EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT No. 166, 2015

Issued by the Authority of the Minister for the Environment

National Greenhouse and Energy Reporting Act 2007

National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015

Purpose

The *National Greenhouse and Energy Reporting Act 2007* (NGER Act) establishes the National Greenhouse and Energy Reporting (NGER) System, which is a national framework for reporting greenhouse gas emissions, and energy consumption and production by Australian corporations. Data reported under the Act assists Australia meet its international reporting obligations and informs government policy, programs and the Australian public.

The *National Greenhouse and Energy Reporting Regulations 2008* (the Principal Regulations) provide necessary details that allow compliance with, and administration of, the NGER Act.

The *National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015* (the amendment Regulation) makes minor technical amendments to the Principal Regulations to support amendments made to the NGER Act by the *Carbon Farming Initiative Amendment Act 2014* (the CFI Amendment Act). The amendment to the Act, which was passed in December 2014 and which takes effect from 1 July 2016, establishes the framework for the safeguard mechanism, a core element of the Emissions Reduction Fund. In particular, the amendment Regulation ensures terms in the Principal Regulations are consistent with new terminology in the NGER Act, provides additional options for defining transport facilities and makes minor changes to auditing provisions. The amendment Regulation also prescribes the maximum civil penalty amount for the safeguard mechanism.

Background to the Safeguard Mechanism

The Emissions Reduction Fund is the centrepiece of the Australian Government's efforts to reduce emissions. Its primary objective is to assist Australia to meet its emissions reduction target of five per cent below 2000 levels by 2020 and 26 to 28 per cent below 2005 levels by 2030, consistent with Australia's international obligations under the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

The Emissions Reduction Fund purchases emissions reductions at lowest cost. To ensure that emissions reductions purchased through the Emissions Reduction Fund are not displaced by a significant rise in emissions above business-as-usual levels elsewhere in the economy, the Government will implement a safeguard mechanism. This will safeguard the value of funds spent under the Emissions Reduction Fund by requiring large emitting facilities to keep their emissions within baseline levels.

Legislative rules and regulations supporting the safeguard mechanism

The NGER Act is supported by subordinate legislation, including the Principal Regulations. Section 77 of the NGER Act provides that the Governor-General may make regulations prescribing matters required or permitted by the NGER Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The NGER Act as amended by the CFI Amendment Act also provides for the Minister to make legislative rules (section 22XS), not inconsistent with the regulations.

Detailed description of the amendments

Details of the regulations for amendment and repeal in Schedule 1 and Schedule 2 are set out in **Attachment A**.

Public consultation

The Government has consulted widely on the safeguard mechanism's design. Terms of reference were consulted on in October 2013, followed by a Green Paper in December 2013 leading to release of a White Paper in April 2014. The Government announced a number of important policy decisions on the safeguard mechanism in the White Paper. During passage of the Carbon Farming Initiative Amendment Bill through Parliament, amendments were made to the *National Greenhouse and Energy Reporting Act 2007* (Act). These established a legislative framework for the safeguard mechanism and enabled final design elements to be implemented through legislative rules. A Regulation Impact Statement was prepared that explores options for the remaining design decisions pertaining to the safeguard mechanism, that is those design elements not decided in either the Act or the White Paper. It also includes estimates of the regulatory burden arising from the introduction of the safeguard mechanism to inform the Government's final decision on its design. Public consultation will be undertaken in September 2015 on the exposure draft amendment Regulation. This draft Explanatory Statement will inform this consultation.

Regulatory Impact

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. These decisions included 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. This was followed with a dedicated Regulatory Impact Statement (RIS) for the safeguard mechanism which was finalised after thorough consultation with a wide range of stakeholders on the remaining aspects of the safeguard policy. The RIS focused on the policy commitment made by the Australian Government, and the manner in which it should be implemented, exploring options and setting recommendations for design decisions not already settled in the NGER Act or the White Paper. The safeguard mechanism will send a signal to businesses to avoid significant increases in emissions beyond business-as-usual levels. It will do so in a light touch way that supports economic growth and allows businesses to continue normal operations. As proposed, the safeguard mechanism is not expected to affect prices, impact upon households, or adversely affect economic growth.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

ATTACHMENT A

Details of the sections in the *National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015*

Regulation 1 – Name

1.1 This regulation provides that the title of the amendment Regulation is the *National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015*.

