2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CLEAN ENERGY BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Climate Change and Energy Efficiency, the Honourable Greg Combet AM MP)

Table of contents

Glossary

The following abbreviations and acronyms are used in this explanatory memorandum.

Abbreviation	*Definition*
ACCC	Australian Competition and Consumer Commission
ACCU	Australian carbon credit unit
ANREU Act	Australian National Registry of Emissions Units Act 2011
ASIC	Australian Securities and Investments Commission
Austrac	Australian Transaction Reports and Analysis Centre
Authority	Climate Change Authority
Authority bill	Climate Change Authority Bill 2011
bill or main bill	Clean Energy Bill 2011
carbon pricing mechanism or mechanism	The carbon pricing mechanism set up by the Clean Energy Bill 2011
CEI plan	Clean Energy Investment Plan
CFI	Carbon Farming Initiative
CFI Act	Carbon Credits (Carbon Farming Initiative) Act 2011
Charges bills	The Clean Energy (Unit Shortfall Charge—General) Bill 2011; Clean Energy (Unit Issue Charges – Fixed Charge) Bill 2011, Clean Energy (Unit Issue Charges – Auctions) Bill 2011, Clean Energy (Charges—Excise) Bill 2011, Clean Energy (Charges—Customs) Bill 2011 Clean Energy (International Unit Surrender Charge) Bill 2011.

Abbreviation	***Definition***
Clean Energy Legislative Package	The Clean Energy Bill 2011 and related legislation
CO_2	Carbon dioxide
CO_2-e	Carbon dioxide equivalence
Consequential Amendments bill	The Clean Energy (Consequential Amendments) Bill 2011
CPRS	Carbon Pollution Reduction Scheme
Database	Liable Entities Public Information Database
DCCEE or Department	Department of Climate Change and Energy Efficiency
EN	Emissions number
Eligible emissions unit	A carbon unit, an eligible international emissions unit or an eligible ACCU
Eligible international emissions unit	Defined in section 4 of the ANREU Act as a certified emission reduction (other than a temporary certified emission reduction or a long-term certified emission reduction); or an emission reduction unit; or a removal unit; or a prescribed unit issued in accordance with the Kyoto rules; or a non-Kyoto international emissions unit. It is immaterial whether a unit covered by paragraph 4(d) was issued in or outside Australia.
Fixed charge period	The financial years 2012-13, 2013-14 and 2014-15, being 'fixed charge years'
Fund	The Energy Security Fund in Part 8 of the bill
Garnaut Review	R Garnaut (2008) *The Garnaut Climate Change Review: Final Report*, Commonwealth of Australia, Cambridge University Press, Melbourne
Garnaut Review Update 2011	R Garnaut (2011) *The Garnaut Review 2011: Australia in the Global Response to Climate Change*, Commonwealth of Australia, Cambridge University Press, Melbourne
Green Paper	*Carbon Pollution Reduction Scheme Green Paper*, July 2008

Abbreviation	*Definition*
GW GWh	Gigawatt Gigawatt hour
IPCC	Intergovernmental Panel on Climate Change
JV	Joint venture
Kyoto rules	This term is defined in section 5. In brief, it includes the Kyoto Protocol, decisions of the Meeting of the Kyoto Parties, certain standards adopted by such a Meeting and prescribed instruments
Kyoto units	An assigned amount unit, a certified emission reduction, an emission reduction unit, a removal unit or a prescribed unit issued in accordance with the Kyoto rules
LI Act	*Legislative Instruments Act 2003*
LETI	Low Emissions Transition Incentive
LTC	Liability transfer certificate
MW MWh	Megawatt Megawatt hour
MPCCC	Multi-Party Climate Change Committee
NGER Act	*National Greenhouse and Energy Reporting Act 2007*
Non-Kyoto international emissions units	A prescribed unit issued in accordance with an international agreement (other than the Kyoto Protocol) or a prescribed unit issued outside Australia under a law of a foreign country
Opt-in Scheme	The Opt-in Scheme set out in Part 3, Division 7 of the bill
OTN	Obligation transfer number
Ozone Act	*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*
PC Act	*Productivity Commission Act 1998*
PEN	Provisional emissions number
Program	The Jobs and Competitiveness Program in Part 7 of the bill

Abbreviation	***Definition***
Registry	Australian National Registry of Emissions Units
Regulator	Clean Energy Regulator
Regulator bill	Clean Energy Regulator Bill 2011
White Paper	*Carbon Pollution Reduction Scheme: Australia's Low Pollution Future*, White Paper, December 2008

Policy context

THE GOVERNMENT'S CLIMATE CHANGE PLAN

On 10 July 2011, the Government released *Securing a clean energy future: The Australian Government's climate change plan*[1], which explains the policy basis for the introduction of the carbon pricing mechanism (the mechanism) and related measures.

The need for action

The evidence that the world is getting warmer is unequivocal. In Australia and around the globe, 2001 to 2010 was the warmest decade on record. In Australia, each decade since the 1940s has been warmer than the last.

If we do not reduce carbon pollution, the world risks serious effects from climate change. Global average temperatures could increase by up to 6.4 degrees Celsius above 1990 temperatures by 2100. Sea levels are estimated to rise by between 0.5 and 1 metre by 2100 from 2000 levels and the acidity of the world's oceans to increase significantly. Cyclones, storms, floods and other extreme weather events are likely to increase in severity or frequency and rainfall patterns around the world to change, making some places drier and other places wetter.

Australia is a hot and dry continent. This means that among the world's developed countries, Australia faces acute risks. Studies indicate that warming of more than 2 degrees Celsius will overwhelm the capacity of many of our natural ecosystems to adapt. With that level of warming, for instance, the survival of the Great Barrier Reef will be in jeopardy as higher ocean temperatures and acidity levels cause major changes to coral reefs.

Climate change will not just damage the natural environment. Left unchecked, it also poses risks to Australia's economic prosperity. Climate change will impose economic costs on our society. These costs can be reduced and managed if the world takes action to reduce carbon pollution.

[1] Australian Government (2011) *Securing a clean energy future: the Australian Government's clean energy plan* Canberra.

But the longer action is delayed, the more it will cost and the worse the impacts will be.

How high temperatures might rise in coming decades will depend on how much carbon pollution increases.

Governments around the world have agreed to limit carbon pollution so that average global temperature rise can be held below 2 degrees Celsius above pre-industrial levels. If the global 2 degree goal is achieved, Australia will still face some impacts. However, our communities and environment will be better able to cope. It is in our national interest to do our fair share.

