecting asset value) may impact investor confidence in the Australian energy sector and hence increase the 'risk premium' or future cost of establishing new energy assets.\textsuperscript{125} While the government accepted that investors who had purchased or constructed CFEGs could have foreseen losses in asset value as a result of government policy, it

\begin{footnotes}
\footnote{118}{Garnaut, 'Oiling the Squeaks', above n 117.}
\footnote{119}{See European Commission, above n 95, 4; Julie Styles, 'The US Waxman–Markey Climate Change Bill' (Background Note, Parliamentary Library, 2009).}
\footnote{120}{CPRS Bill pt 9. See Explanatory Memorandum, CPRS Bill [No 2] 143.}
\footnote{121}{Australian Conservation Foundation, above n 111, 2.}
\footnote{122}{CPRS Bill cls 183, 187.}
\footnote{123}{See Senate Select Committee on Climate Policy, above n 84, 88-89}
\footnote{124}{See Explanatory Memorandum, CPRS Bill [No 2] 129.}
\footnote{125}{See ibid 129-30.}
\end{footnotes}
nonetheless opted to 'partially recognise losses of asset value' up until the Commonwealth first committed to carbon pricing in June 2007 under the Howard government.¹²⁶

Many commentators were similarly critical of the compensation provided to CFEGs. The Total Environment Centre, for example, rejected the government's reasoning arguing that if CFEG investors had not factored in the introduction of carbon pricing, they had 'simply made a poor subjective risk judgement.'¹²⁷ The Garnaut Review also advised that there was 'no tradition in Australia ... [of] compensating capital for losses associated with economic reforms of general application (for example, general tariff reductions, the floating of the currency or the introduction of the goods and services tax).'¹²⁸ In Garnaut's view, '[n]ever in the history of Australian public finance ha[d] so much been given without public policy purpose, by so many, to so few.'¹²⁹

3 The 'Pro-Coal' CPRS

A further concern with the CPRS was that it did not appear to be aimed at reducing Australia's heavy reliance on coal, the most emission-intensive form of fossil fuel.¹³⁰ In addition to financially compensating the coal-fired electricity sector, the government supported the coal-mining sector, promising up to $750 million from the Climate Change Action Fund to Australia's most emissions-intensive coal mines ($500 million in transitional assistance and $250 million for abatement measures).¹³¹

The difficulty facing the Rudd government was that coal was central to Australia's economy, with the comparatively low cost of coal-fired electricity helping, for many years, to support the competitiveness of Australian industry and to provide Australian

¹²⁶ See ibid 130.
¹²⁹ Garnaut, 'Oiling the Squeaks', above n 117.
households with access to affordable power.\textsuperscript{132} This form of energy generated about 80 per cent of Australia’s electricity and combined with coal mining, about 40 per cent of its GHG emissions.\textsuperscript{133} Australia was also the world’s largest exporter of coal, its largest commodity export, which contributed some 17 per cent of export income and tens of thousands of jobs.\textsuperscript{134} Australia’s status as a major coal exporter saw it likened to a ‘drug dealer’ for ‘coal addicts’ by one of the world’s most respected climate change scientists, James Hansen, who argued that coal must be phased out globally, or its emissions substantially reduced by CCS technology, if dangerous climate change is to be avoided.\textsuperscript{135}

Notwithstanding the high emissions-intensity of coal, the Rudd government believed that it had a key role to play for many decades to come as the main source of Australia’s energy supply, a major contributor to export revenue and a significant source of global energy.\textsuperscript{136} The government argued that this would be compatible with GHG reduction objectives due to the expected introduction of CCS technology,\textsuperscript{137} a developing technology which aimed to capture, transport and store emissions from electricity generation underground (as well as emissions from gas production and other emissions-intensive industrial processes).\textsuperscript{138}

Modelling by Treasury indicated that the CPRS would do little to reduce emissions from coal-fired electricity until at least 2020. With the carbon price initially expected to be relatively low, domestic emission reductions were projected to be driven by the 20 per cent RET encouraging investment in renewable energy, not the CPRS.\textsuperscript{139} It was not until 2033 that coal-fired emissions were expected to begin falling significantly. This

\textsuperscript{132} Senate Select Committee on Fuel and Energy, above n 84, 140.
\textsuperscript{134} Senate Select Committee on Fuel and Energy, above n 84, 140.
\textsuperscript{136} Australian Government, Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 1), above n 20, 1-10.
\textsuperscript{137} Ibid xi, 1-10.
\textsuperscript{138} Ibid 6-26.
\textsuperscript{139} Treasury, Australia’s Low Pollution Future: The Economics of Climate Change Mitigation, above n 21, 173.
was projected to occur as CCS technology was deployed on a commercial scale from the 2020s and existing CFEGs were retrofitted from 2033.140

Many credible studies, including the Garnaut Review, shared the Rudd government’s view that CCS was crucial to reducing emissions both in Australia and globally.141 This belief was also held by many developed country Parties to the UNFCCC, including G8 members.142 The risk of emission reduction strategies that relied on CCS, however, was that such technology was yet to be proven commercially and it was not certain that CCS could ever be retrofitted to existing power stations.143 While a number of CCS demonstration activities were planned or in operation both internationally and in Australia, no successful full-scale CCS facilities had yet been built.144 A further issue with CCS is that stored CO2 could leak into the atmosphere in future, further increasing global CO2 levels.145

The Rudd government announced a range of both domestic and international measures to help advance CCS technology. Among these were the:

- Carbon Capture and Storage Flagships Program to invest $2 billion in industrial-scale CCS projects in Australia;146

142 See, eg, European Community, ‘Carbon Dioxide Capture and Storage as Clean Development Mechanism Activities’ in UNFCCC, Technological, Methodological, Legal, Policy and Financial Issues Relevant to the Consideration of Carbon Dioxide Capture and Storage in Geological Formations as Project Activities under the Clean Development Mechanism, UN Doc FCCC/SBSTA/2008/MISC.10 (30 June 2008) 22, 22-23.
143 Dennis, above n 140, 3.
145 See Brazil, ‘Brazilian Submission on Carbon Dioxide Capture and Storage in Geological Formation as Clean Development Mechanism Project Activities’ in UNFCCC, Technological, Methodological, Legal, Policy and Financial Issues Relevant to the Consideration of Carbon Dioxide Capture and Storage in Geological Formations as Project Activities under the Clean Development Mechanism, UN Doc FCCC/SBSTA/2008/MISC.10 (30 June 2008) 3, 4. See generally re CCS technical issues: Sarah M Forbes and Micah S Ziegler, ‘Carbon Dioxide Capture and Storage and the UNFCCC: Recommendations for Addressing Technical Issues’ (WRI Issue Brief, World Resources Institute, November 2010).
146 Department of Climate Change, Climate Change Budget Overview 2009-10, above n 75, 17-18.
• the $500 million National Clean Coal Fund to help bring forward the commercialisation and deployment of clean coal technologies (later re-badged as the National Low Emissions Coal Initiative); \(^{147}\)
• the passing of legislation in 2008 to govern offshore CCS activities; \(^{148}\) and
• the flagship Global Carbon Capture and Storage Initiative announced in September 2008. This included $100 million per annum towards a Global CCS Institute which would aim to coordinate and drive the global effort to commercialise CCS technology. \(^{149}\)

Somewhat controversially, the government also pushed for CCS to be included as an eligible Clean Development mechanism (CDM) project activity under the Kyoto Protocol, encouraging investment in CCS technology in developing countries. \(^{150}\)

Given the prominence of coal in both Australian and global energy mixes, it was understandable that the government sought to advance the development and deployment of CCS technology. It needs to be emphasised, however, that CCS was then (and remains) an experimental technology with no real guarantees as to its effectiveness or affordability. Yet Treasury modelling indicated that significant domestic emission reductions in the Australian economy, allowing it reduce its heavy reliance on international permits to meet its post-2012 mitigation targets, would only occur once CCS was widely deployed in Australia. \(^{151}\) The upshot of the Rudd government’s faith in CCS technology materialising was that it committed Australia to

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\(^{147}\) Ibid 17; Department of Climate Change, *Climate Change Budget Overview 2008-09*, above n 77, 26.


\(^{149}\) Australian Government, *Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 1)*, above n 20, xli. The Institute was officially launched on 16 April 2009 with 85 foundation members including national governments and partners from the private sector. The government also supported a range of CCS related projects with international partners, including China, through the Asia-Pacific Partnership on Clean Development and Climate.

\(^{150}\) Australia, 'Issues Relevant to the Consideration of Carbon Dioxide Capture and Storage in Geological Formations as Clean Development Mechanism Project Activities' in UNFCCC, *Further Views on Issues Relevant to the Consideration of Carbon Dioxide Capture and Storage in Geological Formations as Project Activities under the Clean Development Mechanism*, UN Doc FCCC/SBSTA/2009/MISC.11 (November 2009) 2, 4, 5. This was controversial with Parties such as Brazil who was concerned about the technical challenges of CCS projects and argued that Parties should instead invest in renewable resources: Brazil, 'Brazilian Submission on Carbon Dioxide Capture and Storage in Geological Formation as Clean Development Mechanism Project Activities', above n 145, 6.

\(^{151}\) Treasury, *Australia’s Low Pollution Future: the Economics of Climate Change Mitigation (Summary)*, above n 140, 26.
a continued reliance on coal, locking in this form of energy for decades to come. This
would make it difficult to reduce Australia's reliance on international permits to
achieve its international targets if CCS technology failed to deliver.

4 The CPRS and Complementary Measures

A vigorous debate was also held in Australia regarding the role of complementary
measures. With the introduction of an ETS and a binding cap on emissions,
complementary measures were not actually intended to generate additional
abatement; rather, these policies would chiefly impact where emission reductions
were achieved in the economy.152 According to Garnaut, the major purpose of
complementary measures were to reduce the effect of market failures that could not
be overcome by the carbon price alone.153

The most significant of the government's complementary measures was the 20 per
cent RET for 2020. The RET extended the operation of the Howard government's MRET
which placed a legal obligation mainly on electricity retailers to surrender a specified
number of renewable energy certificates each year or face financial penalties. Given
the introduction of a broad-based ETS, the Productivity Commission and others
questioned the need for an expanded RET which was expected to reduce emissions at
greater cost than an ETS.154 Similarly, Garnaut believed that a RET was only necessary if
an ETS was not designed with the correct parameters to drive investment in renewable
energy.155 The Rudd government acknowledged that the CPRS was unlikely to bring
renewable energy technologies to market in the short-term as the carbon price would
initially be too low.156 As such, it saw the RET as an important interim measure to
accelerate the use of renewable energy and help ensure that it was rapidly deployed

152 See Senate Select Committee on Climate Policy, above n 12; Garnaut, The Garnaut Climate Change
154 See Senate Select Committee on Climate Policy, above n 84, 131-32; Roger Wilkins, Strategic Review
155 Senate Select Committee on Climate Policy, 132. See similar comments by Denniss: 133.
156 Renewable energy provides zero or low emission energy. Major existing and potential sources in
Australia include solar, wind, geothermal, hydro, ocean power (wave and tidal) and biofuels: ibid 121.
once the carbon price was sufficiently high to make renewable technology price competitive with traditional sources.\textsuperscript{157}

In its implementation, the RET suffered from major design flaws early on. First legislated by the Parliament on 20 August 2009,\textsuperscript{158} the RET was amended on 24 June 2010 (the day Kevin Rudd lost the prime ministership to Julia Gillard). In its second incarnation, the RET was split into the Large-Scale Renewable Energy Target (assisting large projects such as commercial wind farms and solar) and the Small-Scale Renewable Energy Scheme (assisting households, small business and community groups with small-scale solar systems).\textsuperscript{159} These changes were necessary after the original design of the RET led to a higher than expected uptake of small-scale systems, discouraging investment in large-scale projects.\textsuperscript{160} Notwithstanding these early difficulties, overall the RET appeared to be the most effective of the government’s complementary measures in reducing emissions.\textsuperscript{161}

Many of the Rudd government’s other flagship measures did not fare so well in their implementation. The Home Insulation Program (part of the Energy Efficient Homes Program) was intended to provide $2.7 billion to install free ceiling installation in homes (both to stimulate the economy during the GFC and to reduce emissions in the residential sector). Due to poor design and rushed implementation, the program tragically contributed to the deaths of four insulation workers as well as 174 house fires, leading to the program being prematurely cut.\textsuperscript{162} The Green Loans Program also experienced major problems including budget blowouts and maladministration, while

\begin{itemize}
\item \textsuperscript{157} Australian Government, \textit{Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 2)}, above n 20, 19-4.
\item \textsuperscript{158} \textit{Renewable Energy (Electricity) Act 2000} (Cth); \textit{Renewable Energy (Electricity) (Charge) Act 2000} (Cth); \textit{Renewable Energy (Electricity) Regulations 2001} (Cth), as amended 20 August 2009.
\item \textsuperscript{159} \textit{Renewable Energy (Electricity) (Large-scale Generation Shortfall Charge) Act 2000} (Cth); \textit{Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Act 2010} (Cth). Effective from 1 January 2011.
\end{itemize}
the Solar Homes and Communities Plan was terminated prematurely due to cost overruns.\textsuperscript{163} While expensive programs, these measures achieved little in the way of actual emissions abatement.\textsuperscript{164} After several years of operation, the international Global Carbon Capture and Storage Initiative has also been heavily criticised for its lack of tangible outcomes.\textsuperscript{165}

C Implementation Part II: The Use of International Permits and the Issue of Environmental Effectiveness

It should be evident from the above review that the CPRS and complementary measures did not represent best practice policy development and implementation. Nonetheless, it appears that the CPRS would likely have positioned Australia well to achieve its 2020 and later mitigation targets. This is primarily because the CPRS would have covered 75 per cent of national emissions and placed a mandatory cap on those emissions sources. In that sense, the CPRS appeared likely to be a legally effective instrument (although see discussion of supplementarity below).

A further significant concern regarding the design of the CPRS, however, was that liable entities were to be allowed unlimited access to eligible international permits to assist in meeting their obligations under the Scheme.\textsuperscript{166} Treasury modelling indicated that Australia's domestic emissions would exceed its international emissions allocation under its 5 to 25 per cent target range for 2020, meaning that access to international permits was crucial to Australia's ability to meet its post-2012 international obligations.\textsuperscript{167} Indeed, under the minimum 5 per cent target Australia's domestic

\begin{footnotes}
\footnote{163} Ibid 211-12.
\footnote{164} Ibid. See also John Daley and Tristan Edis, \textit{Learning the Hard Way: Australia's Policies to Reduce Emissions} (Grattan Institute, 2011). Daley and Edis found that non-market mechanisms in Australia under both the Howard, Rudd and state governments have produced little abatement at very high cost: 9. This finding does not apply to the RET which they categorised as a market mechanism.
\footnote{166} See Senate Select Committee on Climate Policy, above n 84, 63.
\footnote{167} Treasury, \textit{Australia's Low Pollution Future: The Economics of Climate Change Mitigation}, above n 21, 155.
\end{footnotes}
emissions were expected to remain relatively stable until 2033 with emissions only falling once CCS technology was widely introduced (see figure 2).\textsuperscript{168}

![CPRS - 5 scenario](source: Treasury estimates from MMMF)

Figure 2. CPRS-5 emissions scenario.\textsuperscript{169}

The significant reliance of the CPRS on international permits meant that it could be regarded as an ineffective instrument for reducing emissions. As discussed above, however, one of the major reasons for introducing an ETS, as opposed to a carbon tax, was precisely that it would allow Australian businesses to participate in the trade of international permits – such as those generated by the CDM – and thus reduce Australia’s mitigation costs under a post-2012 climate agreement. Thus, subject to Australia conforming with the international rules that govern the use of the flexibility mechanisms, a heavy reliance by the CPRS on international permits did not actually undermine the legal effectiveness of the Scheme.

Australia’s expected reliance on international permits did, however, raise significant questions regarding the environmental effectiveness of its approach to implementation. As a developed country, Australia enjoys a highly robust accounting

\textsuperscript{168} Treasury, Australia’s Low Pollution Future: The Economics of Climate Change Mitigation (Summary), above n 140, 26.

\textsuperscript{169} Ibid.
regime for its GHG emissions, subject to review by the UNFCCC.\textsuperscript{170} As a general rule, this means that the domestic emission reductions claimed by Australia, especially from fossil fuel-based sources, can be assumed to involve genuine abatement.\textsuperscript{171} The same assumption cannot be made, however, in relation to the use of international permits. It goes without saying that, notwithstanding the domestic economic benefits of utilising international permits, a GIC would generally be expected to implement its mitigation targets in a manner that involves genuine abatement. This is because doing otherwise would be inconsistent with article 2 of the UNFCCC, which states that its central purpose is to reduce global emissions so as to avoid 'dangerous anthropogenic interference with the climate system' (commonly referred to as 'dangerous climate change'). The notion that Parties should adopt 'effective' emission reduction measures is also emphasised by the UNFCCC Preamble which recognises, for example, that Parties should 'enact effective environmental legislation'. This issue is examined in detail here as this was the design feature of the CPRS judged to have the most significant implications for Australia's performance as an international citizen in relation to implementation.

1 Legal Background: The Kyoto Protocol and the Flexibility Mechanisms

As briefly outlined in chapter 4, the Kyoto Protocol established three flexibility mechanisms to assist Annex I Parties in achieving their binding mitigation targets. International emissions trading (article 17) allows Annex I Parties with Kyoto mitigation targets (Annex B nations) to trade in several types of emission permits, namely:

- assigned amount units (AAUs – the level of emissions an Annex B Party can emit under its Kyoto target);
- removal units (RMUs – issued to Annex B Parties for LULUCF removals under articles 3.3 and 3.4);
- emission reduction units (ERUs – generated by Joint Implementation (JI) projects under article 6); and


\textsuperscript{171} See chapter 9, however, regarding the greater difficulties in reliably accounting for LULUCF emissions.
• Certified Emission Reductions (CERs – generated by CDM projects under article 12).\textsuperscript{172}

In addition to emissions trading, the Protocol established two 'project-based' mechanisms: JI and the CDM. JI allows Annex B Parties to implement emission reduction or removal projects in other Annex B Parties, generating ERUs which can be counted towards their mitigation targets. This allows an Annex B Party in which emissions abatement is relatively expensive, to implement projects in Annex I Parties with cheaper abatement options, such as the former Soviet Union economies. JI has not been heavily utilised to date, although the number of JI projects has grown rapidly in recent years.\textsuperscript{173}

The CDM provides a similar function although with abatement projects taking place in developing countries. The CDM has the dual purpose of assisting non-Annex I Parties 'in achieving sustainable development and in contributing to the ultimate objective of the Convention', and assisting Annex I Parties 'in achieving compliance' with their Kyoto targets.\textsuperscript{174}

The flexibility mechanisms were designed to allow developed countries to reduce the cost of meeting their Kyoto targets. As with domestic emissions trading, international emissions trading encourages abatement to occur first where it is least expensive.\textsuperscript{175}

Although adopted to allow flexibility in emissions abatement, Kyoto Parties acknowledged that it would be undesirable for Annex I Parties to overly rely on international permits to achieve their targets at the expense of making domestic emission reductions. As such, the Protocol established the principle of

\textsuperscript{172} The various types of units are all equal to one metric tonne of CO2-e: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum (Part 2, Vol 1), UN Doc FCCC/KP/CMP/2005/8/Add.1 (30 March 2006), decision 3/CMP.1, annex ('CMP Report 1, Part 2, Vol 1'); UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum (Part 2, Vol 2), UN Doc FCCC/KP/CMP/2005/8/Add.2 (30 March 2006), decision 13/CMP.1, annex ('CMP Report 1, Part 2, Vol 2').

\textsuperscript{173} See UNEP RISO Centre, JI Projects <http://cdmpipeline.org/ji-projects.htm>.

\textsuperscript{174} Kyoto Protocol art 12.2.

\textsuperscript{175} Australian Government, Carbon Pollution Reduction Scheme: Australia's Low Pollution Future (White Paper, Vol 1), above n 20, 11-2.
'supplementarity'. The emissions trading and JI provisions both provide that trading 'shall be supplemental to domestic actions' for the purpose of meeting a Party's Kyoto target.\(^{176}\) Similarly, the CDM establishes that it may only be used to contribute to compliance with 'part' of a Party's target.\(^{177}\) The Marrakesh Accords further provide that the use of all three mechanisms 'shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made' by each Party in meeting its target.\(^{178}\)

The adoption of the flexibility mechanisms led to the development of a multibillion-dollar carbon market for Kyoto Parties.\(^{179}\) As of 2009, the primary CDM market\(^ {180}\) was worth US$2.6 billion (representing 211 million tonnes of CO2-e); the trading of AAUs US$2 billion (155 Mt CO2-e); and JI ERUs US$354 million (26 Mt CO2-e).\(^ {181}\) An estimated 1 billion CERs were to be issued by 2012, along with 1.8 billion AAUs and 200 million ERUs,\(^ {182}\) with most demand being provided by the EU.\(^ {183}\) As of December 2012, there were 6556 registered CDM projects, a further 176 in the registration process, and 2095 CDM projects which had issued CERs.\(^ {184}\)

a) The Post-2012 negotiations: Kyoto Party Conclusions and the Bali Action Plan

The continuing role and performance of the flexibility mechanisms was a key issue for the post-2012 negotiations. Kyoto Parties agreed in their conclusions at the 3rd Conference of the Parties serving as the Meeting of the Parties in Bali (December 2007) to continue their pre-existing discussions on the means by which Annex I Parties

\(^{176}\) Kyoto Protocol arts 6.1(d), 17.

\(^{177}\) Ibid art 12.3(b).

\(^{178}\) CMP Report 1, Part 2, Vol 1, decision 2/CMP.1, [1]. The Marrakesh Accords include the major CMP decisions governing the Protocol.

\(^{179}\) See Kossoy and Ambrosi, above n 92, 1. Note that the global carbon market is broader than the Kyoto carbon market, also including: Kyoto-linked domestic and regional ETS's like the EU ETS and the New Zealand ETS; non-Kyoto linked Schemes like the US state-based Regional Greenhouse Gas Initiative; and voluntary schemes such as the now defunct Chicago Climate Exchange.

\(^{180}\) The primary market involves transactions between project developers and purchasers of primary CERs. Secondary and derivative markets also exist: see Charlotte Streck and Jolene Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19 The European Journal of International Law 409, 420.

\(^{181}\) Kossoy and Ambrosi, above n 92, 1. The value of carbon trading linked to the mechanisms varies year to year in line with the price of permits.

\(^{182}\) Ibid 2.

\(^{183}\) Ibid; UNEP RISO Centre, CERs <http://cdmpipeline.org/cers.htm>.

\(^{184}\) UNEP RISO Centre, Overview <http://cdmpipeline.org/overview.htm#1>.
could achieve their mitigation objectives including, inter alia, emissions trading, JI and the CDM, and how to improve their effectiveness.185 While a creature of the Protocol, the use of flexibility mechanisms was also discussed in relation to a broader post-2012 agreement, with the Bali Action Plan calling for consideration of "[a]pproaches, including market approaches, to enhance the cost-effectiveness' of mitigation actions.186

2 The Rudd Government's Position on the Use of International Carbon Credits

Unsurprisingly given the design of the CPRS, the Rudd government was a major proponent of the flexibility mechanisms during the post-2012 negotiations. At the international level, the government argued that the 'expansion and improvement of the flexibility mechanisms' was a 'critical component of an effective post-2012 framework'187 as these could help to achieve international and domestic abatement at 'least cost'.188 As explained by Treasury, 'a broader and deeper international emission market' would help to minimise the cost of Australia achieving its mitigation targets 'by creating access to lower cost mitigation opportunities in other regions, and minimising distortions associated with trade-exposed industries.'189

The government also saw broader benefits in maintaining and expanding the flexibility mechanisms such as providing an incentive for the development and diffusion of low carbon technologies in developing countries190 and providing a transitional mechanism

189 Treasury, Australia’s Low Pollution Future: the Economics of Climate Change Mitigation, above n 21, 196.
to engage developing countries in global mitigation activities until they adopted their own binding emission reduction commitments.\(^{191}\)

As noted above, the CPRS was to provide liable entities with unlimited access to eligible international permits generated by the existing or new flexibility mechanisms.\(^{192}\) Eligible permits were initially restricted to permanent CERs, ERUs and RMUs. Non-permanent CERs generated by afforestation and reforestation CDM projects (known as long-term CERs and temporary CERs) were excluded due to their extra associated obligations, risks and higher administrative costs.\(^ {193}\) AAUs were also excluded due to concerns that AAUs generated in some Annex I Parties did not represent genuine emissions abatement (see section C.5 below).\(^ {194}\) New eligible international permits could also be prescribed by regulation\(^ {195}\) including permits generated by other national Schemes such as the New Zealand ETS.\(^ {196}\)

At the international level, the Rudd government made it clear that the use of international permits was a key plank of Australia’s mitigation strategy. As noted in chapter 6, the government’s upper 25 per cent target was made contingent upon the existence of ‘fully functional global carbon markets’ and the 15 per cent target upon progress towards ‘deeper and broader carbon markets’.\(^ {197}\) If the 25 per cent target was

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\(^{192}\) CPRS Bill pt 4, divs 3, 4. The use of international permits was excluded for the first year of the Scheme: cl 129 (6A).

\(^{193}\) CPRS Bill cl 5; Australian Government, *Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 1)*, above n 20, 11-15. Temporary CERs and long-term CERs are non-permanent being limited to two Kyoto commitment periods and 20 to 60 years, respectively, and thus must eventually be replaced with other permits. Note that as part of the post-2012 negotiations the Rudd government sought to extend the list of approved CDM project types to new LULUCF activities: Australia, ‘Emissions Trading and the Project-Based Mechanisms’ (24 November 2008), above n 187, 52. This issue was controversial but is not considered here due to space limitations and the fact that the government opted not to allow LULUCF credits to be imported under the CPRS. See generally, Ian Fry, ‘If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For? An Insider’s View of the Negotiations Surrounding Land Use, Land-Use Change and Forestry for the Second Commitment Period of the Kyoto Protocol’ (2011) 20 *Review of European Community and International Environmental Law* 123, 136.


\(^{195}\) CPRS Bill cl 5.

\(^{196}\) Explanatory Memorandum, CPRS Bill [No 2] 85, 99-100.

\(^{197}\) Ibid 16.
ultimately adopted, the government also indicated that up to 5 percentage points of the target (that is, up to $1/5^{th}$) could be met through the direct purchase of international permits by the government,\textsuperscript{198} enabling it to top up Australia’s emission reductions if the CPRS and complementary measures did not deliver sufficient abatement on their own.

The bulk of international permits bought by liable entities in the early years of the CPRS were likely to be CERs due to the CDM being the most established of the mechanisms. The economic benefits of Australia importing CERs, versus undertaking domestic abatement, were clearly illustrated by the estimated price of domestic CPRS permits versus the average cost of CERs. Treasury estimated a domestic permit price of at least $23 per tonne CO2-e at the commencement of the CPRS (under Australia's unconditional 5 per cent target).\textsuperscript{199} This was expected to rise in subsequent years and also be significantly higher under more ambitious domestic targets.\textsuperscript{200} CERs by contrast averaged US$12.70 in 2009.\textsuperscript{201} Notably, a study by McKinsey and Company estimated that providing unlimited access to CERs under an ambitious global agreement could reduce the cost of Australia’s 2020 abatement task by almost 80 per cent.\textsuperscript{202}

This chapter now turns to examining the credibility of the international permits generated by the CDM in order to help understand the environmental implications of the CPRS providing unlimited access to eligible international permits.

3 The CDM: Legal Overview

As noted, the CDM is a project-based mechanism in which 'project activities' in non-Annex I Parties can generate CERs which may be purchased by Annex B Parties (either by national governments or authorised private or public entities) to assist in complying

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{198} Ibid 83.
\item \textsuperscript{199} Treasury, \textit{Australia’s Low Pollution Future: the Economics of Climate Change Mitigation}, above n 21, 155.
\item \textsuperscript{200} Ibid.
\item \textsuperscript{201} Kossoy and Ambrosi, above n 92, 39. Note that CER prices fluctuate significantly from year to year.
\end{enumerate}
\end{footnotesize}
with their Kyoto targets.\textsuperscript{203} The CDM includes several broad project types: small-scale, large-scale, afforestation and reforestation (both small-scale and large-scale), and programmes of emissions reduction activities.\textsuperscript{204}

The CDM has detailed requirements aimed at ensuring that CERs (often referred to as carbon credits) represent like-for-like abatement with emission reductions that would otherwise be achieved domestically within a developed country. To be certified, article 12 of the Protocol stipulates that emission reductions from a CDM project must result in 'real, measurable, and long-term benefits related to the mitigation of climate change'.\textsuperscript{205} Further, reductions must be 'additional to any that would occur in the absence' of the project.\textsuperscript{206} CDM project proponents must provide a project design document addressing these and other issues.\textsuperscript{207} Proposed activities are then validated or rejected by Designated Operational Entities (DOEs),\textsuperscript{208} before approved projects are forwarded to the CDM Executive Board (CDM EB) for registration.\textsuperscript{209} Emission reductions attributed to the project are then verified and certified by a DOE before CERs are issued by the CDM EB.\textsuperscript{210} These credits can then be sold by the project proponent to entities authorised by Annex I Parties, which is tracked by the international transaction log.\textsuperscript{211}

\textit{a) Additionality and the Baseline Scenario}

The CDM adopted two basic tests to help determine whether claimed emission reductions are genuine: 'additionality' and the 'baseline scenario'. A CDM project is regarded as additional if anthropogenic GHG emissions 'are reduced below those that

\begin{flushright}
\textsuperscript{203} \textit{Kyoto Protocol} arts 12.3, 12.9. Projects have a single 10 year or 7 year crediting period, renewable twice: \textit{CMP Report 1, Part 2, Vol 1}, decision 3/CMP.1, annex [49].
\textsuperscript{204} See generally, CDM Rulebook, \textit{Welcome to the CDM Rulebook} <www.cdmrulebook.org>.
\textsuperscript{205} \textit{Kyoto Protocol}, art 12.5(b).
\textsuperscript{206} \textit{Kyoto Protocol}, art 12.5(c); \textit{CMP Report 1, Part 2, Vol 1}, decisions 3-6/CMP.1. Other requirements for validation include \textit{inter alia} that the project contributes to sustainable development in the host Party (as determined by the host Party).
\textsuperscript{207} \textit{CMP Report 1, Part 2, Vol 1}, decision 3/CMP.1, annex, appendix B.
\textsuperscript{208} \textit{Kyoto Protocol}, art 12.5.
\textsuperscript{209} Projects are automatically registered unless at least three members of the CDM EB request a review: \textit{CMP Report 1, Part 2, Vol 1}, decision 3/CMP.1, annex [41]. The CDM EB’s assessments are assisted by the Registration and Issuance Team and the UNFCCC Secretariat.
\textsuperscript{210} Ibid annex [61-66].
\textsuperscript{211} \textit{CMP Report 1, Part 2, Vol 2}, decision 13/CMP.1, annex [38].
\end{flushright}
would have occurred in the absence of the registered CDM project activity'.\textsuperscript{212} The exact requirements for demonstrating additionality vary depending on the classification of the project. Many large-scale projects, for example, use the standard methodology provided by the CDM EB, namely, the 'tool for demonstration of additionality' ('additionality tool').\textsuperscript{213}

The additionality tool requires proponents to address several steps.\textsuperscript{214} First, identifying realistic and credible alternatives to the proposed CDM project. Second, either an 'investment' or 'barrier' analysis. The investment analysis needs to show that the project is not the most economically or financially attractive (compared to business-as-usual (BAU) options); or is not economically or financially feasible without CER revenue. The barrier analysis needs to show that the project faces barriers that would normally prevent the implementation of this type of project (such as a lack of private capital or the unavailability of the type of technology being used) and would not prevent the implementation of a BAU alternative. The third step is a 'common practice' analysis which provides a 'credibility check' to demonstrate that the proposed project technology or practice is not already widely in use in the relevant sector and region.

Proponents must also establish a baseline emissions scenario. This is the scenario that 'reasonably represents' the anthropogenic emissions that would occur 'in the absence of the proposed project activity.'\textsuperscript{215} Existing or new baseline methodologies approved by the CDM EB must be applied.\textsuperscript{216}

4 The CDM and Environmental Integrity Concerns

Numerous concerns were raised by Kyoto Parties both during and prior to the post-2012 negotiations regarding the operation of the CDM. Among these were:

\begin{itemize}
\item \textsuperscript{212} CMP Report 1, Part 2, Vol 1, decision 3/CMP.1, annex [43].
\item \textsuperscript{213} UNFCCC, Methodological Tool: Tool for the Demonstration and Assessment of Additionality (2004).
\item \textsuperscript{214} Ibid 7-13.
\item \textsuperscript{215} CMP Report 1, Part 2, Vol 1, annex [44].
\item \textsuperscript{216} Ibid annex [45].
\end{itemize}
- that CDM projects often failed to contribute to sustainable development in developing countries – the key purpose of the mechanism other than helping Annex I Parties to achieve their mitigation targets;
- that awarding CERs has created perverse incentives to increase emissions in some sectors – with some Chinese enterprises, for example, purportedly increasing production of HFC-22, and deliberately not introducing more efficient manufacturing practices, so as to profit from CDM projects that destroy HFC-23 (a side effect of the HFC-22 manufacturing process);
- that CDM projects have excessively high transaction costs for the level of abatement achieved;
- the poor regional distribution of projects with most projects occurring in China, Brazil, India and South Korea;
- the under-representation of more 'desirable' project-types such as renewable energy;
- that the CDM has allowed developed countries to pursue the least-expensive mitigation options in developing countries, leaving the more expensive options to be later undertaken by developing countries; and
- that the mechanism creates a disincentive for Annex I Parties to undertake domestic emission reductions.\textsuperscript{217}

It is beyond the scope of this chapter to examine all of the perceived defects of the CDM, which have been well-canvassed in the literature. Rather, this chapter focuses on the issue of 'environmental integrity', the key issue in terms of assessing the environmental effectiveness of the Rudd government's approach to implementation.

a) Party Views Regarding Environmental Integrity

Many Parties raised concerns during the post-2012 climate negotiations regarding the environmental integrity of the CDM. New Zealand, for example, highlighted 'substantial concerns' as to whether the CDM was 'generating real, additional, and verifiable emission reductions', while the Environmental Integrity Group stated that a number of CDM projects were 'of questionable quality' and that 'additionality [was] ... difficult to prove'. In addition, the EU highlighted that it was 'methodologically challenging' to accurately determine baseline emissions, which, if inaccurate, may result in an overestimation of the abatement achieved by a project.

The Rudd government sent mixed signals on this issue. On the one hand, it acknowledged that it was 'important for the [flexibility] mechanisms to deliver "genuine" emission reductions' and that despite the CDM's 'rigorous verification procedures, any assessment of whether abatement is truly "additional" entails a

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221 European Community, ‘Views and Information on the Means that May be Available to Annex I Parties to Reach Their Emission Reduction Targets’, above n 217, 66.

degree of judgment'. The government also identified 'environmental effectiveness' as a core principle in relation to any reform of the flexibility mechanisms.

On the other hand, the Rudd government appeared to wilfully ignore this issue, stating for example, that the Kyoto Protocol framework 'ensures that all CERs are credible, robust, and meet sustainable development objectives' and that achieving all of Australia's emission reductions domestically would 'deliver no additional environmental gain'.

b) Have CERs Resulted in Genuine Emission Reductions?