Regulation 2 – Commencement

1.2 This regulation provides for Schedule 1 of the amendment Regulation to commence on the day after the amendment Regulation is registered on the Federal Register of Legislative Instruments.

1.3 Schedule 2 of the amendment Regulation will commence on 1 July 2016, when the amendments to the NGER Act which give effect to the safeguard mechanism also commence.

Regulation 3 – Authority

1.4 This regulation provides that the legislative authority for the amendment Regulation is the *National Greenhouse and Energy Reporting Act 2007*.

Regulation 4 – Schedule

1.5 This regulation provides that the *National Greenhouse and Energy Reporting Regulation (2008)* (the Principal Regulations) is amended as set out in the Schedule.

Schedule 1 — Regulations for Repeal or Amendment

1.6 Schedule 1 makes amendments primarily to the audit related provisions of the regulations implementing changed terminology from 'CFI audit' to 'ERF audit'. It also makes an optional change to the reporting of transport facilities. These changes commence on the day after the amendment Regulation is registered on the Federal Register of Legislative Instruments.

Audit related amendments

Overview

1.7 Items 377, 378, 380 and 381 of Schedule 1 to the *Carbon Farming Initiative Amendment Act 2014* (the CFI Amendment Act) replaced the defined terms 'CFI audit' and 'CFI audit report' in the NGER Act with a replacement term 'ERF audit' and 'ERF audit report'. The revised definition captures the different types of risk-based audits now conducted under the Emissions Reduction Fund. The Principal Regulations still contain a number of references to 'CFI audits' and 'CFI audit reports' which need to be made consistent with the new terminology references in the NGER Act.

1.8 The amendments introduce the term 'Part 6 audit' to cover off all of the different types of audit covered by Part 6 of the Act. This term will then be used by Schedule 2 to add the concept of safeguard audits to the Principal Regulations.

1.9 In making these technical changes, the Government, in consultation with the Clean Energy Regulator, has decided to make minor streamlining changes to the related audit provisions which reflect current practice and reduce red tape. In particular, the categories of auditors will be streamlined with reference to just 2 rather than 3 categories of auditors. As all category 3 auditors are currently category 2 auditors, no auditor will be affected by the removal of the the category 3 auditor category. The subcategories of 'NGER technical, CFI technical and non-technical' for category 1 auditors will also be removed (without impacting the registration of category 1 auditors as category 1 auditors). These changes simplify the categories of auditor for the Emissions Reduction Fund and the Safeguard Mechanism. The rules in regulation 6.66 for participation in audits have also been clarified.

Item [1]

1.10 This item inserts a new definition at regulation 1.03, "alternative audit" which is designed to minimise current and future complexity in the Principal Regulations by including a collective term which catches any audit that is, in the opinion of the Clean Energy Regulator, comparable to an audit governed by Part 6 of the Act (currently ERF audits and greenhouse and energy audits). This change is reflected in the repeal of the previous definition of "alternative audit" at regulation 6.64A [Item 24].

Items [2], [3], [6] and [28]

1.11 These items replace the term 'CFI audit' with either the specific term 'ERF audit' or the generic new term 'Part 6 audit'. A Part 6 audit includes an ERF audit. For example, item 2 omits the term "a CFI audit" in regulation 1.03 in paragraph (b) of the definition of "audit team leader" and substitutes it with "an ERF audit". This is designed to reflect changes made to the NGER Act by the CFI Amendment Act, which replaced the term 'CFI audit' with 'ERF audit' and the term 'CFI audit report' with 'ERF audit report'.

Items [4], [8], [10], [12], [14], [15], [16], [19], [20] and [22]

1.12 These items make consequential amendments to the Principal Regulation to remove category 3 auditors. This was designed to streamline the administration of the classification of auditors. All category 3 auditors are also registered as category 2 auditors, and as such it was seen as unnecessary to have the two separate categories, requiring additional cost and red-tape. There is currently no functional difference between category 2 and 3 auditors.

Item [5]

1.13 This item inserts a new definition at regulation 1.03, "Part 6 audit" which is designed to define audits that are relevant for the purposes of Part 6 of the NGER Act, and includes ERF audit and a greenhouse and energy audit. This definition will be further amended on 1 July 2016 to include safeguard audit (Schedule 2 [Item 1]).