The task of reducing carbon pollution is achievable. Economies can be retooled so that growth and rising prosperity are decoupled from growth in carbon pollution. This will require changes to the way we live and the way we do business, especially to the ways we produce and use energy.

Studies in Australia and around the world have demonstrated that, with known technologies, pollution can be reduced while maintaining economic growth. Indeed, the retooling of our economy will deliver new technologies, new jobs and new opportunities.

Australia's carbon pollution levels are very high given our population size and our economy is heavily dependent on emissions-intensive energy sources. To maintain our international competitiveness in the future as more countries take action on climate change, we need to reduce our carbon pollution and concentrate on cleaner pathways to economic growth.

Australia's carbon pollution represents 1.5 per cent of global emissions of greenhouse gases. That makes us one of the top 20 polluting countries in the world. Our annual carbon pollution is roughly the same as that of countries like Spain, France, Italy, South Korea and the United Kingdom. All of those countries have populations two to three times larger than Australia. In fact, Australia produces more carbon pollution per head of population than any developed country in the world, more even than the world's biggest economy, the United States.

Reflecting the availability of cheap and abundant coal, electricity generation is Australia's largest source of carbon pollution. Electricity generation is responsible for just over a third of Australia's total carbon pollution. Direct fuel combustion—reflecting the use of gas and other fuels in industry and homes—accounts for another 15 per cent. Transport and agriculture each contribute around another 15 per cent.

The remaining sources are 'fugitive' emissions—mainly the methane and carbon dioxide which escapes into the atmosphere when coal is mined and gas is extracted—along with pollution from industrial processes and decomposition of waste in landfills and elsewhere. Trees absorb carbon dioxide, so when land is cleared there is an increase in carbon pollution and when vegetation grows there is a decrease. The net impact of these sources—deforestation, reforestation and afforestation—contributes 3 per cent of Australia's total carbon pollution.

Australia's emissions are projected to continue to grow by almost 2 per cent a year without action to put a price on carbon. Even taking into account existing climate change policies such as the Renewable Energy Target and the CFI, our emissions are expected to be around 22 per cent higher than 2000 levels in 2020.

The Government has committed to reduce carbon pollution by 5 per cent from 2000 levels by 2020 irrespective of what other countries do, and by up to 15 or 25 per cent depending on the scale of global action. These targets will require cutting pollution in 2020 by at least 23 per cent from the level it would otherwise be expected to be.

The Government has also committed to a new 2050 target to reduce emissions by 80 per cent compared with 2000 levels, in line with targets announced by the United Kingdom and Germany.

Australia's targets represent a fair contribution from Australia, and provide guidance and confidence to investors working to achieve our clean energy future.

The carbon pricing mechanism

A broad-based carbon price is the most environmentally effective and cheapest way to reduce pollution.

A carbon price puts a price tag on carbon pollution. Under the mechanism, around 500 of the country's biggest polluters will be required to pay for each tonne of pollution they release into the atmosphere. This will have two effects.

It creates a powerful incentive for all businesses to cut their pollution by investing in clean technology or finding more efficient ways of operating. A price on carbon will also create economic incentives to reduce pollution in the cheapest possible ways, rather than relying on more costly approaches such as government regulation and direct subsidies.

These incentives will flow through the economy. The carbon price will make lower-polluting technologies, especially clean energy technologies, more competitive and will boost investment in these technologies. In this way, introducing a price on carbon will trigger the transformation of the economy towards a clean energy future.

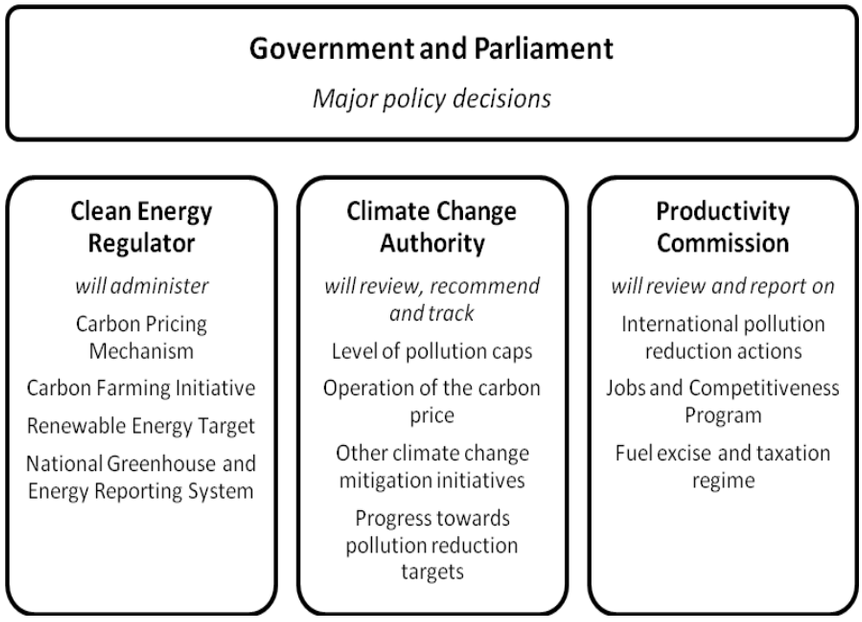
Our economy has successfully handled comparable structural changes over its history. In fact, transformative changes—new products and technologies, and the integration of our economy into the global economy set in train by the reforms of the 1980s and 1990s—have underpinned rising prosperity and sustainable growth in Australia.

Table I: Key elements of the carbon pricing mechanism

Price	A two stage approach:
Fixed price period	The mechanism will commence on 1 July 2012, with a price that will be fixed for the first three years. The price will start at $23 per tonne and will rise at 2.5 per cent per annum in real terms.
Emissions trading scheme	On 1 July 2015, the carbon price will transition to a fully flexible price under an emissions trading scheme, with the price determined by the market.
Coverage	Broad coverage from commencement, encompassing the stationary energy sector, industrial processes, non‑legacy waste, and fugitive emissions (other than from decommissioned coal mines).
Treatment of fuel and transport	Transport fuels comprising liquid petroleum fuels, liquid petroleum gas, liquefied natural gas and compressed natural gas will be excluded from the mechanism. However, an equivalent carbon price will be applied to some business transport emissions and non-transport uses of these fuels through changes in fuel tax credits or fuel excise. Users of specified fuels can choose to opt into the mechanism instead of paying the equivalent carbon price through the fuel tax system.
International linking	International linking to credible international carbon markets and emissions trading schemes will be allowed from the commencement of the flexible price period. At least half of a liable entity's compliance obligation must be met through the use of domestic units or credits.
Price ceiling and floor	A price ceiling and floor will apply for the first three years of the flexible price period. The price ceiling will be set at $20 above the expected international price and will rise by 5 per cent in real terms each year. The price floor will be $15, rising annually by 4 per cent in real terms.