By the time the CPRS was being designed several studies (discussed below) had examined the performance of the CDM, including regarding the environmental integrity issue. Most concerns related to establishing additionality and credible baselines.

i) Assessing Additionality

As noted, the Protocol requires CDM projects to achieve emission reductions that are 'additional to any that would occur in the absence' of the project. Logically, this test appears likely to guarantee the environmental integrity of the mechanism. In practice, however, the additionality test has proven difficult to apply. As stated by Schneider, then a member of the CDM Methodologies Panel, the test is both 'hypothetical and counter-factual' and can 'never be proven with absolute certainty'. While criteria used to assess additionality, such as the investment, barrier and common practice tests, help to introduce some objectivity into the assessment, ultimately it is impossible to definitively establish whether the financial incentive of receiving CERs is the critical factor in a proponent's decision to invest in a CDM project. Indeed, the

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226 Ibid 11-3.
227 Schneider, above n 218, 28.
228 Ibid 28-29.
prospect of being awarded Kyoto credits for a CDM project creates a strong incentive for proponents to misrepresent their motivations for establishing such projects.\textsuperscript{229}

The most detailed analysis of the CDM's operation, by Schneider, examined 93 randomly selected CDM projects that were approved between 2004 and 2007 and found evidence of widespread misapplication of the additionality tool by project proponents, DOEs and the CDM EB.\textsuperscript{230} The criteria applied to assess additionality were also found to be flawed. The barrier analysis, for example, was reported to be 'highly subjective, vague and difficult to validate in an objective and transparent manner'.\textsuperscript{231} The common practice test was also compromised especially as only some approved methodologies explicitly defined what did not amount to a common practice (for example, less than 5 per cent of similar projects).\textsuperscript{232} Technologies could also be defined very narrowly so as to avoid conflicting with the test.\textsuperscript{233} Schneider's study concluded that that '[s]ince no approach for determining additionality is perfect, it needs to be accepted that some projects are not additional.'\textsuperscript{234} Other studies have reached similar views. The US Government Accountability Office, for example, concluded in its assessment of the CDM that 'it is nearly impossible to ensure that projects are additional'.\textsuperscript{235}

Studies have been particularly critical of several CDM project-types in China, the major host of CDM projects. Wara, for example, criticised the CDM EB's decision to approve natural gas-fired power station projects despite evidence that CER revenue was not critical to these projects going ahead, with these projects being strongly encouraged by the Chinese government for domestic policy reasons such as energy security and reducing air pollution.\textsuperscript{236} Wara and Victor made similar arguments in relation to other

\textsuperscript{229} Wara, above n 217, 1798.
\textsuperscript{230} Schneider, above n 218, 36, 39. Note that the process for establishing additionality outlined by the additionality tool is applied by many individual methodologies: see UNFCCC, \textit{CDM Methodologies} <http://cdm.unfccc.int/methodologies/index.html>.
\textsuperscript{231} Schneider, above n 218, 31.
\textsuperscript{232} Ibid 38.
\textsuperscript{233} Ibid.
\textsuperscript{235} United States Government Accountability Office, above n 218, 7.
\textsuperscript{236} See Wara, above n 217, 1790-1796.
important Chinese CDM electricity generation projects, including hydropower and wind farms, which were also actively encouraged by Chinese government policies and laws. Overall, studies have estimated that the percentage of non-additional CERs on the market may be anywhere from 20 per cent to over 50 per cent. It should be noted that the CDM EB has improved oversight of CDM proposals since the CDM was first established, leading to a greater number of projects being rejected, often on the basis of additionality. However, a widely held view among CDM experts, including those with field experience, is that CER revenue often represents the 'icing on the cake' for CDM projects rather than the crucial factor in the decision to invest.

ii) Baselines

The ability to develop credible baseline scenarios (an estimate of the emissions that would occur without a CDM project) has also been heavily critiqued. As with additionality, emission baselines suffer from the weakness that any baseline is hypothetical and counterfactual. As stated by Boyd et al, 'it is impossible to tell and monitor what would have really happened if the CDM project had not been implemented'. A key issue is that project proponents may inflate their baselines in order to receive more CERs. Problems have also been created by the CDM EB's management of the issue. In order to avoid creating a disincentive for developing countries to introduce emission reductions laws, the CDM EB decided in 2005 that proponents could, when establishing project baselines, ignore laws adopted by host countries after 2001 that gave comparative advantages to less emissions-intensive...
technologies. As well as undermining claims of additionality, this means that CDM project baselines will become increasingly less plausible over time as developing countries continue to enact domestic laws and policies to reduce emissions.

iii) Validation and Oversight

Briefly, a further issue affecting environmental integrity has been the quality of the registration and validation process provided by DOEs and the CDM EB. A variety of measures were introduced by the CDM EB to improve the integrity of the approvals process following problems in the early years of the CDM, which led to a greater number of projects being rejected. However, problems with the approvals process were not entirely eliminated. For example, while evidence used to determine additionality can easily be manipulated by project proponents to their advantage (such as financial data for the investment analysis), DOEs do not generally have the time or expertise to properly evaluate this data. Similar criticisms have been made regarding the ability of the CDM EB to provide adequate oversight, due to time and resource constraints, meaning that it is 'prone to approve projects.'

c) Can Environmental Integrity Concerns be Addressed?

The Rudd government’s claim that all CERs were 'credible' and 'robust' was clearly wrong. However, despite the various problems with the CDM, the overwhelming view of Kyoto Parties was that it was desirable for the CDM and other flexibility mechanisms

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245 J de Sepibus, 'The Environmental Integrity of the CDM Mechanism – A Legal Analysis of its Institutional and Procedural Shortcomings' (Working Paper No 2009/24, NCCR Trade Regulation, May 2009) 9; CDM Executive Board, Meeting Report 22 (2005) annex 3, [6-7]. This varies the normal requirement that the baseline take into account relevant national and/or sectoral policies and circumstances: CMP Report 1, Part 2, Vol 1, annex [45(e)].

246 De Sepibus, above n 245, 10.

247 See Wolfgang Sterk, 'From Clean Development Mechanism to Sectoral Crediting Approaches – Way Forward or Wrong Turn?' (JIKO Policy Paper 1/2008, Wuppertal Institute for Climate, Environment and Energy, 2008) 7; United States Government Accountability Office, above n 218, 40. This included, inter alia, a Validation and Verification Manual for DOEs and greater guidance on how to conduct additionality assessments.

248 De Sepibus, above n 245, 15.

249 Wara and Victor, above n 237, 14.
to continue in the post-2012 period. The Parties agreed to this position in May 2008, early on in the climate negotiations. As with Australia, other developed countries believed that the flexibility mechanisms were crucial to achieving cost-effective mitigation, and also provided broader benefits including delivering significant financial flows to developing countries for abatement projects and involving the private sector in climate mitigation. Many developing countries, even if critical of the CDM’s flaws, nonetheless supported its continuance, seeing local benefits, for example, in its contribution to sustainable development by facilitating investment in renewable energy. Experts such as Schneider similarly argued that the broader benefits of the mechanism warranted its continuation so long as environmental integrity concerns could be addressed.

As part of the post-2012 negotiations, Kyoto Parties discussed various reforms to the CDM. The two proposals which appeared to have the most potential to address environmental integrity concerns were 'discounting' and the introduction of 'sectoral approaches'.

i) Discounting

Discounting would essentially apply a 'discount rate' to CDM projects at a level determined by the Parties. If, for example, a discount rate of 30 per cent was applied, a

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251 See, eg, European Community, 'Views and Information on the Means that May be Available to Annex I Parties to Reach their Emission Reduction Targets', above n 217, 56, 66.
252 See, eg, AOSIS, 'Improvements to Emissions Trading and the Project-based Mechanisms (AWG KP)' in UNFCCC, Further Input on How the Possible Improvements to Emissions Trading and the Project-based Mechanisms ... Would Function, UN Doc FCCC/KP/AWG/2009/MISC.3 (6 March 2009) 42, 47; Panama, Colombia, Costa Rica and Mexico, 'Submission' in UNFCCC, Further Input on How the Possible Improvements to Emissions Trading and the Project-based Mechanisms ... Would Function, UN Doc FCCC/KP/AWG/2009/MISC.3 (6 March 2009) 74, 74. Note, however, that AOSIS believed that the CDM was no longer suitable for use by the major-emitting developing countries.
253 Schneider, above n 218, 14. Regarding the various benefits of the CDM see generally: UNFCCC, Benefits of the Clean Development Mechanism (2011).
254 Parties discussed a range of other, more incremental, ideas which could help to address environmental integrity (as well as other CDM deficiencies), namely: determining additionality and baseline emissions based on ambitious sectoral benchmarks or technology penetration rates; introducing standardised, multi-project baselines; establishing positive and/or negative lists of project types (for example, favouring renewable energy projects and discouraging project-types known to have additionality problems); and expanding the use of programmatic CDM: see UNFCCC, Further Elaboration of Possible Improvements to Emissions Trading and the Project-based Mechanisms under the Kyoto Protocol, UN Doc FCCC/KP/AWG/2009/Inf.2 (12 March 2009).
project normally receiving 100 CERs would instead receive 70, potentially reducing or nullifying any credits that were not genuinely additional.\textsuperscript{255} 

Parties were divided on the merits of discounting. The EU believed that this approach could strengthen the CDM’s environmental integrity,\textsuperscript{256} a view shared by some developing countries.\textsuperscript{257} Many developed and developing countries, however, including Australia, were opposed to discounting on the basis that it would introduce a level of artificiality into the calculation of CERs.\textsuperscript{258} 

Discounting has been a popular idea in the literature with some believing that it could help to address the problem of additionality.\textsuperscript{259} Sterk, however, notes that discounting would diminish the incentive for truly additional projects (which require the full rate of CER revenue to be financially viable), while non-additional projects would only have their windfall profits reduced.\textsuperscript{260} Thus, it is not clear that discounting offered a workable approach to improving environmental integrity.

\textit{ii) Sectoral Approaches} 

Proposals for sectoral-based approaches represented a far more significant reform. While some Parties discussed introducing sectoral approaches under a new flexibility mechanism, Parties also discussed the idea as a reform to the CDM. The major proposals included 'sectoral crediting', 'sectoral trading' and 'NAMA crediting'.

\begin{itemize}
\item \textsuperscript{255} More nuanced approaches have also been proposed: see, eg, Andrew Schatz, 'Discounting the Clean Development Mechanism' (2008) 20 Georgetown International Environmental Law Review 703, 728-29; Sonya Butzenengeiger-Geyer et al, \textit{Options for Utilizing the CDM for Global Emission Reductions} (German Federal Environment Agency, 2009) 9-11.
\item \textsuperscript{256} European Community, 'Analysis of Means to Reach Emission Reduction Targets and Identification of Ways to Enhance their Effectiveness and Contribution to Sustainable Development' in UNFCCC, \textit{Further Input in Relation to Possible Improvements to Emissions Trading and the Project-based Mechanisms under the Kyoto Protocol}, UN Doc FCCC/KP/AWG/2008/MISC.7 (5 November 2008) 3, 9.
\item \textsuperscript{257} See, eg, Argentina, 'Submission for the AWG-KP' in UNFCCC, \textit{Further Input on How the Possible Improvements to Emissions Trading and the Project-based Mechanisms ... Would Function}, UN Doc FCCC/KP/AWG/2009/MISC.3 (6 March 2009) 4, 6.
\item \textsuperscript{259} See, eg, Schatz, above n 255, 741; Butzenengeiger-Geyer, above n 255, 9-11.
\item \textsuperscript{260} Sterk, 'From Clean Development Mechanism to Sectoral Crediting Approaches – Way Forward or Wrong Turn?', above n 247, 7.
\end{itemize}
Sectoral crediting and trading were both pushed heavily by the EU. Crediting would be based on an agreed emissions target/threshold, set below the BAU emissions trend for a given sector. Emission reductions below the threshold would generate credits which could then be sold to developed countries. The target would be 'no-lose', meaning that no penalty would be applied if the target was not met. Sectoral trading was similar but would involve a mandatory cap on emissions and penalties for non-compliance.

The EU believed that sectoral approaches would provide significant advantages over the project-based CDM, among them: providing greater financing for developing countries' mitigation; strengthening the engagement of developing countries in mitigation activities; and reducing the potential for intra-national emissions 'leakage' by capturing all emissions within a sector. Importantly, adopting sectoral reference levels would remove the need to assess additionality. It would also move beyond a pure offsetting approach, allowing developing countries to make a net contribution to global mitigation as emission credits would only be awarded for reductions that exceeded the agreed threshold. The literature similarly highlighted a number of

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263 European Community, 'Analysis of Means to Reach Emission Reduction Targets and Identification of Ways to Enhance their Effectiveness and Contribution to Sustainable Development', above n 256, 5. Leakage is a further methodological difficulty for the CDM as emissions avoided by one project may 'leak' if the non-CDM technology is still used elsewhere within the country.

264 Ibid.

265 Ibid 1.
potential advantages of sectoral approaches, including the potential for improved environmental integrity outcomes.266

The Rudd government supported introducing sectoral approaches267 as did many developed and developing countries.268 Views differed, however, on the appropriate forum for sectoral approaches – that is, the CDM, a new sectoral mechanism, or as part of developing countries' nationally appropriate mitigation actions (NAMAs).269 Some non-Annex I Parties, however, rejected sectoral approaches outright,270 or specifically opposed sectoral NAMAs.271

Crucially, Parties were divided on whether sectoral approaches would actually improve environmental integrity outcomes. Brazil, for example, opposed sectoral CDM arguing that setting a BAU reference level would be 'policy oriented and arbitrary and therefore [would] ... not lead to real and measurable reductions'.272 If the baseline was defined too low it would result in 'hot air' (non-genuine emission credits), and if too high, would discourage investment in genuine projects.273

273 Ibid. See also AOSIS, 'Improvements to Emissions Trading and the Project-based Mechanisms (AWG-KP)', above n 252, 45.
The literature has recognised that sectoral approaches would need to overcome numerous challenges to be effective, among them establishing reliable baselines. As briefly noted above, establishing reliable BAU emission scenarios and reductions is enormously difficult. As explained by Sterk, the BAU scenario (from which emission reductions would then be measured) would rely on uncertain modelling and projections, these being based on assumptions about the future impact of current policies, the development and penetration of technologies and the development of economic activity. Uncertainties would be particularly great in rapidly growing developing countries in which growth rates are more variable and difficult to predict.

The point is illustrated by previous efforts to predict emissions growth in developing countries. In 2000, for example, the International Energy Agency (a highly credible organisation in this field) projected that electricity generation in China would be 1.5 trillion kilowatt hours in 2005. Actual generation turned out to be 2.5 trillion kilowatt hours. If China had adopted a sectoral crediting target based on this projection, it would likely have failed to achieve its target by a wide margin. The problem is that under a sectoral crediting or trading approach, faulty baselines would have significant consequences. If BAU emissions were overestimated, large quantities of non-genuine credits would be awarded. Conversely, if the baseline was underestimated, credits may not be issued despite considerable mitigation actions being undertaken by a host country. These risks would create an incentive for host countries to inflate their baselines in order to guarantee or increase their credit revenues.

274 See Schneider and Cames, above n 266, 9.
276 Ibid. See also Schneider and Cames, above n 266, 15.
278 Ibid.
279 Ibid.
280 Schneider and Cames, above n 266, 18.
281 Ibid.
282 Ibid.
**d) Implications for the CPRS**

The Rudd government's CPRS White Paper stated that 'as long as accepting a Kyoto unit into the Australian Scheme means that one less tonne of greenhouse gases is emitted elsewhere in the world, no restrictions on their use are needed.'\(^{283}\) It has been seen above that such a guarantee could not be given regarding the CDM, the major likely source of international permits for the CPRS up to 2020, even if major reforms were introduced such as sectoral approaches.\(^{284}\) This raised strong concerns about the design of the CPRS, as some percentage of CERs purchased by liable entities or directly by the government would likely represent hot air. As such, it needs to be questioned whether the Rudd government's mitigation strategy ought to have been so reliant upon the use of international flexibility mechanisms to achieve Australia's post-2012 targets.

Given the patent deficiencies of the CDM – and the lack of strong reform options available to guarantee environmental integrity – arguably the only responsible position for the Rudd government was to prohibit, or place a strict quantitative restriction on, access to international mechanisms like the CDM – at the very least until environmental integrity issues had been satisfactorily addressed. The government did of course intend to prohibit access to some categories of international permits which had significant environmental integrity concerns, such as AAUs (see discussion below).\(^{285}\) However, it is doubtful whether these restrictions went far enough. Notably, the government's approach went against the advice of Garnaut who, recognising that the CDM was a 'flawed device, from both an environmental and a market perspective',\(^{286}\) favoured setting restrictions on both the source and quantity of


\(^{284}\) Note that the Rudd government accepted that sectoral approaches would likely only be suitable for some sectors and the more advanced developing countries meaning that the project-based CDM would remain an important source of permits even if sectoral approaches were introduced: Australia, 'Emissions Trading and the Project-Based Mechanisms', FCCC/AWGLCA/2009/MISC.1/Add.3, above n 90, 26.

\(^{285}\) Notably, the EU went further than Australia, banning the use of HFC-23 and adipic acid CERs from 2010 onwards, as these were particularly likely to be non-additional: Anja Kollmuss, 'A New Look at Loopholes' (Policy Brief, CDM Watch, December 2011) 5.

international permits from such offsetting mechanisms. The issue of setting a quantitative restriction on the use of international permits is considered further at section C.6.

5 ‘Hot Air’ AAUs and ERUs

More briefly, it should also be highlighted that the credibility of the Rudd government’s mitigation approach further had the potential to be undermined by allowing access to other types of non-credible international permits. A major problem that has emerged under the Kyoto Protocol has been the issuance of non-credible AAUs. This occurred as a result of former Soviet Union countries, especially Russia and Ukraine, being granted overly lenient Kyoto Protocol targets under the first commitment period. This situation allowed these Parties to significantly exceed their targets without undertaking deliberate emissions abatement, resulting in a large surplus of so-called hot air AAUs (representing about 6 per cent of 1990 Annex I emissions under Kyoto’s first commitment period).

During the post-2012 negotiations, Parties including the African Group called for a commitment by Annex I Parties not to use, sell or purchase hot air AAUs beyond the first commitment period, a move strongly opposed by Russia and Ukraine. To the Rudd government’s credit, the CPRS opted to initially exclude AAUs, due to concerns about environmental integrity, as well as their potentially volatile price undermining the stability of the CPRS. Notably, however, the Rudd government stated that its

287 Ibid 340-341.
288 These Parties were required to stabilise their emissions at 1990 levels but when the Protocol was negotiated their emission levels had already dropped well below this level due to the collapse of their economies after the fall of communism: see Kollmuss, above n 285, 3; M G J den Elzen et al, Evaluation of the Copenhagen Accord: Chances and Risks for the 2°C Climate Goal (Netherlands Environmental Assessment Agency, May 2010) 16-17.
289 den Elzen, above n 288, 16-17.
291 International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(390) (6 December 2008) 1. AAUs can be carried over to subsequent commitment periods under the Kyoto rules: CMP Report 1, Part 2, Vol 2, decision 13/CMP.1, annex [15(c)].
position would be 'reviewed in the light of international developments'. While acknowledging the concerns about hot air AAUs, it also saw AAUs as a potential source of low-cost abatement and highlighted that all AAUs were 'legitimate compliance units under the Kyoto Protocol'. It also made the point that AAUs would likely be used at some point by a Kyoto Party for compliance and thus the use of international AAUs in Australia would 'have no impact on aggregate global emissions'. These statements appeared to indicate that the government was willing to allow AAUs to be imported into the CPRS in future. Thus while it made a responsible choice in initially excluding access to AAUs, its broader position was potentially at odds with an environmentally effective approach.

This chapter has not examined the ramifications of the Rudd government allowing access to unlimited ERUs under the JI mechanism, as this mechanism was less advanced at the time the CPRS was designed. But it should be noted that in more recent years the JI mechanism, which similarly applies an additionality test, has also been heavily criticised for producing non-credible international permits.

6 The CPRS and the Principle of Supplementarity

As highlighted earlier, the emissions trading and JI provisions of the Kyoto Protocol stipulate that trading 'shall be supplemental to domestic actions', while the CDM provides that it may only be used by an Annex I Party to contribute to compliance with 'part' of its target. The Marrakesh Accords further provide that the use of the mechanisms 'shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made' by each Annex I Party to meet its target.

296 Ibid.
298 Kyoto Protocol arts 6.1(d), 17.
299 Ibid art 12.3(b).
300 CMP Report 1, Part 2, Vol 1, decision 2/CMP.1, [1].
In light of the above provisions, the Rudd government’s intention to provide liable entities with unlimited access to eligible international permits, and to directly purchase up to 1/5th of Australia’s upper 25 per cent target, was a controversial approach, both on environmental and legal grounds. During the international negotiations, the G77 and China insisted that Annex I Parties were ‘primarily’ obliged to meet their emission reduction obligations through domestic measures. Given that the Protocol and Marrakesh Accords did not quantify the extent to which the flexibility mechanisms could be used, some Parties also pushed to do so. Most generously, South Africa and China called for the use of international permits to be capped at 50 per cent. More conservatively, Brazil and Peru preferred a 30 per cent cap, while the Philippines favoured a cap of just 10 per cent.

For its part, the Rudd government accepted that domestic abatement measures needed to constitute a 'significant element' of its abatement effort, but argued against quantifying the meaning of 'significant' domestic action. It stated that this would help 'to ensure that Parties can continue to reduce emissions at least cost.' In the government’s view the supplementarity principle meant that Australia needed to 'take some meaningful domestic action to meet its emission reduction target' and could not 'rely solely on the flexibility mechanisms.'

306 Ibid.
307 Explanatory Memorandum, CPRS Bill [No 2] 78.
Australia’s opposition to quantifying the supplementarity principle was generally shared by other developed countries with many also intending to make significant use of the flexibility mechanisms to achieve their 2020 targets. New Zealand, for example, whose ETS provided liable entities with unlimited access to Kyoto emission permits, indicated that it expected to meet up to 70 per cent of its 2020 target through importing permits and that it would reduce its national target if access to international permits was restricted. Norway stated that about 30 per cent of its target may be achieved with international permits. The EU, whose ETS had a tight restriction on the use of international permits in Phase II (13.4 per cent), relaxed these requirements in Phase III to no more than 50 per cent of the required abatement. However, this did not restrict EU member states from directly accessing international permits outside the ETS. The proposed US ETS would have restricted the use of international permits to approximately 20 per cent of the Scheme cap.

In designing the CPRS, the Rudd government acknowledged that the absence of an explicit cap on the use of international permits ‘may not be consistent with the principle of supplementarity’ and that it had considered establishing a quantitative restriction. However, it ultimately believed that this was unnecessary. It was ‘confident that even with unlimited access to international units, Australia’s use of the Kyoto Protocol flexibility mechanisms [would] be supplemental to domestic action.’ This was actually a questionable claim. Australia’s emissions in 1990 (Kyoto’s base

309 International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(435) (6 October 2009) 4. The New Zealand ETS relies on being fully linked to the international Kyoto Protocol market. Entities that are part of the scheme can emit as much as they wish as long as allowances are purchased internationally or from forestry companies to cover these emissions. Unlimited use is allowed of CERs, RMUs, ERUs and approved AAUs: Hood, above n 92, 23.
312 See Kossoy and Ambrosi, above n 92, 29.
315 Ibid 11-8.
year) were 548 Mt CO2-e. Its base year emissions were allowed to increase by 8 per cent by 2008-2012 (Kyoto's first commitment period) to 591.5 Mt CO2-e. As noted earlier, analysis by Treasury estimated that under the government's minimum 5 per cent target Australia's domestic emissions would likely remain about the same by 2020, meaning that the target would only be met by utilising international permits. The Rudd government emphasised that Australia's domestic emissions were projected to be significantly less than under BAU circumstances (774 Mt CO2-e by 2020). Viewed from this perspective, it could certainly be argued that the stabilisation of Australia's emissions at 2008-12 levels would have involved 'significant' domestic abatement. However, as Annex I Parties' mitigation targets are measured from a 1990 base year, not projected BAU emissions, this arguably applied the wrong metric to interpreting the supplementarity principle. Measured from Australia's emissions in 1990, the above Treasury analysis projected that all of Australia's abatement would actually be achieved by importing permits.

In order to avoid breaching its legal obligations under the Kyoto Protocol and Marrakesh Accords, there is clearly a strong argument that the government ought to have set a cap on the use of flexibility mechanisms. While the Parties have not been able to agree upon what constitutes supplemental action, and thus it cannot be determined with certainty what the principle legally requires, logic dictates that Australia's use of international permits needed to be less than 50 per cent of its abatement effort, as proposed by South Africa and China. While the government believed that the use of flexibility mechanisms would be supplemental to domestic action even without a cap, not establishing one implied that Australia was prepared to act in breach of the supplementarity principle, if needed, in order to achieve Australia's post-2012 mitigation target at least cost.

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316 Department of Climate Change and Energy Efficiency, above n 43, 6.
317 See Treasury, Australia's Low Pollution Future: The Economics of Climate Change Mitigation (Summary), above n 140, 26.
319 Treasury, Australia's Low Pollution Future: The Economics of Climate Change Mitigation, above n 21, 48.
It should be noted that some use of international permits was probably necessary by Australia from an economic and technological perspective in order to achieve its 5 to 25 per cent 2020 target. According to Pielke, given Australia's projected population and economic growth, and historical rates of decarbonisation in the Australian economy, a 'herculean effort' was required to meet Australia's targets from domestic abatement alone. In his assessment, nearly all Australian coal consumption would need to be replaced by a zero-carbon alternative such as nuclear or renewable in the next decade or less. Thus, it was not a realistic expectation for the government to prohibit the use of international permits entirely. However, it clearly could have established a moderate cap that was both consistent with the supplementarity principle, placed a high priority on domestic abatement (and thus environmental effectiveness), and also reflected what level of domestic abatement was economically and technologically feasible for Australia.

**D Legislating the CPRS: Its Rise and Fall**

This chapter now turns to examining the Rudd government's efforts to legislate the CPRS. The government made it a political priority to pass the CPRS Bill prior to the 15th Conference of the Parties (COP 15) to the UNFCCC in Copenhagen (December 2009) at which Parties hoped to adopt a new post-2012 agreement. Labor argued that it was important to legislate the CPRS prior to COP 15 as this would 'put Australia in a position to influence the shape of the post-2012 international legal framework for climate change'. According to then Minister for Climate Change, Penny Wong, it was important for Australian credibility to have 'a means to deliver its targets'. Prime Minister Rudd also argued that passing the CPRS Bill would 'provide a much-needed boost to negotiations on a global deal'. Garnaut backed Labor on this issue, believing

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321 Ibid 22, 26. Similar issues were faced by other developed countries: Project Catalyst, 'Setting a Benchmark: How Developed Countries Might Equitably Contribute Towards a 450 ppm Pathway' (Briefing Paper, September 2009) 4.
that legislating the CPRS prior to Copenhagen would enhance Australia's credibility on climate change (which had been tarnished by the Howard government's refusal to ratify the Kyoto Protocol) by demonstrating that 'we were able to deliver on what we were promising'.

The Rudd government and Garnaut probably overstated the actual influence of legislating the CPRS on the post-2012 negotiations. As stated by then UNFCCC Executive Secretary, Yvo de Boer, the major concern of Parties during the negotiations was the mitigation target each nation was prepared to adopt, more so than their domestic policies for implementing them. Furthermore, any action by Australia on the domestic front did not carry the same weight as those of the US, China and the other major emitters. It goes without saying, however, that the adoption of an ETS by Australia would have been viewed favourably by other nations and added to, rather than detracted from, momentum in the negotiations.

Domestically, the government's desire for Parliament to pass the CPRS Bill prior to COP 15 proved to be highly controversial. Stakeholders, especially from carbon-intensive industries, as well as various commentators, argued that it was premature to introduce an ETS without first knowing the outcome of the climate negotiations. The argument made was that establishing an ETS without knowing what domestic measures the major emitters were prepared to adopt, especially the US and major developing economies, would put Australia at a competitive disadvantage.

As outlined above, the Rudd government was ultimately unable to secure support for the CPRS Bill in the Australian Senate. In its first legislative attempt, the CPRS was rejected by 42 votes to 30 on 14 August 2009. The Turnbull-led Opposition voted against the Bill, being opposed to the CPRS unless much greater assistance was

325 Senate Select Committee on Climate Policy, above n 84, 68.
327 See Senate Select Committee on Climate Policy, above n 84, 69-70.
328 Ibid 69-70.
329 Parliament of Australia, Journals of the Senate (13 August 2009) 2291.
provided to assist industry and protect jobs. It also argued that the CPRS should not be legislated until both the outcome of the Copenhagen negotiations were known and the proposed US ETS became law, sharing the concerns of industry that to do otherwise would put Australia at a competitive disadvantage.

Without Coalition support, the government required 7 votes from non-Labor Senators to pass the Bill (5 Australian Greens, 1 Family First, and 1 Independent). The Greens also voted against the Bill, disagreeing with many of its design features. Among the Greens' demands included:

- a minimum and unconditional 25 per cent national target by 2020 (and up to 40 per cent under a global treaty);
- Scheme caps consistent with a long-term 350 ppm CO2-e goal;
- no free allocation of emission permits;
- reduced assistance to EITE industries;
- the removal of the price cap;
- a 20 per cent cap on the use of international permits;
- allocating a proportion of Scheme revenue for adaptation and mitigation finance for developing countries;
- improved incentives for individuals and businesses to undertake voluntary emission reductions; and
- the provision of substantial additional finances for renewable energy research and development.


331 Ibid.


Family First Senator Steve Fielding (who contested the existence of anthropogenic climate change altogether) and Independent Senator Nick Xenophon (who preferred a hybrid baseline and credit ETS), also opposed the Bill.  

In October 2009, the Turnbull Opposition agreed to negotiate with the Rudd government on amendments to the CPRS Bill. As noted above, Labor and the Coalition reached agreement on a series of amendments to the Bill on 24 November 2009 which significantly increased assistance to industry. However, Turnbull's backing of the amended CPRS caused a spill of the leadership within the Liberal Party and the election of a new leader, Tony Abbott, who opposed the CPRS in any form. Reneging on the deal with Labor, Abbott insisted that legislating the CPRS prior to the adoption of a post-2012 agreement would 'damage the Australian economy' and put Australia at a 'competitive disadvantage vis-à-vis the rest of the world'. This saw the CPRS rejected for a second time on 2 December 2009.

Following the failure of COP 15 to deliver a binding post-2012 agreement, the Rudd government announced in April 2010 that it would defer the introduction of the CPRS until 2013, citing both slower than expected international progress and a lack of parliamentary support for the Bill. On one hand, this was certainly an understandable position. It was a genuine political reality for Labor that the international negotiations had not delivered what many had hoped for at COP 15 and that it did not have sufficient support for the Bill within the Senate.

On the other, the Rudd government's justifications for deferring the CPRS were not entirely credible. Prior to COP 15, Labor argued that the passage of the CPRS Bill was essential, in part because it would help to build 'momentum' in the post-2012 negotiations by demonstrating to other Parties that it was 'possible to integrate a

336 Tony Abbott and Julie Bishop, ‘Transcript of Joint Doorstop Interview’ (Canberra, 2 December 2009).
carbon price into the economy and reduce emissions with only modest economic impacts'. 338 Rudd criticised political opponents who called for the CPRS to be delayed until after Copenhagen, stating that this demonstrated 'absolute political cowardice' and an 'absolute failure of leadership'. 339 Rudd further argued that if 'every nation ... [made] the decision not to act until others have done so, then no nation will ever act' leading to a 'permanent stand-off' in international negotiations' (a situation known as the 'prisoner's dilemma'). 340 If these arguments were valid prior to COP 15, they were certainly valid afterwards when the international community needed leadership more than ever to keep the post-2012 negotiations on track.

Domestically, the second rejection of the CPRS Bill by the Senate also provided the government with an opportunity to call a 'double dissolution' election, in which both houses of Parliament would be dissolved. If re-elected, this would have enabled Labor to call a joint sitting of Parliament, 341 increasing its chances of passing the Bill. In any case, a regular federal election was already due to be held in 2010. 342 Rudd's decision to delay the CPRS prior to testing support for the Bill or similar legislation in a new Parliament, clearly represented a significant back flip, especially in light of the government's strong political statements on the issue. Although caution must be used when interpreting opinion polling, it is worth noting that polls at the time also appeared to show that the government enjoyed majority public support for legislating the CPRS, even after Copenhagen failed to deliver a binding global agreement. 343

Critics have suggested that Labor's political strategy for negotiating the CPRS – which 'made sport out of the Coalition's internal divisions over carbon pricing' and refused to 'engage constructively' with the Greens and Senators Fielding and Xenophon – also

339 Kevin Rudd, 'Address to the Lowy Institute' (Speech delivered at the Lowy Institute, Sydney, 6 November 2009).
341 Australian Constitution s 57.
342 Ibid ss 13, 28.
343 See Burgmann and Baer, above n 18; Juliet Pietsch and Ian McAllister, "A diabolical challenge": Public Opinion and Climate Change Policy in Australia' (2010) 19 Environmental Politics 217, 224-225. Indeed, polls also suggested that there was a widespread willingness in the community to pay for environmental protection, especially through higher prices: 32.
contributed to the downfall of the CPRS in the Senate.\textsuperscript{344} The Greens shared this view, being highly critical of Labor's decision not to engage with their Party on the CPRS.\textsuperscript{345} While the Rudd government may have been correct in its assessment that the best prospect of passing the Bill was to negotiate with the Coalition (given the disparity of views between the Greens and the two other non-Labor Senators) it does appear that it did not genuinely exhaust all avenues of securing support for the Bill.

Ultimately, the Rudd government's decision to defer the CPRS came at great political cost to Rudd, who was accused of being 'a PM without convictions'.\textsuperscript{346} Having lost the confidence of the Labor party and much of the Australian electorate,\textsuperscript{347} Rudd was ousted as Labor leader and Prime Minister by Julia Gillard on 24 June 2010.\textsuperscript{348} Tellingly, Rudd later expressed his belief that the decision to defer the CPRS was a mistake.\textsuperscript{349}

\textbf{E Implications for GIC}

As flagged earlier, two issues appeared to be most relevant to assessing GIC in relation to the implementation of the Rudd government's mitigation target, namely, whether the government's domestic legal and policy approach was likely to be both legally effective and environmentally effective. Additionally, this thesis would argue that it was particularly important that the government's mitigation approach demonstrate leadership, as expected of developed countries under article 3.1 UNFCCC (and also generally associated with GIC by Gareth Evans). As noted above, Prime Minister Rudd asserted himself that leadership by Australia was important on this issue, given the need for momentum to be added to the international negotiations.

\footnotesize
\begin{itemize}
  \item \textsuperscript{344} Macintosh, Wilkinson and Denniss, above n 161, 209.
  \item \textsuperscript{345} Australian Greens, above n 333.
  \item \textsuperscript{346} Paul Kelly, 'Internal Polling Tipped Gillard Over Line', \textit{The Australian} (Sydney), 30 June 2010.
  \item \textsuperscript{347} Ibid; Burgmann and Baer, above n 18.
  \item \textsuperscript{348} Burgmann and Baer, above n 18. Ironically Gillard was among those who reportedly pressured Rudd to defer the CPRS. The Gillard Labor government later introduced an ETS based on the CPRS, which was commonly referred to as a carbon tax because it legislated a fixed price for permits in its first three years: see, eg, Rosemary Lyster, 'Australia’s Clean Energy Future Package: Are We There Yet?’ 28 (2011) \textit{Environmental and Planning Law Journal} 446, 447-476.
\end{itemize}

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The above review of the major elements of the Rudd government's legal and policy approach to implementation found that Australia witnessed a significant domestic debate on the best instrument to reduce emissions, with some preferring alternative approaches such as a carbon tax. However, it was concluded that the government's choice of a cap and trade ETS was undoubtedly a legitimate policy choice, being consistent with the orthodox economic view that emissions trading provides an effective and efficient means of reducing emissions. An ETS also appeared to best position Australia to participate in the international carbon market established by the Kyoto Protocol, including by linking to existing or emerging ETS's in other countries such as the EU.

Many concerns were raised, however, regarding the specific design features of the CPRS, especially the significant compensation provided to Australia's largest emitting industries. These concerns led some commentators to doubt the merits of enacting the CPRS. Denniss, for example, criticised the Scheme for being too far removed from a 'textbook' ETS, in that it failed to cover all sectors of the economy, provided free emission permits too polluters, and placed an upper cap on the permit price. Macintosh, Wilkinson and Denniss similarly derided the CPRS for progressively becoming 'more economically inefficient as the government offered millions of free permits and other handouts to polluters and affected businesses'. Another critic, Woodward, concluded that the Rudd government's lack of preparedness to 'take on' vested interests in the coal mining, coal power generation, agricultural and other heavy polluting industries, ultimately 'threatened to undermine the integrity and effectiveness of the ETS'. Perhaps most notably, the government's key independent climate change adviser, Garnaut, formed the view that the question of whether to enact the CPRS was 'finely balanced' due to factors such as the weak initial upper target of 15 per cent, inadequate funding for research and development and the commercialisation of new technologies, and the overcompensation of EITE

350 Senate Select Committee on Climate Policy, above n 84, 45.
351 Macintosh, Wilkinson and Denniss, above n 161, 209.
352 Woodward, above n 21, 9.
After the government increased Australia’s upper target to 25 per cent, however, Garnaut did favour legislating the CPRS Bill, although this did not stop him from describing the policy-making process associated with the CPRS as ‘one of the worst...we have seen on major issues in Australia’.

As the above comments make clear, the CPRS, the intended focal point of the government’s emission reduction efforts, was a heavily compromised emissions reduction instrument, both from an economic and public policy perspective. However, the key requirement of the government, from a legal and GIC perspective, was to establish laws and policies that would enable Australia to meet its future international mitigation obligations. International law generally provides nations with broad scope as to how their international obligations are implemented at the domestic level. As stated by Henkin, '[t]he international system requires that a state meet its international obligations, but ordinarily the law has not required that a state meet those obligations in a particular way or through particular institutions and laws.' Cassese similarly notes that international law generally requires an 'obligation of result', not an 'obligation of means'. This is generally true of ICCL as both the UNFCCC and Kyoto Protocol provide that the means by which a Party may implement its obligations is essentially one for the Party, to be decided according to national circumstances (so long as it is consistent with any rules imposed by the ICCL regime, such as regarding supplementarity or accounting methodologies). As highlighted above in de Boer’s comments, this is also generally the case from a diplomatic perspective, with Parties accepting that nations have considerable discretion as to the form of domestic emission reduction measures adopted.