Items [8], [9], [10], [11], [12], [17], [18], [21] and [22]

1.14 These items all make consequential amendments to the Principal Regulations to streamline the three categories of Category 1 auditor in the Principal Regulations, into a single Category 1 auditor. Accordingly, the subcategories of 'NGER technical, CFI technical and non-technical' for category 1 auditors will no longer be relevant. This is also designed to simplify the classification and registration of auditors and associated administrative requirements.

Item [13]

1.15 This item updates the reference to the person who determines whether another person has the relevant qualifications to be an auditor, to the Clean Energy Regulator. This updates the Principal Regulations and removes the now out of date reference to the Greenhouse Energy and Data Officer.

Item [23] and [27]

1.16 Item 23 makes amendments to subregulations 6.59(2), (3) and (3A) to reflect the new definition of "Part 6 audit", which encompasses greenhouse and energy audits and ERF audits (as opposed to CFI audits). This change is reflected in other consequential amendments throughout the Regulations, for example paragraphs 6.69(1)(a) and (aa) [Item 27].

Item [24]

1.17 This item removes "CFI" from the term "CFI methodology determination" to ensure that new methodology determinations are able to be considered under the Principal Regulations.

Item [25]

1.18 This item repeals Regulation 6.64A, which contains the definition of "alternative audit", because Item [1] inserts a new alternative audit definition into Regulation 1.03. The new definition extends to cover an ERF audit.

Item [26]

1.19 Regulation 6.66 is repealed and substituted with a new clause which ensures that all auditors must participate, in a substantial way, in a greenhouse and energy audit, an ERF audit, or a safeguard audit at least once in every 3 calendar years following registration.

1.20 If the auditor has not participated, in a substantial way, in a greenhouse and energy audit, an ERF audit, or a safeguard audit in accordance with that requirement, then the Regulator has the power to accept substantial participation in an alternative audit. The inclusion of a new alternative audit, provides for audits which have not currently been contemplated and gives the Regulator a wider discretion in determining audit participation.

1.21 In determining whether an auditor has participated in an audit in a substantial way, the Regulator is required to have regard to whether the auditor carried out, or assisted in carrying out, the audit, the amount of time the auditor applied to the audit, and the auditor's role and function in relation to the audit.

1.22 In addition to these matters, the Regulator may also consider any other matters it considers relevant.

Transport related amendments

Overview

1.23 Under the Principal Regulations, a transport facility is defined as a series of activities attributable to a single State or Territory. The amendment Regulation will make changes to subregulation 2.19, and create a new subregulation 2.19A which will take effect from 1 July 2016. These changes will amend the existing definition to allow a group entity's total national emissions for each industry sector listed at current subregulation 2.19(3), to be considered part of a single national undertaking or enterprise for the purposes of NGER reporting and coverage under the safeguard mechanism (see also Schedule 2 Item 15).

1.24 Coverage under this national definition is optional, and group entities/persons in eligible sectors under subregulation 2.19(3) will have the discretion to be able to move their activities to this definition from 1 July 2016. Once covered under this national definition, it is not possible to revert to the State or Territory definition. New acquisitions or expansions of the activities of a controlling entity/person who has nominated to be covered under the national definition will also be covered, if they are within the same industry sector.

1.25 Nominations for coverage under the national definition will only apply from a period that begins on the 1 July of a particular year, on or after 1 July 2016, and cannot apply for any period before the date the nomination is made. For example, if the nomination is made to the Clean Energy Regulator and complete on 23 January 2016, then the national definition could not apply before the start of the next financial year, 1 July 2016. The exception to this is where an activity is covered under the national definition and then there is a change of control over the activity. Where this happens, the new controlling entity will have the option to be able to nominate for the activity to be covered under the national definition from the 1 July of the financial year of the nomination. This effectively allows a new controlling entity to retrospectively nominate for the activity to be covered under the national definition extending back to the 1 July of a particular financial year. This addresses circumstances where a facility or activity changes owner or operational controller, for example, in the middle of a financial year. Without this option, the new controlling entity would not be able to nominate for the activity to be covered under the national definition until the beginning of the next financial year.