Carbon Farming Initiative	Kyoto-compliant credits created under the CFI can be used for compliance under the mechanism subject to a 5 per cent limit in the fixed charge period.
Governance	
Climate Change Authority	Establishment of the Authority to advice on pollution caps, progress towards meeting targets, and undertake reviews of the mechanism.
Clean Energy Regulator	Establishment of the Regulator to administer the mechanism.
Productivity Commission	The Productivity Commission will undertake reviews on industry assistance, fuel tax arrangements and carbon pollution reduction activities internationally.

The carbon pricing mechanism's governance structure



Household assistance

The carbon price will be accompanied by a household assistance package.[2] Over 50 per cent of carbon price revenue will be spent on households.

A carbon price will add modestly to the cost of living. The average household will see cost increases of around $9.90 per week, while the average assistance provided will be around $10.10 per week. The prices of most household purchases will barely be affected by the carbon price—for almost everything other than electricity and gas, the estimated price impact is likely to be less than 0.5 per cent in most cases. Taking electricity and gas into account, the overall impact on the Consumer Price Index (CPI) is expected to be around 0.7 per cent in 2012–13. Households will not face a carbon price on transport fuels.

The household assistance package is targeted at those who need help the most, particularly pensioners and low-and middle-income households. Around two in three households will receive assistance that offsets their expected average price impact. About nine out of ten households will receive some assistance.

Because the carbon price raises revenue, it provides an opportunity to cut other taxes. The Government will cut income taxes by raising the tax-free threshold so that, initially, up to 1 million people will no longer need to file a tax return. From 2015, a second phase of tax reform will mean that up to an additional 100,000 people will not have to file a tax return. Reducing taxes by increasing the tax-free threshold is an important change in Australia's tax mix: it involves reducing taxes on desirable things (work and income), boosting incentives to work, and replacing them with a charge on something undesirable (carbon pollution).

The tax‑free threshold will be more than trebled to $18,200 in 2012–13. From 2015, the tax‑free threshold will be further raised to $19,400. People with incomes below the new tax‑free thresholds will get to keep all of their wages in their regular pay packets.

In addition to tax cuts, pensions, allowances and benefits will increase.

Other features of the household assistance package include:

[2] For more information see Australian Government (2011) *Supporting Australian Households: Helping households move to a clean energy future,* Canberra

- special payments for people who have high energy use due to medical needs
- shared assistance between aged care residents and providers
- the development of an opt-in program where household assistance payments can be directed towards accredited energy efficiency measures through non-government organisations.

Household assistance will be permanent and will keep up with increases in the cost of living.

Pensions and other benefits are automatically indexed to keep pace with the cost of living, while the tax changes will be set at a level to cover the expected impact of the expected carbon price to 2019-20.

Jobs and Competitiveness Package

To support Australian businesses to make the transition to a clean energy future, the Government has designed a number of assistance measures for the business community, from large industrial producers to small businesses. The Government will allocate around 40 per cent of revenue from the mechanism to help businesses and support jobs.

Assistance measures will target emissions-intensive, trade-exposed industries, other areas of manufacturing, food processing, foundries and small business.

The Jobs and Competitiveness Program will ensure that businesses that produce a lot of pollution and compete in international markets remain competitive, while still retaining strong incentives to reduce carbon pollution. Almost all emissions-intensive and trade-exposed activities are in the manufacturing sector. The Program will provide support to activities that generate over 80 per cent of emissions within the manufacturing sector.

The food processing, metal forging and foundry industries will also be assisted to support jobs in these parts of manufacturing. More general assistance for small businesses and manufacturing industries will target improvements in energy efficiency.

All of these measures have been carefully designed to avoid interfering with the purpose of the carbon price: creating incentives to reduce carbon pollution.

In addition to these measures, the Government has decided to provide a Coal Sector Jobs Package and a Steel Transformation Plan.

Clean energy

The transformation of Australia's energy sector towards clean energy sources will unfold over the coming decades. The carbon price will play a major role, creating powerful commercial incentives to avoid traditional high-pollution solutions and to adopt low-pollution alternatives. However, given the scale of the transformation and the imperative to change, additional measures to support innovation and investment in clean energy are required.

The Government will provide significant levels of financial support for innovation in clean energy technologies.

A new $10 billion commercially oriented Clean Energy Finance Corporation will invest in renewable energy, low pollution and energy efficiency technologies.

A new Australian Renewable Energy Agency (ARENA) will administer $3.2 billion in Government support for research and development, demonstration and commercialisation of renewable energy.

The Renewable Energy Target, combined with other elements of the Government's plan, including the carbon price, will drive $20 billion of investment in large-scale renewable energy by 2020 in today's dollars.

Energy markets

The Government will implement measures to underpin a successful energy market transition and maintain secure energy supplies. These measures will supplement the carbon price and clean energy policies.

An Energy Security Fund will be established to ensure there is a smooth transition which preserves energy security. The Energy Security Fund comprises two elements.

The first element is an allocation of free carbon units and cash payments to strongly affected coal-fired electricity generators. These allocations will be conditional on electricity generators strongly affected by a carbon price publishing Clean Energy Investment Plans, which show how they will reduce their pollution, and by meeting power system reliability standards.

Second, the Government will seek to negotiate the closure of around 2,000 megawatts (MW) of highly polluting generation capacity by 2020. Closing down some of our highest polluting coal‑fired generation capacity makes room for investment in lower pollution plants—and kickstarts the transformation of our energy industry in a managed way.

In addition to the Energy Security Fund, as a transitional measure the Government will offer loans to coal-fired generators for the purchase of future vintage carbon units at auction for the first three years that auctions are held. The Government may also offer loans to coal-fired generators for the purpose of refinancing existing debt.

The Government has also announced the establishment of an Energy Security Council which will provide advice to the Government in the event that systemic risks to energy security emerge from the financial impairment of power stations arising from any source, including form the introduction of carbon pricing.

Energy efficiency

Using energy more efficiently can lower carbon pollution and save money—which is why energy efficiency is the third element in the Government's clean energy future plan.

The Government is helping households and businesses improve their energy efficiency and will expand these efforts. The carbon price will create a strong incentive to use energy more efficiently. A large proportion of industry and household assistance is also directly targeted at facilitating further energy efficiency improvements.

