

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT NO. 24, 2015

Issued by authority of the Assistant Treasurer

Corporations Act 2001

Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015

The *Corporations Act 2001* (the Act) provides for the regulation of corporations, financial markets, products and services, including in relation to licensing, conduct, financial product advice and disclosure.

Subsection 1364(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to the Act.

Paragraph 765A(1)(y) of the Act provides that the regulations may declare that a product will not be a financial product for the purposes of Chapter 7 of the Act.

Similarly, paragraph 761D(3)(d) of the Act provides that the regulations may declare that a product will not be a derivative for the purposes of Chapter 7 of the Act.

The *Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015* (the Regulation) makes two minor amendments to the *Corporations Regulations 2001* (the Principal Regulations).

The amendments aim to align the financial services provisions of the Act with the Government's policies to reduce Australia's carbon emissions and therefore ensure that the regulatory burdens associated with those provisions remain appropriate.

The Emissions Reduction Fund (the Fund) is the centrepiece of the Government's Direct Action Plan to address climate change. It will purchase the lowest cost emissions reductions as identified through a reverse auction process.

Specifically, the amendments exempt contracts with the Clean Energy Regulator, known as carbon abatement contracts, from the definitions of 'derivative' and 'financial product'.

Details of the Regulation are set out in the [Attachment](#).

Under the Corporations Agreement 2002 (the Agreement), the State and Territory Governments referred their constitutional powers with respect to corporate regulation to the Commonwealth. The Legislative and Governance Forum for Corporations (meeting as the Ministerial Council for Corporations) has been consulted about the proposed Regulations as required by the Agreement. However, clause 507 and sub-clause 511(2) of the Agreement provide that approval of the Council and the usual public exposure period are not required for amendments to regulations relating to financial products and services or managed investment schemes.

A draft of the Regulation was published on the Treasury website on 21 January 2015, together with a consultation paper explaining the regulations, for a consultation period of around three weeks. The draft Regulation contained three exemptions, including

the exemption for carbon abatement contracts. The consultation paper also sought views on whether further exemptions were necessary.

A total of 17 submissions (including 3 confidential submissions) were received. The Government is currently considering views presented during consultation.

In response to this feedback, the Government has decided to progress the exemption for carbon abatement contracts separately from the other exemptions. The Government will monitor participation in the Fund's auctions as it continues to consider the remaining exemptions and the feedback from the submissions on these exemptions.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The *Corporations Act 2001* does not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulations will commence the day after it is registered on the Federal Register of Legislative Instruments.

ATTACHMENT

Details of the Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015.

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015* (Regulation).

Section 2 – Commencement

The Regulation commences on the day after it is registered.

Section 3 – Authority

The Regulation is made under the *Corporations Act 2001* (the Act).

Section 4 – Schedule(s)

This section provides that Schedule 1 amends the *Corporations Regulations 2001*.

Schedule 1 - Amendments

Item 1 ensures the definition of carbon abatement contract used in the Regulation is consistent the definition in the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

Item 2 inserts paragraphs 7.1.04(8)(c), which clarifies that carbon abatement contracts are not derivatives for the purpose of Chapter 7 of the Act.

Carbon abatement contracts are entered into by successful bidders in an Emissions Reduction Fund auction and the Clean Energy Regulator. The contract requires the bidder to provide carbon abatement to the Regulator according to an agreed schedule.

Prior to this amendment, carbon abatement contracts may have been considered derivatives for the purposes of section 761D of the Act as the amount of the consideration or the value of the contract may be considered to be derived from or vary by reference to the value or amount of the underlying Australian carbon credits units being delivered.

Each party to a derivative contract is taken to be an issuer of that contract and issuers are required to hold an Australian Financial Services Licence (AFSL) even if they are only dealing on their own behalf.¹ A person would be required to hold an AFSL if they deal in derivatives as a significant part of their business. Part of the rationale for treating both parties to a derivative contract as an issuer is that each party owes contractual obligations to the other, exposing the other party to risks. Since a government body is the other party to the contract, carbon abatement contracts pose very low default risk to the contracting parties compared to other derivatives.

AFSLs provide additional protection to persons receiving financial services from the licensee, including through financial resource requirements. In this case, however, the primary person receiving financial services in relation to carbon abatement contracts is the Clean Energy Regulator. The Regulator has its own verification and other processes under the *Carbon Credits (Carbon Farming Initiative) Act 2011* that can provide these protections. The relatively heavy regulatory burden applicable to derivatives are therefore not suitable for carbon abatement contracts.

¹ See sub-sections 761E(5) and 766C(3) of the Act.

The Government's intention is that persons should not be required to hold an AFSL only because they regularly enter carbon abatement contracts.

Item 3 inserts regulation 7.1.07J which provides that carbon abatement contracts are not financial products.

REGULATION IMPACT STATEMENT

This regulation does not require a separate Regulation Impact Statement as it is covered by the Regulation Impact Statement for the Emissions Reduction Fund.

The Department of the Environment certified the Emissions Reduction Fund White Paper as a Regulation Impact Statement for initial decisions on the Emissions Reduction Fund, including the Emissions Reduction Fund crediting and purchasing arrangements, Carbon Farming Initiative arrangements incorporated into the Emissions Reduction Fund, and coverage of the Emissions Reduction Fund safeguard mechanism in accordance with the Australian Government Guide to Regulation. The Regulatory Impact Statement will be finalised after consultation with business on the remaining aspects of the safeguard policy.

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

**Corporations Amendment (Emissions Reduction Fund Participants)
Regulation 2015**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The regulation exempts carbon abatement contracts from the definitions of ‘derivative’ and ‘financial product’. Carbon abatement contracts are entered into by successful bidders in an Emissions Reduction Fund auction and the Clean Energy Regulator. The contract requires the bidder to provide carbon abatement to the Regulator according to an agreed delivery schedule.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.