[Item 7]

1.26 New subregulation 2.19A(1) ensures that new regulation 2.19A applies to transport facilities by applying the regulation to the transport industry subsectors listed under existing subregulation 2.19(3).

1.27 A group entity engaged in one of the transport sectors listed under existing subregulation 2.19(3) can nominate to report at the national level (2.19A(2)). This will allow group entities to voluntarily move to the national definition and be covered on this basis under the safeguard mechanism.

1.28 Nominations under new subregulation 2.19A(2) take effect from a 1 July that is specified in the nomination application, and that is after the date of the nomination. The nomination also cannot take effect before 1 July 2016 (2.19A(4)(a)).

1.29 Once a nomination under new subregulation 2.19A is made, this cannot be reversed. That is, a group entity will not be permitted to return to reporting at the disaggregated state and territory level (2.19A(4)(b)).

1.30 Subregulation 2.19A(5) is proposed to allow the new controlling entity of an activity to nominate to have the activity covered by the national definition retrospectively from the 1 July of the financial year of the nomination. This addresses circumstances where a facility or activity changes owner or operational controller, for example, in the middle of a financial year. Retrospective nomination will prevent the new controlling entity from having to wait until the beginning of the following financial year to have the activity covered by the national definition.

1.31 Subregulation 2.19A(6) states that any nomination made under new subregulation 2.19A must be in the approved form.

1.32 New subregulation 2.19A(3) clarifies that any successful nomination applies to activities of the group entity/person attributable to one of the industry sectors mentioned in existing subregulation 2.19(3). This applies whether or not those activities were conducted at the time of the nomination, or if the activities are at a later point under overall control of the group entity/person , but were under control of a different person at the time of the nomination. This makes clear that new expanded activities or an acquired business of the person/group entity are included in the national definition.

Schedule 2 — Regulations for Repeal or Amendment

1.33 Schedule 2 makes changes needed for administration of the safeguard mechanism, that are to commence on 1 July 2016. These include audit, references to persons rather than corporations, the civil penalty amount, waste sector reporting and restricting the ability to change facility boundaries to avoid liability under the safeguard mechanism.

Audit related changes

Overview

1.34 The amendment Regulation amends the Principal Regulations to cater for the safeguard mechanism, and the new audit opportunities and requirements that the safeguard mechanism creates.

Items [1], [2], [6] and [10].

1.35 These items insert a reference to 'safeguard audits' as defined in the NGER Act in an equivalent way to greenhouse and energy audits and ERF audits. The same NGER audit framework consequently applies to safeguard audits as it does to greenhouse and energy audits and ERF audits. The collective of safeguard audits, greenhouse and energy audits and ERF audits will now be known as Part 6 audits as they are all governed by the provisions of Part 6 of the Act (such as section 75 of the Act).

Coverage related amendments

Overview

1.36 The safeguard mechanism will apply to any person or entity operating a designated large facility that emits an amount of covered emissions that exceeds the coverage threshold. The NGER Act (as amended by the CFI Amendment Act) describes entities as either a kind of corporation or a person (which may be an individual, a body corporate, a trust, a corporation sole, a body politic, or a local governing body). The Principal Regulations as previously formulated did not cover the full range of entities that could be considered responsible emitters under the safeguard mechanism. The amendment Regulation amends references to covered entities to ensure the application of the safeguard mechanism to a wider range of legal entities. This change does not mean that the general reporting obligations in sections 19, 22G or 22X of the NGER Act apply to persons other than corporations.

Item [4]

1.37 This item amends regulation 1.03 (definition of "identifying information") to set out the particular type of identifying information the Regulator will require for the range of entities that could be considered responsible emitters under the safeguard mechanism.

Items [7]; [11]; [12]; [13]; [21]; [22]; [23]; [24]; [25]; [26]; [27]; [28]; [41]; [42] and [47]

1.38 These items make related and consequential amendments to these identification terms throughout the Regulation so that the provisions of the Regulations apply to the full range of entities that could be considered responsible emitters under the safeguard mechanism. In most instances, this is accomplished by using the more encompassing term 'person' rather than 'corporation', 'controlling corporation', or 'group entity'.