The Low Carbon Communities Program will be significantly expanded to promote energy efficiency at a local level and among low‑income households and to ensure the services of charities who are heavy users of maritime and aviation fuel are not adversely affected by the introduction of a carbon price.

The Government will expedite the development of a national energy savings initiative, as recommended by the Prime Minister's Task Group on Energy Efficiency. The energy savings initiative will be a 'white certificate' scheme, creating and trading credits that reward energy efficiency activities.

Land sector initiatives

The farming, forestry and land sectors have just as important a role to play in reducing carbon pollution as governments, households and the wider business community.

A carbon price will not apply to agricultural emissions. This means there will be no requirement for farmers to pay for emissions from livestock or fertiliser use.

Australia faces significant opportunities to reduce carbon pollution and increase the amount of carbon stored on the land. Those who pursue these opportunities will be rewarded through the CFI, which allows farmers and land managers to receive credits for carbon storage and pollution reduction activities. Kyoto-compliant credits can be sold to liable entities under the mechanism, and all credits can be sold in the domestic voluntary market or exported to foreign purchasers.

The Government will also provide substantial funding for a range of new land-based measures, including an ongoing fund for landholders to undertake projects that establish, restore, protect and manage biodiverse carbon stores. The Biodiversity Fund will improve the resilience of Australia's unique species to the impacts of climate change, enhance the environmental outcomes of carbon farming projects, and help landholders protect biodiversity and carbon values on their land.

An ongoing Carbon Farming Futures program will help farmers and landholders benefit from carbon farming by supporting research and development, measurement approaches and action on the ground to reduce emissions or store carbon.

The Government is also providing ongoing support for Indigenous communities to participate in carbon farming, and support for natural resource management bodies to plan for climate change.

Major steps to date

International commitments

United Nations Framework Convention on Climate Change

On 30 December 1992 Australia ratified the *United Nations Framework Convention on Climate Change*.[3] The Convention is aimed at stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. It includes an obligation on Australia to 'adopt national policies and take corresponding measures on the mitigation of climate change, by limiting anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs' (Article 4.2(a)). It provides an overall framework for intergovernmental efforts on climate change.

Ratification of the Kyoto Protocol

On 3 December 2007 Australia formally ratified the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*[4] and the ratification entered into force on 11 March 2008. Under the Kyoto Protocol, Australia is committed to restraining its national emissions to an average of 108 per cent of 1990 levels over the first commitment period (2008 to 2012).

Cancun Agreements

The 2010 Cancun Agreements[5] anchor under the Climate Change Convention the mitigation pledges made by developed and developing countries in the Copenhagen Accord. The agreements recognise the need to hold any increase in global temperature to below 2 degrees Celsius. Over 85 countries, including both developed and developing economies, have already made pledges to limit their emissions. Together, these countries represent more than 90 per cent of the global economy and are responsible for more than 80 per cent of global emissions.

[3] Available at http://unfccc.int.
[4] Available at http://unfccc.int/kyoto_protocol.
[5] Available from http://cancun.unfccc.int/

The Garnaut Review and Update

On 30 September 2008, the Government published *The Garnaut Climate Change Review: Final Report*.[6] This was an independent study conducted by Professor Ross Garnaut AO commissioned by the Australian, state and territory governments. In November 2010, the Australian Government commissioned Professor Garnaut to provide an update to the 2008 Review.

Professor Garnaut released a series of papers in early 2011 addressing developments across a range of subjects including climate change science and impacts, emissions trends, carbon pricing, technology, land and the electricity sector.

Professor Garnaut presented his final report, called *The Garnaut Review 2011: Australia in the Global Response to Climate Change*[7], to the Government on 31 May 2011. The Report concluded that a broad-based market approach will best preserve Australian prosperity as we make the transition to a low carbon future.

Previous policy development and legislative processes

In the late 1990s the Australian Greenhouse Office released a series of discussion papers on the design of an Australian emissions trading scheme.

In 2006, a task force set up by the States and Territories released a paper on setting out a proposed design of an Australian emissions trading scheme.

In 2007, the Howard Government's Prime Ministerial Task Group on Emissions Trading[8] — a group of leading business representatives and senior officials — recommended that the Government adopt an emissions trading scheme. Later that year, the States and Territories released their final report on emissions trading scheme design.

---

[6] R Garnaut (2008) *The Garnaut Climate Change Review: Final Report* Commonwealth of Australia, Cambridge University Press, Melbourne. Further information about the Review and update is available on www.garnautreview.org.au

[7] R Garnaut (2011) *The Garnaut Review 2011: Australia in the Global Response to Climate Change*, Commonwealth of Australia, Cambridge University Press, Melbourne

[8] Available from http://pandora.nla.gov.au/tep/72614.

On 16 July 2008 the Government released its *Carbon Pollution Reduction Scheme Green Paper*.[9] This Paper reflected the Government's preferred positions on issues concerning the CPRS.

On 15 December 2008, the Government released a White Paper called *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future*.[10] The decisions in the White Paper formed the basis the CPRS legislative packages.

In 2009 and 2010, the Government introduced three packages of legislation to implement the CPRS. These were not passed by the Parliament.

Treasury modelling

On 10 July 2011, the Government released *Strong growth, low pollution: Modelling a carbon price*[11], which models various scenarios concerning the proposals set out in *Securing a clean energy future: The Australian Government's climate change plan*. This built on *Australia's Low Pollution Future: The Economics of Climate Change Mitigation*[12], which was released on 30 October 2008.

The reports present the results of the Treasury's economic modelling of the potential economic impacts of reducing emissions over the medium- and long-term. They span global, national and sectoral scales, and look at distributional impacts, such as the implications of carbon pricing for the goods and services that households consume.

The Treasury's modelling demonstrates that early global action is less expensive than later action; that a market-based approach allows robust economic growth into the future even as emissions fall; and that many of Australia's industries will maintain or improve their competitiveness under an international agreement to combat climate change.

Architecture for a carbon pricing mechanism

In September 2010 the Government announced the establishment of the Multi-Party Climate Change Committee (MPCCC) to consult, negotiate, and report to the Cabinet, through the Minister for Climate Change and

[9] Available from http://www.climatechange.gov.au/government/reduce/carbon-pricing.aspx.
[10] Available from http://www.climatechange.gov.au/government/reduce/carbon-pricing.aspx.
[11] For further information on the Treasury modelling, see http://www.treasury.gov.au/carbonpricemodelling
[12] For further information on the MPCCC, see http://www.climatechange.gov.au/government/initiatives/multi-party-committee

Energy Efficiency, on agreed options for the implementation of a carbon price in Australia; and to provide advice on, and participate in, building community consensus for action on climate change.[13]

On 24 February 2011, the Prime Minister announced the climate change framework outlining the broad architecture for a mechanism, which had been considered by the MPCCC. The proposed mechanism focused on the high level architecture, start date, potential mechanisms to allow flexibility to move to emissions trading, sectoral coverage and international linking arrangements.