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353 Evidence to Senate Select Committee on Climate Policy, Parliament of Australia, Canberra, 16 April 2009, 20 (Ross Garnaut) 46, 52.
354 Senate Select Committee on Climate Policy, above n 84, 68.
357 See Antonio Cassese, International Law in a Divided World (Oxford University Press, 1986) 15.
358 See, eg, UNFCCC art 4.2, preamble; Kyoto Protocol art 2.1(a).
This chapter found little evidence that the CPRS and complementary measures, despite various flaws, would not have been legally sufficient to enable Australia to achieve its 2020 mitigation targets. This is chiefly because the CPRS set a mandatory cap on a wide range of emissions sources and was complemented by other effective emission reduction measures such as the RET. The government also had the ability to top up Australia’s abatement by purchasing international permits, which was allowed for by the Kyoto rules. To this extent, the Rudd government’s domestic legal and policy response was likely to be legally effective.

There were, however, risks that by not setting a cap on the use of international permits by liable entities that Australia could breach the supplementarity principle in future, at least in spirit if not in letter (with the requirements of the principle not being well-defined). The government’s intention to purchase up to 1/5th of Australia’s 25 per cent target created similar risks. A legally responsible approach would have been to cap the use of international permits at no more than 50 per cent of Australia’s abatement, this being the maximum use of the flexibility mechanisms regarded as reasonable by other Parties. A further concern was that by neglecting to place a cap on the use of international permits, the CPRS would have likely delayed the necessary decarbonisation of the domestic economy, thus creating long-term risks for Australia’s ability to achieve sufficient domestic emission reductions.359 Similar long-term risks were also potentially created by putting so much faith in CCS technology, which if not realised, could see Australia’s domestic emissions remain high for many decades as a result of its reliance on coal-fired electricity. Aside from the risk of breaching the supplementarity principle, however, it appears that the CPRS Bill was generally designed to allow Australia to meet its future targets in a manner that was consistent with the ICCL regime, as was the government’s intention.360

While the Rudd government’s intent to make significant use of international permits may have been legally acceptable, aside from the supplementarity issue, its approach

359 Note that the government disputed this view: Australian Government, Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future (White Paper, Vol 1), above n 20, 11-7.
to implementation certainly created risks for the environmental effectiveness of Australia’s emission reduction response. As stated earlier, it goes without saying that as a Party to the UNFCCC, it was incumbent upon the government to adopt an approach to implementation that resulted in genuine, rather than illusory, emissions abatement. This was a clear legal expectation of all Parties given that the central purpose of the UNFCCC and related instruments is to reduce emissions so as to avoid dangerous climate change. As noted earlier, this expectation is also emphasised by the Preamble to Convention which recognises, for example, that Parties should ‘enact effective environmental legislation’.

This chapter examined environmental integrity concerns chiefly in relation to the CDM, as this was likely to provide the major source of international permits for Australia up to 2020. It was recognised that many Parties wished the CDM to continue, notwithstanding concerns regarding environmental integrity, and that Parties have and continue to make reforms so as to improve its environmental effectiveness. However, at the time the government was seeking to legislate the CPRS it would have been aware that there were significant concerns regarding the credibility of CERs. Nor was it clear that any of the reforms being discussed at the international level could guarantee that future CERs would always represent genuine emissions abatement. As such, the Rudd government’s decision not to place a quantitative cap on the use of the flexibility mechanisms, or at least the CDM, sent the message that its primary concern was to reduce the cost of Australia achieving its mitigation target, regardless of whether or not the international permits purchased by liable entities represented genuine abatement. To its credit, Labor did place restrictions on AAUs due to environmental integrity concerns. Yet it also left the door open for these to become eligible for use under the CPRS in future. Furthermore, it backed the creation of new sectoral approaches, which would have potentially established a new source of less than credible offsets. It will be seen in chapter 8 that the government also wished to establish a new REDD flexibility mechanism which, again, had the potential to provide a further source of environmentally dubious offsets.

Regarding the need for developed country leadership, it should be emphasised that the Rudd government was under no legal obligation to establish an ETS or any other
emission reductions laws and policies prior to COP 15. With Australia's target under
the first commitment of the Kyoto Protocol all but achieved and the post-2012
agreement still in the process of negotiation, Labor could have opted to delay any
major policy work until after Copenhagen. It was commendable, therefore, that Labor
promised to introduce an ETS at the 2007 election, a commitment which it sought to
honour in government. Given the political difficulty of introducing an ETS in Australia,
the mere fact that it sought to do so must be regarded as an act of leadership. It also
constituted an act of leadership internationally as if the CPRS Bill had been enacted,
the Scheme would have become the first national, mandatory ETS to be established
outside of the EU. Conversely, the flawed design of the CPRS arguably missed an
opportunity to show international leadership in the design of best practice domestic
emission reduction laws. This is because a less compromised ETS could have
demonstrated to other nations that it was possible to reduce emissions in a cost-
effective and environmentally credible manner. Opting not to set a conservative cap
on the use of international permits and rejecting the quantification of the
supplementarity requirement at the international level also provided examples of
missed opportunities to show leadership.

Perhaps the greatest damage to the Rudd government's leadership aspirations,
however, came in its decision to defer the CPRS until 2013. When Labor's mettle on
carbon pricing was seriously put to the test, it buckled, backing away from its own
argument that legislating the CPRS was a matter of urgency. The more politically
courageous action would have been to take the CPRS to a double dissolution election.
At the very least, it could have simply deferred the Bill until the next regular election
and, if successful, sought to legislate the CPRS in a new Parliament. Deferring the CPRS,
by contrast, relegated Australia to the position of a follower, awaiting the outcome of
international negotiations to implement its critical mechanism for putting Australia's
economy on a low-emission path.

361 Note that New Zealand's ETS has no emissions cap.
Downplaying the need to act in an environmentally effective manner was also arguably inconsistent with another important principle of the Convention, namely the precautionary principle (article 3.3 UNFCCC).\textsuperscript{362} It is clear that a truly precautionary approach would have emphasised abatement options with a high likelihood of achieving genuine emission reductions, not just those which represented least cost.

Turning to other attributes of GIC identified in chapter 1, a number of these also had clear relevance to the implementation issue. The intention to make significant use of international permits, even at the cost of environmental effectiveness, was certainly inconsistent with the notion of pursuing 'purposes beyond ourselves'. It was also at odds with the notion of advancing 'enlightened self-interest', as it placed Australia’s narrow economic interests (as well as the government’s political interest in achieving least cost abatement) ahead of Australia’s longer-term interest in avoiding dangerous climate change.

As explained in chapter 1, GIC acknowledges that governments are often required to strike a balance between being idealistic and realistic and that the desire to be a GIC is often hampered by legitimate domestic and international constraints. This was certainly the case in relation to the CPRS. The Rudd government’s preference to use international permits was driven by the fact that Australia faced relatively high domestic mitigation costs due to its large share of emission and energy-intensive industries.\textsuperscript{363} As such, the government had a clear political need to minimise the cost of abatement in order to maintain the support of the Australian electorate and businesses that were most affected by carbon pricing. Indeed, most stakeholders who submitted comments on the design of the CPRS to government argued for unlimited access to Kyoto units, in order to reduce the costs of compliance.\textsuperscript{364} The government would also have faced a strong industry backlash from EITE entities and other affected

\textsuperscript{362} This requires Parties to take 'precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.' Further, 'where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures'.

\textsuperscript{363} See Treasury, \textit{Australia’s Low Pollution Future: The Economics of Climate Change Mitigation}, above n 21, 196.

businesses if it did not appease their demands for compensation. The slow pace of international negotiations also made the CPRS a difficult political sell for the government given genuine concerns regarding the competitiveness of the Australian economy if Australia acted too far ahead of its competitors. Furthermore, while appearing to have public support to introduce an ETS, the government did not enjoy favourable political circumstances in the Senate where it counted. Moreover, while its political strategy to secure support for the CPRS Bill may have been less than perfect, it was the Abbott Opposition, not the government, who was ultimately responsible for the failure of the Bill to become law.

In regard to other (more minimalist) GIC criteria, it is clear that the Rudd government took an internationalist approach to the design of the CPRS by ensuring that it could easily link with other mechanisms such as the EU ETS and was generally consistent with the international legal framework established by the Kyoto Protocol (other than the supplementarity issue). It was also an active player on the implementation issue, seeking to establish an ETS in advance of new domestic abatement laws and policies actually being necessary, and demonstrated a willingness to ‘pitch in’ by seeking to be one of the early adopters (outside the EU) of an ETS.

Overall, this chapter argues that it was to the credit of the Rudd government that it sought to introduce an ETS as well as complementary measures such as the RET, notwithstanding their various flaws. In broad terms, the government’s approach to implementation would likely have legally positioned Australia to meet its international target for 2020 if the CPRS had been legislated. While the CPRS, in particular, had significant design flaws such as the overcompensation of EITE industries, its major failing from a GIC perspective was in allowing unlimited access to eligible international permits, risking the environmental effectiveness of Australia’s mitigation response. This approach undoubtedly put Australia’s shorter-term economic interests, and the government’s political interests, ahead of the more important need to genuinely contribute to global abatement. Further, while the government’s effort to legislate an ETS was undoubtedly an act of leadership, the design failings of the CPRS, and its ultimate deferral in the face of difficult political circumstances, undermined its early good intentions and leadership aspirations. In fairness to the government, it must be
acknowledged that it faced challenging domestic political circumstances that made its task incredibly difficult. However, for this author, its failure to prioritise an environmentally effective approach, and its eventual decision to delay the introduction of an ETS (turning Australia into a follower, rather than a leader), means that it is difficult to classify the Rudd government as a GIC on this issue. The government was far from being a poor international citizen, and arguably its sincere efforts to legislate an ETS prior to Copenhagen meant that it ought to at least qualify as an above average international citizen. However, this chapter suggests that chiefly because of the government's lack of resolve to establish an ETS that prioritised genuine, domestic abatement, it could only be regarded as an average international citizen with respect to implementation.
CHAPTER 8. THE RUDD GOVERNMENT AND REDD+

'REDD can and should make a significant and cost effective contribution to the global mitigation of climate change.' The Rudd government, March 2009.1

This chapter examines the Rudd government’s engagement with international efforts to establish a mechanism to reduce forestry-related emissions in developing countries, a major source of global greenhouse gas emissions (GHGs), under a post-2012 climate change agreement. Negotiations on this topic were mandated by paragraph 1(b)(iii) of the Bali Action Plan (BAP),2 adopted at the 13th Conference of the Parties (COP 13) to the United Nations Framework Convention on Climate Change (UNFCCC)3 in Bali, Indonesia (December 2007). Specifically, Parties agreed to consider how to incentivise the reduction of emissions from deforestation and forest degradation (known as 'REDD'), as well as broader activities including conservation, the sustainable management of forests and the enhancement of forest carbon stocks (collectively known as 'REDD+'). Indicative of Parties aspirations on this issue, the European Union (EU) proposed the goal of halving deforestation by 2020 and halting global forest cover loss by 2030.4

Much goodwill existed among the Parties to establish a REDD+ mechanism under a post-2012 agreement.5 However, differing views were held on how it should be

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5 Note that various Parties including Australia also supported linking forestry mitigation activities to developing countries' NAMAs (see chapter 6) or extending the range of forestry activities that could generate carbon offsets under the Kyoto Protocol's Clean Development Mechanism: see, eg, Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 7. The major focus of Parties, however, was on establishing a standalone REDD+ mechanism under a new post-2012 agreement.
designed and implemented. A particularly controversial issue was whether or not REDD+ should operate as a 'market' or 'flexibility mechanism' (similar to the Kyoto Protocol's Clean Development Mechanism (CDM – see chapter 7)) or instead only be financed by developed country governments. In common with other developed countries, Australia favoured a market approach which would generate a new source of relatively low cost international carbon credits, and also shift a large degree of financing responsibility from developed country governments to the private sector.

The Rudd government made the establishment of REDD (more so than the + activities) a priority for Australia in the post-2012 negotiations. Australia made a number of detailed submissions on REDD and as discussed in chapter 6, made the inclusion of REDD in a post-2012 agreement a condition of adopting its upper emission reduction target of 25 per cent by 2020. Wishing to be a global leader in the development of REDD on the ground, the government also established agreements with both Indonesia and Papua New Guinea (PNG) to undertake so-called REDD 'demonstration activities'.

The aim of this chapter is to assess whether the Rudd government's activities on REDD+ met the standard of good international citizenship (GIC). It does so in the following manner. First, the basic legal and policy background to REDD+ is outlined. Second, the Rudd government's negotiating positions are examined. The focus of analysis is the government's push for a market-based mechanism. This raised concerns regarding environmental effectiveness and was judged to be the most significant issue from a GIC perspective in relation to the design of the mechanism. Third, the chapter examines the Rudd government's major practical activity on REDD, namely the Kalimantan Forest and Carbon Partnership (KFCP), which was conducted in partnership with Indonesia. The Rudd government was engaged in a number of other REDD+ related activities, however, due to space limitations this chapter chiefly examines the KFCP, this being the government's flagship REDD initiative. The chapter concludes by

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6 Note that Australia supported a REDD+ mechanism but its major emphasis was on establishing the 'REDD' component.

assessing whether the Rudd government's engagement with REDD+ was consistent with the standard of behaviour expected of a GIC. As with previous chapters, the primary consideration in assessing GIC is whether the government's approach was consistent with the relevant legal framework, however, the analysis also takes into account the broader attributes of GIC highlighted in chapter 1.

A REDD+: Legal and Policy Background

1 The Relationship between Forests and Climate Change

Forests cover about 31 per cent of the Earth's total land area (approximately 4 billion hectares). Emissions in the forest sector are a significant contributor to climate change accounting for more than 17 per cent of global anthropogenic GHG emissions: the third largest source of emissions behind energy supply and industry, respectively. Forests also play a crucial role as a carbon 'sink', containing approximately 77 per cent of all carbon stored in vegetation and 39 per cent of all carbon stored in soils. Deforestation – the human-induced conversion of forest to non-forest land through activities such as land clearing – represents the single largest source of forest-related carbon emissions. Most deforestation occurs in tropical developing counties where an estimated 13 million hectares – an area the size of England – are converted to land uses such as agriculture each year. Deforestation is exacerbated by forest degradation – a reduction in forest biomass from non-deforestation activities such as

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10 Eliasch, above n 9, 15. Forest carbon is found in five so-called 'pools' or 'reservoirs': below-ground biomass, above-ground biomass, litter, dead wood, and soil organic carbon: see Harald Aalde et al, ‘Forest Land’ in Simon Eggleston et al (eds), 2006 IPCC Guidelines for National Greenhouse Gas Inventories (Global Environmental Strategies, 2006) 4.7.
12 Ibid 543.
13 Food and Agriculture Organization, above n 8, xiii; Eliasch, above n 9, xv.
selective timber and fuel-wood harvesting.\textsuperscript{14} Forest degradation represents an estimated 30 per cent of emissions in this sector.\textsuperscript{15}

According to the 2008 Eliasch Review, commissioned by the British government, forest sector emissions could increase atmospheric CO\textsubscript{2} levels by 30 parts per million by 2100 unless mitigation measures are adopted.\textsuperscript{16} This would have an estimated economic impact of US$1 trillion per year by 2100.\textsuperscript{17} As such, REDD or REDD+ clearly needed to be part of a post-2012 climate agreement aiming to prevent dangerous climate change.\textsuperscript{18}

The primary motivation for developing a REDD+ mechanism under the international climate change law (ICCL) regime was to reduce CO\textsubscript{2} emissions and enhance CO\textsubscript{2} removals. According to the 2007 Intergovernmental Panel on Climate Change Fourth Assessment Report (IPCC AR4), REDD represented a mitigation option 'with the largest and most immediate carbon stock impact in the short term'.\textsuperscript{19} An agreement on REDD+ also had the potential to deliver a broader range of economic, social and environmental benefits. Forests, for example, provide an important role in delivering 'ecosystem services' (such as regulating regional rainfall, flood defence, maintaining soil stability and supporting biodiversity) which are crucial for the approximately 1.6 billion people who are in some way dependent on forests for their welfare and livelihoods\textsuperscript{20} and the estimated 350 million people which live directly in forests.\textsuperscript{21} Forests provide fuel-wood, medicinal plants, foods, shelter and many other services to these communities.\textsuperscript{22} Notably, REDD+ had significant potential to reduce the loss of

\textsuperscript{14} Narbuurs, above n 11, 550.
\textsuperscript{16} Eliasch, above n 9, xi, xvi.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid xi-xii.
\textsuperscript{19} Narbuurs, above n 11, 550.
\textsuperscript{20} See Eliasch, above n 9, xv.
\textsuperscript{21} Ibid xix.
\textsuperscript{22} Ibid. See further: UN-REDD Programme, Multiple Benefits – Issues and Options for REDD (UN, 2009) 4.
biodiversity, with tropical forests supporting an estimated 50 to 90 per cent of the world's species.\textsuperscript{23}

\textbf{2 Legal Overview}

\textit{a) UNFCCC and Kyoto Protocol}

Efforts to reduce forest-related emissions in developing countries have evolved slowly under the ICCL regime.\textsuperscript{24} The 1992 UNFCCC only addressed the issue in broad terms. Article 4.1 establishes obligations on all Parties to, for example, promote 'sustainable management' and 'conservation and enhancement' of 'sinks'\textsuperscript{25} and 'reservoirs'\textsuperscript{26} including, inter alia, biomass, forests and other terrestrial ecosystems.\textsuperscript{27} These obligations are very weak due to the vagueness of the language adopted as well as various qualifiers including that the Parties commitments are subject to the principle of 'common but differentiated responsibilities' and their specific 'priorities, objectives and circumstances'\textsuperscript{28} and the principle that 'economic and social development and poverty eradication are the first and overriding priorities' of developing countries.\textsuperscript{29} Developing country obligations are also subject to developed countries first fulfilling their commitments regarding financial and technology transfer.\textsuperscript{30}

A number of Parties to the 1997 Kyoto Protocol to the UNFCCC\textsuperscript{31} sought to incentivise the reduction of forestry-related emissions in developing countries during the negotiations on the Protocol's detailed rules, known as the 'Marrakesh Accords'\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{23} Eliasch, above n 9, 10.
  \item \textsuperscript{25} 'Sink' means any process, activity or mechanism which removes a GHG, an aerosol or a precursor of a GHG from the atmosphere: \textit{UNFCCC} art 1.8.
  \item \textsuperscript{26} ‘Reservoir’ means a component or components of the climate system where a GHG or a precursor of a GHG is stored: Ibid art 1.7.
  \item \textsuperscript{27} Ibid arts 4.1(a). See also arts 4.1(b)-(d).
  \item \textsuperscript{28} Ibid art 4.1.
  \item \textsuperscript{29} Ibid art 4.7.
  \item \textsuperscript{30} Ibid.
  \item \textsuperscript{31} \textit{Kyoto Protocol to the United Nations Framework Convention on Climate Change}, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) (‘Kyoto Protocol’).
\end{itemize}
(adopted in 2001). Several Latin American countries as well as the Umbrella Group (including Australia), favoured including 'avoided deforestation' as a recognised project activity under the CDM. Brazil, China, the Alliance of Small Island States (AOSIS) and others, however, strongly opposed including this activity due to concerns about a potential loss of sovereignty (as forest usage rights could be transferred to foreign states or corporations); the displacement of other types of potentially more beneficial CDM projects such as for renewable energy; Parties' ability to accurately assess additionality, baseline emissions and leakage; as well as the 'flooding' of the carbon market with cheap carbon credits.

Such concerns resulted in forest mitigation activities under the CDM being restricted to two forest restoration activities, namely: afforestation – the conversion of land to forest that has not contained a forest for at least 50 years – and reforestation – the conversion of land to forest that was not forested on 31 December 1989. Together these activities are known as 'A/R'. Forestry projects have had limited uptake in the CDM, chiefly due to: the temporary status given to A/R Certified Emission Reductions (CERs), which means that they must ultimately be replaced by the purchaser; strict

32 The Marrakesh Accords define 'deforestation' as 'the direct human-induced conversion of forested land to non-forested land': UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum 3 (Part 2), UN Doc FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), decision 16/CMP.1, annex [1(d)] ('CMP Report 1: Addendum 3 (Part 2)'). Note that the Marrakesh Accords were initially agreed to by UNFCCC Parties in 2001, before later being adopted by Kyoto Parties in 2005 after the Protocol came into effect.


35 The Marrakesh Accords define a 'forest' as 'a minimum area of land of 0.05-1.0 ha with tree crown cover (or equivalent stocking level) of more than 10-30% with trees with the potential to reach a minimum height of 2-5 metres at maturity in situ...': CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, annex [1(a)].

36 ibid annex [1(b), 1(c), 13].

37 Validated A/R projects issue temporary CERs (tCERs) or long-term CERs (lCERs). tCERs expire at the end of the commitment period subsequent to the one in which they were issued. lCERs expire at the end of the crediting period for the project (either 20 years, renewable twice, or 30 years). A/R CERs must be replaced by Parties which have purchased them with other Kyoto permits at the expiration of their crediting period: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum 1 (Part 2), UN Doc FCCC/KP/CMP/2005/8/Add.1 (30 March 2006), decision 5/CMP.1, annex [1(g), 1(h), 48].
limits on the use of A/R CERs by Annex I Parties;\(^{38}\) and their exclusion from the European Union Emissions Trading Scheme.\(^{39}\)

The idea for a comprehensive agreement on avoided deforestation, then limited to 'reducing emissions from deforestation' (RED), was re-introduced by PNG and Costa Rica in 2005 who suggested developing a separate Protocol on RED or including avoided deforestation in the CDM.\(^{40}\) The proposal was not adopted by Kyoto Parties but RED was placed on the agenda of the Subsidiary Body on Scientific and Technological Advice (SBSTA) to address methodological issues,\(^{41}\) and workshops were held on RED in 2006 and 2007.\(^{42}\)

b) COP 13 Outcomes

As noted, Parties agreed under the BAP at COP 13 to formally establish policy-level negotiations on REDD+, with the aim of including this sector in a post-2012 agreement. Specifically, Parties were to consider:

- '[p]olicy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries' (REDD activities); and
- 'the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' (the REDD '4+' activities).\(^ {43}\)

While deforestation and forest degradation were the primary concern of most Parties, several countries pushed strongly for the inclusion of the '4+' activities. India, which has little deforestation, gained the inclusion of conservation, wishing to receive financial

\(^{38}\) Total acquisitions of A/R CERs by Annex I Parties must not exceed one per cent of their base year emissions, times five: CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, annex [14].


\(^{40}\) See Fry, 'More Twists, Turns and Stumbles in the Jungle', above n 34, 348-49.

\(^{41}\) Ibid 349.

\(^{42}\) See UNFCCC, Report on a Workshop on Reducing Emissions from Deforestation in Developing Countries, UN Doc FCCC/SBSTA/2006/10 (11 October 2006); UNFCCC, Report on the Second Workshop on Reducing Emissions from Deforestation in Developing Countries, UN Doc FCCC/SBSTA/2007/3 (17 April 2007) (hosted by Australia).

\(^{43}\) COP 13 Report, decision 1/CP.13, [(b)(iii)].
compensation for retaining its remaining forests.\textsuperscript{44} Japan – a long-time proponent of the sustainable management of forests (SMF – essentially sustainable logging practices) – pushed for the inclusion of this activity.\textsuperscript{45} China, whose forest carbon stocks were increasing, gained inclusion of the enhancement of carbon stocks (ECS) with the aim of obtaining financial reward for growing plantations.\textsuperscript{46} Other countries saw ECS as encompassing other carbon stock enhancement activities such as soil carbon improvements through improved agricultural activities, replanting of degraded forests, or A/R activities.\textsuperscript{47}

Decision 2 at COP 13 also provided guidance to the Parties on the development of REDD+, including by, for example:

- mandating the SBSTA to continue addressing methodological issues;\textsuperscript{48}
- encouraging Parties to support capacity-building and provide technical assistance and technology transfer to developing countries to improve their REDD data, monitoring and reporting and to address their institutional needs;\textsuperscript{49} and
- further encouraging Parties to explore a range of activities, including ‘demonstration activities, to address the drivers of deforestation ... with a view to reducing emissions from deforestation and forest degradation’.\textsuperscript{50}

B The Rudd Government’s Support for a Market-based REDD+ Mechanism

As noted, one of the key issues for the REDD+ negotiations to address was whether or not the mechanism should operate as a market or fund-based mechanism (or a mix of the two). The essential difference between these approaches was that a market-based

\textsuperscript{45} Ibid 180.
\textsuperscript{46} Ibid 180-181.
\textsuperscript{47} Ibid 181.
\textsuperscript{48} COP 13 Report, decision 2/CP.13, [7].
\textsuperscript{49} Ibid [2].
\textsuperscript{50} Ibid [3].
mechanism would allow carbon credits (also known as emission permits or carbon offsets) to be awarded to participating developing countries for achieving emission reductions below a defined 'reference emission level'. These credits could then be purchased by Annex I Parties (either by governments or authorised private entities) to assist in meeting their mitigation targets.\textsuperscript{51} As with the CDM, a market-based mechanism would allow emission reductions to be funded largely by the private sector. By contrast, emission reductions under a fund-based approach would not generate carbon credits and would instead be directly funded by developed country governments.\textsuperscript{52}

1 The Rudd Government's Position

The Rudd government's strong advocacy for a market-based REDD+ mechanism was heavily driven by economic considerations. It made this clear, stating that REDD was 'one of the most cost-effective opportunities for reducing global emissions in the short-term.'\textsuperscript{53} This view was informed by the Australian Treasury who estimated that if REDD and other forest-related mitigation activities were not included in international emissions trading after 2012, global mitigation costs could be up to 25 per cent higher.\textsuperscript{54} The Rudd government thus saw a market-based approach to REDD, leveraging the capital of the private sector and encouraging global abatement to occur first where it is cheapest, as the most 'efficient and effective means' of achieving global mitigation objectives.\textsuperscript{55} This view was consistent with its broader position that flexibility mechanisms should cover 'as many sectors and activities as possible' so as to reduce Annex I Parties' mitigation costs.\textsuperscript{56}

\textsuperscript{51} See generally Arens, above n 15, 28.
\textsuperscript{52} See ibid 27.
\textsuperscript{53} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 7.
\textsuperscript{54} Treasury, Australia's Low Pollution Future: The Economics of Climate Change Mitigation (Summary) (2008) 27. As a percentage of GWP and in relation to a 550 ppm CO2-e agreement. The Eliasch Review estimated that a market-based REDD mechanism could reduce the cost of halving global emissions by up to 50 per cent in 2030 and 40 per cent in 2050: Eliasch, above n 9, xii, 84.
\textsuperscript{55} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 7.
While pushing for a market approach to REDD, the Rudd government recognised that developed countries would need to directly fund 'REDD-readiness' activities in the short to medium-term; such as assistance for carbon monitoring and accounting, policy development and institutional capacity-building. However, the broader aim of this was still to prepare developing countries for participation in a market-based mechanism with the government arguing that only carbon markets could mobilise investment 'on the scale needed to support and provide incentives for these emission reductions.'

2 Other Party Views

Developed countries, among them the United States (US), EU and one of the strongest proponents of REDD, Norway, also backed a market-based mechanism (although again with direct funding by developed countries for REDD-readiness activities). Most Parties supporting a market approach, including Australia, recognised that due to the complexities of REDD+, the mechanism would need to evolve through a phased approach with preliminary activities such as establishing GHG inventories, monitoring capabilities, demonstration activities, legal frameworks and so forth being financially supported by developed countries; with carbon credits only being generated once host

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57 Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 3, 9.
58 Ibid 7.
60 Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 9.
countries could deliver verified emissions abatement. Potential sources of funding for the early phases of REDD+ included, among others, the World Bank-hosted Forest Carbon Partnership Facility (FCPF) and the UN-REDD Programme which are largely supported by voluntary developed country contributions; bilateral arrangements with developed country governments; and the then still to be negotiated post-2012 Financial Mechanism.

Developing countries were more divided on the market versus fund issue. Many expressed a preference for a non-offsetting mechanism funded by the proposed new Financial Mechanism, among them AOSIS; Brazil; Ecuador; Nicaragua, Guatemala, Dominican Republic, Honduras, Panama; and Bolivia. Bolivia, for example, argued that a fund-based approach would allow for a more 'equitable distribution of funds'; be 'more likely to ensure environmental integrity'; better 'protect the rights of indigenous peoples and local communities as there would be no transfer of rights of carbon ownership to the market'; and 'ensure sovereignty and national as well as local control over REDD-plus activities'.

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63 See UN, UN-REDD Programme <http://www.un-redd.org>/.
64 See further discussion of potential funding streams below.
70 Ibid.
Equally, however, many developing countries shared the view that while direct funding was needed in the early stages of REDD+, ultimately the mechanism needed to link to the market.\textsuperscript{71} Chiefly, these countries included the ‘Rainforest Coalition’ (a like-minded group of developing nations primarily from the Amazon, Congo Basin and Southeast Asia, and led by one of Australia’s key REDD partners, PNG),\textsuperscript{72} Indonesia\textsuperscript{73} (Australia’s other key REDD partner); the African Group,\textsuperscript{74} the Congo Basin countries,\textsuperscript{75} and India.\textsuperscript{76} Importantly, however, the Rainforest Coalition stated that the linking of REDD to the market must be preceded by an ambitious collective Annex I mitigation target of at least 40 per cent below 1990 levels by 2020 and 80 per cent by 2050.\textsuperscript{77} This was to ensure that there was sufficient demand (and hence a sufficient price) for REDD credits.\textsuperscript{78} The Rainforest Coalition and others were also concerned to ensure that regardless of the source of financing, REDD+ would deliver ‘transparent, adequate, predictable and sustainable’ funding.\textsuperscript{79}

3 Would a Market-based REDD+ Mechanism be Environmentally Effective?

Parties widely recognised that significant hurdles needed to be overcome if REDD+ was to be an environmentally effective mechanism. It was of course important for REDD+...
to deliver genuine emissions abatement regardless of whether it operated as a market or fund-based mechanism. However, the credibility of claimed abatement was particularly important if the mechanism was used by Annex I Parties as a substitute for domestic emissions abatement. This is because if REDD+ credits represented 'hot air' (non-genuine emissions abatement), the use of REDD+ credits would ultimately contribute to an increase in global GHG levels.

As argued in chapter 7, a GIC would generally be expected to utilise approaches that involve genuine emissions abatement in order to act consistently with the UNFCCC's central objective of avoiding dangerous climate change. This chapter therefore contends that whether the Rudd government pushed for an environmentally effective design for REDD+ was as a key determinant of its GIC credentials on this issue. At face value, the Rudd government appeared to recognise the importance of this issue, stating that the mechanism ought to be 'effective', 'robust and credible' and 'ensure environmental integrity'. However, as will be seen below, establishing a credible mechanism was likely to be easier said than done.

This chapter now turns to considering the various design issues and hurdles that a REDD+ mechanism needed to overcome if it was to deliver credible emissions abatement.

a) Key Design Issues and Hurdles

i) Scope of Activities

As a preliminary issue, concerns were raised about the implications of expanding REDD to REDD+. Fry (Tuvalu's climate negotiator), for example, argued that India could receive unjustified financial compensation as its forest conservation efforts were chiefly driven by domestic interests unrelated to preventing climate change. Environmental groups such as Greenpeace also argued that the mechanism should focus on REDD activities, seeing the + activities as a distraction from the key objective

80 Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 3.
of protecting primary forest – the largest forest-related carbon stock and the major source of biodiversity.\textsuperscript{82} Parties such as Suriname, however (a so-called ‘high forest low deforestation’ country), warned that unless the mechanism extended to activities such as SMF and conservation, these Parties’ forests would be susceptible to deforestation in future as they sought to develop their economies.\textsuperscript{83} While it was clearly important to avoid ‘rent seeking’ behaviour from countries such as India, most developed and developing countries recognised the need for a broad REDD+ mechanism, as envisaged by the BAP, which accommodated the differing national circumstances of developing countries.\textsuperscript{84}

In addition to the + activities referred to by the BAP, Australia and Norway favoured extending the mechanism to A/R activities, already included, but unpopular, in the CDM.\textsuperscript{85} The Rudd government argued that including A/R under REDD+ would increase the abatement potential of the mechanism and the range of Parties which might participate.\textsuperscript{86} Its position was also likely driven by the relatively cheap abatement opportunities offered by these activities.\textsuperscript{87} Concerns have been raised in the literature that A/R projects could result in adverse impacts for biodiversity if mono-plantations

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\textsuperscript{83} See Suriname, 'Paragraph 1 (b) (iii): Reducing Emissions from Deforestation, Forest Degradation and the Role of Conservation, Sustainable Forest Management and Enhancement of Forest Carbon Stocks (REDD+)’, in UNFCCC, \textit{Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Part 2, FCCC/AWGLCA/2009/MISC.4 (Part 2) (24 April 2009) 101, 101. This was consistent with the so-called ‘forest transition theory’ which postulates that countries initially engage in high levels of deforestation as they develop, which tapers as they become more economically advanced: see Eliasch, above n 9, 47.


\textsuperscript{85} Australia, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’ (23 March 2009), above n 1, 3; Norway, above n 59, 55. Note that while A/R could be regarded as ‘carbon stock enhancement’ under the BAP various Parties identified it as a separate activity. Australia also supported extending REDD+ to the full land sector, including agriculture, as developing country capabilities increased: 5.land sector in developing countries over time: UNFCCC, \textit{Notes on Sources for FCCC/AWGLCA/2009/INF.1 (Part 2) (2009) 111.

\textsuperscript{86} Australia, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’ (23 March 2009), above n 1, 3.

and non-native species were used.\footnote{See Arens, above n 15, 25; Max Collett, 'In the REDD: A Conservative Approach to Reducing Emissions from Deforestation and Forest Degradation' (2009) 3 Carbon and Climate Law Review 324, 333.} However, the Rudd government indicated that it was keen to ensure that the mechanism did not result in 'perverse outcomes' for biodiversity.\footnote{Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 6.} So long as biodiversity concerns were sufficiently addressed, the Rudd government's preference to include A/R appeared to be a sensible approach as it would be inconsistent to regulate A/R under the CDM but not include it in a comprehensive forestry mechanism.

\textit{ii) National or Sub-national Accounting}

Parties also debated whether to establish REDD+ at a national or sub-national level. A national-level approach would see host countries earn credits for emission reductions and enhanced removals achieved against a national 'baseline' or 'reference emission level'. In contrast, a sub-national approach would operate more like the CDM, generating credits for emission reductions or enhanced removals achieved by individual projects or groups of projects. The Rudd government\footnote{Ibid 3, 6.} shared the view of most Parties,\footnote{See, eg, Belize et al, 'Submission of Views' (30 March 2009), above n 61, 6; Nicaragua et al, above n 68 39; Arens, above n 15, 19-20 (EU, Brazil and China).} that a national level approach to accounting was necessary if the mechanism was to be environmentally effective, even if projects were implemented sub-nationally. The risk of not applying a national baseline was that emission reductions achieved by one project could be nullified by increased deforestation activities in other parts of the country – a process known as 'intra-national leakage'.\footnote{Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 6.} As a national-approach would be more complex and expensive to implement some developing countries argued that REDD+ needed to encompass sub-national approaches so as to allow for differing national circumstances (with some potential host countries having particularly weak institutional, technical and financing capabilities).\footnote{See, eg, Colombia, 'Reducing Emission from Deforestation: Consideration of Relevant Methodological Issues' in UNFCCC, Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries, UN Doc FCCC/SBSTA/2008/MISC.4 (22 April 2008) 7, 10.} The Rudd government's push for a national-level approach, however,
was certainly the more desirable, being better placed to address leakage concerns which may otherwise undermine the environmental integrity of the mechanism.\(^{94}\)

**iii) Setting Baseline Emission Levels**

A major hurdle for the environmental effectiveness of REDD+ concerned the need to develop credible baselines or reference emission levels from which emission reductions and enhanced removals could be measured and emission credits ultimately awarded.\(^{95}\) The Rudd government accepted that addressing this issue was 'critical to the success of a market-based approach.'\(^{96}\) As with sectoral crediting or sectoral trading approaches (see chapter 7), REDD+ faced the problem that if host countries' baseline emission levels were set too high, some carbon credits would represent hot air. On the other hand, if baseline levels were set too low, an insufficient financial incentive would exist to discourage deforestation.\(^{97}\) Thus, the challenge was to establish methodologies that both ensured the additionality of emission reductions and incentivised the participation of developing countries.\(^{98}\)

The most straightforward approach to setting baselines was to simply apply host countries' historic emission levels. This approach was preferred by Parties such as Brazil, India and Indonesia, who believed that historical emissions provided the best baseline for measuring actual emission reductions.\(^{99}\) Most Parties, however, including Australia,\(^{100}\) the EU, US, Norway and most developing countries, believed that a more nuanced 'historical-adjusted' approach was necessary that reflected both historical

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\(^{96}\) Australia, 'Views on How to Address Outstanding Methodological Issues on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' in UNFCCC, *Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries: Addendum 2*, FCCC/SBSTA/2008/MISC.4/Add.2 (2 June 2008) 3, 5.

\(^{97}\) See Norway, above n 59, 56.

\(^{98}\) See ibid.