Items [8] and [9]

1.39 These items update the notes in regulation 1.03—which sets out a list of expressions used in the Principal Regulations and defined in the NGER Act—to ensure expressions are consistent between the two instruments, in line with the amendments made through the CFI Amendment Act. For instance, the expression 'foreign corporation' is replaced with 'foreign person' in paragraph (d) of regulation 1.03, while 'person' is added to the list at paragraph (ja) of regulation 1.03.

Operational control related amendments

Overview

1.40 Under the safeguard mechanism, the person or entity with operational control of a designated large facility, referred to in the NGER Act as the 'responsible emitter' in section 22XH, will be responsible for ensuring an excess emissions situation does not exist (section 22XF in NGER Act). Every designated large facility therefore requires an entity to be identified as the entity with operational control.

1.41 To ensure this is the case, sections 11 and 11A of the NGER Act provide a framework for determining the person with operational control over a facility. Section 11B of the NGER Act provides for nominating a person as the person with operational control, when no one person has the greatest operational authority. In line with the requirement for the safeguard mechanism to cover the full range of entities that could be considered responsible emitters under the safeguard mechanism, the CFI Amendment Act amends the NGER Act at section 11C to include an additional framework for a person to be nominated as the person with operational control when a facility is operated by a trust with multiple trustees.

Items [16]; [17]; [18]; [19]; and [20]

1.42 These items amend the Principal Regulations to reflect the introduction of section 11C of the NGER Act. Specifically, the items ensure subregulations 2.27 and 2.28 stipulate the information to accompany the nomination of a person with operational control of a facility, where the facility is operated by a trust with multiple trustees. Many of the items also provide for the substitution of the term 'group entity' with 'person'. The requirements are generally consistent between section 11B and 11C.

Items [35]; [36]; [37]; [38]; [39]; and [40]

1.43 Section 54 of the NGER Act provides for the Regulator to declare a facility for a group (i.e. a controlling corporation), and section 55 to declare that a corporation has operational control. In line with the principal of broadening the application of the legislation to the full range of entities that may be considered responsible emitters under the safeguard mechanism, the CFI Amendment Act amends section 54A of the NGER Act to allow the Regulator to declare a facility for a non-group entity and section 55A to declare that a non-group entity has operational control.

1.44 These items ensure the provisions within the Principal Regulations that relate to corporations under section 54 and 55 of the NGER Act also apply in the same manner to persons/non-group entities under section 54A and 55A of the NGER Act.

Civil penalty related amendments

Overview

1.45 The primary objective of the Emissions Reduction Fund is to assist Australia to meet its emissions reduction target of five percent below 2000 levels by 2020 and 26 to 28 per cent below 2005 levels by 2030, consistent with its international obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol.

1.46 The Emissions Reduction Fund purchases emissions reductions at lowest cost. To protect taxpayer funds the Government will implement the safeguard mechanism to ensure that emissions reductions purchased through the Emissions Reduction Fund are not displaced by a significant rise in emissions above business as usual levels elsewhere in the economy.

1.47 It does this by requiring large emitting facilities to keep their emissions within baseline levels. If they do not, a civil penalty applies under section 22XF of the NGER Act. The maximum civil penalty amount which a court could impose is the prescribed number of penalty units (being the amount prescribed by the regulations). For an individual, the maximum amount is one-fifth of the prescribed amount.

1.48 When recommending the maximum penalty, subsection 22XF(3) of the NGER Act requires the Minister responsible for the administration of that Act, to consider the financial advantage the responsible emitter could gain from non-compliance. This financial advantage could arise in two ways:

a. the responsible emitter could surrender credits late, benefitting from:
   i. any drops in credit price after the compliance date; and
   ii. the use of the money during the period of non-compliance (a time value of money benefit); or
b. the responsible emitter could never surrender credits, keeping the money they would have otherwise spent on reducing their emissions or buying credits.

1.49 The financial advantage arising from non-compliance will be unique to the circumstances surrounding each excess emissions situation. Given that the civil penalty could be applied in addition to an injunction to rectify the excess emissions situation under section 49(1)(q) of the NGER Act, the financial advantage should be considered in this context.

1.50 The other continuing offences under the NGER Act, for example, for failing to submit an emissions report by the deadline, attract a civil penalty of 100 penalty units per day. While the section 22XF obligation does not appear in the section listing continuing offences (subsections 30(2), (2A) and (2B) of the NGER Act), the nature of the offence means that offences under section 22XF are continuing offences. Subsections 30(1) and (3) of the NGER Act are therefore intended to apply.