DCCEE conducted a public consultation process on the proposed mechanism in April and May 2011.

Securing a clean energy future

On 10 July 2011, the Government published *Securing a clean energy future: The Australian Government's climate change plan*. This set out the details of the mechanism and related proposals for fostering renewable energy generation, energy efficiency and action on the land. It also set out measures to assist Australian households and businesses to adapt to the mechanism and to support energy markets.

Exposure draft legislation

On 28 July 2011, the Government released the following draft bills to implement the mechanism and related initiatives for public comment:

- Clean Energy Bill 2011;
- Clean Energy (Consequential Amendments) Bill 2011;
- Clean Energy Regulator Bill 2011;
- Climate Change Authority Bill 2011;
- Clean Energy (Unit Shortfall Charge—General) Bill 2011;
- Clean Energy (Unit Issue Charge—General) Bill 2011;
- Clean Energy (Charges—Excise) Bill 2011;
- Clean Energy (International Unit Surrender Charge) Bill 2011;

[13] For further information on the policy, see http://www.cleanenergyfuture.gov.au

- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011;
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011;
- Fuel Tax Legislation Amendment (Clean Energy) Bill 2011;
- Excise Tariff Legislation Amendment (Clean Energy) Bill 2011; and
- Customs Tariff Amendment (Clean Energy) Bill 2011.

The exposure process

During the period from 28 July 2011 to 22 August 2011, DCCEE:

- met with government representatives from the States and Territories;
- convened a forum for peak industry, environmental, community and other non-government organisations;
- convened three legal experts workshops (in Sydney, Melbourne and Brisbane);
- convened four technical working group meetings on the treatment of natural gas, the point of liability and landfill (in Canberra and Perth);
- conducted meetings and teleconferences with business representative groups, businesses and other stakeholders; and
- received over 300 submissions on the draft legislation.

The 2011 Clean Energy Legislative Package

A description of the bills introducing the mechanism is set out below.

Table II: The Clean Energy Bill 2011 and related bills

Main bill	The **Clean Energy Bill 2011** creates the mechanism. It sets out the structure of the mechanism and process for its introduction. These include: • entities and emissions that are covered by the mechanism; • entities' obligations to surrender eligible emissions units; • limits on the number of eligible emissions units that will be issued; • the nature of carbon units; • the allocation of carbon units, including by auction and the issue of free units; • mechanisms to contain costs, including the fixed charge period and price floors and ceilings; • linking to other emissions trading schemes; • assistance for emissions-intensive, trade-exposed activities and coal-fired electricity generators; • monitoring, investigation, enforcement and penalties; • administrative review of decisions; and • reviews of aspects of the mechanism over time.
Statutory bodies	The **Clean Energy Regulator Bill 2011** sets up the Regulator, which is a statutory authority that will administer the mechanism and enforce the law. The responsibilities of the Regulator include: • providing education on the mechanism, particularly about the administrative arrangements of the mechanism; • assessing emissions data to determine each entity's liability; • operating the Australian National Registry of Emissions Units (the Registry); • monitoring, facilitating and enforcing compliance with the mechanism; • allocating units including freely allocated units, fixed charge units and auctioned units; • applying legislative rules to determine if a particular entity is eligible for assistance in the form of units to be allocated administratively, and the number of other units to be allocated; • administering the National Greenhouse and Energy Reporting System (NGERS), the Renewable Energy Target

	(RET) and the Carbon Farming Initiative (CFI); and • accrediting auditors for the CFI and NGERS.
	The **Climate Change Authority Bill 2011** sets up the Authority, which will be an independent body that provides the Government with expert advice on key aspects of the mechanism and the Government's climate change mitigation initiatives. The Government will remain responsible for carbon pricing policy decisions. This Bill also sets up the Land Sector Carbon and Biodiversity Board which will advise on key initiatives in the land sector.
Consequential amendments	The **Clean Energy (Consequential Amendments) Bill 2011** makes consequential amendments to ensure: • NGERS supports the mechanism; • the Registry covers the mechanism and the CFI; • the Regulator covers the mechanism, CFI, the Renewable Energy Target and NGERS; • the Regulator and Authority are set up as statutory agencies and regulated by public accountability and financial management rules; • that emissions units and their trading are covered by laws on financial services; • that activities related to emissions trading are covered by laws on money laundering and fraud; • synthetic greenhouse gases are subject to an equivalent carbon price applied through existing regulation of those substances; • the Regulator can work with other regulatory bodies, including the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Transaction Reporting and Analysis Centre (Austrac); • the taxation treatment of emissions units for the purposes of GST and income tax is clear; and • the Conservation Tillage Refundable Tax Offset is established.
Procedural bills	Those elements of the mechanism which oblige a person to pay money are implemented through separate bills that comply with the requirements of section 55 of the *Constitution*. These bills are the **Clean Energy (Unit Shortfall Charge—General) Bill 2011**, **Clean Energy (Unit Issue Charge – Fixed Charge) Bill 2011**, **Clean Energy (Unit Issue Charge – Auctions) Bill 2011, Clean Energy (Charges—Excise) Bill 2011, Clean Energy (Charges—Customs) Bill 2011**, **Clean Energy (International Unit Surrender Charge) Bill 2011**,

	Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011 and **Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011**.
Related bills	Other elements of the Government's Climate Change Plan are being implemented through other legislation. These are: • the **Clean Energy (Excise Tariff Legislation Amendment) Bill 2011** and the **Clean Energy (Customs Tariff Amendment) Bill 2011**, which imposes an effective carbon price on aviation and non-transport gaseous fuels through excise and customs tariffs; • the **Clean Energy (Fuel Tax Legislation Amendment) Bill 2011**, which reduces the business fuel tax credit entitlement of non-exempted industries for their use of liquid and gaseous transport fuels, in order to provide an effective carbon price on business through the fuel tax system; and • the **Clean Energy (Household Assistance Amendments) Bill 2011**, **Clean Energy (Tax Laws Amendments) Bill 2011** and the **Clean Energy (Income Tax Rates Amendments) Bill 2011,** which will implement the household assistance measures announced by the Government on 10 July 2011. These bills amend relevant legislation to provide payment increases for pensioners, allowees and family payment recipients and provide income tax cuts and establish new supplements for low- and middle-income households.