\(^{99}\) Arens, above n 15, 20.

emission levels and national circumstances.\textsuperscript{101} A key deficiency of any baseline that only reflected historical emissions was that it could not adequately incentivise the participation of the high forest low deforestation countries which had yet to commercially exploit their forests.\textsuperscript{102}

Parties backing the historical-adjusted approach suggested that baselines should reflect a range of forward-looking factors. The Rudd government, for example, proposed that baselines reflect:

- historical emissions data;
- pre-existing emissions reduction measures;
- population growth;
- the drivers of deforestation;
- relevant national policies and measures;
- national circumstances; and
- respective capabilities.\textsuperscript{103}

Other Parties suggested criteria such as gross national product (GNP) per capita;\textsuperscript{104} estimated future emissions and removals trends;\textsuperscript{105} a 'developmental adjustment' factor;\textsuperscript{106} and early action to reduce emissions.\textsuperscript{107} Numerous approaches were also suggested in the literature.\textsuperscript{108}

As discussed in chapter 7 in relation to sectoral mechanisms, establishing credible baseline emission levels in developing countries would be a challenging task. This would be especially the case for forestry emissions. Setting baselines according to

\textsuperscript{101} Arens, above n 15, 20.
\textsuperscript{102} See Cameroon et al, above n 75, 24, 25.
\textsuperscript{103} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 7, 9.
\textsuperscript{104} Norway, above n 59, 57.
\textsuperscript{105} Ibid.
\textsuperscript{106} Belize et al, 'Submission of Views' (30 March 2009), above n 61, 7.
\textsuperscript{107} Ibid.
historical emissions would be difficult due to the fact that most developing countries have highly inaccurate historical emissions data.\textsuperscript{109} Meanwhile, historical adjusted-approaches would risk creating non-genuine credits.\textsuperscript{110} This is because historical-adjusted baselines would be based upon assumptions about future deforestation and emission rates and thus would only be reliable as the assumptions they relied upon.\textsuperscript{111} Notably, even developed countries like Australia have had significant difficulty estimating future emissions from deforestation.\textsuperscript{112} A further difficulty was that a REDD+ mechanism needed to secure the wide participation of developing countries in order to minimise the 'international leakage' of emissions (see below). This created the risk that host countries would be granted inflated baselines (maximising their financial return) in order to incentivise their participation.

\textit{iv) Non-Permanence}

Another key issue was how to address the non-permanent nature of forestry-related CO\textsubscript{2} removals, a feature of the land-based sector which means that certified emission reductions and enhanced removals may re-enter the atmosphere at a later point in time (for example, if protected forest is later deforested). As noted, Kyoto Parties sought to address this issue in relation to A/R CDM projects by classifying A/R CERs as temporary, but this approach proved to be unworkable.

The Rudd government proposed to address non-permanence concerns under REDD+ by establishing an international 'confidence buffer', that is, a pool of credits that would be set aside and used to replace REDD+ credits in the event of a 'major anthropogenic event' that caused a reversal of reductions or removals.\textsuperscript{113} Each host country would contribute a percentage of their generated credits to the buffer for this purpose.\textsuperscript{114} This would allow REDD+ credits to be classified as permanent. The Rainforest Coalition

\textsuperscript{109} Arens, above n 15, 18.
\textsuperscript{110} Ibid 19.
\textsuperscript{112} See Andrew Macintosh, ‘The Australia Clause and REDD: A Cautionary Tale’ (2012) 112 \textit{Climatic Change} 1, 8. Aggregate emissions for five year periods for which data is available have been between 32 to 63 per cent higher than projected: 9.
\textsuperscript{113} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries' (23 March 2009), above n 1, 8.
\textsuperscript{114} Ibid.
also proposed a buffer approach,\textsuperscript{115} which has been utilised in the voluntary carbon market by the Verified Carbon Standard and the Chicago Climate Exchange.\textsuperscript{116}

The Rudd government's proposal to address non-permanence appeared to have merit. Notably, however, Australia only proposed to replace credits where reversals were due to anthropogenic causes and not natural events such as wildfires. This was a major flaw from an environmental effectiveness point of view, creating the obvious risk that carbon credits could be awarded but later become meaningless if the associated emission reductions were reversed by non-anthropogenic events. If forests did not regrow after a natural wildfire, for example, the associated emission reversals would go unaccounted for. The Rainforest Coalition supported Australia's approach,\textsuperscript{117} but others such as Norway adopted a more environmentally responsible position recognising that both anthropogenic and naturally-caused reversals should be accounted for.\textsuperscript{118}

\textit{v) International Leakage}

A further barrier to the environmental effectiveness of REDD+ was the problem of international leakage, that is, where policy measures to reduce deforestation in one country simply displaced this activity to others. The problem of international leakage is not unique to REDD+; rather, it is a general issue faced by the ICCL regime. However, Parties recognised that international leakage was a major risk to the credibility of REDD+, particularly as an offsets mechanism. Most Parties, including Australia,\textsuperscript{119} believed that international leakage was best addressed by encouraging broad

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} Belize et al, 'Submission of Views' (30 March 2009), above n 61, 6. Norway also proposed related ideas such as insurance arrangements, or a temporary setting aside of REDD revenues: Norway, above n 59, 57.
\item \textsuperscript{116} Previously known as the Voluntary Carbon Standard. See Baker & McKenzie and Covington & Burling LLP, \textit{Background Analysis of REDD Regulatory Frameworks} (Terrestrial Carbon Group and UN-REDD Programme, 2009) 32.
\item \textsuperscript{117} Belize et al, 'Submission of Views' (30 March 2009), above n 61, 9.
\item \textsuperscript{118} Norway, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 59, 57.
\item \textsuperscript{119} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)' (24 November 2008), above n 100, 83. The Rudd government also highlighted a range of measures which could assist in monitoring, though not preventing international leakage, such as a global carbon monitoring system (which Australia was helping to develop) and Annex I Party reporting of imported 'harvested wood products' from developing countries: 83-84.
\end{itemize}
\end{footnotesize}
participation in the mechanism.  

Norway, however, took a stronger stance in proposing that Parties consider applying an 'international leakage discount factor' to REDD+ credits until all developing countries were participants.  

vi) Measuring, Reporting and Verifying Emission Reductions/Enhanced Removals

Another key challenge was how to establish reliable systems for measuring, reporting and verifying (MRV) forestry-related emission reductions and enhanced removals in host countries. This would generally require the use of satellite remote-sensing and ground-based assessments in combination with appropriate methodologies for estimating emissions and removals. Most Parties, including Australia, held the view that REDD+ was technically viable, especially in relation to deforestation activities, given technical advancements and growing scientific expertise in the area of forestry accounting. But Parties recognised that significant financial, technological and human resources, including capacity-building, were required in developing countries for reliable REDD+ MRV to eventuate.

The Rudd government understood the importance of high-quality MRV and proposed that prior to participating in the market-phase of REDD+ host countries would need to meet minimum and rigorous MRV specifications that were consistent with IPCC Tier 3


121 Norway, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 59, 56.


123 See, eg, Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)' (24 November 2008), above n 100, 80; International Institute for Sustainable Development, Earth Negotiations Bulletin, vol 12(387) (2 December 2008) 1 (EU). This view was supported by several major studies: see, eg, Eliasch, above n 9, 145; Angelsen, above n 94, ix; Ruth Defries et al, 'Earth Observations for Estimating Greenhouse Gas Emissions from Deforestation in Developing Countries' (2007) 10 Environmental Science & Policy 385.

124 See, eg, Norway, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 59, 56; Colombia, above n 93, 10; Cameroon et al, above n 75, 25.
accounting (the most rigorous level) and other IPCC guidelines. It also suggested that the IPCC be involved in developing performance specifications. The aim of REDD MRV systems would be to ensure that emission reductions were ‘real, measurable, permanent, additional and independently verifiable’. Most Parties shared Australia’s view that a high-level of rigour was required for MRV systems, especially for market-linked credits, and that these would need to build on existing IPCC guidelines. Some Parties, however, were prepared to accept less stringent MRV systems than Australia. The US, for example, was open to host countries applying IPCC Tier 1 accounting (the least stringent level) as the minimum standard for participation in a market mechanism, while Colombia and Indonesia were open to the use of Tier 2 accounting. Thus Australia adopted a more environmentally rigorous position than some. To its credit, Australia was also actively engaged in activities to advance MRV systems in developing countries including in Indonesia (see section C).

vii) Deforestation Laws and Governance

Inadequate laws and poor governance in many developing countries were further recognised problems confronting the successful implementation of REDD+. Acknowledging this concern, the Rudd government proposed that a host country would need to implement ‘effective national and/or sub-national level policy,

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125 Australia, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’ (23 March 2009), above n 1, 8; Australia, ‘Views on How to Address Outstanding Methodological Issues on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’, above n 96, 5.
126 Australia, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)’ (24 November 2008), above n 100, 83.
127 Ibid.
128 See, eg, Norway, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’, above n 59, 56; Belize et al, ‘Submission of Views’ (30 March 2009), above n 61, 7.
130 Colombia, above n 93, 8; Indonesia, ‘Reducing Emissions from Deforestation in Developing Countries’ in UNFCCC, Views on Outstanding Methodological Issues Related to Policy Approaches and Positive Incentives to Reduce Emissions from Deforestation and Forest Degradation in Developing Countries, UN Doc FCCC/SBSTA/2008/MISC.4 (22 April 2008) 29, 31.
governance, enforcement and regulatory frameworks' as a precondition to entering a market mechanism.\textsuperscript{132} Australia was right to highlight this issue, but the literature has underscored how difficult establishing effective REDD+ laws and governance is likely to be in practice. Multiple issues would need to be overcome including unclear legal frameworks (including with respect to land tenure, indigenous land ownership or interests, and carbon property rights); inconsistency between national and provincial laws; foreign ownership and investment restrictions;\textsuperscript{133} and the weakness of many national, regional and local institutions.\textsuperscript{134} A major problem is that many developing countries have high levels of corruption across their societies and economies, not just in relation to forestry, which cannot be quickly or easily resolved by REDD+.\textsuperscript{135} These issues have been seen in relation to the CDM in which many African countries, for example, have struggled to participate due to governance and corruption issues.\textsuperscript{136} A particularly significant issue was the need to address the rights of local communities and indigenous peoples with an estimated 60 million indigenous people being almost wholly dependent on forests.\textsuperscript{137} See further discussion of this latter issue in relation to the KFCP at section C.

\textit{viii) Addressing the Drivers of Deforestation}

Finally, Parties recognised that REDD+ would need to address the various and inter-linked drivers of deforestation in developing countries.\textsuperscript{138} The key purpose of REDD+ was to make forests worth more to owners standing – in financial terms – than if logged, helping to address the major economic driver of deforestation.\textsuperscript{139} Other drivers of deforestation, however, also needed to be addressed. For example, large-scale deforestation generally occurs in order to supply timber and agricultural products for

\textsuperscript{132} Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)' (24 November 2008), above n 100, 82.
\textsuperscript{134} Eliasch, above n 9, xix.
\textsuperscript{136} Arens, above n 15, 36.
\textsuperscript{137} Eliasch, above n 9, 9.
\textsuperscript{138} See, eg, United States, 'Reducing Emissions and Enhancing Removals from Forests and Land Use', above n 59, 33.
\textsuperscript{139} See Eliasch, above n 9, 35-36.
both local and global markets\textsuperscript{140} and demand for such products was likely to continue rising as the global population increased.\textsuperscript{141} Inadequate laws, governance and institutions also act as drivers of deforestation. Examples include policy and legal frameworks that encourage deforestation by providing subsidies and tax breaks; lack of clear and secure land tenure/property rights (meaning that logging concessions are easily awarded); and weak law enforcement practices and capacity that allows large-scale illegal logging to take place.\textsuperscript{142} Illegal logging in Indonesia, for example, may be responsible for between 40 to 60 per cent of its deforestation.\textsuperscript{143} The decisions of developed countries also drive deforestation, such as whether or not consumers choose to purchase sustainably produced timber and agricultural products.\textsuperscript{144} Thus while the aim of REDD+ was to address the key driver of deforestation – the economic value of logging vis-a-vis forest protection – it was also clear that reducing deforestation required a much broader, multi-faceted approach.

\textit{b) Additional Risks of a Market-linked REDD+ mechanism}

In addition to the challenges outlined above, various stakeholders and commentators highlighted that a market-based REDD+ mechanism would introduce an additional layer of complexity due to the nature of market-based mechanisms (see general discussion of these in chapters 6 and 7). According to the 2008 Meridian Report, commissioned by the Norwegian government, the major risks that would arise under a REDD+ market mechanism included:

- market flooding: – large amounts of REDD+ credits saturating the carbon market (depressing the global carbon price, reducing the income of host countries, and decreasing the incentive for developed countries to undertake domestic abatement);
- price volatility; and

\begin{enumerate}
\item\textsuperscript{140} Ibid 36. See also John Costenbader, 'Introduction' in John Costenbader (ed), \textit{Legal Frameworks for REDD: Design and Implementation at the National Level} (IUCN, 2009) 6-8.
\item\textsuperscript{141} Eliasch, above n 9, 35.
\item\textsuperscript{142} Ibid 35-36.
\item\textsuperscript{143} Erik Olbrei and Stephen Howes, 'A Very Real and Practical Contribution? Lessons from the Kalimantan Forests and Climate Partnership' (Discussion Paper 16, Development Policy Centre, ANU, March 2012) 29.
\item\textsuperscript{144} Eliasch, above n 9, xvi.
\end{enumerate}
• price shocks due to uncertainties around the timing of REDD+ credits entering
the market.\textsuperscript{145}

Developed countries would also need to adopt sufficiently ambitious mitigation targets
in order to create the necessary demand for this new source of credits.\textsuperscript{146}

Such concerns were not necessarily insurmountable, however, with various levers
existing to mitigate potential supply and demand risks, such as: controlling the supply
of REDD+ credits; requiring Annex I Parties to purchase an agreed percentage of
REDD+ credits in meeting their targets; capping the quantity of REDD+ credits that
could be purchased by developed countries in line with the principle of
'supplementarity' (see chapter 7); and establishing a floor and ceiling price on
credits.\textsuperscript{147} The Rainforest Coalition also believed that requiring developed countries to
directly fund a portion of REDD+ on an ongoing basis would help to mitigate
fluctuations in supply and demand.\textsuperscript{148}

c) Quantity and Sources of Funding

As discussed in chapter 6, developing countries made various proposals regarding their
post-2012 financing needs. The G77 and China, for example, called for developed
countries to direct 0.5 to 1 per cent of their GNP to developing countries for mitigation
and adaptation purposes.\textsuperscript{149} Developing countries also suggested that a range of
sources could help Annex I Parties to directly fund REDD+ (either in full or in part),
among them:

• new and additional official development assistance;
• the auctioning of Assigned Amount Units (AAUs), which were allocated freely
to Annex I Parties under the Kyoto Protocol's first commitment period;

\textsuperscript{145} Angelsen, above n 94, 59. See also, Friends of the Earth International, \emph{REDD Myths: A Critical Review
of Proposed Mechanisms to Reduce Emissions from Deforestation and Degradation in Developing
Countries} (2008) 7. For an early legal overview of issues confronting REDD see also Rosemary Lyster,
\emph{Environmental and Planning Law Journal} 417, 441.

\textsuperscript{146} Angelsen, above n 94, 60.

\textsuperscript{147} See ibid. See also Eliash, above n 9, xviii, 165.

\textsuperscript{148} Belize et al, ‘Submission of Views’ (30 March 2009), above n 61, 6, 7.

\textsuperscript{149} G77 and China, ‘Financial Mechanism for Meeting Financial Commitments under the Convention’ in
the auctioning of national emission permits under developed countries’
domestic emissions trading schemes (ETS);
a levy on the trading of AAUs; and
carbon taxes within Annex I countries.\(^{150}\)

Environmental groups such as Friends of the Earth also suggested measures such as
redirecting fossil fuel subsidies (estimated as being worth $US57-$100 billion per
annum) and establishing new global taxes such as on shipping, aviation and financial
markets.\(^{151}\)

As noted, Australia and many other Parties rejected such approaches, in part due to
their belief that ultimately the carbon market needed to be utilised if sufficient
financing for REDD+ was to be available in the long-term. Much of the literature shared
the view that a market mechanism was preferable as it would enable both public and
private sector sources to be fully leveraged and also help to deliver least cost global
abatement by encouraging the cheapest abatement options to be pursued first.\(^{152}\) A
market scheme would essentially generate finance by allowing host countries to sell
REDD+ CERs to entities in developed countries, particularly in the private sector, who
had liabilities under domestic ETSs and wished to reduce their abatement costs by
purchasing international credits.\(^{153}\) A market scheme would also encourage the private
sector to invest in REDD+ projects on the expectation of making a profit from the sale
of REDD+ credits. Importantly, a market-based REDD+ mechanism would avoid the
need to introduce significant and likely unpopular new taxes to fund REDD+ within
developed countries. This was a major concern for Annex I Parties in the negotiations,

\(^{150}\) See Belize et al, ‘Submission of Views’ (30 March 2009), above n 61, 4, 5; Panama, Paraguay and El
Salvador, ‘Proposing Text for Six Different Sections: Preamble, Shared Vision, Mitigation, Adaptation,
Technology, Finance, REDD’ in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of
\(^{151}\) See Friends of the Earth, ‘State of Forest Carbon Market: A Critical Perspective’ (Policy Paper, Friends
of the Earth, 2011) 6-8. The Group of 20 nations have politically committed to phasing out fossil fuel
subsidies.
\(^{152}\) See, eg, Angelsen, 6-7; Eliasch, above n 9, xviii; Arens, above n 15, 30, 36; Kossoy and Ambrosi, above
n 39, 33-34.
\(^{153}\) See discussion of ETSs in chapter 7.
especially with the 2008 Global Financial Crisis placing significant constraints on many developed countries' public budgets.\(^{154}\)

The reason why developed countries including Australia regarded market mechanisms as preferable is obvious when the likely scale of financing needed for REDD+ is considered. The Meridian Institute estimated that US$15-$35 billion would be required per annum for REDD+ readiness and implementation if global forest emissions were to be halved.\(^{155}\) Similar estimates were made by the Eliasch Review and other studies.\(^{156}\) Tens of billions of additional dollars would also be required for the + activities.

The major outcome of COP 15, the Copenhagen Accord, saw Parties agree on the need for the 'immediate establishment of a mechanism including REDD-plus, to enable the mobilisation of financial resources from developed countries' for this purpose.\(^{157}\) Developed countries also agreed to direct new finance to REDD+ as part of their broader commitment to provide US$30 billion in fast-start financing for 2010-2012, and US$100 billion annually by 2020 for mitigation and adaptation activities in developing countries.\(^{158}\) Six nations – France, Japan, Norway, the United Kingdom, the US and, to the Rudd government's credit, Australia – also directly pledged US$3.5 billion of fast-start finance towards REDD+.\(^{159}\) Parties were unable to agree, however,
on the source of long-term financing for REDD+, that is, whether it would be market or fund-based.\textsuperscript{160}

Briefly, it can be seen that, notwithstanding environmental effectiveness concerns, assessing the merits of the Rudd government’s support for a market-based REDD+ mechanism is not a simple task. While it is unclear whether a market-linked mechanism will be able to generate credible CERs, the substantial funding requirements of REDD+ arguably suggest that a market-based approach at least needed to be explored and tested. The implications of the Rudd government’s support for a market-based approach for its credentials as a GIC are considered further at section D after first examining its involvement in REDD demonstration activities.

C The Rudd Government and the Kalimantan Forests and Carbon Partnership

1 Legal and Issue Background

As noted above, decision 2 at COP 13, Bali, called for Parties to support capacity-building and to provide technical assistance and technology transfer for REDD to developing countries, as well as undertaking REDD ‘demonstration activities’.\textsuperscript{161} Decision 2 also provided indicative guidelines for demonstration activities,\textsuperscript{162} while basic methodological guidance on conducting REDD+ was later provided in decision 4 at COP 15.\textsuperscript{163}

Since Bali, various international initiatives have been established in order to support the development of REDD+ under a post-2012 agreement. Multilateral initiatives (chiefly funded by voluntary donations from developed countries) have included the UN-REDD Programme;\textsuperscript{164} the FCPF and the Forest Investment Program (FIP, both

\textsuperscript{160} Parties later deferred a decision on financing the third, results-based phase for REDD+ until at least COP 17: UNFCCC, Report of the Conference of the Parties on its Sixteenth Session: Addendum (Part 2), UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), decision 1/CP.16, part iii(c) [77].

\textsuperscript{161} COP 13 Report, decision 2/CP.13, [2, 3].

\textsuperscript{162} Ibid, annex.

\textsuperscript{163} COP 15 Report, decision 4/CP.15.

\textsuperscript{164} UN, About the UN-REDD Programme <http://www.un-redd.org/AboutUN-REDDProgramme/tabid/102613/Default.aspx>.
hosted by the World Bank);\textsuperscript{165} the Congo Basin Forest Fund;\textsuperscript{166} funding for REDD+ and SMF by the Global Environment Facility;\textsuperscript{167} and the REDD+ Partnership.\textsuperscript{168} Various countries have also established bilateral initiatives, led by Norway’s International Climate and Forest Initiative,\textsuperscript{169} which included a results-based pledge of US$1 billion to assist Indonesia establish REDD+ at the national level, including by inter alia: completing a REDD+ strategy, developing an MRV system and funding instrument, piloting province-wide REDD+ schemes, and implementing a two year moratorium on new forestry concessions for the conversion of peat and natural forest.\textsuperscript{170}

2 The Rudd Government’s Contribution to REDD+ Readiness: Overview

Australia’s involvement in efforts to reduce forest carbon emissions in developing countries was begun by the Liberal National Howard government during its last year in office. In March 2007, the Howard government announced the $200 million Global Initiative on Forests and Climate (GIFC) which would aim to reduce deforestation, plant new forests and promote SMF in developing countries.\textsuperscript{171} In September 2007, the government then announced the $100 million KFCP, in cooperation with Indonesia, which promised to reduce emissions by around 700 million tonnes over 30 years in central Kalimantan.\textsuperscript{172} Australia committed $30 million to the Partnership, expecting to raise the remainder through contributions from other countries and the private

\textsuperscript{165} Climate Investment Funds, Forest Investment Program <https://www.climateinvestmentfunds.org/cif/node/5>.
\textsuperscript{167} Global Environment Facility, Sustainable Forest Management (SFM)/REDD+ <http://www.thegef.org/gef/SFM>.
\textsuperscript{168} REDD+ Partnership, REDD+ Partnership <REDD+ Partnership>.
\textsuperscript{171} John Howard, Alexander Downer and Malcolm Turnbull, ‘Australia to Lead the World: Global Initiative on Forests and Climate’ (Media Release, 29 March 2007).
sector. At the High Level Meeting on Forests and Climate, hosted by Australia in July 2007, the Howard government also announced that Australia would be the lead developer of a Global Carbon Monitoring System to help monitor changes in forest cover and forest carbon.

Following its election in November 2007, the Rudd government re-announced and re-badged the Howard government’s GIFC as the International Forest Carbon Initiative (IFCI). To be implemented jointly by the Department of Climate Change (DCC) and AusAID, the IFCI would aim to demonstrate that REDD could be ‘part of an equitable and effective future global outcome on climate change.’ It would focus on:

- improving forest carbon monitoring and accounting capacity, including by assisting Indonesia and PNG to develop national forest carbon accounting systems;
- undertaking REDD demonstration activities, particularly in Indonesia and PNG; and
- supporting international efforts to develop market-based approaches to REDD, for example by ‘taking a lead role’ in the REDD climate negotiations and supporting initiatives like the FCPF and FIP.

The government’s emphasis on assisting Indonesia and PNG reflected the advice of the Labor-commissioned Garnaut Climate Change Review that it would be desirable for an Australian ETS to ultimately link to REDD schemes in these countries, providing Australia with ‘access to low-cost abatement options’. Of the two countries, Indonesia has been the most proactive on practical REDD initiatives, now hosting

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173 Ibid.
175 See Climate Funds Update, Australia’s International Forest Carbon Initiative <http://www.climatefundsupdate.org/listing/ifci>.
around half of all global REDD projects, and this country became the focus of the Rudd government's activities.

To help implement the IFCI's objectives, the Rudd government announced the Papua New Guinea-Australia Forest Carbon Partnership in March 2008, followed by the Indonesia-Australia Forest Carbon Partnership (IAFCP) in June 2008. The partnership with Indonesia, the focus of this chapter, would concentrate on strategic climate change policy dialogue; supporting the development of Indonesia's National Carbon Accounting System, and implementing incentive-based REDD+ demonstration activities. Related to this, Australia and Indonesia announced the Roadmap for Access to International Carbon Markets to support Indonesia's participation in a future market-based REDD+ mechanism. The KFCP, originated by the Howard government, was also rebadged as a 'demonstration project', consistent with the terminology adopted by the BAP. In establishing the KFCP, both Australia and Indonesia claimed to be 'demonstrating leadership' on REDD+ as was encouraged by the BAP. Australia and Indonesia further announced their intention to develop a second demonstration activity, the Sumatra Forest Carbon Partnership, however, this project ultimately never proceeded.

In addition to its bilateral efforts, the Rudd government supported a range of multilateral initiatives, among them:

- a strategic partnership with the Clinton Climate Initiative to support several developing countries to develop their national MRV systems;

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179 Olbrei and Howes, above n 143, 3.
181 Ibid.
182 Ibid.
184 Ibid.
186 See further mention of this project below.
• providing over $30 million to the FCPF and over $30 million to the FIP; and
• the REDD+ Partnership.187

The Rudd government’s involvement in a wide range of REDD+ readiness activities was clearly laudable. A notable achievement was its role in supporting the development of Indonesia’s National Carbon Accounting System, an essential element of REDD+ for Indonesia, which appears to have proceeded well under the Rudd government.188 Due to space limitations, this chapter limits its detailed analysis to the KFCP, the Rudd government’s flagship and most complex REDD initiative.

3 The Kalimantan Forests and Climate Partnership

a) Background

Indonesia is estimated to be the world’s 3rd largest GHG emitter, with 85 per cent of its emissions due to land-use change.189 The main cause of deforestation in Indonesia is land clearing for agriculture, especially for palm oil plantations.190 A high proportion of Indonesia’s land-use change emissions are also attributed to the deforestation of peat land as well as peat fires.191 Nearly half of Indonesia’s emissions result from forest fires, and 20 per cent from decomposing dry peat.192 The inclusion of emissions from peat forest degradation reportedly increases Indonesia’s global ranking as a GHG emitter from 21st to third.193

189 See Australia Indonesia Partnership, Kalimantan Forests and Climate Partnership (KFCP) Design Document (2009) 13. The large-scale exploitation of forests in Indonesia’s outer islands, including Kalimantan, began in the late 1960s when the Suharto regime effectively nationalised Indonesia’s forests through the introduction of a concession system under the Basic Forest Law. This led to the establishment of large-scale logging, pulp and paper industries and the world’s largest palm oil industry. Since the 1960s over 60 million hectares have been deforested from a 130 million hectare national forest estate and vast areas of forests have become severely degraded: Olbrei and Howes, above n 143, 6.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
The intention of the KFCP was to reduce emissions in the carbon rich peat land forests of central Kalimantan.\textsuperscript{194} The KFCP was located in the Ex-Mega Rice Project area. In 1995 former President Suharto ordered over one million hectares of Kalimantan peat swamp to be drained for conversion to rice growing.\textsuperscript{195} This project proved to be a major failure with the area being unsuitable for this purpose.\textsuperscript{196} Furthermore, the project led to the degradation of peat land ecosystems and significant GHG emissions from fire and oxidisation.\textsuperscript{197} The largely abandoned drained peat land has since burned frequently, leading to higher levels of GHG emissions.\textsuperscript{198}

According to the Rudd government and Indonesia, the KFCP was the 'first, large-scale demonstration activity of its kind in Indonesia'.\textsuperscript{199} The project was intended as a 'learning activity in which technical, scientific, and institutional innovations' could be tested, adding 'to the body of REDD knowledge and experience'.\textsuperscript{200} The major goal of the KFCP was 'to demonstrate a credible, equitable, and effective approach' to reducing deforestation and forest degradation, including in peat lands, that could both 'inform a post-2012 global climate change agreement and enable Indonesia's meaningful participation in future international carbon markets.'\textsuperscript{201}

The KFCP was officially ended in June 2013,\textsuperscript{202} although with many of its major goals unfulfilled (see below), AusAID indicated that some aspects of the Partnership may continue in future.\textsuperscript{203}

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\textsuperscript{194} Australia and Indonesia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 183, 97. \\
\textsuperscript{195} Olbrei and Howes, above n 143, 7. \\
\textsuperscript{196} Ibid 7-8. \\
\textsuperscript{197} Australia Indonesia Partnership, above n 189, 1-1. \\
\textsuperscript{198} Olbrei and Howes, above n 143, 8. \\
\textsuperscript{199} Australia and Indonesia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 183, 97. \\
\textsuperscript{200} Australia Indonesia Partnership, above n 189, 2. \\
\textsuperscript{201} Ibid. \\
\textsuperscript{203} Indonesia Australia Forest Carbon Partnership, KFCP <http://www.iafcp.or.id/content/page/44/KFCP>. \\
\end{flushleft}
b) Key Features

The KFCP was located within a single 'peat dome' (peat of over three metres in depth) of approximately 120 000 hectares. The KFCP site included degraded and partially degraded fire-prone peat swamp forest which contained very high carbon stocks. Situated within the Kapuas District, the demonstration site was sparsely populated, with approximately 9 000 residents (mostly indigenous Ngaju Dayak) living in 14 villages and hamlets along the banks of the Kapuas River. The residents used land near their villages for food crops and rubber cultivation, and also harvested timber, other forest products and fish in more remote parts. Livelihood opportunities had been greatly reduced by the deforestation of large areas since 1996. The majority of the site was part of the National Forest Estate and thus under the Ministry of Forestry's authority. However, Dayak communities had lived on the site for generations and claimed land within five kilometres of their villages under customary law.

The KFCP was to be implemented in two key phases. The 'early implementation phase' (originally 1 January to 30 June 2009) would lay the foundation for REDD through activities such as designing a MRV system, building the institutional framework at the provincial and district level, and completing the project's overall design. The 'implementation phase' (originally 1 July 2009 to 30 June 2012) would then aim to rapidly scale up implementation activities.

The KFCP had four major stated components:

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204 Australia Indonesia Partnership, above n 189, 3.
205 Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)' (24 November 2008), above n 100, 88.
206 Australia Indonesia Partnership, above n 189, 3.
207 Ibid.
208 Ibid.
209 Ibid.
210 Ibid.
211 Note that in addition to the Indonesian, Australian, Central Kalimantan and Kapuas District governments, the KFCP had a number of implementation partners including a Managing Contractor and various NGOs, among them CARE, Wetlands International Indonesia and Borneo Orangutan Survival: ibid, 4, 44.
212 Ibid 4.
213 Ibid.
1. reducing GHG emissions through providing incentives to local people and technical means;
2. developing methods and capacity to measure and monitor GHG emissions;
3. developing and testing equitable and practicable mechanisms to channel financial payments to those people and organisations who contributed to achieving emission reductions; and
4. building institutional and technical readiness in local government and villages to implement REDD on a sustainable basis.\textsuperscript{214}

As noted, the KFCP as originally announced by the Howard government, was intended to protect 70 000 hectares of peat land forests, re-flood 200 000 hectares of dried peat land, and plant up to 100 million trees on rehabilitated land, leading to a reduction of 700 million tonnes of GHG emissions over 30 years.\textsuperscript{215} These hard targets were never formally revoked by the Rudd government, but were left out of the KFCP Project Design Document (PDD).\textsuperscript{216} The downsizing of the project caused it to be labelled, unfairly, 'a total failure' by Australian Greens Leader, Christine Milne.\textsuperscript{217} The KFCP appears to have been downsized for a number of legitimate reasons including that the allocated $30 million was found to be insufficient for the task; expected funding from other potential partners did not materialise; and also the change of government and the subsequent repositioning of the KFCP as a demonstration project within the context of the BAP.\textsuperscript{218}

\textsuperscript{214} Ibid 2.
\textsuperscript{215} Downer and Turnbull, above n 172.
\textsuperscript{216} Australia Indonesia Partnership, above n 189, 29; Barber, Hudson and Sari, above n 188, 11.
\textsuperscript{217} Evidence to Senate Environment and Communications Legislation Committee, Parliament of Australia, Canberra, 21 May 2012, 102 (Christine Milne, Greens Leader and Senator).
\textsuperscript{218} Olbrei and Howes, above n 143, 11-14.
c) Criticisms of the KFCP

A number of studies have examined the design and implementation of the KFCP. The major criticisms that have been raised concern delays and shortfalls in implementing the program; the KFCP's effectiveness in reducing emissions; and its consistency with the rights of local communities, especially the indigenous Dayak peoples. The latter issue had the greatest implications for the Rudd government's performance as a GIC and thus receives most analysis here.

i) Delays and Shortfalls in Implementation

The KFCP experienced significant delays in its implementation. The Independent Progress Report on the IAFCP, commissioned by AusAID, reported in March 2011 that the KFCP was only likely to partially deliver on its objective – of demonstrating effective and equitable approaches to REDD+ – by mid-2013, let alone be fully implemented by 30 June 2012 as was originally intended. The report found that '[c]onsiderable work' remained to be done in engaging with local communities and that the future legal status of the demonstration site and the rights of local communities to timber, other forest products and carbon had yet to be negotiated.

More positively, however, a 'competent' implementation team was in the field, and '[g]ood progress' had been made on the emissions and monitoring program. Initial payment mechanisms had also been introduced and tested and after a slow start, local government staff had become more engaged in the KFCP.

While this report thus found signs of encouragement, a 2012 report by Olbrei and Howes found that the achievements of the KFCP had still only been 'modest' with little

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220 Barber, Hudson and Sari, above n 188, 16. This report was commissioned by AusAID to assess the progress and performance of the IAFCP, including the KFCP, and the relevance of the program designs.
221 Ibid 16-17.
222 Ibid.
223 Ibid 17.
224 Ibid 18.
evidence on the ground of actual reductions in deforestation and forest degradation.\(^{225}\) It should of course be noted that the Rudd government only bore part of the responsibility for implementation, with its term in office ending on 24 June 2010 when Kevin Rudd was ousted as Labor leader and Prime Minister by Julia Gillard. However, the criticisms made regarding delays in implementation applied to both governments.

Ultimately, the KFCP fell well short of achieving the ambitious targets originally set for the project by the Howard government. In February 2012, AusAID was still optimistic that 25 000 hectares of dried peat land would be re-flooded in Block A, although this was only one-tenth of the original target of re-flooding 200 000 hectares.\(^{226}\) However, at the time the KFCP was officially ended in June 2013, re-flooding was still yet to occur, although the preconditions for doing so (such as conducting appropriate scientific studies and obtaining consents from relevant authorities) finally appeared to have been achieved.\(^{227}\) While 2.5 million seedlings had been raised, and over 50 000 trees planted, this was vastly short of the Howard government's original target of planting 100 million trees.\(^{228}\)

There appeared to be a number of reasons for delays in implementing the objectives of the KFCP, among them:

- the inherent complexity of the project and interaction required with local communities;
- the need for local community consent to activities such as fire-prevention, re-flooding and re-planting;
- the need for environmental impact assessments before canal-blocking could commence (with approvals being required from various levels of government); and

\(^{225}\) Olbrei and Howes, above n 143, 19, 24.  
\(^{226}\) Ibid 12.  
\(^{228}\) Hamann, above n 217; Olbrei and Howes, above n 143, 12.
• difficulties in the relationship between the IAFCP and the Indonesian Ministry of Forestry.229

Notwithstanding the above delays and shortfalls in implementation, it should be noted that AusAID claimed a number of positive outcomes for the KFCP as of June 2013, among them: the establishment of a forest management unit to manage REDD+ at the local level; the successful application of a peat, water table and vegetation monitoring system; and the provision of livelihood support for local communities (through improving farming and forestry practices and providing payment for activities like planting seedlings).230

Overall, while delays in the project and the failures to meet stated objectives were certainly undesirable, it would be unreasonable to argue that this had much bearing on the government's credentials as a GIC, especially given the challenging and novel nature of the project and its explicit function as a learning activity. The delays experienced were also consistent with those of other REDD+ projects.231

ii) Effectiveness in Reducing Emissions in Central Kalimantan

A second concern was that the basic design of the KFCP (which was chiefly the Rudd government's responsibility) was flawed in that it failed to address the real drivers of deforestation in central Kalimantan and thus had little prospect of significantly reducing emissions in the area (even if its implementation had proved to be more successful). This issue was highlighted in February 2011 by a local alliance of Dayak community groups, Yayasan Petak Danum Kalimantan Tengah (YPD), in a letter to AusAID.232 The YPD's concern was that while the KFCP covered an area of approximately 120 000 hectares, this was but a small fraction of central Kalimantan (which totals 15.1 million hectares).233 According to the YPD, at least 12.5 million

229 Olbrei and Howes, above n 143, 25.
230 Indonesia Australia Forest Carbon Partnership, above n 203.
231 See Olbrei and Howes, above n 143, 25; Barber, Hudson and Sari, above n 188, 16.
233 Ibid 2.
hectares of central Kalimantan outside the KFCP site would be converted or destroyed in future through clearing for oil palm crops, monoculture pulp plantations or mining. The resulting emissions would thus overwhelm any minor emission reductions that may be achieved by the KFCP. This problem was exacerbated by illegal land clearing in central Kalimantan by palm oil firms.