Item 34

1.51 This item inserts a new Part into the Principal Regulations. Part 4A- Emissions reduction safeguard mechanism. This Part deals specifically with the duty of facilities covered by the safeguard mechanism to ensure that an excess emissions situation does not exist.

1.52 Under Item [34], new regulation 4A.01 sets the maximum civil penalty (being the prescribed number of penalty units under subsection 22XF(2) of the NGER Act) for failing to discharge the duty, at the lesser of: 100 penalty units in respect of each day that the excess emission situation exists; and 10 000 penalty units in respect of all days for which the excess emissions situation exists.

1.53 The amount of the maximum civil penalty in court proceedings is referenced in section 31(3) of the NGER Act.

1.54 Subregulation 4A.01(2) clarifies circumstances where infringement notices have been paid and makes clear the interaction between paying an infringement notice for one or more day's breach and further court action if the breach continues.

1.55 For example, an infringement notice was issued in relation to the conduct of being in an excess emission situation on 1 March, 2 March and 3 March. That notice was paid by the responsible emitter such that section 43 of the Act applies. The maximum amount for a civil penalty on 10 March would be 700 penalty units as of the 10 days for which the excess emissions situation exists. This is because three of those 10 days would be disregarded under subregulation 4A.01(2) and the 700 penalty units is lesser than the 10,000 penalty units in paragraph 4A.01(1)(b).

Transport related amendments

Overview

1.56 A transport facility is currently defined under the Principal Regulations as a series of activities attributable to a single State or Territory. The amendment Regulation will make changes to subregulation 2.19, which will take effect from 1 July 2016. These changes will allow a group entity's total national emissions for each industry sector listed at current subregulation 2.19(3), to be considered part of a single national undertaking or enterprise for the purposes of NGER reporting and coverage under the safeguard mechanism. The transport related amendments in Schedule 2 clarify that where a nomination to be covered under the national definition has not been made, then the series of activities will remain attributable to a single state or territory.

Item [15]

1.57 From 1 July 2016, the circumstances in which a transport activity is taken to be a facility will be amended. Under amended subregulation 2.19(1) if an activity:

1.57.1 provides the most value out of any of its activities and is a transport activity attributable to an industry sector listed in subregulation 2.19(3); and

1.57.2 that transport activity is under the overall control of the same group entity; and

1.57.3 if that transport activity is undertaken and no nomination has been made to report as a national facility, meaning that the transport activity remains attributable to a single state or territory;

then the activity or series of activities and all of its ancillary activities, that are under the overall control of the same corporation, will be attributable to a single state or territory. In contrast, if a nomination is provided and the first two conditions are met, the facility is defined on a national basis rather than being attributable to a single state or territory.

1.58 For example, a corporation conducts trucking activities. These activities are attributable to the one of the industry sectors listed in subregulation 2.19(3), 'Road Freight Transport'. These activities occur in New South Wales and Victoria based on the location of fuel purchased.

1.59 Under the Principal Regulations these activities would have been divided into two facilities:

1.59.1 a New South Wales facility that consists of fuel purchased in New South Wales and used in trucking activities combined with any ancillary activities that occur within New South Wales and are under the overall control of the same corporation such as depots or warehousing; and

1.59.2 a Victorian facility that that consists of fuel purchased in Victoria and used in trucking activities and any ancillary activities that occur within Victoria and are under the overall control of the same corporation such as the company's head office and fuelling stations.

1.60 Under the amended Regulations, the controlling person will have the option from 1 July 2016, to have these activities considered a single national 'Road Freight Transport' facility.

[Item 33]

1.61 In reporting for each national transport facility, disaggregated information in regards to the operations conducted in each state and territory will still be required to be provided under new regulation 4.29. Uplift of fuel will remain the test for determining the state or territory to which a particular activity is attributable, in accordance with subregulation 2.19(2). This is the case regardless of any nomination made under new subregulation 2.19A to report as a national facility.

Waste related amendments

Overview

1.62 The safeguard mechanism will cover emissions from waste deposited after the commencement of the safeguard mechanism. Organic waste decays over time. This means that landfills generate emissions for many years after the waste is deposited. As landfill operators cannot retrospectively alter landfill composition, the safeguard mechanism only covers emissions from waste deposited after the safeguard mechanism commences.

