Australian Government
Clean Energy Regulator

Response to Mr Oliver Yates: Submission on Proposed Benefit Sharing Arrangements

The Clean Energy Regulator (CER) has published a response to the submission by Mr Yates as it contains some inaccuracies regarding the fixed delivery exit arrangement.

Importantly, the exit arrangement was implemented to streamline a contractual arrangement that existed in the original carbon abatement contracts to pay specified, capped damages instead of meeting specific delivery obligations. The exit process was deliberately a "minimal change" that does not alter rights under the contract. It avoids the need for a protracted process or litigation, and provides greater certainty of outcome for all parties.

The CER does not agree that there is a material risk of it purchasing ACCUs at a higher price as a result of the exit arrangement. The CER did not offer fixed delivery contracts at the last auction and has no plans to offer fixed delivery contracts in the future. Optional delivery contracts are offered for ACCUs tied to specific new projects, which means they incentivise new supply rather than ACCUs already ear-marked for fixed delivery contracts.

The CER's response to specific inaccuracies in Mr Yates' original submission is provided below:

1. There is an assertion that non-delivery by choice is a repudiation of the whole carbon abatement contract. Sellers have always been entitled to inform the CER of a potential non-delivery and negotiate a way forward. The new arrangements streamline this process in certain circumstances. The contract specifically contemplates a situation of delivery failure against a specific delivery milestone. A failure to deliver against a milestone does not constitute repudiation of the whole contract. In the case of a delivery failure, the contract could only be terminated if the Buyer's Market Damages were not paid in accordance with the contract.

2. The submission claims that Buyer's Market Damages are only available where a project cannot produce sufficient carbon abatement to fulfill the carbon abatement contract. There is nothing in the language of the contract that states this. Where there is a failure to meet a delivery milestone (irrespective of the circumstances of the specific failure), the contract terms are clear – Buyer's Market Damages are available and they are capped.

3. In relation to the claim that losses would include profits foregone from the potential sale of delivered Australian Carbon Credit Units (ACCUs), this is based on both factual and legal error. The CER is not a "seller" of ACCUs and has no legislative power to do so. By law, ACCUs that are delivered under carbon abatement contracts are moved to a specific account for cancellation. Unless changes are to be made to the relevant legislation, the CER is unable to act as a 'carbon reserve bank' for the Commonwealth in the manner suggested. However, as a result of the exit arrangement, abatement that could have been delivered under existing contracts to the Government will now be available to be sold by the person holding the ACCUs to the private market.

   This is similar to what occurs under the optional delivery contracts that the CER has been offering at auction since March 2020, whereby contract holders have the right but not an obligation to sell ACCUs to the Commonwealth. However, fixed delivery contract holders are still held to their delivery obligations or the payment of contractually agreed damages.

In terms of the matters raised in Mr Yates' 3 August response, the CER acknowledges his view that carbon abatement contracts were designed with particular intentions in mind. However, this does not change the legal meaning of the terms of the carbon abatement contracts nor does it constrict the interpretation of the contract by the parties who actually entered the contracts. In accordance with these terms, Buyer's Market Damages apply where there is a failure to meet a delivery milestone. Contrary to Mr Yates' response, these terms do not limit the application of Buyer's Market Damages to situations where the contract cannot be performed.