3 August 2022

David Parker AM
CEO and Chair
Clean Energy Regulator
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Dear David,

Thank you for your note dated 6 July 2022 and for recognising that the CER did not publish my formal submission.

Given this omission I wish to ensure that the correct understanding of the Buyer's Market Damages (BMD) clause is clear and recorded. **The Clean Energy Regulator's (CER) omission of publishing my submission and consideration of its contents, is a significant concern.**

Regarding the submission process, I make the following observations:

1. As a regulator I am concerned that you have publicly stated that all submissions received support the proposed benefit sharing mechanism. **This is not correct.**

2. You claim that all submissions received, that were not confidential, were released. **This is also not correct**.

3. To seek submissions on a matter involving over $3bn of taxpayer money and then **to ignore submissions from market participants should be a significant governance concern for the Minister and I assume your Board**.

In receiving your response, I sought legal advice regarding my position and can confirm that it has been reaffirmed as being correct, accordingly I wish to set out key facts relating to this situation:

The ERF contract was designed and built with the input of both the CER and the Clean Energy Finance Corporation (CEFC). As the CEO of the CEFC at the time, we were expressly requested by our then Minister Hunt to work with the CER to ensure that the ERF contract was constructed in a way that would enable lenders to lend to project sponsors of ERF projects. I was personally involved in these discussions and the amendments to the draft ERF contract to ensure the contracts could be effectively lent against (financed).

Most importantly **the Buyer's Market Damages clause was developed by the CEFC with the CER to address the fact that many project sponsors could not enter into agreements where delivery failure was a "default", and the loss they could incur from that default was unlimited**. Most corporate sponsors have cross default provisions in their financing documents and therefore a "default" under the ERF contract could trip a default under all of their borrowing facilities. In addition, most corporate borrowers cannot enter into contracts where failure to perform could trigger unlimited damages and therefore there was considerable flexibility for the sponsor to agree an alternative delivery schedule or remedy with the CER. This arrangement ensured that the CER could determine the remedy in the event a project would not deliver the carbon as anticipated.

The contracts were not designed to allow a project sponsor to walk away from them because they didn't like the price stipulated in the contract, and especially when performance was not an issue. To do so was not contemplated as it would have been a repudiation of the entire contract. The contract was not an option to deliver, it was an obligation unless the project was incapable of delivery. Only when the contract can't be performed does BDM apply, not when they don't like the price. The CEFC was able to finance EDL which was a major early participant as a result of the introduction of the BDM clause that replaced the default provisions.

Your claim that "the exit process was implemented to streamline a contractual arrangement that existed in the original contracts to pay specified, capped damages instead of meeting specific delivery obligations" **is only correct to the extent where a project fails to be capable of performance, and not just because the contract counterparty doesn't like the contracted price**.

As the Market Advisory Group (MAG) stated in their analysis:

"While the Clean Energy Regulator is likely to deal with legitimate cases of default and the application of BMDs in good faith and on reasonable terms, we believe they may not treat kindly any participants who use BMD's for pure price arbitrage purposes. Participants that employ such a strategy could place their ability to participate in future auctions or even register projects in the future in jeopardy. Choosing to default on delivery to take advantage of higher spot prices is not a strategy that should be taken lightly. There will almost certainly be ongoing damaging consequences to a participant's ability to participate in the ERF".

It is clear that the BMD clause was not designed to permit participants to "use BMD for pure price arbitrage purposes".

Your statement that the "minimal change" does not alter the contract is not correct and I am yet to understand - if it does not, then why is the change required? Of course, it alters the rights under the contract - this is what project sponsors who don't like the contracted price wanted. Counterparties who elect to litigate this point are up against a clear and compelling set of documents (ie your files) that provide clear explanations of how the contract works and how the BMD provision was only there to assist parties in the event a project failed. It was not there to be used if they don't like the prevailing carbon price.

Regarding your claimed inaccuracies in my submission:

1. The question of repudiation only applies where a sponsor tries to use the provision where a project is capable of performance when they don't like the contracted price. You are correct that non-delivery is not a repudiation where the contract can't be performed as that was how the CEFC and CER designed it.

2. You are correct that where a contract can't be performed Buyers Damages are available and they are capped as intended. But this doesn't apply where the carbon is available and the sponsor elects not to provide it to the CER, as to do so is a repudiation.

3. The CER is fully aware that as a result of the proposed changes, a right to receive the contracted carbon results is a very significant economic loss to the nation and an economic benefit to the projects sponsor. You are of course also aware that as a result of the changes made, the project sponsors that benefit most from these changes have now been sold multiple times in the last few months for 100s of millions of dollars, evidencing the wealth transfer enabled by your contract change. While you are not currently able to operate as a

carbon bank that is an option the government could have considered. I again remind you of your obligation under the APS as set out clearly in my original submission.

4. To claim that later contracts creates delivery optionality means that previous contracts must have the same optionality is fictional and ignores their terms.

I would appreciate that this response also be published as it is vital that a correct record of this matter, be available to the new government and the public. I assume my submission, your letter and this response will be provided to your Board and your Minister, so they are fully aware of the significant governance issues it highlights.

Yours sincerely

Oliver Yates

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cc: Please copy the CER Board members :
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