Outline of the Clean Energy Bill 2011

Structure of the Clean Energy Bill 2011

The bill creates the mechanism. The mechanism is also implemented through other bills, and reference should also be made to those bills where appropriate. This Explanatory Memorandum indicates where those other bills are relevant.

Table III: Structure of the Clean Energy Bill 2011

Part	Title	Description
Part 1	Preliminary	Part 1 sets out the objects of the bill, arrangements for commencement, definitions and explains specific concepts of relevance to the mechanism.
Part 2	Carbon pollution cap	Part 2 provides that a carbon pollution cap can be set by the Government through regulations.
Part 3	Liable entities	Part 3 sets out the circumstances in which a person is liable under the mechanism, deals with mechanisms for transferring liability and establishes the Opt-in Scheme for specified fuels.
Part 4	Carbon Units	Part 4 provides for carbon units and the way in which these are issued by the Regulator and dealt with under the Registry.
Part 5	Emissions Number	Part 5 sets out how a person's emissions number is determined.
Part 6	Surrender of eligible emissions units	Part 6 sets out the way in which a person may make a payment or surrender units to meet their obligations under the mechanism.
Part 7	Jobs and Competitiveness Program	Part 7 provides for assistance to emissions-intensive trade-exposed industries to adjust to the mechanism.
Part 8	Coal-fired electricity generation	Part 8 provides for assistance to coal-fired electricity generators to support energy markets.
Part 9	Publication of information	Part 9 sets out the Regulator's obligations to publish specific information about the mechanism.

Part	Title	Description
Part 10	Fraudulent conduct	Part 10 sets out the circumstances in which a person may be ordered to relinquish units if they are convicted of a criminal offence involving fraudulent conduct.
Part 11	Relinquishment of carbon units	Part 11 sets out the way in which a person relinquishes units where he or she must do so.
Part 12	Notification of significant holdings of carbon units	Part 12 sets out the obligations of corporate groups and others to notify the Regulator of a significant holding of units.
Part 13	Information gathering powers	Part 13 sets out the Regulator's information gathering powers when investigating possible contraventions.
Part 14	Record-keeping requirements	Part 14 sets out liable entities' reporting requirements under the mechanism and the consequences of not complying with them.
Part 15	Monitoring powers	Part 15 sets out the Regulator's powers to engage in monitoring activities, including entering premises under warrant, when investigating possible contraventions
Part 16	Liability of executive officers of bodies corporate	Part 16 provides that executive officers of bodies corporate may be liable for contraventions in certain circumstances.
Part 17	Civil penalty orders	Part 17 sets out the way in which civil penalties, including pecuniary penalties, are imposed for contraventions.
Part 18	Infringement notices	Part 18 sets out the way in which infringement notices may be issued.
Part 19	Offences relating to unit shortfall charge and administrative penalties	Part 19 sets out the way in which sanctions for contraventions of criminal offences are imposed.
Part 20	Enforceable undertakings	Part 20 provides that the Regulator may accept enforceable undertakings from persons who may have engaged in a contravention, and the way in which these undertakings may be enforced.
Part 21	Review of decisions	Part 21 provides for reviews of administrative decisions made by the Regulator and the Government.
Part 22	Reviews by Climate Change Authority	Part 22 sets out the obligations of the Authority to undertake periodic reviews about the mechanism and aspects of it and also specific reviews requested by the Minister or both Houses of Parliament.

Part	Title	Description
Part 23	Miscellaneous	Part 23 provides for a range of matters which facilitate the operation of the mechanism.

The objects of the carbon pricing mechanism

The objects of the mechanism are:

- to give effect to Australia's international obligations on addressing climate change under the Climate Change Convention and the Kyoto Protocol;
- to support the development of an effective global response to climate change, consistent with Australia's national interest in ensuring that average global temperatures increase by not more than 2 degrees Celsius above pre-industrial levels;
- to take action directed towards meeting Australia's long-term target of reducing net greenhouse gas emissions to 80 per cent below 2000 levels by 2050 and take that action in a flexible and cost-effective way; and
- to put a price on greenhouse gas emissions in a way that encourages investment in clean energy, supports jobs and competitiveness in the economy and supports Australia's economic growth while reducing pollution.

The objects of the bill are set out in Part 1. The constitutional basis of the mechanism is addressed in Chapter 11.

The mechanism

The mechanism starts on 1 July 2012. From that date, businesses covered by it will pay for each tonne of carbon pollution they put into the atmosphere each year.

The commencement arrangements of the bill are set out in Part 1 (see Chapter 11).

There will be two stages. For the first three years, the carbon price for each tonne of pollution will be fixed, and will operate like a carbon tax. Then, from 1 July 2015, the mechanism will shift to a 'cap and trade'

emissions trading scheme. In this second 'flexible charge' stage, the carbon price will be set by the market.

The fixed charge period

An initial stage with fixed carbon charges will provide stability and predictability. This will give businesses time to get used to the new system, to understand their obligations and to start planning ways to reduce their pollution. Businesses will reduce their pollution when it is cheaper to do so than to pay the fixed charge. Thus the market will create incentives to cut carbon pollution.

The fixed charge will start at $23 per tonne on 1 July 2012. In each of the next two years, it will rise by around 2.5 per cent in real terms, assuming inflation of 2.5 per cent a year, which is the mid-point of the Reserve Bank of Australia's target range for inflation. The carbon charge will be $24.15 per tonne in 2013-14 and $25.40 per tonne in 2014-15.

This issue is discussed in Chapters 1, 2, 3 and 4 of this Explanatory Memorandum. The operation of the fixed charge period is covered in Parts 3, 4, 5 and 6.

Moving to a flexible price

The mechanism will move automatically to a flexible, market-driven approach on 1 July 2015. From this date, the carbon charge will no longer be fixed, but will be set by the market.

During the flexible price period, an overall limit (or cap) will be placed on Australia's annual greenhouse gas emissions from all sources of pollution covered by the carbon price. There will be no limits on individual sectors, firms or facilities.

The Government will set the cap by issuing a fixed number of carbon units each year. Each unit will represent one tonne of pollution. This will be one of the main ways Australia meets its pollution targets. Some of the carbon units issued each year will be sold by the Government at auction. Others will be allocated to businesses without charge to support jobs and competitiveness, and help strongly affected industries make the transition to a clean energy future.

