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LEGAL LIABILITY AND CCS: A COMPARATIVE PERSPECTIVE

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OVERVIEW

- Presentation based upon the broader study – released by the Institute in November 2014.

- Scope and aim of the study:
  - Examine the approaches adopted in the design and implementation of legal liability regimes for CCS activities;
  - Identify key issues and important considerations;
  - Focused upon three jurisdictions – State of Victoria, Australia; Province of Alberta, Canada; and the United Kingdom;
  - Jurisdictions selected on the basis of their legal and regulatory models for CCS and their shared common-law tradition;
  - Many of the liability issues identified in the study will be relevant to any jurisdiction developing CCS law, whether based on common law or civil law traditions.

KEY FINDINGS

CIVIL LIABILITY

- Each jurisdiction has seen the development of civil liability principles in the form of case law:
  - Established principles sit alongside statutory systems of assessment and licencing.
- Largely similar approach to addressing some common concepts (e.g. torts of negligence, public nuisance, trespass):
  - However; not always interpreted in a uniform manner across the three jurisdictions.
- Principles applying to pollution incidents and land contamination, for example, are likely applicable by analogy.
- Particular issues to be highlighted include the jurisdictions' approaches to:
  - Regulatory compliance and potential civil liability;
  - Potential importance of limitation periods when bringing a claim.

ADMINISTRATIVE LIABILITY

- Consideration given to the powers afforded to public bodies to require an operator to undertake remedial action in light of actual/perceived environmental damage.

- CCS-specific legislation in each jurisdiction includes provisions which enable an authority to issue ‘directions’ or order specific activities.

- Substantial powers also found within broader environmental regulatory regimes in each jurisdiction – not drafted with CCS in-mind, but potentially broad enough to apply.

- Potential issues identified in relation to these powers include:
  - Broad nature of the obligations to be imposed upon operators;
  - Ability of an operator to challenge the exercise of an authority’s power;
  - Interactions between the various responsible authorities, despite ‘carve out’ provisions;
  - CCS-specific provisions remain untested.

EMISSIONS TRADING LIABILITY

- GHG trading schemes, which provide an economic benefit for CCS activities, will be required to address any subsequent leakage of stored CO_2.

- The approach under the EU ETS is to focus responsibility upon the storage operator (prior to the post-closure transfer):
  - To purchase allowances to meet any subsequent leakage;
  - Maintain adequate financial security to cover potential liabilities.

- Provision of financial security ‘up-front’ - prior to the commencement of injection – may prove problematic for a potential operator.

- Significant timescales involved may represent a challenge when calculating the future price of allowances under the ETS.

TRANSFER OF LIABILITY AND RESPONSIBILITIES

- The three jurisdictions all include some form of liability transfer, but scope and details differ substantially.

- None of the regimes offer absolute or unconditional release of liabilities

- Important to distinguish between:
  - Continuing responsibilities for a closed site (monitoring, remedial action, etc.);
  - Liabilities resulting from leakage during operations (but may not be discoverable for many years) and those resulting from leakages occurring after operations.

TRANSFER OF LIABILITIES

- The critical questions to be addressed are:
  - When can transfer take place?
  - What conditions must be satisfied?
  - What is transferred?
  - Can a State re-open the operators' liability (inclusion of 'claw-back' provisions)?

WHEN?

- EU Directive : A minimum of 20 years, but could be less if certain conditions are satisfied.
- Alberta : The RFA Panel recommends 10 year minimum, but no provision for shorter periods.
- Victoria: No minimum time-limits included in the legislation

CONDITIONS TO BE SATISFIED

- EU Directive: "'*all available evidence' indicates that the stored CO_2 will be completely and permanently contained*":
  - Plus report by Operator on conformity of actual behaviour of CO_2 with models and no detectable leakage.

- Alberta: Minister is satisfied that the CO_2 is behaving in a stable and predictable manner, with no significant risk of future leakage (plus compliance with regulations).

- Victoria: Minister of the opinion that the CO_2 is behaving and will continue to behave in a predictable manner;
  - Operator has reduced risks from storage to as low as is reasonably practicable.

WHAT IS TRANSFERED?

- EU Directive: administrative responsibilities for monitoring, corrective, remediation, and surrender house gas allowances (nothing on civil (tort) liabilities).