The Independent Progress Report agreed with YPD that site-specific approaches to REDD suffered from various problems including their inability to address the broader drivers of deforestation. Partly on this basis, it recommended that the Gillard government abandon the Rudd government’s planned second site-specific project in Sumatra, preferring that the government direct support to provincial and national level approaches (advice which the Gillard government subsequently adopted, deciding not to proceed with the project in Sumatra as originally planned). However, the report also noted that if well-designed, site-specific approaches could provide a ‘good base for analysis’ and ‘could generate lessons which inform both policy and practice’. Notably, site-specific approaches were the dominant model of early REDD+ projects in Indonesia, presumably because most proponents viewed these as providing the most manageable starting point for REDD+. As pointed out by Pickering, the successful implementation of broader province-wide and national-level approaches (such as being attempted by Norway) would in part depend on lessons gained from site-specific projects such as the KFCP. As such, while the criticism that the KFCP was too limited to have much impact on emissions in central Kalimantan was certainly understandable, this view appeared to misunderstand or ignore the real objective of the KFCP, which was to trial REDD+ on a small-scale and learn lessons that could later be applied to larger-scale projects.

234 Ibid.
235 Ibid.
236 See Pearse and Dehm, above n 219, 14.
238 Barber, Hudson and Sari, above n 188, 11.
239 Ibid. There are an estimated 35 REDD+ demonstration projects in Indonesia, most in Kalimantan and Sumatra.
240 See Pickering, above n 219.
iii) Community Engagement and the Protection of Indigenous Rights

The third major criticism of the KFCP concerned its approach to community engagement and the protection of indigenous rights. As noted above, safeguarding the rights of local communities, including indigenous peoples, was one of the key challenges for REDD+. While REDD+ has the potential to improve the welfare of forest-dependent communities, it also presents significant risks. A key problem is that many forest areas, which are generally under state control, are characterised by unclear land tenure and indigenous land rights that are not guaranteed or enforced.241 This creates risks such as the exclusion of forest communities from REDD+ decision-making, activities and financial benefits, and indigenous peoples being displaced from their traditional territories.242

International Context

The Rudd government’s design of the KFCP took place against the backdrop of the international REDD+ negotiations. Decision 2 at COP 13 recognised that the needs of local and indigenous communities needed to be addressed by REDD+243 and Parties, including Australia, continued to highlight the importance of this in their REDD+ submissions.244 Importantly, Parties recognised the relevance of various international legal instruments, especially under international human rights law, and also international environmental law.245 Among the international instruments relevant to

241 Sophie Lemaitre, ‘Indigenous Peoples’ Land Rights and REDD: A Case Study’ (2011) 20 Review of European Community & International Environmental Law 150, 150. There is wide variation in land tenure models between forest nations, from complete state administration of forest lands to almost 100 per cent private ownership by communities and indigenous groups: Eliasch, above n 9, 44. See also Lyster, above n 145, 445-453.
243 COP 13 Report, decision 2/CP.13, chapeau.
244 Australia, ‘Reducing Emissions from Deforestation and Forest Degradation in Developing Countries’ (23 March 2009), above n 1, 5-7. See also, eg, Norway, ’The Norwegian Proposal for a Legal Text on a Mechanism Reducing Emissions by Sources and Increasing Removals by Sinks in the Forestry Sector in Developing Countries’ in UNFCCC, Ideas and Proposals on Elements Contained in Paragraph 1 of the Bali Action Plan: Addendum 2, UN Doc FCCC/AWGLCA/2009/MISC.4/Add.2 (27 May 2009) 18, 19; Bolivia, above n 69, 53.
245 See, eg, European Community, ’Reducing Emissions from Deforestation in Developing Countries: Views on Issues Relating to Indigenous People and Local Communities: Approaches to Stimulate Action’ in UNFCCC, Issues Relating to Indigenous People and Local Communities for the Development and Application of Methodologies, UN Doc FCCC/SBSTA/2009/MISC.1 (9 February 2009) 3, 3; Norway, ’The
REDD+ are: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Rio Declaration on Environment and Development; Agenda 21; the Convention on the Conservation of Biological Diversity; the Forest Principles; and, mostly relevantly to indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention concerning Indigenous and Tribal Peoples in Independent Countries (International Labour Organisation Convention No 169).

The major focus of attention in the negotiations was the need to safeguard the rights of indigenous peoples as outlined by the UNDRIP. The UNDRIP outlines various indigenous rights and corresponding duties of states, on matters such as land, territories and resources; participation in decision-making; culture; and self-determination. The Declaration uses treaty-style articles and obligatory language such as 'shall'. However, it was only adopted as an aspirational, non-binding declaration by the UN General Assembly. Notwithstanding this, the legal effect of the UNDRIP's articles under international law is not entirely clear. The Declaration was sourced from Norwegian Proposal for a Legal Text on a Mechanism Reducing Emissions by Sources and Increasing Removals by Sinks in the Forestry Sector in Developing Countries', above n 244, 19.


existing international human rights law and many of its articles essentially inform how these rights apply to indigenous peoples. Thus various articles may have a binding character in practice, either because they give effect to similarly worded treaty rights or because they reflect customary international law. It has also been suggested that the articles of the Declaration may be binding as 'general principles of law recognised by civilised nations' under article 38 of the Statute of the International Court of Justice. This argument is strengthened by the fact that the UNDRIP was widely adopted by members of the General Assembly, with only four countries voting against it – Australia (under the Howard government), Canada, the US and New Zealand. The other instrument with major relevance to indigenous peoples, International Labour Organisation Convention 169, is a legally binding instrument (being a treaty) but its legal and political significance is diminished by its limited number of ratifications.

Regardless of the UNDRIP's precise legal status, this chapter contends that the design and implementation of the KFCP needed to be consistent with relevant articles of the UNDRIP in order for the Rudd government to qualify as a GIC. Compliance with the Declaration would undoubtedly have been expected of Australia if its articles were binding in character. As discussed in chapter 1, a GIC is generally expected to adhere to

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258 UN Permanent Forum on Indigenous Issues, Report of the Eight Session (18-29 May 2009), UN ESCOR, supplement No 23, UN Doc E/2009/43-E/C.19/2009/14, annex, [11-12]. The International Court of Justice recognises four sources of binding international law: international conventions or treaties; international customary law; general principles of law recognised by civilised nations; and judicial decisions and teachings of the most highly qualified publicists as a subsidiary means of determining the law: Statute of the International Court of Justice art 38.
259 UNBIS, A/RES/61/295 <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295>, 11 countries abstained and 34 did not vote. New Zealand and Australia (see below) have since formally supported the Declaration. On the Howard government’s reasons for opposing the UNDRIP see Davis, above n 255, 468-69.
its binding international legal commitments. But even if non-binding (thus only establishing legal 'expectations' rather than enforceable obligations), there is a strong argument that, similar to the UNFCCC article 3 principles, Australia needed to respect the rights enshrined in the Declaration in order to demonstrate the higher form of conduct associated with GIC. This was especially the case given that the Declaration enjoys widespread acceptance among both states and indigenous peoples and the fact that the Rudd government made political capital out of its decision to endorse the Declaration in April 2009 (reversing Australia's opposition to it under the Howard government).²⁶¹ Its significance to REDD+ was also highlighted by its formal inclusion in the UN-REDD Programme's operational policy instruments.²⁶²

Various non-governmental organisations (NGOs) representing indigenous peoples made submissions to the post-2012 negotiations regarding the need for indigenous rights to be respected in the design and implementation of REDD+, especially customary rights to land and the principle of 'free, prior and informed consent' (FPIC). The International Alliance of Indigenous and Tribal Peoples of Tropical Forests, for example, insisted that REDD initiatives be 'designed and implemented with full respect for the rights of indigenous peoples, including our rights to our territorial lands, the right to free, prior and informed consent, and the right to fully enact our responsibilities toward our forest land and resources'.²⁶³

The UNDRIP protects indigenous peoples' customary land rights in several articles, including article 26 which stipulates that indigenous peoples have the right to 'own, use, develop and control the lands, territories and resources' that they possess by reason of traditional ownership, occupation or use and that states shall give legal

²⁶² See Morgera, above n 242, 44.
²⁶³ The International Alliance of Indigenous and Tribal Peoples of Tropical Forests on Behalf of International Indigenous Peoples' Forum on Climate Change, 'Submission to SBSTA on Item 11 of FCCC/SBSTA.2008/L.23' (Submission to the SBSTA, February 2009) 2. See also, eg, Forest Peoples Programme, 'Views on Issues Relating to Indigenous Peoples and Local Communities for the Development and Application of Methodologies' (Submission to the SBSTA, 15 February 2009) 8-9; Indigenous Peoples' Global Summit on Climate Change, The Anchorage Declaration (24 April 2009) 1.
recognition and protection to these lands, territories and resources. The principle of FPIC is protected by several articles. These include article 19 which requires states to 'consult and cooperate in good faith with indigenous peoples ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. Article 32.2 also requires states to obtain the 'free and informed consent' of indigenous peoples 'prior to the approval of any project affecting their lands or territories and other resources'.

Many UNFCCC Parties recognised the importance of respecting indigenous rights in the post-2012 agreement, especially in relation to REDD+. However, clear differences emerged regarding the strength with which Parties wished to refer to these rights, or incorporate them within a post-2012 agreement. Some Parties wished to specifically refer to the UNDRIP within a post-2012 agreement. Surprisingly, this did not include the Rudd government who opposed including a reference to the UNDRIP on a number of occasions. This included a move to replace a direct reference to the UNDRIP in the official negotiating text in favour of a vague reference to REDD+ implementation needing to be 'consistent with relevant international instruments, obligations and national legislation'. The Copenhagen Accord ultimately failed to recognise the UNDRIP or even the general rights of indigenous peoples, and the REDD+ methodological guidance provided at COP 15 only weakly referred to the important role of indigenous peoples in REDD, rather than their rights. Various developing countries also pushed for REDD+ to specifically recognise the principle of FPIC.

264 UN Declaration on the Rights of Indigenous Peoples arts 26.1-3.
267 COP 15 Report, decision 4/CP.15, chapeau, [4]. The later methodological guidance provided at COP 16, Cancun, gave greater recognition to indigenous rights indicating that REDD+ activities should respect the knowledge and rights of indigenous peoples by taking into account relevant international obligations and specifically mentioned the UNDRIP: UNFCCC, Report of the Conference of the Parties on its Sixteenth Session: Addendum (Part 2), UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), decision 1/CP.16, annex, [2(c)].
268 See, eg, Bolivia, above n 69, 7; Panama, 'Submission' in UNFCCC, Issues Relating to Indigenous People and Local Communities for the Development and Application of Methodologies, UN Doc
However, many developed countries, again including Australia, favoured watering down this reference, only acknowledging the need for prior 'consultation' with indigenous peoples, rather than explicit 'consent'.269 The Rudd government's approach to referencing indigenous rights within a post-2012 agreement gave the impression that safeguarding indigenous rights was not a priority for Australia and was certainly a negative for its GIC credentials.

Community Concerns with the KFCP

The PDD for the KFCP specifically acknowledged the importance of community engagement and addressing land tenure issues. Regarding community engagement, the PDD indicated that gaining the support of 'all segments' of local communities was a 'precondition' for emission reductions.270 The government recognised that gaining community support would be difficult and would 'take time, effort, and the ability to offer real incentives' to participate, especially with climate change being a 'remote threat' compared to more immediate livelihood challenges.271 Indeed, the PDD acknowledged that the potential financial benefits of REDD seemed 'remote' to villagers, 'if the concept was understood at all'.272 One difficulty was that local communities were generally 'mistrustful of outside interventions' after their negative experience with the Ex-Mega Rice Project.273 Public consultations were to be undertaken, however, to explain the meaning and benefits of REDD and the KFCP to local communities.274

As noted earlier, the majority of the KFCP site formed part of the National Forest Estate and thus was under the authority of the Indonesian Ministry of Forestry, however, Dayak communities had lived in the area for generations and claimed land

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269 See, eg, Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)' (24 November 2008), above n 100, 82; Norway, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', above n 59, 58. United States, 'Reducing Emissions and Enhancing Removals from Forests and Land Use', above n 59, 33.
270 Australia Indonesia Partnership, above n 189, 5.
271 Ibid.
272 Ibid.
274 Ibid 2-1.
within five kilometres of their villages based on customary law. Regarding land tenure, the PDD recognised that this was a complex issue to be addressed with much uncertainty existing 'over how much land a village may claim' and which rights were associated with various types and intensities of land and natural resource use. The district government was working with local NGOs and villages to formalise land tenure and information about this would be collected during the project's early implementation phase. The PDD recognised the need to resolve these issues prior to major project activities taking place such as dam building, reforestation and the testing of payment systems. The PDD also recognised the principle of FPIC, but only indicated that the village engagement process should 'provide the opportunity' for this to occur, stopping short of guaranteeing that FPIC would be obtained from relevant rights holders.

In February 2011 the aforementioned letter by YPD to AusAID outlined a host of concerns with the KFCP from a rights perspective. While these complaints were raised during the Gillard government's term in office, the concerns extended to the Rudd government's initial project design as well the period in which it was responsible for implementation. Among YPD's concerns were that the project failed to recognise and respect the Dayak peoples' customary land tenure and associated rights. YPD complained that the Indonesian government had 'yet to formally honour the land tenure and rights of the Dayak people' and thus by 'collaborating with the Indonesian Government' the KFCP 'condone[d] this lack of consideration and hence the continued undermining of our customs and rights.' This view reflected the fact that Indonesia's REDD+ regulations did not appear to respect the rights of indigenous peoples, seemingly allowing the state to establish public and privately held forestry concessions.

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275 Ibid 25.
276 Ibid 18-19.
277 Ibid 20.
279 Yayasan Petak Danum Kalimantan Tengah, above n 232, 1.
280 Ibid.
and 'carbon sinks' in forests traditionally owned by indigenous peoples without taking into consideration their customary rights.  

According to YPD, community consultation and engagement had 'focused primarily on facilitating project activities and getting the project off the ground', which did 'not represent a process or an attempt to seek free, prior informed consent.' It believed that consultations, presentations and community meetings had wrongly focused only on obtaining community acceptance and participation in the project without providing an opportunity for community members to provide feedback or advice on the KFCP’s design. Despite extensive consultations taking place, it also believed that most community members were still unclear on what REDD really entailed and thus their participation was 'far from constituting free, prior informed consent.' Fearing that their 'basic rights and ... rights to natural resource management' had not been guaranteed, YPD adopted the motto 'No rights, No KFCP'.

AusAID responded to YPD's concerns in April 2011 stating that 'extensive community consultation' had been undertaken beginning in early 2009 to ensure that community

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281 This concern was directly expressed by the UN Committee on Racial Discrimination: see Chairperson of the Committee for the Elimination of Racial Discrimination, Letter to the Permanent Mission of the Republic of Indonesia to the United Nations Office at Geneva (13 March 2009) http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf. REDD+ is governed by two regulations and one decree in Indonesia: see Wright, above n 219, 127-128, 130; Annalisa Savaresi and Elisa Morgera, 'Ownership of Land, Forest and Carbon' in John Costenbader (ed), Legal Frameworks for REDD: Design and Implementation at the National Level (IUCN, 2009) 14, 31-32; Butt, above n 170, 267.

282 Yayasan Petak Danum Kalimantan Tengah, above n 232, 2.

283 Ibid.

284 Ibid.

views were incorporated in the project's design and implementation. According to AusAID, the KFCP had been 'stringent in its efforts to respect customary rights' and had been 'in regular communication' with local customary leaders and organisations. AusAID also rejected the assertion that its partnership with Indonesia implied 'any disregard or disrespect for customary (or other) rights' and stated that Australian government policy required all overseas activities to adhere to Australia's international human rights obligations including the ICCPR, ICESCR and the UNDRIP. AusAID believed that through the KFCP it was 'working to empower local communities to manage their own land and forest resources, not to take forest away from communities.' It further rejected the assertion that there had been a lack of effective community consultation, engagement and input into the project design, stating that '[f]ull and effective consultation with local communities ha[d] been the primary focus of initial activities under the KFCP' and that physical intervention such as canal blocking and reforestation had only taken place following 'extensive community consultation'.

It is difficult to accurately determine from the contrasting evidence available whether the Rudd government's design and implementation of the KFCP conformed with the rights of local indigenous peoples as protected by the UNDRIP. On the one hand it is clear, notwithstanding YPD's complaints, that substantial efforts to address land tenure issues and consultations with local communities did take place during the early and full implementation phases. It also appears that the Rudd government did seek to undertake significant consultation, if not obtain full consent, before important aspects of the project proceeded. Indeed, the complexity of resolving land tenure

\[\text{References}\]

287 Ibid 1-2.
288 Ibid 2.
289 Ibid.
290 Ibid 3.
issues was subsequently identified by the DCC as the key reason for delays in the KFCP’s implementation.  

What is obvious, however, is that the project-site and basic project design were agreed to by the Australian and Indonesian governments without first clarifying land tenure issues. Article 26 of the UNDRIP makes clear that indigenous peoples have rights to control the lands, territories and resources that they possess through traditional ownership and that legal protection must be given to these lands, territories and resources (which had not occurred under Indonesia’s REDD+ laws). Article 32.2 also indicates that states must obtain the 'free and informed consent' of indigenous peoples 'prior to the approval of any project affecting their lands or territories and other resources', which clearly did not occur in relation to the KFCP. As such, Australia and Indonesia's decision to proceed with the KFCP prior to resolving land tenure issues in the project area and obtaining appropriate consents, appears to have been inconsistent with the requirements of article 32.2.

The Rudd government seemed to be aware of this problem, but stated its view in the PDD that clear land tenure laws could not be made 'a precondition of project development', otherwise 'no projects would ... ever be developed or they would all be developed in the same handful of places.' Rather, the government believed that the KFCP could act as an 'instrument of change, where community management rights [were]... first given to locals in a step-wise process to full land tenure.' The Rudd government's enthusiasm to announce the KFCP demonstration project without first resolving land tenure issues was perhaps understandable, especially in the context of the post-2012 negotiations in which the international community felt a sense of 

292 Evidence to Senate Environment and Communications Legislation Committee, Parliament of Australia, Canberra, 21 May 2012, 102 (Blair Comley, Secretary, Department of Climate Change and Energy Efficiency).


294 Australia Indonesia Partnership, above n 189, 19. See further Pearse and Dehm, above n 219, 17; Friends of the Earth Australia et al, What a Scam! Australia's REDD Offsets for Copenhagen (Friends of the Earth Australia, Aid/Watch, Friends of the Earth Indonesia (WALHI), Serikat Petani Indonesia, 2009).
urgency to rapidly advance REDD+ so as to begin reducing emissions from deforestation in developing countries. It is clear, however, that where indigenous peoples are likely to possess customary land rights, and thus their informed consent may be required for a project, land tenure ought to be clarified, and relevant consents obtained, prior to any decision being made to proceed with such a project. Any other approach fails to show due respect for the rights of indigenous peoples enshrined in the UNDRIP.

To its credit, the Rudd, and later the Gillard government, appeared to slow the implementation of the KFCP once it realised the complexity of the land tenure issue. But complaints by indigenous peoples regarding the lack of protection for their rights remained ongoing throughout the project's implementation,296 which is unsurprising given the way in which it was imposed on local indigenous peoples without their prior agreement.

**D Implications for GIC**

Based on the above material, this chapter suggests that several attributes of GIC are particularly relevant to assessing the Rudd government’s engagement with REDD+. First, similar to the concerns raised in chapter 7, it is clear that the government needed to pursue an approach to the design of REDD+ that was environmentally effective, in that it would likely to result in genuine emissions abatement. This is only logical given the UNFCCC's primary purpose is to reduce GHGs so as to avoid dangerous climate change.297 The precautionary principle (article 3.3 UNFCCC) also clearly favours the adoption of abatement measures with strong prospects of resulting in genuine emission reductions.

Research for this chapter revealed that the Rudd government’s push for a market-based REDD+ mechanism had the potential to create a new source of non-genuine emission reductions.

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297 UNFCCC art 2.
credits in the ICCL regime, similar to the issues that have surrounded the CDM. Fears that REDD+ could result in a new source of hot air appear to have been well-founded given the enormous range of barriers it faced in order to be environmentally effective. Significant challenges included establishing reliable baseline emission levels, preventing international leakage, and overcoming common problems in developing countries such as weak governance and law enforcement, and corruption. A market-based REDD+ mechanism would also add additional layers of complexity and, if not well-designed, could have negative impacts on the effectiveness of the broader carbon market by, for example, flooding the market with cheap carbon credits.

The Rudd government was cognisant of these concerns and generally appeared to make a positive contribution to the REDD+ negotiations on these issues. It also appeared to have a strong desire for REDD+ to be environmentally effective (for example, proposing that the most stringent form of emissions accounting be in place before a host country could participate in international emissions trading). There were also negatives in the government’s approach, however, including its position that REDD+ accounting need not take account of reversals of emission reductions caused by natural events.

Commentators such as Collett have argued that the ‘greatest flaw’ of Australia’s REDD+ proposal was in its support for a market-based mechanism. 298 While this view is tempting given concerns surrounding the market-based approach, such a conclusion arguably overlooks the complexity of the REDD+ issue, especially the difficulty of obtaining the necessary level of financing without utilising the carbon market. The funding needs of REDD+ are certainly large – up to US$35 billion per year. While this level of funding is not so vast that developed countries could not conceivably provide this level of funding from public expenditure, it needs to be remembered that funding for REDD+ only represents a small portion of the hundreds of billions of dollars of additional finance developing countries will likely require to meet their future mitigation and adaptation needs (see chapter 7). Viewed in this broader context, it is

298 Collett, above n 88, 336.
understandable why developed country governments would wish to pursue a market-based approach to REDD+, given that this would shift much of the cost of financing REDD+ to the private sector in developed countries (who would be the major purchasers of REDD+ credits) and also encourage least cost abatement at the global level.

A second key concern was whether Australia's approach was consistent with the notion of leadership. As explained in chapter 1, this is both a legal expectation of developed countries under the UNFCCC (article 3.1), as well as a key general attribute of GIC emphasised by Gareth Evans and various scholars. Given that the design of a REDD+ mechanism was in its infancy, there was clearly a role, and need, for aspiring GICs to show leadership by helping to develop REDD+, both in the international negotiations and on the ground via demonstration projects and other activities.

At a general level it could certainly be argued that the government demonstrated much leadership on REDD+. A number of its activities appeared to be demonstrative of this attribute such as its activism in the REDD+ negotiations; the adoption of the IFCI and KFCP (continuing and refining the work of the Howard government); assisting Indonesia in developing a national carbon accounting system; contributing finances to various multilateral efforts on REDD+ such as the FCPF and FIP; and the commitment of fast-start REDD+ financing at COP 15.

The government's efforts on the KFCP, at least at a general level, were also particularly worthy given the strong need for REDD+ to be tested on the ground. The KFCP was of course criticised on the basis that its scope was too limited to address the broader drivers of deforestation in central Kalimantan. However, it is also clear that the government's selection of a site-specific approach was a legitimate policy choice, especially given the KFCP's relatively modest but useful ambition of learning lessons which could be applied to future, larger-scale projects. The delays in implementation, criticised by some, were also not uncommon for REDD+ demonstration projects, and in this case appeared to be largely due to the need to undertake extensive community engagement. The government may not have demonstrated leadership to the extent of Norway — who placed a substantial US$1 billion on the table to support the
development of REDD+ in Indonesia – but Australia’s activities nonetheless qualified it as one of the leading developed countries on REDD+.\textsuperscript{299}

The government's general standing as a leader on REDD+, and as a GIC, was arguably diminished, however, by a number of factors. For some, this would include its push for a market-based mechanism. But this is a matter of contention given the clear pragmatic requirement for REDD+ to operate as an offsets mechanism in order to obtain sufficient financing. Certainly, the Rudd government could have placed its diplomatic weight behind a REDD+ mechanism directly funded by Annex I Parties. However, GIC recognises that governments often need to strike a balance between being idealistic and realistic due to both international and domestic constraints. Clearly there was a general lack of willingness among developed countries to fully fund REDD+ from public expenditure, including among the wealthiest developed countries like the US (who possessed the most capacity to provide the necessary scale of resources). Thus there would arguably have been little point (other than symbolism) in Australia advocating for a fund-based mechanism. Notably, the practical necessity for REDD+ to have access to the financial resources of the private sector, through the carbon market, was accepted by many potential host countries who widely endorsed a market approach.

The Rudd government’s desire for REDD+ to be market-based also reflected the fact that Australia has relatively high mitigation costs (see chapters 6 and 7) and thus it had a political need to minimise the cost of Australian abatement. While it could be suggested that the government’s desire to establish a new source of low-cost carbon credits was overly driven by narrow self-interest, rather than leadership, on balance this chapter accepts that there were sound reasons for the Rudd government to pursue a market-based approach to REDD+. It would clearly be wrong for future Australian governments to allow liable entities to purchase REDD+ credits under an ETS if the REDD+ mechanism cannot ultimately deliver genuine abatement. But there were

\textsuperscript{299} Notably, very few REDD+ demonstration projects have been led by developed country national governments, most being run by NGOs: see CIFOR, Distribution of REDD+ Projects Worldwide <http://www.forestclimatechange.org/redd-map/>.
strong pragmatic reasons for a market-based mechanism to at least be trialled, suggesting that the government's support for a market-based approach was not incompatible with the notion of leadership.

A third key consideration in assessing GIC was the need for the government's approach to REDD+ (especially the KFCP) to be consistent with international law regarding the rights of indigenous peoples. This reflected the fact that, as noted earlier, there is a general expectation that a GIC will adhere to its international legal commitments. As discussed previously, while only being a political declaration, the UNDRIP's articles may have a binding character, although this is unclear under international law. Even if only non-binding, this thesis would argue that the government needed to respect this important instrument in order to qualify as a GIC, especially given the Declaration's widespread acceptance among the international community and indigenous peoples, and the government's own strong endorsement of it.

The Rudd government's performance as an international citizen was certainly diminished by its approach to safeguarding the rights of indigenous peoples in the KFCP. While it appeared to engage in significant consultations with local indigenous people to resolve land tenure issues and to obtain FPIC, the complaints made by local indigenous peoples suggest that its activities in this regard could have been handled far better. Furthermore, as argued above, the announcement of the KFCP project without first resolving land tenure issues and obtaining relevant village consents did not fully respect the rights of indigenous peoples in the KFCP project area. While the government's haste in advancing the KFCP was perhaps understandable, given the desirability of REDD+ being operationalised as quickly as possible, it is clear that in order to act consistently with the UNDRIP it ought to have properly engaged with indigenous peoples prior to agreeing upon a REDD+ project at the state-to-state level. Such an approach would also have given proper effect to the principle of leadership.

Related to this, the Rudd government's failure to support a strong reference to indigenous rights in the post-2012 outcome was also a negative for its GIC credentials.
This went against the wish of some Parties to refer to the UNDRIP in the 'objective, scope and guiding principles' section of a future agreement, an outcome called for by various groups representing indigenous peoples. While the government did propose a general acknowledgement by Parties of the need to respect their international obligations when implementing REDD+, its decision not to support a specific reference to the UNDRIP made little sense given its support of this instrument. It also demonstrated a lack of leadership with regard to safeguarding indigenous rights.

Regarding other general attributes of GIC identified in chapter 1, a number of these were clearly relevant to the assessment of the Rudd government's engagement with REDD+. Prima facie, it is arguable that the government's preference for a market-based REDD+ mechanism was inconsistent with the notions of acting for 'purposes beyond ourselves' and 'enlightened self-interest'. This is because global and broader Australian interests unquestionably lay in establishing a REDD+ mechanism that prioritised environmentally effective abatement. As explained above, however, this chapter accepts that there were legitimate reasons to at least trial a market-based approach, not least of which was the pragmatic need for the mechanism to attract sufficient funding. In this regard, the government's approach could be categorised as striking a reasonable balance between what Evans referred to as idealism and realism.

It is also clear that the Rudd government displayed a number of other, easier to satisfy GIC qualities, through its participation in the negotiations and activities in Indonesia, among them: internationalism, activism, multilateralism, a commitment to international institutions (chiefly the UNFCCC), a willingness to 'pitch in', and that of being a good neighbour to Indonesia. Although there were certainly deficiencies in the government's approach to indigenous rights, in a broad sense, its active involvement in the negotiations also demonstrated a commitment to international law and utilising an international law framework to reduce forestry emissions in developing countries.

Overall, there were undoubtedly many positives for the Rudd government from a GIC perspective on the issue of REDD+. The government's good intentions were let down,

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300 UNFCCC, Notes on Sources for FCCC/AWGLCA/2009/INF.1 (Part 2), above n 85, 110-114.
however, by several of the specifics of its international proposals and the design and implementation of the KFCP, especially with respect to indigenous rights. This chapter suggests that the latter deficiency in particular means that the Rudd government could not qualify as a GIC on REDD+ given that the notion of GIC requires a higher form of state conduct. The government's significant overall efforts on REDD+, however, and its attempt to address concerns relating to indigenous rights in the KFCP once these were properly understood, means that it would be overly harsh to classify the government as a 'poor' or even 'average' international citizen on REDD+. Rather, and bearing in mind the inherent challenges in establishing a demonstration project in a developing country, it seems appropriate to mark the Rudd government as an 'above average' international citizen on this topic.
CHAPTER 9. THE RUDD GOVERNMENT AND LULUCF

'The treatment of LULUCF should not lead to the creation of loopholes to enable Annex I Parties to achieve their emissions reduction commitments by simply doing "magic" paper work.' China, Submission to the AWG-KP, 2008.¹

This final chapter examines the Rudd government’s engagement with the most technically complex area of the post-2012 climate negotiations relating to mitigation, namely, the rules by which developed countries account for emissions in the land use, land-use change and forestry (LULUCF) sector under the Kyoto Protocol.² The aim of this chapter is to assess whether the Rudd government’s contribution to the LULUCF negotiations was consistent with its aspiration to be a good international citizen (GIC). The LULUCF accounting rules, established by the 2001 Marrakesh Accords, were only agreed to apply to the Protocol’s first commitment period (2008-12).³ This meant that Parties required a new decision on LULUCF if the Protocol was extended to a second commitment period beyond 2012. Negotiations on LULUCF also had a wider relevance, with the rules adopted by Kyoto Parties likely to form the basis of the land sector accounting rules for any broader post-2012 agreement established under the Bali Roadmap.⁴

² Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) (‘Kyoto Protocol’). The Kyoto Protocol refers to ‘land-use change and forestry’ (LUCF) but the broader category of land use, land-use change and forestry (LULUCF) was later adopted by the Marrakesh Accords: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum 3 (Part 2), UN Doc FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), decision 16/CMP.1 (‘CMP Report 1: Addendum 3 (Part 2)’). Note that these rules were first agreed to in 2001 by the UNFCCC Conference of the Parties, and later endorsed by Parties to the Kyoto Protocol at their first Meeting of the Parties in 2005.
³ CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, [4]. As explained in chapter 4, the Marrakesh Accords provide the detailed rules for implementation of the Protocol.
LULUCF has long been a contentious topic within the international climate change law (ICCL) regime and continued to be so during the post-2012 negotiations. From a scientific viewpoint, the necessity of reducing emissions in the land sector is well accepted. Yet the regulation of this sector has proved controversial for several reasons. First, the LULUCF sector can provide a significant 'offset' for developed countries, lessening the need to reduce greenhouse gas (GHG) emissions caused by burning fossil fuels. Second, accurately accounting for LULUCF emissions and removals is far more difficult than for fossil fuel-based sources. This has created concerns that developed countries can 'cook the books', artificially inflating the amount of LULUCF abatement they are awarded. Third, significant natural variations in emissions and removals occur in this sector. This makes it difficult to accurately account for the anthropogenic component of LULUCF emissions and removals, which is the focus of the ICCL regime.

Parties raised numerous concerns about the LULUCF accounting rules during the course of the post-2012 negotiations. While many developing countries initially favoured simply extending the first commitment period rules, Australia and other developed countries pushed for a variety of reforms. This chapter assesses the record of the Rudd government on this issue in the following manner. First, the basic legal and policy background is outlined. Second, the chapter examines several of the key issues under negotiation, with a focus on forest management, the dominant topic of discussion during the period of review. Third, the chapter comments on the

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7 Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 124.
9 Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 124.
implications of the Rudd government's negotiating positions for its aspiration to be a GIC, examining both the consistency of its positions with the relevant international legal framework and the broader attributes of GIC highlighted in chapter 1. It will be seen that the overarching concern in this area was that any changes to the accounting rules for the land sector improved or maintained, rather than diminished, the credibility of the existing accounting framework. As such, the key focus of this chapter is on assessing whether the rules promoted by the Rudd government were likely to be environmentally effective. As argued in previous chapters, a GIC would be expected to support mitigation approaches that result in genuine, rather than illusory emissions abatement, given that the central purpose of the ICCL regime is to reduce emissions so as to avoid dangerous climate change.

A Legal and Policy Background

1 The UNFCCC, Kyoto Protocol and Bali Roadmap

a) UNFCCC

Land sector emissions were first addressed by the ICCL regime under the United Nations Framework Convention on Climate Change (UNFCCC). Article 4.1(a) requires both Annex I Parties (essentially the developed countries) and non-Annex I Parties (essentially the developing countries) to establish national inventories of anthropogenic GHG 'sources' as well as 'sinks', and provide these to the Conference of the Parties (COP). The land sector is a key source of emissions through activities such as deforestation, but also operates as a sink with natural and plantation forests, for example, removing CO2 from the atmosphere.

10 'Source' means any process or activity which releases a GHG, an aerosol or a precursor of a GHG: *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 1.9 ("UNFCCC").

11 'Sink' means any process, activity or mechanism which removes a GHG, an aerosol or a precursor of a GHG from the atmosphere: UNFCCC art 1.8.

12 UNFCCC art 12.1(a).


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The reporting obligations of developed and developing countries differ in line with the principle of 'common but differentiated responsibilities and respective capabilities' (article 3.1 UNFCCC) with only Annex I Parties being required to provide annual inventories of their GHG emissions and removals.\textsuperscript{14} UNFCCC Parties adopted a 'land-based' approach to reporting LULUCF emissions, with Annex I Parties reporting annually on emissions and removals with respect to: forest land; cropland; grassland; wetlands; settlements; and other land.\textsuperscript{15} Articles 4.2(a) and (b) provide that the Annex I Parties' non-binding commitment to return their collective emissions to 1990 levels by 2000 can include activities to both reduce emissions and enhance CO2 removals. Article 4.1(d) also requires all Parties to promote the 'sustainable management' and 'conservation and enhancement' of sinks and reservoirs,\textsuperscript{16} including 'biomass', 'forests', and other terrestrial ecosystems.

\textit{b) Kyoto Protocol}

The accounting rules for LULUCF under the Kyoto Protocol are highly complex. This reflects the inherently technical nature of the area and scientific uncertainties, but also the fact that some rules have been adopted to advance the particular interests of various Annex I Parties.\textsuperscript{17} The LULUCF rules only apply to Annex I Parties who have adopted mitigation targets under the Protocol (Annex B Parties).\textsuperscript{18} The rules which applied to the first commitment period were contained in several places, chiefly articles 3.3, 3.4 and 3.7 of the Protocol; the Marrakesh Accords (specifically decision 14/CP.11, FCCC/SBSTA/2006/9 (18 August 2006) 59.

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\textsuperscript{14} UNFCCC, \textit{Report of the Conference of the Parties on its First Session: Addendum (Part 2, UN Doc FCCC/CP/1995/7/Add.1} (6 June 1995), decision 3/CP.1, [2(b)].


\textsuperscript{16} 'Reservoir' means a component or components of the climate system where a GHG or a precursor of a GHG is stored: UNFCCC art 1.7.


\textsuperscript{18} \textit{Kyoto Protocol} art 3.
A key concern of many Parties regarding LULUCF has been to ensure that emissions and removals are accounted for accurately. This is reflected in decision 16/CMP.1, paragraph 1, which outlines a set of principles to govern the treatment of LULUCF activities. These include, among others, that LULUCF should be 'based on sound science'; that consistent estimation and reporting methodologies should be used over time; and that accounting for LULUCF should not impact the aim of Annex I Parties to collectively reduce their GHGs by 5 per cent below 1990 levels by 2008-12 (under article 3.1).

In a departure from practice under the UNFCCC, Kyoto Parties adopted an 'activity-based' approach to land sector accounting. Annex I Parties are required to account for changes in LULUCF emissions and removals on the basis of several mandatory and elective activities. Article 3.3 lists the mandatory activities. These include:

- afforestation – planting trees on land that has not had forest for the past 50 years;
- reforestation – planting trees on land that did not have forest on 31 December 1989, and
- deforestation – the conversion of forested land to non-forested land.