1.63 Specifically, paragraph 7(1)(b) of the safeguard rule excludes emissions from waste deposited in the past—known as legacy emissions—from coverage under the safeguard mechanism.

1.64 Subsection 7(2) of the safeguard rule defines legacy emissions as emissions from waste deposited before 1 July 2016.

Items [45] and [46].

1.65 These items repeal paragraphs (i) to (m) in Item 1 and paragraphs (j) to (n) of Item 2 of Part 6 of Schedule 3 of the Principal Regulations to require landfills to report waste emissions separately.

1.66 Items [45] and [46] of the amendment Regulation modify Part 6 Schedule 3 of the Principal Regulation to require large landfills with total direct (scope 1) emissions of more than 100,000 tonnes CO_2-e each year to report both legacy and non-legacy emissions..

1.67 Item [45] of the amendment Regulation relates to emissions that are measured using method 1 (as set out in the NGER Measurement Determination). Item [46] of the amendment Regulation relates to emissions that are measured using methods 2, 3 or 4 (as set out in the NGER Measurement Determination). The NGER Measurement Determination will be amended to set out methods for separately measuring legacy and non-legacy emissions. These are intended to mirror provisions previously part of that determination.

Item [5]

1.68 This item carries the definition of legacy waste provided in subsection 7(2) of the safeguard rule over to the Principal Regulations by amending regulation 1.03 to include this definition. Conversely, non-legacy emissions are emissions from waste deposited after 1 July 2016.

1.69 This means a landfill will be covered by the safeguard mechanism if its direct (or scope 1) emissions from non-legacy waste exceed 100,000 tonnes CO_2-e each year.

1.70 To give effect to the exclusion of legacy emissions from coverage under the safeguard mechanism, legacy and non-legacy emissions must be reported separately.

1.71 The Principal Regulations specify the information to be included in emissions reports under the NGER Act. In particular, Part 6 of Schedule 3 of the Principal Regulations specify the information that must be set out in a report submitted by a landfill.

Other amendments

Overview

1.72 These items are grouped together as they are a series of miscellaneous amendments designed to further accommodate the changes required by the inclusion of the safeguard mechanism into the NGER Act.

Item [3]

1.73 This item inserts a definition of grid–connected electricity generator into regulation 1.03 of the Principal Regulations. This is designed to mirror the new definition inserted into the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015.* Generators that are connected to a designated electricity network make production decisions by taking into account the operational requirements of the whole network and production

decisions of other connected generators. As it is expected that for the purposes of the safeguard mechanism, a sectoral baseline will apply to grid-connected electricity generators, clarification of what this means is important.

Item [14]

1.74 This item creates a new regulation 2.18A which restricts the ability to redefine a 'facility' for the purpose of reducing liability under the safeguard mechanism. This could either be done to reduce liability for facilities which exceed their baselines, or to reduce emissions below the 100,000 tonne coverage threshold such that a facility is no longer considered a 'designated large facility.' Both of these actions are restricted by the operation of new regulation 2.18A.

1.75 The regulation includes circumstances where it could reasonably be concluded that a substantial reason for taking an activity in or outside a facility boundary is to avoid liability, whether or not there is objective evidence of such an intention. This includes where the redefinition has other benefits, but the circumstances of the decision suggest that an important factor in the decision is the avoidance of liability.

1.76 The principles in this regulation will be relevant under paragraph 54(3)(a) and 54A(3)(a) when the Regulator is deciding whether to declare that an activity or series of activities are a facility. This power can be exercised in the Regulator's own initiative if facilities are being defined in a manner that would undermine the application of the safeguard mechanism.

Item [29] and [30]

1.77 Item [29] inserts a new paragraph 3.05(1)(i) into the Principal Regulations. This is designed to ensure that where a corporation is registered with the Clean Energy Regulator, and it submits an application to be deregistered, that it includes a statement that the corporation is not likely to be a responsible emitter for a designated large facility for a period of five financial years from the financial year the application is made. This increases the emphasis upon the applicant to demonstrate that they are suitable to be deregistered. This information is necessary to apply paragraph 18B(3)(b) of the NGER Act introduced by the CFI Amendment Act. [Item 30] makes consequential amendments to subregulation 3.05(5) to give effect to the changes made by [Item 29].