- UK legislation adds: any liabilities, whether future or present, actual or contingent, arising from leakage from the storage complex.

- Alberta: administrative responsibilities, plus Crown indemnity for tort actions against operator in respect of licenced activities. (But indemnity implies operator must still exist)

- Victoria: law unclear, but probably administrative responsibilities. No transfer of civil liability – considered but rejected as would reduce incentives on operators.

CLAW-BACK

- EU: State may recover costs where these are due to any fault on the part of the operator. “Fault’ wide definition including cases of deficient data.

- UK: State may recover costs where due to fault on the part of the operator (negligence, deceit, or failure to exercise due diligence). This will certainly encompass some type of tort claims, but maybe not all.

- Alberta and Victoria: No specific provisions, but where there has been deliberate fraud, or deceit by an operator, general legal principles will probably invalidate any liability transfer.

FINANCIAL SECURITY

- All three jurisdictions have imposed financial security requirements upon operators, to limit the potential exposure of the State.

- The approach has varies between the three jurisdictions, but all have drawn upon established domestic models (e.g. oil and gas sector):
  - Beneficial to both regulators and operators, who are familiar with many of the pre-existing concepts;
  - However, their application in to CCS activities remains untested.

- Flexibility, review and adjustment likely to be important benefits to the operator:
  - Timing of payments provides one tangible example, in particular the approach adopted in Victoria and Alberta.

COMMERCIAL CONSIDERATIONS

- Where the storage operator is separate and distinct from those undertaking capture and transport elements:
  - Detailed commercial agreements likely to be established – perhaps based upon existing oil and gas models;
  - Perhaps difficult to predict how risk and liability is to be handled in these contractual arrangements.

CONCLUSIONS

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- The three legal and regulatory models considered, provide well-characterised examples of how to approach liabilities associated with CCS operations:
  - Comprehensively address a wide range of liabilities;
  - Provide important models for those jurisdictions currently designing legal and regulatory frameworks.

- However, aspects of these models remain speculative and untested:
  - Nascency of the legislation and the models; and
  - Insufficient project-level experience to-date.

- For these jurisdictions, further refinement of regulatory models, together with flexibility in their implementation, will likely prove important.

FOR FURTHER INFORMATION

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CONDITIONS FOR TRANSFER

	Core conditions	Post-closure time limit
The EU Directive	'all available evidence' indicates that the stored CO_2 will be completely and permanently contained	Minimum period of twenty years unless the competent authority is satisfied that the core condition is met at an earlier date
United Kingdom	'all available evidence' indicates that the stored CO_2 will be completely and permanently contained	Minimum period of twenty years unless the competent authority is satisfied that the core condition is met at an earlier date
Alberta	The Minister is satisfied that the captured CO_2 is behaving in a stable and predictable manner, with no significant risk of future leakage	Not yet specified in the Regulations. The RFA recommends a minimum period of ten years, with no discretion for the authority to reduce this period
Victoria	The Minister is satisfied that: (i) the injected CO_2 is behaving in a predictable manner, (ii) the licence holder has reduced risks to as low as reasonably practicable and (iii) the stored CO_2 will not present a risk to public health or the environment	None specified in the legislation

LIABILITIES/RESPONSIBILITIES TRANSFERRED

	Body the liabilities transferred to	Liabilities transferred	Notes
The EU Directive	The competent authority	Obligations under the CCS Directive relating to monitoring and corrective measures, obligations relating to the surrender of EUAs under the ETS Directive in the event of leakage and obligations relating to preventative and remedial action under the ELD	
England and Wales	The competent authority (the Secretary of State)	Obligations under the CCS Directive relating to monitoring and corrective measures, obligations relating to the surrender of EUAs under the ETS Directive in the event of leakage and obligations relating to preventative and remedial action under the ELD. Also, any liabilities, whether present or future, actual or contingent, arising from leakage from the site	
Alberta	The Crown	Future responsibilities under various environmental legislation	The former lessee is indemnified from any liabilities in damages in torts. The RFA recommends that liabilities under the greenhouse gas emissions regime should also be transferred
Victoria	The Crown	Future responsibilities under environmental laws are presumed to be transferred, although are not specified	There is no transfer or indemnification in respect of liabilities for torts