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19 CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1.
22 CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, [1(a)(b) and (c)].
23 'Afforestation' is the direct human-induced conversion of land that has not been forested for a period of at least 50 years to forested land through planting, seeding and/or the human-induced promotion of natural seed sources: ibid annex [1(b)].
24 'Reforestation' is the direct human-induced conversion of non-forested land to forested land through planting, seeding and/or the human-induced promotion of natural seed sources, on land that was forested but that has been converted to non-forested land. Reforestation activities for the first commitment period were limited to lands that did not contain forest on 31 December 1989: ibid annex [1(c)].
25 'Deforestation' is the direct human-induced conversion of forested land to non-forested land: ibid annex [1(d)]. 'Forest' is defined as a minimum area of land of 0.05-1.0 hectare with tree crown cover (or equivalent stocking level) of more than 10-30 per cent with trees with the potential to reach a minimum height of 2-5 metres at maturity in situ: annex [1(a)].
Article 3.4 lists the elective activities. Decision 16/CMP.1 limited these to:  

- revegetation – the increasing of vegetation that does not qualify as afforestation or reforestation;  
- forest management – the 'sustainable' management of the forest to fulfil its ecological, economic and social functions;  
- cropland management – the management of land used for agricultural crops; and  
- grazing land management – the management of land used for livestock production.

Complicating land sector accounting under the Protocol, two different approaches were adopted to account for these activities. Afforestation, reforestation and deforestation (article 3.3) as well as forest management (article 3.4) adopted so-called 'gross-net' accounting. This measured the net changes in carbon stocks that occurred in the first commitment period (2008-12). The remaining article 3.4 activities applied so-called 'net-net' accounting. This compared the emissions or removals in the first commitment period to the emissions/removals in 1990 (the Kyoto base year). The differing approaches were adopted in an attempt to factor out non-anthropogenic influences on LULUCF emissions and removals such as 'CO2 fertilisation', 'nitrogen deposition' and the 'age-class structure' of forests (see further below).

26 Ibid annex [6].  
27 'Revegetation' is a direct human-induced activity to increase carbon stocks on sites through the establishment of vegetation that covers a minimum area of 0.05 hectares and does not meet the definitions of afforestation and reforestation contained elsewhere in decision 16/CMP.1: ibid annex [1(e)].  
28 'Forest management' is a system of practices for stewardship and use of forest land aimed at fulfilling relevant ecological (including biological diversity), economic and social functions of the forest in a sustainable manner: ibid annex [1(f)].  
29 'Cropland management' is the system of practices on land on which agricultural crops are grown and on land that is set aside or temporarily not being used for crop production: ibid annex [1(g)].  
30 'Grazing land management' is the system of practices on land used for livestock production aimed at manipulating the amount and type of vegetation and livestock produced: ibid annex [1(h)].  
31 See ibid annex [9]; Höhne, above n 17, 355-56. This was the accounting approach applied to non-LULUCF sectors.  
Once land was accounted for under articles 3.3 and 3.4, all anthropogenic emissions and removals on that land were required to be accounted for throughout subsequent and contiguous commitment periods. This was designed to ensure that Parties which received 'credits' for net removals in the first commitment period would also receive 'debits' should the carbon later be released. This was necessary given that LULUCF removals can later re-enter the atmosphere due to activities such as deforestation, or natural events such as wildfires. Net emissions or net removals resulting from LULUCF activities were either added to or subtracted from a party's Assigned Amount Unit (AAU) for the first commitment period. Parties which received credits under articles 3.3 and 3.4 could issue removal units, which were fully fungible with other Kyoto emission permits except that they could not be directly banked for use in future commitment periods.

To address concerns that some Annex I Parties could largely achieve their mitigation targets through improved forest management (as well as a result of non-anthropogenic influences), both general and individual caps were placed on the use of forest management by Parties for whom article 3.3 activities represented a net source of emissions.

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33 CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, annex [19].
34 Höhne, above n 17, 356.
35 See further on how emissions/removals are calculated: UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session: Addendum 2 (Part 2, Vol 2), UN Doc FCCC/KP/CMP/2005/8/Add.2 (30 March 2006), decision 13/CMP.1, annex; Höhne, above n 17, 357-358.
37 Ibid [16]. Note, however, that removal units (RMUs) could be banked through a loophole, namely that RMUs could be converted to AAUs for the purposes of emissions trading under article 17, and then banked as AAUs: Fry, 'More Twists, Turns and Stumbles in the Jungle', above n 5, 343, 346.
38 The general cap limited reliance on forest management up to the amount of net emissions under article 3.3 and not greater than 9 megatonnes of CO2 times 5: CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, annex [10]. The cap was originally based on 15 per cent of the estimated removals on lands subject to forest management, or 3 per cent of AAUs, whichever was lower, but more generous caps were sought by and granted to Russia, Japan, and Canada: Schlamadinger, 'Options for Including Land Use in a Climate Agreement Post-2012', above n 17, 297. For the individual caps see decision 16/CMP.1, annex [11], appendix.
The other rule with particular relevance to LULUCF accounting is found in article 3.7. The second sentence of article 3.7 requires Annex I Parties for whom LULUCF constituted a net source of emissions in 1990 to include their aggregate anthropogenic land-use change emissions (that is, deforestation) in their 1990 base year.\(^\text{39}\) As noted in chapter 2, this clause was obtained by Australia under the Howard government.\(^\text{40}\) Commonly known as the 'Australia clause', this provision delivered a windfall gain to Australia. The rule allowed Australia to add 132 megatonnes carbon dioxide-equivalent (Mt CO\(_2\)-e) to Australia's 1990 base year emissions level. Because Australia's rate of deforestation had already dropped significantly prior to the negotiation of the Protocol, this made Australia's abatement task significantly easier.\(^\text{41}\) Indeed, with fossil fuel-based emissions in Australia continuing to rise after 1990, lower net emissions from deforestation (about 49 Mt CO\(_2\)-e by 2008-12) were the primary reason Australia was able to meet its Kyoto target for the first commitment period.\(^\text{42}\)

c) The Bali Roadmap

With the LULUCF rules only applying to the first commitment period, Kyoto Parties agreed in 2006 to open discussion on the LULUCF rules as part of their broader negotiations regarding mitigation commitments beyond 2012.\(^\text{43}\) With these negotiations unresolved, Kyoto Parties agreed to continue these discussions under the Bali Roadmap, pursuant to article 3.9 of the Protocol, and forward the results of their negotiations to the next conference of the parties to the Kyoto Protocol.

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\(^\text{40}\) See Fry, 'Twists and Turns in the Jungle', above n 5, 161.


work to the 5th Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP 5) in Copenhagen (December 2009).  

2 General Concerns Regarding the LULUCF Sector

As noted, many developed countries pushed for various reforms to be made to the LULUCF accounting rules (see specific proposals below). This included the Rudd government whose general view was that the 'significant abatement potential' of the LULUCF sector was 'currently untapped' due to limitations caused by the first commitment period rules. Many developing countries by contrast were sceptical about the need for, and motivations behind, proposed rule changes. Major developing countries such as China, India, Brazil, Malaysia and Indonesia all questioned the focus on LULUCF issues by developed countries, stressing the priority of reducing fossil fuel emissions. India, for example, argued that it was undesirable for Annex I Parties to increase their reliance on the LULUCF sector as this would divert their attention from 'more tangible action in [the] crucial sectors of energy, transport, industry and waste management.' This type of concern led the G77 and China, and others, to propose a general cap on the use of LULUCF by Annex I Parties to ensure that other sectors were properly addressed; a move rejected by Australia, New Zealand, Japan, Canada and

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other developed countries on the ground that it would create a disincentive for LULUCF abatement efforts.\textsuperscript{48}

The developing countries' concern about an over reliance on LULUCF abatement by Annex I Parties reflected a number of issues. First was the fact that emissions and removals in the land sector are more difficult to accurately account for. The Coalition for Rainforest Nations, for example, raised concerns about the 'high uncertainties' in LULUCF data which could 'seriously undermine the credibility' of estimated LULUCF emissions and removals.\textsuperscript{49} The argument being made was that higher uncertainties in land sector accounting meant that LULUCF emissions and removals were not directly comparable to fossil fuel-based emission reductions (especially those producing CO2).\textsuperscript{50}

The concern about the accuracy of LULUCF accounting appeared to be a legitimate one. Indeed, Australia has struggled to accurately measure its emissions and removals from deforestation since the early 2000s, despite having one of the best carbon monitoring systems in the world.\textsuperscript{51} The Rudd government reported, for example, that uncertainties for Australia's forest management emissions and removals were up to ±40 per cent for 2007.\textsuperscript{52} While the government had a stated ambition that emission

\begin{itemize}
  \item Ibid 2. Note that uncertainties in LULUCF accounting are within the range of uncertainty for non-CO2 GHGs: Höhne, above n 17, 353-54.
  \item Macintosh, 'The Australia Clause and REDD: a Cautionary Tale', above n 41, 9-10.
  \item Australia, 'Australian Government Data Submission' (UNFCCC Informal Session Discussion, 4 October 2009) 5. Uncertainties for 'forest land' data (A/R activities; harvested native forests, plantations, and other native forests; fuelwood consumption, prescribed burning and wildfires in forests; and removals from recovery post-fire) were also estimated at ±30 per cent: Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (Informal Data Submission to the UNFCCC), above n 42, 1. This did not include deforestation (land-use change).
\end{itemize}
reductions and removals in the land sector should be 'genuine', this was clearly easier said than done due to the technical limitations of accounting in this sector.

Second, developing countries were concerned that the complexity of the new accounting rules being discussed could have implications for the environmental integrity of the Protocol. China, for example, cautioned against creating 'loopholes' that would enable Annex I Parties to achieve their mitigation targets 'by simply doing 'magic' paper work'. Given concerns about the complexities of LULUCF accounting, as well as the lack of time available to negotiate new rules by COP 15/CMP 5 in December 2009 (which had been on the Parties' agenda since 2006), China called for the existing rules to simply be extended to a new commitment period.

The literature has also highlighted the various dangers of relying too heavily on LULUCF abatement as a mitigation strategy. Stern and Taylor, for example, emphasise that if abatement in the LULUCF sector comes at the expense of reducing fossil fuel emissions, this may increase overall mitigation costs in the long-term due to high-carbon infrastructure being 'locked-in' and inadequate investment taking place in low-carbon technologies. A further concern is that unlike when fossil fuel emissions are cut, LULUCF emission reductions and removals are non-permanent, being vulnerable

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53 Australia, 'Australia's Views on the Definitions, Modalities, Rules and Guidelines for the Treatment of LULUCF in the Kyoto Protocol Second Commitment Period', above n 45, 2.
54 China, 'Submission by China on LULUCF under AWG-KP' (24 April 2009), above n 1, 28. See also Malaysia, 'Submission by Malaysia on AWG-KP Agenda Item 5 (b)' in UNFCCC, Views on Options and Proposals for Addressing Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry, UN Doc FCCC/KP/AWG/2009/MISC.11 (24 April 2009) 55, 55.
to future reversals from human land use and management and natural events, especially in a warming climate.  

It should be noted that LULUCF abatement during the first commitment period only represented a minor component of the Annex I Parties' overall mitigation effort (about 2 per cent) due to the restrictions imposed by the rules and the low uptake of voluntary activities under article 3.4. However, Parties recognised that this could change substantially in future with reforms to the rules. If full land-based accounting was introduced, for example, net removals from LULUCF could potentially represent about 30 per cent of Annex I Parties' abatement by 2030. Thus it was widely recognised that the credibility of LULUCF accounting was an important issue in terms of the Parties' ability to achieve their long-term global mitigation goals.

Specifically in relation to Australia, modelling by Treasury for the proposed Carbon Pollution Reduction Scheme (CPRS, see chapter 7) estimated that LULUCF would play a relatively minor role in Australia's 2020 abatement effort: about 2 per cent from reduced deforestation and 4 per cent from increased afforestation and reforestation (A/R). This estimate assumed that the established LULUCF rules would apply and that Australia would continue its practice under the first commitment period of only accounting for mandatory activities under article 3.3. This meant that Australia's reliance on abatement in the land sector could be much higher depending on the exact

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57 See Climate Commission, above n 6, 57; M G J den Elzen et al, *Evaluation of the Copenhagen Accord: Chances and Risks for the 2°C Climate Goal* (Netherlands Environmental Assessment Agency, May 2010) 16. As noted above, the LULUCF rules attempt to address this by requiring a Party to account for a unit of land on an ongoing basis once it has been included in that Party's accounts: *CMP Report 1: Addendum 3 (Part 2)*, decision 16/CMP.1, annex [19].


59 Ibid 54-55.

60 See, eg, UNEP, *Bridging the Emissions Gap* (UNEP, 2011). This report suggested that global emission levels of approximately 44 gigatonnes of CO2-e (GtCO2-e) in 2020 would be consistent with a 'likely' chance of limiting global warming to 2°C. If the low ambition Copenhagen Accord pledges were implemented in a 'lenient' fashion there would be a significant 'emissions gap' of 11 GtCO2-e: 8-9. If industrialised countries, however, adopted 'strict' accounting rules that minimised the use of 'lenient LULUCF credits' (essentially non-genuine credits), the emissions gap could be reduced by up to 0.6 GtCO2e: 27.


62 See ibid.
reforms made to the accounting rules. Indeed, Macintosh suggested that Treasury may have 'significantly' underestimated the potential contribution of LULUCF to Australia's mitigation effort.63 This was because much greater abatement was theoretically possible from several activities, namely: electing to account for article 3.4 activities (especially forest management); from improved vegetation and management schemes in New South Wales and Queensland; and by issuing domestic carbon credits to landholders for LULUCF abatement under the proposed CPRS.64

B Reforming the LULUCF Rules: Analysis of Key Issues

Kyoto Parties agreed early in 2008 that the LULUCF sector would continue to be available to Annex I Parties under a second commitment period of the Protocol.65 This allowed negotiations to focus on the content of any potential rule changes. Since the adoption of the Protocol in 1997 and decision 16/CMP.1 in 2001, numerous deficiencies have been highlighted in relation to the first commitment period rules,66 many of which were directly raised by Parties during the post-2012 negotiations.67 This section confines its analysis to several issues that were given priority by the Parties and Australia during the period of review, the most important of which was how to address deficiencies in accounting for forest management.

1 Rules or Targets First?

As a preliminary issue, developed and developing countries disagreed on whether the LULUCF rules or new Annex I Party mitigation targets (for the post-2012 period) ought to be agreed upon first. The Rudd government had a 'strong preference' for the LULUCF rules to be decided prior to Australia and other Annex I Parties committing to

63 Macintosh, LULUCF Offsets and Australia's 2020 Abatement Task, above n 41, 6.
64 Ibid 8-9, 12. Macintosh estimated that LULUCF offsets could reach up to 370 Mt CO2-e/yr by 2020 compared to Treasury's estimate of 103 Mt CO2-e/yr under a 5 per cent emission reduction target for 2020: 27.
66 See generally, Schlamadinger, 'Options for Including Land Use in a Climate Agreement Post-2012', above n 17, 98.
67 In addition to the many Party submissions to the AWG-KP (available at UNFCCC, Submissions from Parties <http://unfccc.int/documentation/submissions_from_parties/items/5900.php>) see, eg, Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5; UNFCCC, Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper, above n 58, 48-62.
their final quantitative targets. Its belief was that making a decision on the rules prior to the announcement of national targets would allow Australia and other developed countries to make 'an objective commitment' for the second commitment period.

This was because net LULUCF emissions and removals were either added to or subtracted from a Party's AAU, meaning that the land sector rules would have an impact on the level of effort required in other sectors of the economy to meet any given mitigation target. Whether Parties were seen to be making a '[c]omparable effort' would thus be impacted by the LULUCF rules on matters such as forest management caps, which land sector activities were covered, whether activities were mandatory or elective, the baselines adopted, and so forth.

Australia's preference for 'rules before targets' was widely shared by developed countries, but the issue was controversial with many non-Annex I Parties. China, for example, regarded the developed country position as a 'delaying tactic'. The G77 and China (as well as the Alliance of Small Island States (AOSIS)) argued that developed countries should set their targets based on the existing rules, and then increase their targets if rule changes were later made that lessened the mitigation effort required of them.

Developing countries such as Tuvalu, however, accepted the merit of the rules being decided before targets. It noted that the process of setting targets before rules

68 Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 3. This view extended to the broader Kyoto rules and mechanisms, such as those pertaining to use of the flexibility mechanisms. Analysis here is confined to the LULUCF issue.
70 See Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 4.
71 Ibid 3-4. See broader discussion on the notion of comparable effort in chapter 6.
73 China, 'Submission by China on LULUCF under AWG-KP' (24 April 2009), above n 1, 28.
under the first commitment period had led to the undesirable situation in which certain accounting rules were developed to suit the needs of individual Parties, rather than for sound policy reasons. Establishing rules before targets would thus be preferable, allowing developed countries to consider the implications of the accounting rules before setting their final targets.

Tuvalu’s statements as well as the literature on this issue suggest that the Rudd government’s preferred position had a sound policy basis. Indeed, several of the proposed rule changes being discussed had the potential to allow Australia to achieve its minimum 5 per cent target reduction for 2020 solely through its LULUCF activities, highlighting the sense in formalising the accounting rules before setting final mitigation goals.

Ultimately, given the complexity of the LULUCF negotiations, and the inability of Parties to quickly resolve this issue, it became clear that developed countries needed to announce their mitigation targets prior to the adoption of new LULUCF rules. If not, Parties would have been unable to engage in meaningful negotiations on mitigation targets prior to COP 15/CMP 5 in Copenhagen (December 2009). To its credit, Australia ultimately announced its mitigation goal for 2020 regardless of the lack of consensus on the LULUCF rules, recognising the practical need to do so, as did other Parties.

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76 See ibid 2.
77 See ibid.
78 See, eg, Höhne, above n 17, 367; Schlamadinger, ‘A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords’, above n 17, 273; Schlamadinger, ‘Options for Including Land Use in a Climate Agreement Post-2012’, above n 17, 298.
79 Macintosh, LULUCF Offsets and Australia’s 2020 Abatement Task, above n 41, 27.
2 Activity Versus Land-Based Accounting

As noted, the Kyoto Protocol adopted an activity-based approach to LULUCF accounting. One of the most far-reaching proposals in the LULUCF negotiations was to introduce full land-based accounting, the approach of the Convention.81 The key proponent of this approach leading up to CMP 5, known as 'Option B', was Papua New Guinea (PNG), backed by the Coalition for Rainforest Nations and various other developing countries.82 PNG's joint submissions argued that activity-based accounting 'significantly erode[d] the environmental integrity' of Annex I Parties' mitigation targets.83 This was because Annex I Parties were able to opt out of voluntary article 3.4 activities, thereby avoiding to account for a 'significant portion' of anthropogenic GHGs.84 The rules also allowed Annex I Parties to 'cherry pick' the land areas and activities they reported on under article 3.4 activities – that is, Parties could choose to account for areas generating removals and exclude areas causing emissions.85

Several developed countries including the EU and Switzerland initially expressed an interest in considering land-based accounting for the second commitment period.86 However, while recognising the benefits of this approach, most Parties ultimately opposed introducing land-based accounting at that time, seeing it as a longer-term

81 See generally UNFCCC, Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper, above n 58, 54-55.
83 Central African Republic et al, above n 82, 17.
84 Ibid. This submission estimated that mandatory reporting of emissions/removals from A/R and deforestation during CP 1 covered less than 1 per cent of Annex I Parties' total land area.
85 Ibid. See further Andrew Macintosh, ‘Are Forest Management Reference Levels Incompatible with Robust Climate Outcomes? A Case Study on Australia’ 2 (2011) Carbon Management 1, 1-4; Schlamadinger, ‘Options for Including Land Use in a Climate Agreement Post-2012’, above n 17, 296. The broad and narrow approaches allowed for forest management accounting in particular allows Parties to preferentially exclude forest areas that are sources and include sink areas to maximize LULUCF offsets.
The major concern was that emissions data was not yet sufficiently reliable for all land areas and would thus increase the uncertainty of emissions and removals estimates. This was particularly the case in relation to wetlands, settlements and changes in soil carbon stocks.

The Rudd government indicated that its preferred option was to move to land-based accounting in a third commitment period (post-2020), believing that more modest revisions of the activity-based approach were 'more feasible' in the negotiating time available. The government also introduced a related proposal to list LULUCF as a sector/source category in Annex A of the Protocol, removing the complex approach to calculating Parties' final emission reductions and removals that is collectively required by articles 3.3, 3.4 and 3.7. The 'inclusion in target' proposal would have required Annex I Parties' emissions baselines to reflect net emissions from all mandatory and elected activities for the purposes of determining its AAU.

93 See Australia, 'Text to be Included in the "Draft Conclusions Proposed by the Chair" (FCCC/KP/AWG/2009/L.3)', above n 90, 5-6, 11; Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (Informal Data Submission to the UNFCCC), above n 42, 10.
a transitional means of moving towards full land-based accounting, but did not have the backing of other Parties.

It is clear from a scientific point of view that full land-based accounting was ultimately a preferable approach, representing a more complete form of carbon accounting. PNG's joint-submission argued that the quality and quantity of data reported by Annex I Parties had continuously improved over time and that the 'principle of conservativeness' could be applied to prevent overestimation of emissions and removals. However, it needs to be appreciated that, as noted earlier, implementing land-based accounting could increase Annex I Parties' net removals by up to 30 per cent by 2030. As such, Parties including Australia were right not to push ahead with this accounting method in the second commitment period given that Annex I Parties were not yet able to do so with a sufficient degree of confidence in its environmental integrity.

3 Harvested Wood Products

A further rule change sought by Annex I Parties, including Australia, was to introduce accounting for so-called 'harvested wood products' (HWPs). With Parties unable to agree on how to account for HWP emissions when negotiating the Marrakech Accords, this subject was not addressed by the first commitment period rules. This meant that the carbon stored in these products was simply assumed to be released into the atmosphere at the time the relevant forest was harvested. The Rudd government sought reform of this rule, arguing that carbon stored in wood products was only

94 Kirsten Macy, Bill Hare and Claudine Chen, 'LULUCF Guide' (AirClim Briefing No 8, AirClim, 2011) 18.
95 Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 125.
97 Central African Republic et al, above n 82, 21.
98 See Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper, above n 58, 55.
99 HWPs are wood-based products that store carbon for varying periods of time depending on their use. Examples include paper, cardboard, short-lived timber products such as pallets and longer-lived timber products such as building trusses and furniture: see Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 133.
100 Schlamadinger, 'Options for Including Land Use in a Climate Agreement Post-2012', above n 17, 297.
released into the atmosphere once a wood product decayed or was burnt.\textsuperscript{101} It preferred that HWPs be accounted for so as to accurately reflect 'what the atmosphere sees'.\textsuperscript{102} This would create an incentive for Parties to maximise the time in which carbon was stored in HWPs by creating longer-lived wood products.\textsuperscript{103} Other developed countries also generally supported the introduction of accounting for HWPs so as to incentivise the storage of carbon in this manner.\textsuperscript{104}

Parties discussed several options for HWP accounting. Three methods under consideration, proposed as far back as 1998, included the stock-change approach, the production approach and the atmospheric-flow approach. These methods differed in terms of whether the producer or consumer country would be held responsible for changes in carbon stocks and in the wood products pool.\textsuperscript{105} New Zealand also proposed the 'emissions-to-atmosphere' approach, which was backed by the Rudd government.\textsuperscript{106} This approach proposed to account for emissions from forest harvesting on the basis of when they occurred, subject to reliable data being available.\textsuperscript{107} The responsibility for the relevant emissions would rest with the wood producing country, irrespective of whether the HWP was exported to another

\textsuperscript{101} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 11.
\textsuperscript{103} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 11. Australia supported a change to decision 16/CMP.1, annex, paragraph 21, whereby HWP would be added as an additional carbon pool which must be accounted for if appropriate data was available: 12
\textsuperscript{106} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 11.
country.\textsuperscript{108} Emission estimates would be derived by applying default internationally agreed average lifetimes of different end-uses for wood products and by-products (tier 2 accounting) or agreed country-specific lifetimes (tier 3 accounting).\textsuperscript{109} New Zealand proposed that accounting for HWPs be introduced for both A/R activities and forest management.\textsuperscript{110} The Rudd government believed that New Zealand’s proposal offered a ‘practical approach’\textsuperscript{111} and suggested that the IPCC be tasked with developing the appropriate methodologies.\textsuperscript{112}

While introducing accounting for HWPs was generally supported by developed countries, key developing countries including China and India expressed strong reservations. China argued that ‘difficulties in relevant data and methodologies’ should prevent its inclusion in the second commitment period.\textsuperscript{113} Similarly, India noted that accounting for HWPs was ‘not easy’ and that ‘no universally acceptable methodology’ was then available.\textsuperscript{114} As such, it saw HWP as a ‘grey area’ which it was unable to support unless the accounting approach adopted was ‘foolproof’.\textsuperscript{115} Tuvalu, however, supported including HWP, albeit on a more restricted basis. Unlike the emissions-to-atmosphere proposal, Tuvalu preferred that Annex I Parties only account for domestically consumed HWPs (not those that were exported), in part to make HWP accounting simpler, more transparent and verifiable.\textsuperscript{116} It also proposed that HWP be limited to reforestation, biomass decline, forest management, and generally to ‘relatively long lived HWPs’.\textsuperscript{117}

\begin{thebibliography}{9}
\bibitem{55} Ibid 55.
\bibitem{56} New Zealand, ‘Input to AWG-KP Session 6 (Ghana August 2008) on Land Use Land-Use Change and Forestry Rules for Post-2012’ (Informal Submission to the UNFCCC, August 2008) 15.
\bibitem{57} Ibid. Emissions would be accounted for within the existing five carbon pools (above-ground biomass, below-ground biomass, litter, dead wood and soil organic carbon): 18.
\bibitem{58} Australia, ‘Land Use, Land-Use Change and Forestry (LULUCF)’ (6 March 2009), above n 45, 11.
\bibitem{59} Ibid 12.
\bibitem{60} China, ‘Submission by China on LULUCF under AWG-KP’ (24 April 2009), above n 1, 29.
\bibitem{61} India, ‘Submission by Government of India on AWG-KP Agenda Item 5 (b)’, above n 47, 45.
\bibitem{62} Ibid.
\bibitem{63} Tuvalu, ‘Submission on Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry (LULUCF) in the Second Commitment Period’, above n 75, 3-4.
\bibitem{64} Ibid 4. Biomass decline was a new activity proposed by Tuvalu. Japan shared Tuvalu’s view that HWP accounting should be restricted to long-lived and domestically consumed HWPs: Japan, ‘Japan’s View on the Need for Information and Data to Facilitate Parties’ Understanding of the Implications of the Options for the Treatment of LULUCF’ (Informal Submission to the UNFCCC, August 2009) 2.
\end{thebibliography}
Parties were ultimately unable to agree on an accounting approach for HWP at Copenhagen, with the different approaches under discussion being seen to advantage or disadvantage particular countries.\textsuperscript{118} It should be noted that while this issue was pushed heavily by several developed countries, accounting for HWPs was only expected to have a minor impact on Annex I Parties’ overall emissions and removals.\textsuperscript{119} This included Australia for whom the emissions-to-atmosphere proposal (its preferred option) would have only marginally increased its claimable removals from A/R and forest management.\textsuperscript{120} Nonetheless, the concerns of some Parties regarding environmental effectiveness were understandable given that unreliable HWP accounting would undermine the credibility of LULUCF accounting, regardless of its small overall impact on emissions. Introducing HWP would also have allowed Annex I Parties to marginally decrease their immediate emission reductions in their fossil fuel sectors, as accounting for carbon emissions from HWPs would be delayed until a later date (instead of being presumed to occur at the time of harvest). Nonetheless, it was entirely reasonable for the Rudd government to back the inclusion of HWP accounting – so long as it could be done reliably – as this reform would have enabled Parties to more accurately account for the emissions the atmosphere actually sees and also incentivised the use of long-lived wood products.\textsuperscript{121}

\section*{4 Inclusion of Other Article 3.4 Activities}

Another key topic of negotiation was whether or not to extend the list of activities which Parties could voluntarily account for under article 3.4. Proposed new activities

\begin{footnotesize}
\begin{enumerate}
\item See the draft decision on the LULUCF rules: UNFCCC, \textit{Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol to the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at its Fifth Session}, UN Doc FCCC/KP/AWG/2009/L.15 (16 December 2009) annex, 22; Fry, ‘If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?’, above n 5, 133-134. Parties ultimately agreed at CMP 7, Durban 2011, that Annex I Parties could account for domestic HWPs (except for several activities, especially deforestation) on the basis of default values or country-specific data, subject to transparent and verifiable data being available: UNFCCC, \textit{Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Seventh Session: Addendum (Part 2)}, UN Doc FCCC/KP/CMP/2011/10/Add.1 (Part 2) (15 March 2012), decision 2/CMP.7, annex [26-31] (‘CMP 7 Report’).
\item Approximately 0.5 per cent of 1990 non-LULUCF emissions: see UNFCCC, \textit{Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper}, above n 58, 61.
\item See Macintosh, \textit{LULUCF Offsets and Australia’s 2020 Abatement Task}, above n 41, 24.
\item See further Schlamadinger, ‘Options for Including Land Use in a Climate Agreement Post-2012’, above n 17, 297. Cf concerns that HWP accounting could incentivise increased forest harvesting and thus unsustainable logging: Macy, Hare and Chen, above n 94, 18.
\end{enumerate}
\end{footnotesize}
included devegetation, forest biomass decline, forest degradation and wetland/peat land management.\textsuperscript{122} A number of developing countries were greatly concerned about the potential consequences of adding new activities, such as increasing accounting complexities, creating new accounting loopholes and potential obfuscation.\textsuperscript{123} This included China and India, who both cited environmental effectiveness concerns. China argued that due to 'difficulties in relevant data and methodologies' new activities such as wetland management should not be considered for the second commitment period,\textsuperscript{124} while India opposed including new activities without improvements to the quality of accounting.\textsuperscript{125} The Rudd government did not prioritise this issue and thus this chapter does not consider the topic in detail. However, the government did indicate that it was open to considering the inclusion of new activities such as wetland/peat land management, subject to its broader concerns regarding the effects of natural disturbances and inter-annual variability on Parties' accounts first being addressed\textsuperscript{126} (see discussion below). This view appeared to be consistent with that of other developed countries,\textsuperscript{127} many of whom were open to including new activities, although Japan also highlighted the need for improvements in data quality.\textsuperscript{128} Notwithstanding the concerns raised by several developing countries, the Rudd government's openness to considering the inclusion of new activities appeared to be

\begin{footnotesize}
\begin{enumerate}
\item See, eg, UNFCCC, \textit{Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper}, above n 58, 53-54; Tuvalu, 'Submission on Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry (LULUCF) in the Second Commitment Period', above n 75, 3; Belarus, 'Submission on Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry (LULUCF) in the Second Commitment Period' in UNFCCC, \textit{Views on Options and Proposals for Addressing Definitions, Modalities, Rules and Guidelines for the Treatment of Land-Use, Land-Use Change and Forestry}, UN Doc FCCC/KP/AWG/2009/MISC.11 (30 April 2009) 8, 10. 'Forest biomass decline' is a similar concept to forest degradation.
\item Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 134-135.
\item China, 'Submission by China on LULUCF under AWG-KP' (24 April 2009), above n 1, 29.
\item India, 'Submission by Government of India on AWG-KP Agenda Item 5 (b)', above n 47, 44.
\item Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 10.
\item Japan, 'View on the Treatment of Land Use, Land-Use Change and Forestry (LULUCF)', above n 88, 45.
\end{enumerate}
\end{footnotesize}
reasonable, bearing in mind the need for more comprehensive accounting of the LULUCF sector until full land-based accounting can be introduced.\textsuperscript{129}

5 Forest Management: Force Majeure and Forest Management Reference Levels

This chapter now turns to examining in detail the issue of forest management accounting, the major concern of Annex I Parties regarding LULUCF, including Australia, during the period of review. The two major topics of negotiation included how to address the effects of major or extreme natural disturbance events (such as wildfires and droughts), and how to address the effects of other 'indirect' non-anthropogenic effects. These latter effects included:

- CO2 fertilisation – increased forest growth caused by rising CO2 levels, which is greater in some regions than others;
- nitrogen deposition – increased forest growth from deposited nitrogen, from various sources, which varies from region to region; and
- the effects of pre-1990 activities, particularly the age-class structure of forests – which absorb less carbon as they age, meaning that some Parties' forest sinks are naturally growing, while others are shrinking.\textsuperscript{130}

Before considering the Parties' specific proposals on these issues, it is necessary to outline the broader historical context to the forest management negotiations. 'Factoring out' non-anthropogenic effects from LULUCF accounting was a significant concern in the Marrakesh Accord negotiations. The LULUCF principles adopted at Marrakesh recognise that emissions and removals caused by these effects should be excluded from Parties' accounts.\textsuperscript{131} At the time, however, Parties did not consider it practical to explicitly exclude these non-anthropogenic effects, resulting in Parties aiming to indirectly achieve this aim by defining special land-use change 'activities' (deforestation, A/R, forest management etc) and specific accounting rules.\textsuperscript{132}

\textsuperscript{129} No decision on the inclusion of new activities was reached by CMP 5, Copenhagen. Parties later agreed to the inclusion of 'wetland drainage and rewetting' at CMP 7, Durban 2011: CMP 7 Report, decision 2/CMP.7, annex [6].
\textsuperscript{130} See generally Canadell, above n 32, 371-72; Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 273, 276.
\textsuperscript{131} CMP Report 1: Addendum 3 (Part 2), decision 16/CMP.1, [1(h)].
\textsuperscript{132} See Canadell, above n 32, 375.
As noted, Parties adopted a gross-net approach to forest management accounting, combined with a cap, in the first commitment period. This meant that Annex I Parties only accounted for net emissions and removals during 2008-12, rather than comparing emissions and removals in 2008-12 to 1990 (the net-net approach applied to fossil fuel-based sectors). The gross-net approach was adopted for forest management primarily due to concerns that some Parties would be unfairly penalised by the age-class distribution of their forests if net-net accounting was used.\(^\text{133}\) This was because in many Annex I countries, reforestation policies were initiated prior to 1990, and forests could be reaching maturity and their point of carbon 'saturation'.\(^\text{134}\) Net-net accounting could thus result in these Parties incurring emission debits that were not the result of anthropogenic activities.\(^\text{135}\) Gross-net accounting introduced the risk, however, that some Parties could receive windfall credits, as all emissions and removals from forest management lands during 2008-12 would be assumed to be the product of deliberate policy measures.\(^\text{136}\) This meant that some Parties could earn credits from indirect non-anthropic effects or actions taken prior to 1990.\(^\text{137}\) Indeed, if fully utilised, forest sinks in the US, Canada and Japan could have achieved removals roughly equivalent to Annex I Parties' collective target for the first commitment period (5 per cent below 1990 levels),\(^\text{138}\) while the US could have achieved its Kyoto target solely from pre-existing forest management activities.\(^\text{139}\)

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\(^{133}\) Macintosh, 'Are Forest Management Reference Levels Incompatible with Robust Climate Outcomes? A Case Study on Australia', above n 85, 4. Note that Annex I Parties regarded net-net accounting as acceptable for other article 3.4 activities (grazing land management, cropland management and revegetation) as this provided a relatively effective means of factoring out some natural and indirect human-induced impacts. However, Parties were still exposed to the impacts of inter-annual variability and major natural disturbance events: see Andrew Kerr Macintosh, 'LULUCF in the Post-2012 Regime: Fixing the Problems of the Past?' (2011) Climate Policy 1; Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 276; Canadell, above n 32, 377.

\(^{134}\) See Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 273, 276-277.

\(^{135}\) Ibid 277.

\(^{136}\) Macintosh, 'Are Forest Management Reference Levels Incompatible with Robust Climate Outcomes? A Case Study on Australia', above n 85, 4.

\(^{137}\) Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 277.

\(^{138}\) See Höhne, above n 17, 365.

at COP 6, 2001, the EU, G77 and China and AOSIS sought to limit the use of sinks.\textsuperscript{140} Ultimately, a deal was reached that saw Annex I Parties accept a cap on the use of forest management removals in meeting their mitigation targets.\textsuperscript{141}

Notwithstanding these efforts to address concerns regarding forest management accounting, many Annex I Parties, including Australia, opted not to account for this voluntary activity during the first commitment period, chiefly due to concerns about the impact of non-anthropogenic influences on their emissions and removals.\textsuperscript{142} This meant that in the post-2012 negotiations, a number of Annex I Parties were concerned about how to best exclude the impacts of non-anthropogenic effects so as to enable them to account for forest management beyond 2012. This issue was the major focus of the Rudd government in the LULUCF negotiations.\textsuperscript{143}

The two specific concerns of Australia and other Parties are now addressed in turn.