Businesses will be free to buy and sell the carbon units they have acquired from the Government. This will create a market for carbon units that is designed to ensure the reductions in pollution under the carbon price are achieved at the lowest cost to the economy: firms will buy units if they cannot reduce their pollution for less than the cost of the units.

This issue is discussed in Chapters 1, 2, 3 and 4 of this Explanatory Memorandum. The operation of the flexible price period is covered in Parts 2, 3, 4, 5 and 6.

Pollution caps

In the flexible price period, the Government will set annual caps on pollution. Before the start of this flexible price period, the Government will be required to set out the caps for the first five years from 1 July 2015. Once the flexible price system is under way, the caps will be extended each year. This is designed to ensure that businesses always have five years of certainty about the pollution caps they face.

Table IV: Timeline for setting pollution caps

Deadline	**Pollution cap announced for financial year(s) beginning:**
31 May 2014	2015, 2016, 2017, 2018 and 2019
30 June 2016	2020
30 June 2017	2021
	Pollution caps will continue to be set annually

Pollution cap timelines are discussed in Chapter 2 of this Explanatory Memorandum. Pollution caps are covered in Part 2.

Climate Change Authority

The bill provides for reviews by an independent statutory body, the Authority, which will provide independent advice to the Government on the performance of the carbon price and other initiatives. It is set up by the Authority bill.

One of the Authority's roles will be to make recommendations to the Government on pollution caps and on any national emissions trajectory or carbon budget. The Government will make the final decisions. The Authority will report regularly on progress. The Authority will conduct regular, public reviews and its reports will be made public. The Government will respond to its recommendations within a limited timeframe.

The Authority will complete its first review – which will provide recommendations on the mechanism's first five years of pollution caps – February 2014.

This issue is discussed in Chapter 10 of this Explanatory Memorandum. The Authority's responsibilities are set out in Part 22 and the Authority bill.

Price ceilings and floors

For the first three years of the flexible price period, safety valves will be built into the system, in form of price ceilings and floors, to avoid price spikes or plunges. This will reduce the risk for businesses as they gain experience in having a market set the carbon price.

A price ceiling will be set $20 higher than the expected international carbon price at the start of the flexible price period (1 July 2015). A price floor will mean that the carbon price cannot fall any lower than $15 a tonne in 2015-16. The floor is designed to reduce the risk of sharp downward movements in the price, which could undermine long-term investment in clean technologies. Both the price ceiling and the price floor will increase gradually each year.

The price ceilings and floors will apply for the first three years of the flexible price period. A review by the Authority of the role of the price ceiling and price floor will occur in 2017.

This issue is discussed in Chapter 2 of this Explanatory Memorandum. Price ceilings and floors are addressed in Part 4, Division 2 and in Part 23.

Coverage of the carbon price

Carbon pollution from the following sources will be covered by the mechanism: stationary energy, non-legacy waste, industrial processes and fugitive emissions (other than from decommissioned coal mines).

Some business transport emissions will face an equivalent carbon price through changes to fuel tax credits or fuel excise. Emissions from non-transport uses of liquid petroleum transport fuels (for example, diesel and petrol) and gaseous transport fuels (LPG, LNG and CNG) will also be subject to an equivalent carbon price in this way. This issue is discussed in greater detail in the section below on transport.

The bill also allows for the establishment of an Opt-in Scheme to enable large users of specified fuels to voluntarily opt into the mechanism instead of paying the equivalent carbon price under the fuel tax or excise systems.

Treasury modelling shows that a broad-based carbon price will encourage pollution reductions across all sectors of the economy. If sectors are

excluded, it means that Australia misses out on their full contribution to the pollution reduction task.

Around 60 per cent of Australia's emissions will be directly covered by the mechanism and around two-thirds will be covered by a carbon price applied through various means.

This issue is discussed in Chapter 3 of this Explanatory Memorandum. Coverage is addressed in Part 3.

Carbon Farming Initiative

Farming and other land-based activities will not be covered by the mechanism. However, the CFI will give farmers and other land managers an opportunity to generate income from taking action to reduce their pollution.

The CFI is covered by the CFI Act and the Carbon Credits (Consequential Amendments) Act 2011.

Gases

The mechanism will cover four of the six greenhouse gases counted under the Kyoto Protocol – carbon dioxide, methane, nitrous oxide and perfluorocarbon emissions from the aluminium sector. The remaining greenhouse gases counted under the Kyoto Protocol (hydrofluorocarbons and sulphur hexafluoride) as well as other perfluorocarbon emissions will face an equivalent carbon price through existing synthetic greenhouse gas legislation.

Amendments to apply an equivalent carbon price to synthetic greenhouse gases are set out in the Consequential Amendments bill.

Large polluters

It is important to ensure that the mechanism is practical and minimises costs to business. For this reason, only facilities that release over a certain amount of carbon pollution a year, or are users or natural gas suppliers, will pay the carbon price under the mechanism. Facilities that have direct greenhouse gas emissions of 25,000 tonnes of CO_2-e a year or more (excluding emissions from transport fuels and some synthetic greenhouse gases) will be covered. There will be a lower threshold for certain landfill facilities. Facilities that consume large volumes of natural gas will also be covered. Natural gas suppliers will be liable for carbon pollution from the use of natural gas they supply to small-to medium-sized customers.

Liable entities will be required to either make a payment for emissions or surrender an equivalent number of units. If a liable entity does not surrender any units or an insufficient number to meet their liability, then it will become liable for a shortfall charge. Those who choose to pay, or who are liable for, a shortfall charge will pay a premium above the value of the unit.

This issue is discussed in Chapters 3 and 4 of this Explanatory Memorandum. The operation of the fixed charge period is covered in Parts 3 and 6.

Transport

Households and light commercial vehicles will not face a carbon price on the fuel they use for transport. In addition, the agriculture, forestry and fishing industries will not face a carbon price on their off-road fuel use.

An effective carbon price will apply to fuels used in domestic aviation, marine and rail transport. Similarly, a carbon price will apply when liquid petroleum and gaseous transport fuels are used for non-transport purposes, such as running diesel generators on a mine site.

In general, where an effective carbon price applies to transport fuels, it will be applied through changes in fuel tax credits or changes in excise. The changes will be calculated to have the same price effect as coverage by the mechanism and will be adjusted periodically to ensure the effective carbon price on transport fuels is in step with the carbon price applying to the rest of the economy.

The Government intends to apply an effective carbon price to heavy on-road transport from 1 July 2014.

