Canberra (Head Office)

Level 10
60 Marcus Clarke St
Canberra ACT 2601

GPO Box 2201
Canberra ACT 2601

p: +61 2 6247 0960
e: appea@appea.com.au
w: www.appea.com.au

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Mr John Lee
Analyst, Corporations and Schemes Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

(via e-mail to: ERF@treasury.gov.au)

Dear Mr Lee

RE: DRAFT *CORPORATIONS AMENDMENT (EMISSIONS REDUCTION FUND PARTICIPANTS) REGULATION 2015*: COMMENTS FROM THE AUSTRALIAN PETROLEUM PRODUCTION & EXPLORATION ASSOCIATION

The Australian Petroleum Production & Exploration Association (APPEA) welcomes the opportunity to provide comments on relevant areas of the *Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015 Consultation Paper*, dated January 2015 (the Consultation Paper), and the Exposure Draft of the *Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015* published by The Treasury (the Draft Regulation).

Since 1959, APPEA has been the peak national body representing the upstream oil and gas exploration and production industry. APPEA has more than 85 member companies that explore for and produce Australia's oil and gas. In addition, APPEA's more than 270 associate member companies provide a wide range of goods and services to the industry. Further information about APPEA can be found on our website, at www.appea.com.au.

Comments on specific areas of the Consultation Paper[1]

Discussion Question 1 of the Consultation Paper asks *"Are any further amendments to the corporations law required for the efficient operation of the ERF?"*. The purpose of this submission is to propose a further amendment to the corporations law which is necessary to ensure the efficient operation of these aspects of the ERF for the upstream oil and gas industry.

Key points

The purpose of the proposed exemptions is to ensure an effective and efficient ERF. One way to achieve this is to decrease the regulatory burden on ERF participants: in particular, to reduce or limit the circumstances in which an ERF participant would be required to hold an AFSL.

[1] Section references are to the *Corporations Act 2001* and references to regulations are to the *Corporations Regulations 2001*.

Participants in the ERF need to mitigate the risk that, despite the ERF, they will have a shortfall or excess of ACCUs.

We are concerned that, despite the Draft Regulation, some ACCU holders will still be required to hold an AFSL in order to deal in ACCUs (and related financial products) on the secondary market. This is an unnecessary and inefficient regulatory burden, is contrary to the Government's stated aims and will ultimately hamper the effectiveness of the ERF.

In particular, the exemption that applies to related bodies corporate and associated entities in Regulation 7.1.35C should be extended to any dealing in ACCUs by an operator on behalf of an unincorporated joint venture (UJV).

The need for a robust secondary market

We understand from our members that Carbon Farming Initiative project proponents may need to deal in ACCUs outside of selling them to the government under the ERF. This may include that project proponents bid a portion of expected ACCUs into the auction process, as they may hold some back as a buffer to mitigate future delivery risk. If such project proponents have a surplus of ACCUs towards the end of their contracting period, it could be advantageous to sell them into a secondary ACCU market.

A liquid secondary market for ACCUs can help reduce the risks any auction bidders may face regarding the "make good" provisions and should facilitate greater participation in the Government's reverse auction process. Therefore it is in both the Government's and project proponents' interests to increase the number and type of entities participating in the ACCUs secondary market.

However, the Draft Regulations do not extend to the secondary market and this is problematic. As a result, some project proponents will still be required to hold an AFSL. The acquisition and maintenance of an AFSL is a significant burden and for some of our members it could prove to be a barrier to participating in the secondary market and ultimately therefore to participating in the ERF.

Unincorporated joint ventures

The use of unincorporated joint ventures in the Australian oil and gas industry

A common commercial practice in the Australian oil and gas industry is the use of the UJV. UJVs may be either a purely contractual relationship between the parties or a partnership between the joint venture parties. Either way, they are prevalent in the oil and gas industry especially in cases where the parties only associate for a specific project rather than having an ongoing relationship.

Exemptions not available for UJVs

Neither the current nor the proposed regulation of ACCUs takes into account the status of UJVs. In particular, there are a number of regulations and exemptions which most ACCU holders can utilise to avoid the AFSL requirement but which are not available for UJVs. Two examples follow.

Self-dealing

A person is taken not to deal in a financial product if the person deals in the product on their own behalf, and the dealing is not in relation to a financial product issued by the person (section 766C(3)). If a person deals in a financial product as an agent of another person (the principal), then they are not considered to be dealing in the product on their own behalf, even if the dealing, when considered as a dealing by the principal, is a dealing by the principal on the principal's own behalf (section 766C(3A)).

If a participant is dealing with the ACCUs in its capacity as operator of a UJV, that is, on behalf of UJV participants, then it will not be dealing on its own behalf and therefore this exemption is not available.

Regulation 7.1.35C

Regulation 7.1.35C provides that disposing of ACCUs will not be 'dealing in a financial product' if:

a) the disposal is made on behalf of a related body corporate or associated entity; and
b) the related body corporate or associated entity is an entity that is a liable entity entered in the information database under section 183 of the Clean Energy Act 2011.

Since a UJV is unincorporated, it does not have legal identity and cannot meet the 'related body corporate or associated entity' test.

Examples from our membership

There are several APPEA members that are engaged, or expect to be engaged in the ERF, and may be required to sell ACCUs. These members currently manage liquids and gas production as a UJV. A number of these projects have also established projects that will result in ACCUs and these will be held by the operator of the project for and on behalf of the UJV participants. In these cases, the operator is generally the legal title holder of the ACCUs and is recorded as the owner on the electronic Australian National Registry of Emissions Units.

At some time, the operator may need to sell any surplus ACCUs not sold through the ERF auctions, in order to realise their value and distribute the revenue between the UJV participants. The operator may also need to deal in ACCUs in connection with the ERF.

The operator would be doing this on behalf of the UJV which is not an 'associated entity' as understood in the *Corporations Act*. Therefore, neither the self-dealing exemption nor Regulation 7.1.35C are available.

This is an inappropriate outcome for such projects. Dealing in ACCUs would be an inconsequentially small part of their business and does not justify the regulatory burden incurred by the AFSL requirement.

Further amendments to the corporations law

From a policy perspective, the UJV is of a comparable character to an associated entity of a project operator. We consider therefore that the exemption that applies to related bodies corporate and associated entities in Regulation 7.1.35C should be extended to any dealing in ACCUs by an operator on behalf of a UJV.

If you require additional information about our submission, please do not hesitate to contact me on 6267 0902 or at ddwyer@appea.com.au. I would welcome the opportunity to discuss these matters with you.

Yours sincerely

Damian Dwyer
Director – Economics