\textit{a) Addressing Major Natural Disturbances/Force Majeure}

\textit{i) Australia's Concerns}

The Rudd government was strongly concerned about the impact of 'major natural disturbance events', as well as inter-annual climatic variability, for forest management accounting in Australia.\textsuperscript{144} It highlighted that events such as large wildfires, drought, extensive windthrow or pest outbreaks, could lead to significant variations in yearly emissions and removals.\textsuperscript{145} The risk of large wildfires, and to a lesser extent inter-

\begin{flushright}
\textsuperscript{140} See Höhne, above n 17, 365.
\textsuperscript{141} See ibid. See above, n 38, regarding cap details.
\textsuperscript{142} See New Zealand, 'Input to AWG-KP Session 6 (Ghana August 2008) on Land Use Land-Use Change and Forestry Rules for Post-2012', above n 109, 8. 21 of 37 Parties (excluding the European Community) elected to account for forest management.
\textsuperscript{143} Note that Australia was also concerned about the role of non-anthropogenic effects on other article 3.3 and 3.4 activities. Discussion here is limited to forest management. While non-anthropogenic factors were also relevant to mandatory accounting of A/R activities under article 3.3, the A/R 'debit-credit sub-rule' allowed Australia to manage the risk. This rule prevents debits (emissions) being larger than credits (removals) on harvested land. Australia supported the rule continuing in CP2, if necessary, depending on what other rule changes were made: see Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 12; \textit{CMP Report 1: Addendum 3 (Part 2)}, decision 16/CMP.1, annex [4]; Höhne, above n 17, 356.
\textsuperscript{144} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 64, 65.
\textsuperscript{145} Ibid. Windthrow refers to trees being uprooted or broken due to severe wind.
\end{flushright}
annual climatic variability, caused the government not to elect to account for any article 3.4 activities during the first commitment period.\textsuperscript{146}

The Rudd government accepted that 'usual levels of variability', such as minor fires and pest activity, should be accounted for under forest management.\textsuperscript{147} Its main concern was to exclude emissions from 'major' natural disturbances, which could leave Parties with 'no control over meeting or exceeding their [mitigation] commitments'.\textsuperscript{148} Major Australian wildfires in 2003, for example, had caused 190 Mt CO2-e emissions on article 3.4 lands, about one third of Australia's annual 591.5 Mt CO2-e emissions allowance for 2008-12.\textsuperscript{149} While reporting methods under the Convention allowed Parties to symmetrically include or exclude CO2 removals and emissions from natural disturbances on 'managed lands', no such procedure existed under the Protocol.\textsuperscript{150}

The Rudd government was further concerned about the effects of inter-annual climatic variability, such as rainfall or average temperature, which also caused large annual variations in Australia's carbon emissions and removals.\textsuperscript{151} A single year in Australia could produce a large spike in emissions. In 2002, for example, inter-annual rainfall variability caused a jump in emissions of around 70 Mt CO2-e from croplands (about 12 per cent of Australia's base year emissions) which was then recovered in 2003.\textsuperscript{152} The government wished to address this by allowing Parties to account for emissions and removals using a rolling average \textsuperscript{153} for example, 3, 5 or 7 years, which would flatten out any emissions or removal spikes in particular years.\textsuperscript{154} This proposal received little attention in other Parties' submissions, and is not discussed in detail here as Parties instead opted to address this issue when setting forest management reference levels (see below).

\textsuperscript{146} Ibid 65, 67.
\textsuperscript{147} Ibid 65.
\textsuperscript{148} Ibid.
\textsuperscript{149} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 7.
\textsuperscript{150} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 66-67. As per the IPCC's 2003 \textit{Good Practice Guidance for LULUCF}: see Penman, above n 21, ch 3.
\textsuperscript{151} See Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 65, 67.
\textsuperscript{152} Ibid 68; Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 7.
\textsuperscript{153} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 9.
\textsuperscript{154} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 68.
The Rudd government made clear that without appropriate rule changes being made to the treatment of these non-anthropogenic emissions, Australia would be unable to elect to account for forest management in future commitment periods, limiting Australia's mitigation potential in this area.\textsuperscript{155} This would have an ongoing impact on the completeness of Australia's accounts given that all of its forest lands were regarded as 'managed' under the Protocol (due to activities such as prescribed burning to reduce the severity of wildfires).\textsuperscript{156} As noted in chapter 6, the 'adequate treatment' of natural disturbances was made a condition of Australia adopting its upper 25 per cent reduction target for 2020.\textsuperscript{157}

Briefly, it should be noted that this issue overlapped with another important topic in the LULUCF negotiations, namely whether accounting for article 3.4 activities ought to be voluntary or mandatory. The G77 and China wished to stop the ability of developed countries to 'pick and choose' which activities they accounted for and thus called for accounting of all article 3.4 activities to be mandatory for the second commitment period.\textsuperscript{158} The Rudd government, however, made clear that it would not support a move to mandatory accounting unless major natural disturbance and inter-annual

\textsuperscript{155} Ibid 65.
\textsuperscript{156} Australia, 'Australian Government Data Submission', above n 52, 2; Macintosh, 'Are Forest Management Reference Levels Incompatible with Robust Climate Outcomes? A Case Study on Australia', above n 85, 12. The IPCC \textit{Good Practice Guidance for LULUCF} divided forested land into 'managed' and 'unmanaged' categories. Only managed forest lands must be accounted for: see Penman, above n 21, ch 3.
\textsuperscript{157} Australian Government, \textit{FOI Australia's Target Conditions – Where Do We Stand?}, above n 48, 2. See chapter 6 regarding Australia's 2020 target and conditions.
\textsuperscript{158} Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 127.
variability issues were addressed, a view shared by other developed countries such as New Zealand.

**ii) Proposals to Address Major or Extreme Non-Anthropogenic Emissions**

The Rudd government's concern regarding non-anthropogenic influences on emissions and removals was held by a range of other Parties, especially those with similar national circumstances to Australia like Canada and Russia. According to the UNFCCC, natural disturbance impacts under a second commitment period could amount to about 5 per cent of Annex I Parties' total non-LULUCF emissions in 1990.

To address its concerns, the Rudd government introduced a proposal to exclude the impacts of certain natural disturbance events. Its proposal built on the approach available in Convention reporting. Parties with sufficient accounting practices (preferably tier 3, the most stringent IPCC level) would be able to symmetrically include or exclude CO2 emissions and removals from 'major natural disturbances'. Only emissions that were 'not direct-human induced' would be excluded. Presumably this meant that emissions that were, for example, caused by deliberately lit fires, would be included in a Party's accounts, but the government did not make this clear.

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159 Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 65-66. In 2012, the Gillard government reversed Australia's position, opting to account for cropland management, grazing land management and revegetation in the second commitment period due to satisfactory changes being made to the rules on major natural disturbances (see below) and improvements to the way Parties could estimate emissions from land activities which reduced the risk of emissions from natural causes being accounted for: see Australian Government, 'New Opportunities for Land Sector Participation in Carbon Markets' (Fact Sheet, 2013) 2.

160 New Zealand also argued against mandatory accounting due to 'data limitations and uncertainty' and 'the high cost of measurement and monitoring': New Zealand, 'A Submission to the Ad-Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP)' (24 February 2009), above n 107, 53. No decision was made on this issue at CMP 5, Copenhagen. Parties later agreed at CMP 7, Durban 2011, that accounting for forest management would be compulsory in the second commitment period but that other article 3.4 activities would remain voluntary: CMP 7 Report, decision 2/CMP.7, annex [6-7]. See further, Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, will it be Accounted For?', above n 5, 127.

161 See UNFCCC, Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper, above n 58, 57; Canada, 'Land Use, Land-Use Change and Forestry (LULUCF)', above n 104, 13.

162 See UNFCCC, Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper, above n 58, 57.

163 Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 70.

164 Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (Informal Data Submission to the UNFCCC), above n 42, 6.
The overarching principle behind Australia's proposal was that only anthropogenic emissions and removals should be accounted for. Key features of the proposal were that:

- previous credits for removals on a unit of land prior to the major natural disturbance could be maintained;
- the unit of land could re-enter the national accounts only once the CO2 removals equalled the carbon stock losses from the disturbance event (as the forest regrew, absorbing CO2);
- emissions would not be excluded if a land-use change occurred after the major natural disturbance, such as deforestation (to prevent creating a perverse incentive to deforest land affected by wildfires and other natural events);
- the threshold for determining what amounted to a 'major natural disturbance' would be supplied by the Party who would need to demonstrate that the event was 'an anomalous event differentiated from background emissions'. This would be subject to expert review;
- non-CO2 emissions would be permanently excluded from a Party’s accounts (as non-CO2 emissions are not absorbed by terrestrial ecosystems); and
- direct-human induced emissions and removals on the land subject to the major natural disturbance would still be accounted for.

Tuvalu, a developing nation which has long had a particular interest in improving LULUCF accounting, made a similar proposal to allow an accounting time-out for what it termed a *force majeure* event, a legal concept that exists in both international and domestic law. Tuvalu’s proposal had a higher conceptual threshold for the exclusion of non-anthropogenic emissions, with *force majeure* defined by Tuvalu as 'an

165 Ibid.
166 Ibid 7; Australia, 'Land Use, Land-Use Change and Forestry (LULUCF) Sector', above n 102, 70.
extraordinary event or circumstance that is beyond the control of Parties'.\textsuperscript{168} The concept would not 'excuse negligence or other malfeasance of a Party.'\textsuperscript{169}

Alternative approaches were also proposed by various other Parties. PNG and others suggested that Parties could 'carry over' emission debits caused by such events to the subsequent commitment period, thus avoiding any penalties.\textsuperscript{170} This was based on the idea that any emission debits would be offset in future commitment periods due to forest regrowth.\textsuperscript{171} The Rudd government was strongly opposed, however, to any carry-over provision. It argued that non-anthropogenic emissions would still remain in Parties' accounts and would thus remove comparability between their mitigation commitments (as non-anthropogenic emissions would be accounted for by those that experienced major natural disturbances in a given commitment period but not others).\textsuperscript{172} It would also reduce the ability of some Parties to adopt ambitious post-2012 mitigation targets as countries like Australia would still need to factor in the potential impacts of major natural disturbances.\textsuperscript{173} These concerns were clearly justified and were shared by countries such as Canada.\textsuperscript{174}

A further proposal was to introduce a 'discount factor' for awarded debits and credits.\textsuperscript{175} This was supported by the EU, Switzerland\textsuperscript{176} and others but opposed by

\begin{itemize}
\item \textsuperscript{168} Tuvalu, 'Submission on Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry (LULUCF) in the Second Commitment Period', above n 75, 7. Emphasis added. As with Australia's proposal, the clause proposed addressing major non-anthropogenic events such as wildfire, severe pest outbreak, flooding, landslide, volcano, earthquake, or severe wind storm.
\item \textsuperscript{169} Ibid.
\item \textsuperscript{170} Central African Republic et al, above n 82, 20.
\item \textsuperscript{171} Ibid.
\item \textsuperscript{172} Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 7-8.
\item \textsuperscript{173} Ibid 8.
\item \textsuperscript{174} Canada, 'Information and Data on Land Use, Land-Use Change and Forestry (LULUCF)' (Informal Data Submission to the UNFCCC, September 2009) 9.
\item \textsuperscript{175} The implications of a discount factor on emissions/removals would depend on the factor applied. For example, an 85 per cent cap would yield similar results to the existing cap (about 1.4 per cent of total Annex I emissions in 1990 without LULUCF) but differences would vary party to party: UNFCCC, \textit{Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper}, above n 58, 50.
\item \textsuperscript{176} European Community, above n 104, 37; Switzerland, 'Submission on Possible Options for Consideration Relating to Land-Use, Land-use Change and Forestry', above n 127, 68.
\end{itemize}
Australia and others including Canada and Russia. The Rudd government's concern was again that non-anthropogenic emissions would still remain in Parties' accounts, limiting the incentive to account for forest management and to mitigate this source of emissions.

The approach that ultimately received most interest was that of a time-out or force majeure type provision, along the lines proposed by Australia and Tuvalu. A key point of contention arose, however, regarding the threshold at which such a provision should apply. Some Parties preferred to adopt a stronger threshold than Australia. In preference to Australia’s threshold of a 'major' natural disturbance, New Zealand and Indonesia shared Tuvalu’s view that a force majeure clause should only apply to 'extraordinary' natural disturbances that were beyond a Party's control and that resulted in a compliance risk. The EU was similarly chiefly concerned about 'extreme' events causing a compliance risk. New Zealand suggested that determining what constituted a force majeure could be achieved by comparing the scale of the event in percentage terms to a Party's total emissions or similar factors.


178 See Australia, 'Land Use, Land-Use Change and Forestry (LULUCF)' (6 March 2009), above n 45, 7-9. A further idea was to address major natural disturbances through a global insurance mechanism of forest management credits set aside by all Parties to compensate those with major natural disturbances. This was also rejected by the Rudd government, and received little attention by the Parties: 8.


180 European Community, above n 104, 37-38.

Other Parties supported a weaker threshold. Canada argued that thresholds such as 'major' or 'extraordinary' were unworkable due to its national circumstances. It stated that 'significant emissions' from natural disturbances occurred every year in Canada (namely from wildfires and insect infestations), 'not just on an exceptional basis'.\(^{182}\) This was despite its 'substantial protection efforts'.\(^{183}\) Thus Canada argued that limiting factoring out to natural disturbance emissions that met the threshold of 'major', 'extreme', force majeure or a 'compliance risk', would not adequately remove the effect of lesser natural disturbances in Canada's accounting.\(^{184}\) It thus proposed seeking guidance from the IPCC on methodological approaches for excluding natural disturbance emissions and removals.\(^{185}\)

Other Parties such as India were reluctant to support a force majeure provision at all. India argued that this was a 'grey area', highlighting that there was 'a thin line between an event being "force majeure" or ... man-made.'\(^{186}\) In doing so, India raised a major methodological problem regarding a force majeure clause, namely, how to determine whether major or extreme events were 'natural' or 'anthropogenic'. Many wildfires in Australia, for example, are deliberately or accidentally started by humans,\(^{187}\) and it would clearly be difficult to distinguish between such emissions. India also highlighted the difficulty of establishing whether an event was beyond a Party's control, as it would need to be considered whether a Party took adequate preventative or control measures before and after the event, respectively.\(^{188}\) Japan was also cautious on this issue, believing that excluding natural disturbance impacts from accounting risked reducing the incentive to prevent natural disturbances and restore affected areas as

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\(^{182}\) Canada, 'Information and Data on Land Use, Land-Use Change and Forestry (LULUCF)', above n 174, 9. Fire and insect infestations in Canada caused LULUCF sector emissions/removals to fluctuate between a 13 per cent credit to a 31 per cent debit since 1990: 1-2.

\(^{183}\) Ibid.

\(^{184}\) Ibid.

\(^{185}\) Canada, 'Land Use, Land-Use Change and Forestry (LULUCF)', above n 104, 16.

\(^{186}\) India, 'Submission by Government of India on AWG-KP Agenda Item 5 (b)', above n 47, 45.

\(^{187}\) See Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 131.

\(^{188}\) See India, 'Submission by Government of India on AWG-KP Agenda Item 5 (b)', above n 47, 45.
part of normal forest management activities, but was nonetheless open to a *force majeure* provision using the threshold of 'extraordinary'.

### iii) Analysis

There were clearly risks from an environmental effectiveness perspective in introducing a time-out/*force majeure* provision for forest management accounting, especially as 'natural' disturbances such as wildfires can both be caused and exacerbated by human activity. The type of provision being proposed by Australia and others undoubtedly risked introducing a new accounting loophole for developed countries. Australia was criticised by some environmentalists during the post-2012 negotiations for proposing such a provision. Then Deputy Leader of the Australian Greens, Christine Milne, for example, labelled the Rudd government's proposal an attempt to 'cook the books', while Greenpeace International labelled it an 'accounting fraud'. Such critics, however, seemed to ignore the legitimate need for Parties like Australia to exclude emissions from events which it could not practicably control as well as the focus of the ICCL regime on reducing human-induced, rather than natural, sources of emissions. In stating this, it needs to be emphasised that Australia has, for many years, undertaken significant efforts to limit the extent of events such as wildfires through prescribed burning and other practices; yet these practices are typically unable to prevent major fires caused by extreme weather.

As such, notwithstanding the potential risks involved in the Rudd government's proposal, its call for a provision to address emissions from natural disturbances was warranted, at least in principle. Without such a provision, it was clear that future Australian governments would remain unable to account for any emissions and removals on forest management lands, providing no incentive to abate emissions in this area and limiting Australia's access to a legitimate and relatively low cost source of...

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mitigation. Electing to account for forest management without such a rule change, would put Australia at risk of breaching its future mitigation commitments, and likely require it and other Annex I Parties with similar national circumstances to import international emission permits to cover any shortfall. In reaching this conclusion, it should reiterated that the clear aim of the UNFCCC and Kyoto Protocol is to address human-induced, rather than naturally-caused emissions, and thus the Rudd government's desire not to be held responsible for non-anthropogenic emissions was perfectly consistent with the objective and provisions of the ICCL regime. The ICCL regime's focus on mitigating anthropogenic emissions also suggests that the Rudd government's proposal to exclude emissions from 'major' natural events, as opposed to 'extraordinary' or some other particularly stringent level, was reasonable.

While this chapter thus suggests that the Rudd government's negotiating positions on the force majeure issue were thus broadly reasonable and not inherently inconsistent with an environmentally effective approach, it needs to be appreciated that during the period of review, Parties had yet to agree on the precise threshold and conditions they would need to satisfy before invoking such a clause. It was apparent from the Parties' discussions that the environmental integrity of a force majeure clause would ultimately hinge on the precise details of when it could be invoked by Parties. Negotiations on this were ultimately not concluded during the period of review.

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192 Note that forest management accounting was made compulsory at CMP 7, Durban 2011, due to the rule changes later agreed to on this issue (see below).
193 UNFCCC art 2; see, eg, Kyoto Protocol art 3.1.
194 Subsequent to the first Rudd government’s term in office, Australia and Canada made further submissions on this issue: see, eg, Australia and Canada, 'Implementing Force Majeure' (Informal Presentation to the AWG-KP, Tianjin, 7 October 2010).
195 Rules were later agreed to at CMP 7, Durban 2011, that picked up on elements of both Australia and Tuvalu’s proposals. The rule allows Parties to exclude 'significant' natural disturbance emissions as part of their forest management reference levels. Parties defined 'natural disturbances' as 'events or circumstances' that caused 'significant emissions in forests' and were 'beyond the control of, and not materially influenced by, a Party...': CMP 7 Report, decision 2/CMP.7, annex [1(a)]. Parties can also define a 'background level' of annual emissions from natural disturbances in their forest management reference levels. Emissions from natural disturbances that exceed the background level in a given year can then be excluded if various conditions are met: annex [33(a)]. Similar rules were also adopted for A/R under article 3.3: annex [33(b)].
Alternatives to Gross-Net Accounting

The second major issue for the negotiations on forest management was how to address the perceived inadequacies of the accounting method adopted for the first commitment period – gross-net accounting plus the application of general and specific caps. Several Annex I Parties believed that the existing rules were satisfactory and should be retained. Japan, for example, stated that extending the use of gross-net accounting and caps would provide the best incentive for sustainable forest management; prevent introducing new methodological challenges and arbitrariness in accounting; and avoid granting excessive credits. Having elected to account for forest management in the first commitment period, it also favoured continuity of the rules as the growth of its forests (resulting from deliberate policies to increase carbon removals) would take several decades. Many Parties, however, supported reforms to the rules.

Several Parties strongly favoured applying net-net accounting. Russia, whose forest emissions have dropped considerably since 1990, favoured net-net accounting with a 1990 base year, from which it would benefit. This approach was unpopular with others, however, as while it could cancel out some long-term trends in carbon fluxes due to global warming, CO2 levels and nitrogen deposition, net-net accounting would penalise Parties such as New Zealand because of the age-class structure of its managed forests. In preference to the 1990 base year, Tuvalu proposed introducing net-net accounting using emissions and removals in the first commitment period as a

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196 Japan, 'Japan's View on the Annex of the Conclusion of the AWG-KP7', above n 189, 50.
197 Japan, 'View on the Treatment of Land Use, Land-Use Change and Forestry (LULUCF)', above n 88, 46. See also New Zealand, 'Input to AWG-KP Session 6 (Ghana August 2008) on Land Use Land-Use Change and Forestry Rules for Post-2012', above n 109, 4. New Zealand would be penalised by net-net approaches based on a 1990 base year due to the effects of saturation and age-class structure.
199 Russia, 'Proposals for Clarification of the Negotiating Text of the Ad Hoc Working Group on Further Commitments for Parties Included in Annex I (AWG-KP), 10th Session', above n 88, 2.
200 Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 276.
201 New Zealand, 'Input to AWG-KP Session 6 (Ghana August 2008) on Land Use Land-Use Change and Forestry Rules for Post-2012', above n 109, 1, 5. This is because New Zealand established significant new forests in the period prior to 1990.
base period. However, New Zealand highlighted, and Tuvalu itself accepted, that adopting a base period would still not fully address the effects of age-class structure.

The other major alternative was to introduce forest management reference levels. The most influential proposals in this regard were the ‘forward-looking’ approach promoted by Canada, and the ‘bar’ approach introduced by the EU. The Canadian proposal, which appeared to have most influence on the final outcome, proposed that debits and credits be awarded for emissions and removals that were beyond those expected under BAU conditions. The reference level (which would be subject to expert review) would be based on a variety of data such as forest inventories; existing policies to reduce emissions and removals; historical data and BAU management plans. Following the conclusion of the second commitment period, actual emissions and removals would be compared to the reference level, and then Parties would be issued with either emission debits or credits.

As an alternative to this, the African Group preferred to set the reference level based on historic emissions and removals only (for example, emissions or removals from 2000-09). However, Canada argued that the forward-looking approach would best address indirect non-anthropogenic effects including age-class legacy, CO2 fertilization

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202 Tuvalu, ‘Submission on Definitions, Modalities, Rules and Guidelines for the Treatment of Land Use, Land-Use Change and Forestry (LULUCF) in the Second Commitment Period’, above n 75, 4.
206 Canada, ‘Views and Proposals on Land Use, Land-use Change and Forestry’, above n 177, 24-25.
207 Ibid.
208 Ibid 25; Canada, ‘Land Use, Land-Use Change and Forestry (LULUCF)’, above n 104, 13.
209 Fry, ‘If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?’, above n 5, 129.
and nitrogen deposition (as these would be factored into the reference level), while natural disturbances could also be specifically excluded. Canada also suggested that the reference level approach would remove the need for forest management caps.

Among developing countries, the G77 and China initially opposed the use of reference levels, being concerned about the uncertainties associated with this approach. Tuvalu also cautioned that BAU reference levels would be ‘complex and difficult to verify’. The G77 and China’s initial opposition to the use of reference levels later relaxed, however, as the reference level approach became accepted within the REDD+ negotiations for use by developing countries in their national REDD+ schemes (see chapter 8).

During the period of review, Kyoto Parties failed to reach agreement on an approach for forest management accounting beyond 2012. However, Parties were invited to submit data on their forest management reference levels, without presuming particular accounting rules, by November 27, 2009. The Rudd government submitted a reference level applying a BAU approach, lending its support to this accounting method (see analysis below).

210 Canada, ‘Land Use, Land-Use Change and Forestry (LULUCF)’, above n 104, 13; Canada, ‘Views and Proposals on Land Use, Land-use Change and Forestry’, above n 177, 24-25.
211 Canada, ‘Views and Proposals on Land Use, Land-use Change and Forestry’, above n 177, 25. Canada suggested that if Parties wished to exclude the impacts of natural disturbances they would need to supply transparent and verifiable information that the disturbances were non-anthropogenic; identify the areas of land subject to these events; and explain how the emissions and removals were excluded from the accounting: 25; Canada, ‘Land Use, Land-Use Change and Forestry (LULUCF)’, above n 104, 13.
215 Fry, ‘If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?’, above n 5, 129.
216 See Australia, ‘Data on Forest Management: Submission by Australia’ (Submission to UNFCCC, December 2009) 1.
of most developed countries and was later endorsed for use by Parties at COP 16/CMP 6 in Cancun (December 2010). Parties then submitted updated reference levels at COP 17/CMP 7 in Durban (December 2011).

i) Analysis

The question that arises on this issue is whether it was reasonable – from the perspective of environmental effectiveness – for the Rudd government to adopt a forward looking reference level approach for forest management or whether it should instead have backed other accounting methods. It must be noted that it is difficult to fully assess the Rudd government’s approach to this issue. This is because ultimately the rigorousness of the methodology and the accuracy of data employed by Australia in determining its reference level will have a major bearing on whether its reference level will prove to be environmentally effective. The limited period of review of this chapter means that such questions are outside its scope. However, it can be examined whether it was appropriate to back the forward-looking reference level approach at a more general level.

To begin with, it is clear that while some Parties backed the status quo on forest management accounting, the methodology adopted for the first commitment period was demonstrably flawed. Gross-net accounting, as highlighted by various Parties and in the literature, clearly failed to adequately isolate the human impact on forestry emissions and removals, meaning that Parties could receive either windfall gains or

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219 See UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Sixth Session: Addendum (Part 2), UN Doc FCCC/KP/CMP/2010/12/Add.1 (Part 2) (15 March 2011), decision 2/CMP.6, [4-5], appendix I-II; Fry, 'If a Tree Falls in a Kyoto Forest and Nobody is There to Hear it, Will it be Accounted For?', above n 5, 130. Decision 2/CMP.6, page 5, indicated that reference levels inscribed in appendix I were 'set transparently', taking into account: (a) removals or emissions from forest management (FM) as shown in GHG inventories and relevant historical data; (b) age-class structure; (c) FM activities already undertaken; (d) projected FM activities under a BAU scenario; (e) continuity with the treatment of FM in commitment period 1; and (f) the need to exclude removals from accounting in accordance with decision 16/CMP.1, appendix II, paragraph 1. Reference levels including and excluding ‘force majeure’ were also requested.

220 See UNFCCC, Forest Management Reference Levels <http://unfccc.int/bodies/awg-kp/items/5896.php>; UNFCCC, Synthesis Report of the Technical Assessments of the Forest Management Reference Level Submissions, UN Doc FCCC/KP/AWG/2011/INF.2; CMP 7 Report, decision 2/CMP.7, annex [12], appendix. Parties were effectively allowed to submit reference levels using their preferred methodology (reference levels, net-net or gross-net), although these were made subject to technical review: annex [14-15].
liabilities regardless of their direct policy measures.\textsuperscript{221} The deficiencies of this accounting method provided little encouragement for many Parties to elect to account for forest management in Kyoto's first commitment period.\textsuperscript{222}

Net-net accounting is generally regarded as an improvement upon gross-net accounting, especially if a long base-period is used.\textsuperscript{223} This approach is relatively simple to implement and partly removes indirect and natural disturbance effects. This is because if these non-anthropogenic effects have an equivalent impact both in the base period and in the accounting period, the effects may cancel each other out.\textsuperscript{224} However, net-net accounting still reflects indirect effects and natural disturbances where these change between the two periods of comparison.\textsuperscript{225} Fixed net-net baselines also have a diminishing capacity to remove the effects of age-class structure and CO2 fertilisation as trees mature.\textsuperscript{226} As noted, Kyoto Parties rejected net-net accounting for forest management in the Marrakesh Accords as a result of such concerns.

Given deficiencies in the above approaches, the interest in the use reference levels was clearly understandable. As noted, however, Parties like Tuvalu raised concerns about the environmental integrity of this approach, a concern shared by environmental groups such as Climate Action Network International (CANI).\textsuperscript{227} CANI argued that forward-looking baselines would, among other things, 'disconnect the accounting mechanism from reality' and be 'open to manipulation and impossible to

\begin{footnotes}
\footnote{See, eg, Schlamadinger, 'A Synopsis of Land Use, Land-use Change and Forestry (LULUCF) under the Kyoto Protocol and Marrakech Accords', above n 17, 277; Macintosh, 'Are Forest Management Reference Levels Incompatible with Robust Climate Outcomes? A Case Study on Australia', above n 85, 14; Cowie, Kirschbaum and Ward, above n 96, 310. Note that discussion in the latter article is in relation to a land-based approach but the effect of different accounting approaches remains relevant to activity-based accounting.}

\footnote{UNFCCC, \textit{Analysis of Possible Means to Reach Emission Reduction Targets and of Relevant Methodological Issues: Technical Paper}, above n 58, 50.}

\footnote{See, eg, Cowie, Kirschbaum and Ward, above n 96, 310; Canadell, above n 32, 377-78; Schlamadinger, 'Options for Including Land Use in a Climate Agreement Post-2012: Improving the Kyoto Protocol Approach', above n 17, 298-300.}

\footnote{Ibid.}

\footnote{Ibid.}

\footnote{Climate Action Network International, 'CAN Feb 15 LULUCF Submission' (Submission to the AWG-KP, CAN International, 23 February 2009) 12-13.}
\end{footnotes}
verify'. Essentially, by introducing the use of BAU projections as a basis for measuring emission reductions, the BAU reference level approach could create similar credibility problems to those experienced by the Clean Development Mechanism, and which are anticipated for reference levels under REDD+ (see chapters 7 and 8, respectively). This is because ‘there is no fool proof way of making counterfactual forecasts’ of BAU emissions.

CANI further argued that the forward-looking reference level approach could allow Parties to include increased forest harvesting in their baselines, but escape receiving increased debits by describing these as BAU activities. This latter concern was particularly significant. According to Greenglass et al, the reference levels submitted by Annex I Parties (as of October 2010) would see removals due to forest management plans reduce significantly (from historic levels of -937 Mt CO2e per year (1990-2008) to -484 Mt CO2-e per year). Thus the atmosphere could see an increase of 453 Mt CO2-e per year from forest management activities, an increase that would not be recorded in Annex I Parties' accounts under the reference level approach. Furthermore, Parties could potentially avoid any penalty for increasing emissions from future management activities by including these in their projected baselines. Given the types of concerns raised above, both Greenglass et al and CANI argued that Parties ought to have adopted a net-net approach to accounting with a historical base period (1990-2008, or at least 10 years).

228 Ibid 12. See also Climate Action Network International, ‘Forest Management: Getting the Accounting Right’ (Presentation to the AWG-KP Pre-Sessional Workshop, Bonn, 30 July 2010) 18.
232 Greenglass, above n 231, 180.
233 Ibid 181.
Turning to the specifics of Australia’s reference level, the Rudd government’s initial submission to the UNFCCC in December 2009 projected annual removals on forest management lands of -9.16 Mt CO2-e (between 2013-2020). The Rudd government did not publicly provide details on precisely how this reference level was derived. However, the Gillard government later provided information on this as part of the Parties’ ongoing activities on this topic. While this thesis is concerned only with the actions of the Rudd government, it appears that the reference levels submitted by the Gillard government were largely based on the work of its predecessor, meaning that some lessons can be drawn from the information it provided.

Macintosh’s analysis of the reference levels submitted by the Gillard government found that there were a number of dangers created by its accounting approach. Several aspects of Australia’s reference level could lead to ‘false accounting’, especially, the government’s definition of managed lands; data uncertainties in relation to native forests and major natural disturbances; and uncertainties in technical modelling of emissions and removals. Estimating future emissions also required the government to make assumptions about factors such as the rate of forest harvesting; the likely level of emissions under a BAU scenario; and the impact of major natural disturbances, all of which required judgements to be made. Irrespective of the methods applied in determining the reference level, this meant that there would ‘remain a significant risk of credits and debits being recorded for changes in net emissions that … [were] not attributable to additional direct anthropogenic actions.

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235 Australia, ‘Data on Forest Management: Submission by Australia’, above n 218, 1.
239 Ibid 10-12.
240 Ibid 9, 12.
On the other hand, Macintosh noted that the BAU reference level approach potentially also had advantages from an environmental effectiveness perspective, as both gross-net and net-net accounting approaches could result in large windfall credits being awarded to Australia.\textsuperscript{241} The advantage of the reference level approach was that it could better isolate the additional direct anthropogenic influence on forest carbon fluxes.\textsuperscript{242} While uncertainties associated with counterfactual projections meant that 'considerable scope' existed for 'false accounting', this risk could be guarded against if a cap was placed on the use of credits.\textsuperscript{243} This was ultimately the approach adopted by Parties at CMP 7, December 2011, with decision 2/CMP.7 restricting the use of forest management credits to 3.5 per cent of a Party's base year emissions.\textsuperscript{244} The cap had been pushed for by the G77 and China since 2010,\textsuperscript{245} but opposed by the Rudd government – who wished to use LULUCF offsets as fully as possible – and other developed countries including New Zealand.\textsuperscript{246} As a further safeguard, Parties agreed to a procedure that would allow ex-post adjustments to be made to reference levels where these proved to be incorrect.\textsuperscript{247}

Overall, it is clear that a number of risks were associated with the BAU reference level approach adopted by the Rudd government. It is also apparent, however, that this approach evolved in response to a genuine need to find a more accurate means of excluding the impacts of non-anthropogenic effects on forest management emissions and removals and that the forward-looking approach offered many advantages in this regard. As such, the Rudd government's preference for the forward-looking reference level approach appeared, again, to be broadly reasonable. Only time will tell, however, whether the use of BAU reference levels by Australia and other Parties will prove to be

\begin{itemize}
\item \textsuperscript{241} Ibid 9.
\item \textsuperscript{242} Ibid 13.
\item \textsuperscript{243} Ibid.
\item \textsuperscript{244} CMP 7 Report, decision 2/CMP.7, annex [12], appendix. Having addressed the concerns regarding natural disturbances, Annex I Parties also agreed to make accounting for forest management mandatory: annex [7, 13].
\item \textsuperscript{245} International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(467) (7 June 2010) 4.
\item \textsuperscript{246} International Institute for Sustainable Development, \textit{Earth Negotiations Bulletin}, vol 12(468) (8 June 2010) 3-4.
\item \textsuperscript{248} CMP 7 Report, decision 2/CMP.7, annex [14-15].
\end{itemize}
environmentally effective. That is, while Australia’s approach was defensible in principle, the proof of its merits will require analysis of its effectiveness in practice at a later date.

**C Implications for GIC**

As argued in previous chapters, a GIC would generally be expected to pursue environmentally effective approaches in order to act consistently with the ultimate purpose of the Convention, namely, to reduce GHG emissions so as to avoid dangerous climate change. This was the key test of GIC in relation to the Rudd government's engagement with the negotiations on LULUCF. Environmental effectiveness was a major concern due to a range of factors including the high complexity involved in accounting for land sector emissions and removals and the ability of Annex I Parties to game the LULUCF rules in their favour (as the Howard government did for Australia in relation to article 3.7 at Kyoto).

This chapter highlighted that many developing countries were initially opposed to any modifications being made to the LULUCF rules for the second commitment period, being concerned that Annex I Parties would increase their reliance on LULUCF removals at the expense of reducing fossil fuel emissions. While these concerns were certainly understandable, it would clearly be wrong to suggest that in order to be a GIC Australia ought to have backed the status quo. This is because there were undoubtedly major deficiencies in the first commitment period rules and thus there was a justifiable basis for seeking accounting reforms. The question, however, is whether the changes sought by Australia were likely to improve the environmental integrity of LULUCF accounting, or conversely, to detract from it.

Regarding the 'rules before targets' issue, while criticised by some Parties, this chapter found that there were sound policy reasons for the Rudd government to seek a decision on the new rules prior to developed countries announcing their targets. This was a sensible approach as the accounting rules can heavily modify the stringency of Parties' mitigation targets. Thus, an early agreement on the rules would have allowed

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249 UNFCCC art 2.
Annex I Parties to more accurately compare the strength of their commitments. Further, it would have avoided the potential for a repeat of the Australia clause situation in which a Party's headline mitigation target was subsequently watered down by favourable accounting rules. Given the difficulty Parties had in agreeing upon new rules, however, the Rudd government ultimately adopted a responsible position by announcing its post-2012 target prior to a new decision on LULUCF being reached.

Regarding activity versus land-based accounting, the Rudd government also appeared to adopt a responsible position. The activity-based approach adopted in the Protocol was widely recognised to be flawed, however, Parties also accepted that emissions data was not yet sufficiently accurate to enable a move to land-based accounting in the second commitment period. As such, the Rudd government's emphasis on transitioning towards land-based accounting in a third commitment period appeared to be sensible.

Regarding HWP accounting, it was noted that some developing countries were concerned about the accuracy of HWP data. However, there again appeared to be sound reasons for including HWP in the second commitment period. This was because doing so would more accurately reflect when emissions actually occur and also incentivise the use of long-lived wood products as a mitigation strategy. Similarly, there appeared to be sound reasons behind Australia's backing for the inclusion of new article 3.4 activities (subject to accurate data being available), given that this would encourage some Parties to account for a broader land-area (such as wetlands or peat lands) as a transitional measure towards full land-based accounting.

As noted, the major issue addressed by Parties during the period of review, and the focus of the Rudd government, was how to improve forest management accounting. It was seen that the gross-net accounting method adopted by the Parties during the first commitment period prevented several developed countries, including Australia, from accounting for this activity. This was perfectly understandable, given the potential of natural emission events to overwhelm emission reduction efforts in other sectors. The Rudd government's proposal to provide Annex I Parties with a time out clause for major natural disturbance events appeared to make a solid contribution to the
negotiations on this topic. However, there were also obvious risks involved, including that Parties would seek to 'pass off' anthropogenic emissions (such as deliberately lit fires or poor management of fires) as natural disturbances. The government also provided little clarification (in quantitative terms) of exactly how severe natural disturbance events would need to be to warrant being excluded from a Party's accounts. Given the emphasis of the ICCL regime on reducing anthropogenic emissions, however, it seems clear that the Rudd government's approach was generally warranted, and that the methodological difficulties simply needed to be resolved by Parties going forward.