Item [31]

1.78 This item adds a new paragraph (i) to subregulation 4.04A(2), requiring entities, when reporting to the Regulator regarding a particular facility, to include in the general information that they provide, a statement which identifies whether the facility is a grid-connected electricity generator or not. This is relevant to the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the safeguard rule) and whether the sectoral baseline is exceeded under those legislative rules.

Item [32]

1.79 This item is a consequential amendment to the Principal Regulation, paragraph 4.17(2)(d). Regulation 4.17 of the Principal Regulations deals with information that must be

provided in reports by controlling entities of the emissions of waste facilities. The change deletes the words “each of” but does not change the operation of the paragraph.

Item [43]

1.80 This item makes a small change to regulation 7.01 which clarifies that definitions in regulation 7.01 apply for the purposes of the Division.

Item [44]

1.81 This item of the amendment Regulation creates a new regulation 7.04 in the Principal Regulations, which identifies that the amendment Regulation applies to reporting requirements of the NGER Act from the commencement of the safeguard mechanism on 1 July 2016.

1.82 The item also creates new regulations 7.05, 7.06 and 7.07 in the Principle Regulations to clarify that the amendments created by the amendment Regulation, only apply to applications for a nomination of a group entity, applications for a coporation to be deregistration and reports under Parts 3, 3E and 3F of the Act, if they are made on or after the commencement of those amendments on 1 July 2016.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015

This draft legislative instrument, referred to as the ***National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015*** (the Amendment Regulation) 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 *National Greenhouse and Energy Reporting Act 2007* (NGER Act) establishes the National Greenhouse and Energy Reporting (NGER) System, which is a national framework for reporting greenhouse gas emissions, and energy consumption and production by Australian corporations. Data reported under the NGER Act assists Australia meet its international reporting obligations and informs government policy, programs and the Australian public.

The *National Greenhouse and Energy Reporting Regulations 2008* (the Principal Regulations) provide necessary details that allow compliance with, and administration of, the NGER Act.

The National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015 (the amendment Regulation) makes minor technical amendments to the Principal Regulations to support amendments made to the NGER Act by the Carbon Farming Initiative Amendment Act 2014 (the CFI Amendment Act). These amendments, which were passed in December 2014 and take effect from 1 July 2016, establish the framework for the safeguard mechanism, a core element of the Emissions Reduction Fund. In particular, the amendment Regulation ensures terms in the Principal regulations are consistent with new terminology in the NGER Act, and provides additional options for defining transport facilities and makes minor changes to auditing.

The amendment Regulation also prescribes the maximum civil penalty amount for the safeguard mechanism. Section 22XF of the NGER Act clarifies a responsible emitter's duty to avoid an excess emissions situation, and sets out that a civil penalty applies where this duty is breached. The duty requires responsible emitters to keep their net emissions number below their baseline emissions number.

Human rights implications

The human rights engaged by the draft amendment Regulation are the following privacy and reputation aspects (such as those protected by Article 17(1) of the International Covenant on Civil and Political Rights):

Identifying facilities that are designated large facilities and quantifying the duty described above, depends on responsible emitters registering and submitting reports under the NGER Act. This may include providing identifying information to the Clean Energy Regulator.

Supporting transparency about the implementation of the safeguard mechanism, the Clean Energy Regulator will publish information about designated large facilities. This information includes a responsible emitter's duty to avoid an excess emissions situation and situations where the duty has not been met.

There is no likely impact on the human right engaged, because responsible emitters are only likely to be very large businesses, not individuals. Even in the very unlikely circumstance that an individual were to be a responsible emitter, information provided to the Clean Energy Regulator is protected by strict secrecy provisions in the Clean Energy Regulator Act 2011 as well as the Privacy Act 1988. The information that is published about the safeguard mechanism is often publically available from other sources, not of a personal nature and relates to the integrity of the safeguard mechanism. Accordingly, the requirements are considered reasonable and unlikely to limit or adversely impact human rights. In particular, any potential impacts on privacy or reputation are not unlawful or arbitrary.

Conclusion

The amendment Regulation is compatible with human rights because it is unlikely to limit human rights.

Greg Hunt, Minister for the Environment