Similarly, it is clear that there were legitimate reasons behind the Rudd government's desire to move away from gross-net accounting. It was seen, however, that there were also risks associated with the BAU reference level approach it supported, including that it relied on the ability of Parties to make accurate assumptions about the likely impact of government policies on emissions or the expected impact of natural disturbances. If Australia's reference level proved to be inaccurate there were certainly risks that it could be awarded windfall credits in the second commitment period. Nonetheless, as with the issue of excluding major natural disturbances, the use of a BAU reference level appeared to have sound policy justifications, notwithstanding the risks involved, given the deficiency of alternative accounting options. Parties would clearly need to monitor the environmental effectiveness of the BAU reference level approach, however, and make adjustments in future if it proved to be flawed.

Overall, then, this chapter suggests that the Rudd government generally adopted defensible positions from an environmental effectiveness standpoint.

As with the topics previously considered by this thesis, this chapter again contends that displaying leadership was important to the government's GIC credentials (which is both expected of developed countries by article 3.1 UNFCCC, and a key general attribute of GIC as articulated by Gareth Evans). Given the potential of LULUCF accounting reforms to undermine the credibility of land sector abatement, promoting environmentally effective approaches was an obvious means by which a Party could distinguish itself as a 'good' rather than 'average' or 'poor' citizen on this topic.
Regarding leadership, it is clear that the Rudd government did not display the blatantly nationalistic behaviour of the Howard government in negotiating article 3.7 at Kyoto. Certainly, the Rudd government’s positions were also aimed at advancing Australia’s narrow self-interest, namely, its economic interest in opening up a new source of low-cost abatement opportunities in forest management – thus reducing the overall cost to Australia of meeting its post-2012 mitigation target. However, unlike its predecessor, the Rudd government did not appear to push these narrow economic interests to an unreasonable extent. This is because its proposals generally appeared to be aimed at unlocking genuine sources of abatement for Australia, rather than windfall credits.

Notwithstanding the fact that the Rudd government’s positions were generally defensible, it is clear that it could have done more to demonstrate leadership in terms of improving the environmental effectiveness of land sector accounting. For example, there were strong indicators that given the risks involved in introducing a time-out/force majeure clause and BAU reference levels, a precautionary approach was needed (as expected by article 3.3 UNFCCC), and thus a new cap on forest management was appropriate for the second commitment period. Establishing a cap would also have helped to address developing countries’ legitimate concerns that Annex I Parties would rely excessively on LULUCF offsets in future, at the expense of reducing fossil fuel emissions. While, as noted, Annex I Parties did later agree to a new forest management cap at CMP 7 (December 2011), this move was not supported by the Rudd government during its involvement in the negotiations. Indeed, the government indicated that Australia would not adopt its mid and upper range mitigation targets for 2020 (of 15 and 25 per cent, respectively) if a cap was placed on the use of LULUCF sinks.

Similarly, the Rudd government could have done more to address concerns that major human-induced emissions, such as those resulting from deliberately lit fires, could be

\[250\] This requires Parties to take ‘precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.’ Further, ‘where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures’.

\[251\] Australian Government, FOI Australia’s Target Conditions – Where Do We Stand?, above n 48, 2-3.
excluded from Parties' accounts by classifying them as natural events. It could, for example, have proposed specific rules for inclusion in a LULUCF decision. In the same vein, it could have suggested specific rules on how to distinguish between 'major' and 'non-major' natural disturbance events, to help place reasonable limits on which emission events may be factored out. Further, if the Rudd government genuinely wished to be a leader on LULUCF, it could have offered to correct the windfall gain Australia received in the first commitment period by virtue of article 3.7. This could have been achieved, for example, by undertaking to purchase international emission permits at a level equivalent to the quantity of non-genuine abatement Australia would be credited with by virtue of the Australia clause.

Regarding other general attributes of GIC identified in chapter 1, several of these were again relevant to this issue. In particular, attributes such as acting for 'purposes beyond ourselves' and 'enlightened self-interest' support the view that it was incumbent upon the government to advance environmentally effective approaches, such as a forest management cap and rules to transparently distinguishing between major and non-major natural disturbances, and natural and anthropogenic emissions. This is because Australia and other Parties' long-term interests undoubtedly lay in having credible LULUCF accounting rules which helped to achieve the goal of avoiding dangerous climate change.

As with all other topics assessed by this thesis, the Rudd government's cooperative engagement with the LULUCF negotiations was indicative of an internationalist, activist, multilateralist and institutionalist approach. The government also 'pitched in', contributing useful policy inputs to Parties' deliberations. While it could have done more to advance environmentally effective accounting rules, its approach nonetheless displayed a general commitment to international law as the preferred means of resolving this issue.

Overall, it is apparent that the Rudd government made a solid contribution to the negotiations on LULUCF and the positions it advanced generally had a reasonable policy basis. It is too early, however, to conclusively assess the impact of the major changes sought by the Rudd government during its term in office – namely, the
exclusion of major natural disturbances, the use of BAU reference levels and HWP accounting. The new LULUCF rules eventually adopted at CMP 7 in Durban (which incorporated a number of the positions favoured by the Rudd government) will likely need to operate for several years before the true ramifications of its negotiating positions are known. Complicating assessment of this topic was the fact that a new decision on LULUCF was not settled by Kyoto Parties until CMP 7 – meaning that the analysis in this chapter only covers the early period of the negotiations on the LULUCF rules. It should also be noted that assessing the behaviour of the government on this issue was especially difficult due to the particularly technical nature of the land sector rules, which make it challenging for those outside the negotiating process or the relevant government bureaucracies to fully assess their implications.

Leaving aside these limitations, this chapter suggests that the Rudd government is best described as an 'average' international citizen on the LULUCF issue. The government did not, by and large, appear to unreasonably advance Australia's narrow self-interest in the negotiations, in contrast to the earlier Howard government. However, its negotiating emphasis was unquestionably on achieving rule changes that would advantage Australia by providing it with greater LULUCF abatement opportunities. While there is nothing inherently wrong with this approach, arguably it needed to display a greater level of leadership in promoting environmental effectiveness to distinguish itself as a GIC. This is especially so given the higher level of conduct associated with the GIC ideal.
CONCLUSION

'At the heart of the concept [of good international citizenship] is the notion that every country has a major interest in seeing the ... resolution of what Kofi Annan used to describe as transnational "problems without passports", which are by their nature beyond the capacity of any one of them, however great and powerful, to deliver or resolve.' Gareth Evans, 2012.¹

A Assessing Good International Citizenship: Final Remarks

The aim of this thesis has been to assess whether the first Rudd Labor government qualified as a good international citizen (GIC) in its engagement with international climate change law (ICCL) from December 2007 to June 2010. The major focus of analysis has been the government's engagement with the post-2012 climate negotiations – this being the key development in ICCL during the period of review – and more specifically, the topic of mitigation, the central issue for the climate negotiations to address.

1 What is Good International Citizenship?

The initial challenge for this thesis was to understand the meaning of the term GIC (often used interchangeably with 'good global citizen') and to determine how to apply the concept to the thesis question. The notion of GIC was first popularised in Australia in the late 1980s by former Labor Foreign Minister, Gareth Evans, who argued that alongside traditional security and economic interests, Australia had an interest in 'being, and being seen to be a good international citizen'.²

At its most basic level, the notion of GIC reflects an uncontroversial view that there are both 'good' and lesser forms of international conduct by states which have a bearing on their standing as members or 'citizens' of the international community. In other words, GIC involves the practice of some form of ethical or 'higher' behaviour by states

¹ Gareth Evans, 'Idealism and Realism in Australian Foreign Policy' (Speech delivered at the Hedley Bull Lecture, Sydney, 14 August 2012) <http://www.gevans.org/speeches/speech482.html>.
² Gareth Evans, Making Australian Foreign Policy (Australian Fabian Society, 1989) 9.
in the international realm. The problem of course is that identifying what distinguishes good from bad international conduct, and the shades of grey in between, is often not a straightforward task. There are many examples of behaviour that most would readily agree provide clear evidence of good or bad international citizenship. For example, providing humanitarian relief to a country affected by a natural disaster is an obvious example of GIC, just as failing to protect human rights enshrined in international law is a clear example of bad international citizenship. There are many issues on which states are engaged, however, where determining what GIC requires, and whether the standard has been met, is far less clear-cut.

This thesis formed the view that Evans' writings and speeches on GIC provided the best starting point for understanding the concept, notwithstanding the growing body of academic literature that has emerged on the topic since Evans first made GIC an official goal of the Hawke and Labor governments' foreign policy. This was in large part because Evans' articulation of GIC still appears to best represent how Australian governments, especially on the Labor side of politics, broadly understand the concept. Based on an extensive review of Evans' writings and speeches on GIC, as well as the relevant literature, this thesis identified a number of attributes or characteristics that Evans associated with the concept. These were identified as follows (while noting that some overlap exists between several of them):

- adopting an internationalist, cooperative approach to international affairs, rather than an isolationist one;
- an activist, rather than passive or reflexive, approach to addressing international issues;
- the display of leadership;
- 'pitching in' to international tasks – such as contributing to humanitarian or peacekeeping efforts;
- promoting more ethical or moral courses of action – including seeking to advance 'purposes beyond ourselves', not just narrow self-interest;
- practising a values-based foreign policy – especially one influenced by universal values such as human rights;
embracing a broader or more 'enlightened' approach to determining where the national interest actually lies – that is, advancing 'enlightened self-interest';

- supporting multilateralism and international institutions like the United Nations;

- supporting, and complying with, international law;

- being a good neighbour – that is, being a good citizen within one's own region;

- acting consistently on the domestic front with the values and agendas a GIC promotes abroad; and

- striking a defensible balance between idealism and realism. While promoting a more idealistic approach to foreign policy, Evans emphasised that GICs needed to be realistic about what they could achieve in international affairs in light of both international and domestic constraints (whether political, economic, or other). Thus Evans did not suggest that narrow self-interest must be completely sacrificed by GICs. Rather, GIC was about seeking to achieve more idealistic or ethical outcomes within the constraints of government.

With respect to international law, the major concern of this thesis, Evans' writings and speeches indicated that a GIC would be expected to engage appropriately in the four major stages of the international legal process, namely by:

- helping to develop international law in a positive direction – such as in negotiating new treaties to tackle global problems;

- adopting relevant international treaties and other instruments such as declarations (through ratification or signature, as required);

- complying with all of its international legal obligations; and

- generally playing a role in the advancement and upholding of international legal norms within the international community, such as by encouraging other nations to adopt treaties or holding them to account for any infractions.

It was clear from Evans' account of GIC that the various general attributes of GIC outlined above were highly relevant to how a GIC ought to engage with the international legal system. For example, a GIC would be expected to be an active
participant in treaty bodies, show leadership in developing new international law, and generally advance its legal interests in a more ethical fashion.

Evans' enthusiasm for GIC was in part driven by 'hard-headed' reasons, with the Foreign Minister believing that in an increasingly globalised and interdependent world, acting as a GIC was vital to advancing Australia's broader and longer-term interests. But it was also driven by a belief that behaving as a GIC was inherently, from an ethical or moral standpoint, the right thing to do. GIC endorsed the view that with citizenship of the international community comes a responsibility to advance more than just the base interests of the state's domestic citizenry. While accepting that the furtherance of narrow national interests, especially security and economic ones, will always be a fundamental expectation of government by those who elect them, GIC essentially promoted the idea that states have ethical responsibilities to a larger group of 'moral constituencies', chief among them, the international community; humankind more generally; future generations; and on environmental issues like climate change, non-human species. Whether or not a state meets the standard of GIC is thus often determined by the manner and extent to which it favours particular national interests over and above the needs of its broader moral constituencies, and vice versa.

At this point, two things need to be said about GIC. First, while Evans' articulation of the concept has been influential on this thesis, there is of course no 'correct' account of GIC. While it may be possible to agree upon its broad features, ultimately it is a subjective concept meaning that any particular account will always reflect the

3 To this extent, a GIC can perhaps be viewed as what Lawler terms a 'mediating agent between competing moral realms': Peter Lawler, 'The Good State: In Praise of "Classical" Internationalism' (2005) 31 Review of International Studies 427, 446. Lawler uses this description in relation to the conceptually similar notion of the 'good state'.

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worldview and philosophical leanings of the person providing it.4 It was noted in the
literature review, for example, that Evans' vision of GIC drew either explicitly or
implicitly upon multiple political and academic traditions, among them realism,
idealism, liberal internationalism, citizenship discourse and social democracy. Evans'
account of GIC thus reflects a Western – not to mention an Australian and Australian
Labor Party – perspective of what GIC entails, but other perspectives are of course
possible.

Second, while Evans' account of GIC underpinned how this thesis understood the
concept, it needs to be emphasised that context is always highly significant to the
interpretation and assessment of GIC. The thesis identified a range of GIC attributes in
chapter 1, however, not all of these were found to be equally relevant to, or
determinative of, the thesis question. Thus scholars need to exercise judgement as to
which attributes of GIC are actually significant to a given issue. Moreover, the
attributes of GIC espoused by Evans should only be regarded as the starting point, not
the final word, on what constitutes GIC. This is because once a close analysis of a
particular subject is undertaken new attributes relevant to distinguishing good from
poor international citizenship may become apparent.

2 Which Attributes of GIC Were Most Determinative?

As stated in earlier chapters, this thesis argues that the key attribute or characteristic
which distinguished 'good' from lesser forms of conduct in the current context, was
the extent to which the Rudd government respected the established principles and
provisions of the ICCL regime, and where relevant, broader international law norms.
This attribute followed from the general expectation that a GIC ought to be supportive
of, and comply with, international law. It was also suggested by the context, namely,

4 This thesis' explanation of GIC differs, for example, from that of Pert, a legal scholar who also drew
upon the work of Evans. Pert suggests that the major attributes of GIC are compliance or engagement
with international law, support for multilateralism, willingness to 'pitch in' to international tasks,
'international good deeds', and leadership, in the sense of raising international standards. Pert's thesis
focused on the first two of these attributes, judging that they were of most interest and relevance to an
international lawyer: see Alison Pert, 'Australia as a Good International Citizen from Barton to Howard:
An International Law Perspective' (PhD Thesis, University of Sydney, 2010) 327-328. This thesis agrees
that these are relevant attributes of GIC but has adopted a more expansive approach to defining GIC
and how it can be assessed.
the Rudd government's involvement in negotiations under the ICCL regime, in which relatively clear ethical expectations were established for Parties by the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, as well as subsequent decisions of the treaty Parties including the Bali Roadmap. While the ICCL framework established little in the way of legally binding obligations on Parties in relation to the negotiation of a post-2012 agreement, it did provide a clear set of legal expectations. These included, for example, that Parties would act consistently with the ultimate objective of the Convention – the need to avoid dangerous climate change (article 2 UNFCCC); would act on the basis of equity and common but differentiated responsibilities (article 3.1 UNFCCC); and that developed countries would adopt mitigation targets that reflected a comparative level of effort (decision 1/CP.13 Bali Action Plan).

Of course, given the capacity of the ICCL regime to evolve through the adoption of new treaties and decisions, the established provisions and principles of the ICCL regime were open to negotiation. Parties were also free to disagree on how principles such as common but differentiated responsibility should be interpreted. Nonetheless, the established principles and provisions of the ICCL regime provided solid guidance as to how 'good' treaty Parties would conduct themselves, especially where the legitimacy of these principles and provisions were well accepted by the Parties. Similarly, there was an expectation that Parties would act in accordance with well accepted legal norms or principles of broader international law, where relevant, such as those contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

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Probably the key legal expectation overall was the need for the Rudd government to act consistently with the Convention's ultimate objective of avoiding dangerous climate change. The principle of leadership (article 3.1) was also judged to be highly relevant to many of the issues under examination (an attribute also generally associated with GIC by Evans). Leadership was often singled out as a particularly important legal principle, and GIC attribute, precisely because this quality was all too lacking from developed countries in the post-2012 negotiations, yet was essential if the negotiations were to achieve a successful outcome. Another principle argued to be especially important, was the need for the Rudd government to promote and adopt environmentally effective emission reduction measures, that is, measures that would likely result in genuine emissions abatement. This was not an explicit principle of the UNFCCC, but was clearly implied given that the central purpose of the ICCL regime is to reduce GHG emissions so as to avoid dangerous climate change.

A number of GIC attributes associated with Evans (other than leadership) – such as the need to promote purposes beyond ourselves and to adopt restraint in the pursuit of narrow self-interest – were also relevant to the issues examined by this thesis, and thus were commented upon in previous chapters. The thesis found that the notion that GICs must balance both idealism and realism particularly relevant, as it was evident that the Rudd government faced many conflicting concerns and interests in determining its response to climate change. While a GIC is expected to adopt a more idealistic and less self-interested approach to international affairs, the thesis accepted that governments generally do not have the luxury of being able to ignore pragmatic or realistic considerations. Rather, they typically need to balance a range of factors, both idealistic and realistic (and often involving multiple moral constituencies), in determining what course of action to take. As such, the thesis sought to take due account in assessing GIC of any legitimate international and domestic constraints upon the Rudd government's behaviour.

On the issue of climate change it was clear that the government faced genuine economic and political challenges on the domestic front in seeking to act as a GIC, given the potentially significant impact of strong abatement measures for economic prosperity and jobs and the absence of bipartisan political support for strong action on
climate change. This is not to say that pragmatic constraints should always be regarded as excusing poor conduct, and generally this thesis judged that they did not. However, the thesis accepted that it is an important part of the GIC analysis if only to help understand, if not necessarily excuse, situations in which a government may fail to live up to the higher standards expected of a GIC.

**B Concluding Assessment of the Rudd Government’s Performance as an International Citizen**

It will be evident to the reader that several attributes of GIC associated with Evans in chapter 1 were not directly commented on, while others only received relatively brief consideration, in the chapters examining the Rudd government’s engagement with ICCL. This was because they were not regarded to be the most determinative of GIC, with the thesis placing greatest weight on the extent to which the government's approach respected the relevant international legal framework. At this point, however, it is useful to consider these attributes more holistically in relation to the issues examined in chapters 5 to 9.

When the Rudd government’s activities are viewed as a whole, it is clear that it certainly displayed much behaviour that was consistent with the notion of GIC as articulated by Evans. To begin with, the government clearly adopted an internationalist and cooperative approach to addressing climate change on all issues, as evidenced by its high level of engagement in the post-2012 negotiations. Similarly, the government undoubtedly adopted an activist approach, both internationally and domestically – for example, in making numerous submissions to the post-2012 negotiations; working directly with Indonesia on reducing emissions from deforestation and forest degradation (REDD); and in seeking to implement a domestic emissions trading scheme (ETS). The government also demonstrated a strong willingness to 'pitch in' to international efforts to address climate change, as demonstrated, for example, by its commitment of fast-start financing for developing countries in the Copenhagen
Accord; its pledge to reduce Australia's emissions by up to 25 per cent by 2020; and its involvement in establishing a REDD demonstration project in Indonesia.

It was argued in chapter 6 that the Rudd government's 5 to 25 per cent target for 2020 was insufficiently ambitious to be consistent with GIC. However, while less than perfect, its willingness to reduce emissions by up to 25 per cent nonetheless broadly demonstrated a desire to adopt a reasonably ethical approach to mitigation. This is certainly evident when compared to the behaviour of the earlier conservative Howard government who was unapologetic in pressing Australia's narrow self-interest in the Kyoto Protocol negotiations, unjustifiably winning Australia the right to increase its emissions in the first commitment period. The Rudd government's characterisation of climate change as a moral issue, as well as its stated desire for Australia to make a fair contribution to the global mitigation effort, also indicated that Labor's approach to climate change was driven at least to some extent by values, not just strategic interests.

Other positives for the Rudd government included that its active and generally cooperative engagement with the post-2012 negotiations demonstrated a strong commitment to multilateral means of addressing climate change, as well as the relevant international institutions (chiefly the UNFCCC, which is both a treaty and a treaty body). The Rudd government also generally acted consistently at home with its statements and activities abroad, especially as evidenced by its attempt to legislate an ETS to ensure that Australia could meet any future emission reduction commitments. There was also evidence of Australia being a good neighbour, for example, in its REDD activities with Indonesia; although as noted in earlier chapters, the government's insufficient global and Australian mitigation targets undermined its standing as a good neighbour in other respects, with many of Australia's Pacific neighbours' interests not being well-served by Australia's positions in this regard.

Regarding international law, it was argued that the Rudd government's negotiating positions often fell short of giving full effect to relevant principles of the UNFCCC, such as the need to demonstrate developed country leadership. Viewed more holistically, however, it is clear that the Rudd government generally demonstrated a strong level of overall support for the ICCL regime, seeing it as the pre-eminent forum for addressing climate change. This was evident, for example, in its decision to ratify the Kyoto Protocol – reversing Australia's steadfast opposition to this treaty under the Howard government; its active involvement in the post-2012 negotiations; and its stated preference for the international community to adopt a legally-binding post-2012 agreement to supplement or replace the Protocol.

General higher level comments should also be made regarding the government's activities in relation to the four phases of the international legal process. Regarding the development phase of international law, the primary concern of this thesis, it was seen in earlier chapters that many of the government's post-2012 negotiating positions were flawed in various respects. Key deficiencies included, for example, its preferred global and Australian mitigation targets, which were too weak, and its push for Annex I Parties to have unlimited access to international carbon credits. Notwithstanding this, it would be unfair to conclude that the Rudd government's activities did not, on balance, help to advance ICCL in a positive direction. This is because the type of post-2012 agreement sought by Australia, while not going far enough to achieve the ultimate objective of the Convention, nonetheless generally represented an advancement from the status quo.

Regarding the adoption phase of the international legal process, it was certainly to the Rudd government's credit that it ratified the Kyoto Protocol, backed the Bali Roadmap at the 13th Conference of the Parties (COP) (December 2007), and endorsed the Copenhagen Accord at COP 15 (December 2009).

Regarding the compliance phase, it was noted that there was no need for the Rudd government to establish new laws or policies to enable Australia to meet its mitigation target under Kyoto's first commitment period. Nor was there any obligation on the government to establish new laws or policies for the post-2012 era, given that a new
global agreement was yet to be established. Thus it was a major credit to the government that it sought to legislate an ETS in 2009 – the Carbon Pollution Reduction Scheme (CPRS) – in order to show leadership and position Australia to meet its future international mitigation obligations. As discussed further below, however, the government showed less concern about whether or not it complied with its largely soft law commitments under the UNFCCC in negotiating a post-2012 agreement, such as the need to act in accordance with the principles of developed country leadership or the precautionary principle (article 3.3). Similar comments could be made in relation to how it viewed its commitments under the UNDRIP in relation to REDD+.

There was also a role for GICs to play in the fourth major stage of the international legal process, that of generally advancing and upholding international legal norms within the international community. There was an obvious need, for example, for Parties to continue encouraging the United States to ratify the Kyoto Protocol, and to pressure Parties like Canada to comply with their Kyoto mitigation commitments (with the latter country not being on track to do so and ultimately choosing to withdraw from the treaty). It is difficult to properly comment on the Rudd government's performance in this regard, however, as it was not a focus of research for the thesis, and therefore it is not clear what, if any, representations were made by the Rudd government to other Parties in this regard.

1 Summary of Key Findings

The above analysis of the Rudd government's activities demonstrates that the government certainly did much that was consistent with the notion of GIC. However, in evaluating the government's performance, this thesis ultimately placed the greatest weight on the extent to which the government complied with the relevant international legal framework, chiefly as provided by the ICCL regime.

11 Canada withdrew from the Kyoto Protocol because it would not be able to meet its target without purchasing a significant quantity of international credits: Kent, Peter, 'Statement by Minister Kent' (Ottawa, 12 December 2011) <http://www.ec.gc.ca/default.asp?lang=En&n=FFE36B6D-1&news=6B04014B-54FC-4739-B22C-F9CD9A840800>. 
To summarise the findings of chapters 5 to 9, chapter 5 found that the Rudd government's push for a 450 ppm CO2-e/2°C climate agreement was unlikely to be sufficient to achieve the ultimate objective of the Convention – avoiding dangerous climate change – especially for the most vulnerable countries. The preferable approach would have been to back the 350 ppm CO2-e/1.5°C target favoured by the Alliance of Small Island States (AOSIS) and the Least Developed Countries (LDCs). This latter target provided much better prospects of achieving the ultimate objective of the Convention and supporting it would have been more consistent with several principles contained in article 3 UNFCCC such as the precautionary principle and the requirement to give full consideration to the needs of the particularly vulnerable countries (article 3.2).

Similar arguments applied to the Rudd government's preferred goal of reducing global emissions by 50 per cent by 2050 (below 2000 levels) and for global emissions to peak by 2020, which were also demonstrably too weak. Australia's preferred targets were of course likely to be more economically and technologically feasible and had greater prospects of being adopted in a post-2012 agreement. However, it was argued that in order to be a GIC on this issue the government needed to back global mitigation targets that were actually consistent with achieving the ultimate objective of the Convention.

Regarding the Rudd government's commitment to reduce Australia's emissions by 5 to 25 per cent by 2020, chapter 6 accepted that its upper pledge broadly represented a comparable or proportionate contribution to a 450 ppm CO2-e agreement in which developed countries collectively reduced their emissions by about 30 per cent below 1990 levels (which was broadly its intention). However, it was argued, for similar reasons to above, that to be consistent with GIC the government needed to adopt a stronger upper target that was capable of realising the more ambitious 350 ppm CO2-e/1.5°C stabilisation goal. Various UNFCCC principles including equity, common but differentiated responsibility and developed country leadership also suggested that developed countries likely needed to collectively reduce their emissions by more than 30 per cent, as was demanded by developing countries, also necessitating a higher reduction target from Australia. Crucially, the government itself indicated that its 5 to
25 per cent target was intended to do 'no more and no less' than other Parties, confirming that its aim in making this pledge was never actually to position Australia as a leader. The thesis accepted that pledging a higher upper target would have been domestically difficult for the government for economic and political reasons. However, it was nonetheless judged that in order to be a GIC on this issue the government needed to again demonstrate real leadership and pledge a target that was consistent with achieving the ultimate objective of the Convention.

The thesis also examined in detail the government's decision to adopt a conditional target-range, rather than a single credible target. It was accepted that there were legitimate economic and political reasons for this approach, given that cutting emissions more rapidly than other nations risked placing Australia's economy at a competitive disadvantage and the loss of jobs. However, it was suggested that real leadership required the government to set a target that genuinely positioned Australia as a mitigation front runner, notwithstanding economic and political challenges. A further problem with the government's target range was that its upper end was not sufficiently ambitious to genuinely display leadership, even if its conditions were met.

The analysis of the conditions attached to the 25 per cent target found that while these were often strict, they were not in the most part unreasonable, as they generally did not appear to make unjustifiable demands of other Parties. This was because the conditions broadly reflected the basic design elements, including abatement levels, that were realistically necessary to achieve the government's preferred 450 ppm CO2-e goal, on which the 25 per cent target was based. Some conditions, however, were undoubtedly inconsistent with a leadership position, especially those requiring unrestricted access to international carbon credits and LULUCF abatement, in light of legitimate concerns about the environmental effectiveness of these abatement options.

With respect to implementation, chapter 7 saw many positives in the Rudd government's general approach. As noted above, the government's legal and policy response (namely, the CPRS and complementary measures such as the Renewable Energy Target) was generally likely to be legally effective in positioning Australia to comply with its post-2012 mitigation targets had the CPRS been enacted by Parliament. There were, however, a number of notable design flaws in the CPRS. Chief among these were: the extensive compensation for emissions-intensive trade-exposed industries (reducing the economic efficiency of the Scheme); the decision to provide liable entities with unlimited access to eligible international carbon credits (potentially undermining the environmental effectiveness of Australia's mitigation target and also breaching the principle of 'supplementarity'); and the failure of the CPRS to seriously address Australia's heavy reliance on coal (potentially locking-in high Australian emission levels for many decades to come if carbon capture and storage technology did not prove to be viable). The design flaws in the CPRS not only undermined the credibility of the scheme, but represented a missed opportunity for Australia to show leadership in the design of best-practice domestic emission reduction laws and policies, which could have influenced the practice of other countries around the world.

Of these design flaws, the most damaging from a GIC perspective was the decision to allow liable entities unrestricted access to eligible international carbon credits, as well as the Rudd government's preparedness to achieve up to 1/5th of the upper 25 per cent target through directly purchasing international credits. The government's emphasis on the use of international flexibility mechanisms, at the expense of strong domestic abatement, ignored legitimate concerns regarding the environmental integrity of carbon credits issued to date under the Protocol, especially by the Clean Development Mechanism. This approach was argued to be inconsistent with the need for abatement measures to be environmentally effective. The thesis accepted that there was a pragmatic need to provide Australian businesses with some access to international market mechanisms to ensure that achieving Australia's future mitigation target was economically feasible. However, placing such a heavy emphasis on the use of international credits was inconsistent with the object of the treaty and the leadership principle, placing Australia's narrow economic interests ahead of the larger need for environmentally effective abatement. A preferable approach would have
been to place a stringent cap on the use of international carbon credits, while continuing to work at the international level to improve the environmental integrity of the flexibility mechanisms.

Despite such design flaws, the thesis recognised that the Rudd government’s substantial efforts to legislate the CPRS represented an act of leadership in itself, particularly given the highly divisive domestic political environment in which it introduced the Carbon Pollution Reduction Scheme Bill (CPRS Bill).\(^\text{13}\) The government’s early good intentions, however, were ultimately undermined by its decision in April 2010 to defer the introduction of the CPRS until 2013, in response to the failure of the Senate to support the Bill as well as the slow progress of the post-2012 climate negotiations. This was a major policy reversal by the government which undermined its earlier display of leadership. Of course, the government did not enjoy a majority in the Senate, and the Liberal National Coalition ultimately refused to support the CPRS under first Malcolm Turnbull and then Tony Abbott, meaning that securing its passage was a tough ask. However, after the CPRS Bill was rejected for a second time the government could have exercised the option of calling a double dissolution election, or simply have sought a fresh mandate for the CPRS at the next general election, but lacked the political resolve to do so.

On the issue of REDD+, chapter 8 highlighted that the Rudd government’s strong advocacy for a market-based REDD mechanism was controversial, with a market-based approach potentially creating a new source of non-credible international offsets, an approach that was again potentially at odds with the central purpose of the ICCL regime. However, it was accepted that there were sound pragmatic reasons for at least testing a market-based approach, given the significant finances required to fund REDD+, and thus the need to obtain private sector financing through the sale of carbon credits, bolstering direct funding by developed country governments. In many respects, the government’s active involvement on REDD+ helped give effect to the principle of developed country leadership, with Australia being an important

\(^{13}\) Carbon Pollution Reduction Scheme Bill 2009 (Cth).
participant in the REDD+ negotiations and involving itself in various practical activities to support the development of REDD+ on the ground, including the flagship Kalimantan Forest and Carbon Partnership (KFCP) in Indonesia. The government's standing as a leader was, however, diminished by failings in the design and implementation of the KFCP with respect to the protection of indigenous peoples' rights enshrined in the UNDRIP, a declaration Australia signed up to under the Rudd government.

Lastly, chapter 9 examined the Rudd government's engagement with the negotiations on LULUCF accounting, especially with regard to forest management. The thesis found that the reference level approach to forest management accounting favoured by Australia involved a risk that developed countries would be awarded emission credits for non-genuine abatement (again potentially at odds with the central purpose of the Convention). However, it was also recognised that no perfect accounting method existed for forest management and that there were sound reasons for testing the theoretically attractive reference level approach, notwithstanding environmental effectiveness concerns. The government's opposition to placing a cap on the use of forest management and LULUCF generally, however, again failed to implement the principle of leadership, as the purpose of a cap was to mitigate the risk of non-genuine LULUCF credits being awarded under the proposed accounting reforms. Indeed, the government's overall approach to the LULUCF negotiations generally appeared to be more concerned with establishing new (low-cost) abatement opportunities for Australia than on prioritising environmentally effective mitigation.

Overall, the thesis suggested that the Rudd government achieved the following 'grades' as an international citizen in its engagement with the above issues:

- long-term global mitigation goal: average;
- 5 to 25 per cent mitigation target for 2020: average;
- implementation: average;
- REDD+: above average; and
- LULUCF: average.
Overall, then, despite many positive statements and activities by the Rudd government from a GIC perspective, ultimately this thesis concludes that the government did not qualify as a GIC in its engagement with ICCL on the issues assessed. While the government was by no means a poor international citizen, this thesis argues that the higher form of behaviour required to distinguish good from lesser forms of international citizenship (especially in this case showing genuine respect for the principles and provisions of the ICCL regime and, where relevant, broader international law) was not sufficiently or consistently evident to warrant the Rudd government being regarded as a GIC. Rather its efforts are probably best categorised as that of an 'average' international citizen.

C Final Comments

Chapter 1 of this thesis highlighted various disparaging views by scholars regarding the normative and analytical value of GIC, for example, that the concept was too ambiguous, not radical enough in its expectations of government, or that that it may be employed disingenuously by states in their political rhetoric to obscure what are actually more self-interested motives. More positively, arguments were made that GIC offers a useful conceptual tool for both the formulation and assessment of government policy; that GIC behaviour represents a more ethical approach to the practice of foreign policy than is generally the norm; and that invoking the concept in international discourse may help to shift the behaviour of states in a more ethical direction.

After considerable examination of the GIC concept, as well as the application of the concept to a complex topic of study, this thesis generally concurs with the more positive view of the normative and analytic value of GIC. Having said this, several points are worth making.

First, it needs to be acknowledged that GIC is not an easy concept to apply when assessing government behaviour, there being no universally agreed understanding of what constitutes GIC or how it should be measured. While the broad features of GIC outlined above appear to require fairly reasonable expectations of states, as noted above, ultimately GIC is a subjective concept and thus it cannot be expected that all
scholars (not to mention practitioners) will agree upon its practical requirements. The porous nature of GIC, however, should not be seen to undermine the concept from an academic perspective. It simply means that scholars need to articulate what they mean by GIC and explain their reasoning in determining whether or not the standard has been met. This is no different to many concepts employed by scholars in the law and humanities such as realism, liberal internationalism and cosmopolitanism, discussed in chapter 1. This thesis would suggest, however, that it is preferable to adopt approaches to assessing GIC that draw upon the concept as articulated by Evans (which has not always been the case in the literature), as this arguably remains the best starting point for understanding the practical requirements of GIC.

Second, the thesis found that GIC is not necessarily an easy concept to apply for someone from an international law, rather than an international relations, background. This is because legal scholars, not surprisingly, are more accustomed to providing analysis of legal issues than the broader types of concerns raised by GIC, such as whether or not a government has achieved a defensible balance between idealism and realism, or sought to advance purposes beyond ourselves. Nevertheless, this author concurs with the view of Pert that GIC offers a useful tool for international lawyers to assess governmental engagement with international law in a more qualitative and deeper fashion.14 It is hoped that this thesis demonstrates that while applying GIC to the international law field is not without its challenges, it does provide a useful and broader perspective from which to understand and assess governmental engagement with the international legal system.

Third, this thesis would argue that while the term GIC is often misused by governments – in that they may claim to be acting as GICs when this is patently not the case – this does not diminish the usefulness of the concept as a political aspiration or motif. While public commitments to the ideal do not guarantee that higher standards of international conduct will occur in practice, it seems likely that governments which profess a belief in GIC are more likely to aim for, if not always achieve, more ethical

14 Pert, above n 4, 329.
forms of international conduct. It is undoubtedly the case, for example, that the Rudd government, despite its flaws, adopted a manifestly more ethical and responsible approach to engagement with ICCL than the Howard government, which had little interest in being regarded as a GIC in this field. Furthermore, it must be recognised that GIC is an essential aspiration for the international community as a whole, not just Australia, if dangerous climate change is to be averted. The alternative – continuing to preference short-term self-interest – is not a viable option in the face of a transnational problem like climate change which requires states to set aside short-term national gains for the long-term global good.

Finally, it is apparent to this author that national governments in Australia will always struggle to meet the standard of GIC on the issue of climate change unless a broader political and community consensus can be found on the need for strong action to reduce GHG emissions. This is because the decarbonisation of the Australian economy will require some degree of economic sacrifice by the Australian community and many businesses to modify their practices so as to lessen their carbon impact. As such, abatement measures which involve economic costs are never likely to be inherently popular with the Australian public and large sectors of the business community. At the time of writing, it appeared extremely unlikely that the new Liberal National Abbott government had any intention of forming such a political consensus on climate change, or to act as a GIC in the ongoing climate negotiations (which were still yet to adopt a binding post-2012 agreement). While GIC has largely been associated in Australia with Labor governments, who have done the most to advance the issue of climate change, GIC ultimately needs to be accepted as an ethical responsibility by both major political parties. Unless this occurs, it is difficult to envisage any federal government, even a well-intentioned one, ever having the political courage to genuinely act as a GIC on what Kevin Rudd correctly labelled 'one of the greatest moral, economic and environmental challenges of our age'.

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