While no transport fuels will be covered directly under the mechanism on a mandatory basis, large users of specified transport fuels may, in certain circumstances, choose to opt into coverage by the mechanism via the Opt-in Scheme. These opt-in arrangements will be available from 1 July 2013. By opting-in, fuel users will have their fuel emissions directly covered by the mechanism and will not face the equivalent carbon price through the fuel tax system.

Table V: Treatment of transport fuels

A carbon price will be applied to:	A carbon price will not apply to:
Domestic aviation	Fuel used by households for transport
Domestic shipping	Light on-road commercial vehicles
Rail transport	Ethanol, biodiesel and renewable diesel
Off-road transport use of liquid and gaseous fuels (except in agriculture, forestry, fisheries)	Gaseous fuels used for on-road transport
	Off-road fuel use by the agriculture, forestry and fishing industries
Non-transport use of liquid and gaseous fuels	Transport fuels when used as lubricants and solvents or in other ways that do not result in emissions

The treatment of transport fuels is addressed through the:

- Clean Energy (Fuel Tax Legislation Amendment) Bill 2011;
- Clean Energy (Excise Tariff Legislation Amendment) Bill 2011; and
- Clean Energy (Customs Tariff Amendment) Bill 2011.

Jobs and Competitiveness Program

The Government recognises the importance of manufacturing and heavy industries that compete on international markets and use large amounts of energy or generate significant levels of carbon pollution. The goods these industries produce will remain important in a clean energy economy.

In most industries, a carbon price will represent a very small proportion of total revenue. However, some industries, particularly heavy manufacturing industries, are pollution intensive.

Without appropriate assistance arrangements, applying constraints on carbon pollution in Australia before other countries could risk 'carbon leakage' — activities could be relocated from Australia to countries where those activities may not be subject to comparable carbon constraints. Carbon leakage is not in Australia's interests — either from an environmental or an economic point of view. The Jobs and Competitiveness Program (the Program) is designed to reduce this risk.

The Government has designed the Program to provide assistance to our emissions-intensive, trade-exposed industry while still maintaining a strong price signal for industries to reduce the pollution intensity of their

products. Making products like steel, aluminium, glass, clinker and chemicals in cleaner and more efficient ways is good for the environment, supports Australian jobs and will ensure our industry remains competitive.

This issue is discussed in Chapter 5 of this Explanatory Memorandum. The Program is set out in Part 7.

Energy Security Fund and coal-fired electricity generation

An Energy Security Fund will be established to smooth the transition and maintain energy security. This Fund will incorporate two main initiatives. First, there will be transitional assistance to highly emissions-intensive coal-fired power stations in Australia. This assistance will come with conditions to ensure security of supply and transparent information on the action taken by these generators to move to a cleaner energy future. Second, there will be scope for payments for the closure of around 2,000 megawatts (MW) of very highly emissions-intensive coal fired generation capacity by 2020. This will start the process of replacing existing, highly polluting electricity assets with cleaner generation.

This issue is discussed in Chapter 6 of this Explanatory Memorandum. The Fund and assistance for coal-fired electricity generation is covered in Part 8.

International linking

Australia's carbon price will be linked to carbon markets around the world from the start of the flexible price period. This will allow reductions in carbon pollution to be pursued globally at the lowest cost. Carbon pollution is not confined to national borders. It affects the whole planet. International linking of carbon markets will allow businesses that release carbon in one country to be matched up with businesses in other countries that are able to reduce their carbon pollution at lower costs. International linking encourages action to reduce carbon pollution around the world, and plays an important role in helping developing countries adopt clean technologies.

International linking will start when the carbon price moves to its flexible price period from 1 July 2015. Australian businesses will be able to buy international units from credible international carbon markets or emissions trading schemes in other countries. They will be allowed to use these units to meet some of their local obligations. When an Australian business buys an international unit, it means that a tonne of pollution cannot be released overseas. In addition, farmers will be able to sell credits generated from the CFI to international markets.

Safeguards will be in place to ensure international units are credible and do not undermine the environmental integrity of Australia's pollution reduction efforts. Until 2020, businesses will have to meet at least half of their annual obligations each year by buying carbon units or Australian Carbon Credit Units (ACCUs). It will be more efficient and less costly to reduce Australia's carbon pollution by a mixture of domestic reductions and international unit purchases compared with relying on domestic action alone. International linking allows Australian businesses to pursue credible, cheaper carbon pollution reduction opportunities wherever they are available.

If reducing carbon pollution in Australia is more expensive than reducing carbon pollution in another country, Australian firms will be able to purchase an international unit. With international linking, the carbon price in Australia will be set by international supply and demand for units.

This issue is discussed in Chapter 3 of this Explanatory Memorandum. International linking issues will be addressed in Part 4 of the bill and in the Consequential Amendments bill.

Governance

Sound governance will ensure that the mechanism is efficient and effective. The roles of making, administering and reviewing the rules have been carefully allocated to ensure that appropriate accountabilities are in place.

The Government and the Parliament will be responsible for major policy decisions that require the balancing of environmental, economic and social factors.

Clean Energy Regulator

The Regulator will administer key elements of the mechanism, as well as the CFI and the Registry. It will have robust powers to ensure the integrity of the mechanism and the Registry.

The Regulator is set up through the Regulator bill. This issue is discussed in Chapter 7 of this Explanatory Memorandum and the Explanatory Memorandum for the Regulator bill. The Regulator's responsibilities and powers to administer and enforce the mechanism are set out throughout the bill, and general powers set out in Part 23.

Climate Change Authority

The Authority will review pollution caps, the future trajectory of Australia's pollution levels and the performance of the carbon price and

will track Australia's progress towards meeting its targets for reducing carbon pollution.

The Authority is set up through the Authority bill. Its role is discussed in Chapters 2 and 10 of this Explanatory Memorandum and the Explanatory Memorandum for the Authority bill. The Authority's responsibilities and powers to conduct reviews are set out in Part 22.

Productivity Commission

The Productivity Commission will review industry assistance under Parts 7 and 8. It will also review the impact of the carbon price on industry and continue reporting on actions by other countries to reduce carbon pollution.

This issue is discussed in Chapters 5 and 6 of this Explanatory Memorandum. The Commission's responsibilities and powers to conduct reviews are set out in Parts 7 and 8.

Links to other Regulators

The mechanism will be administered by the Regulator; however other national economic Regulators and law enforcement agencies will also have a role. Under the Package, the Regulator will be given powers to share information and cooperate with these agencies.

The Australian Competition and Consumer Commission (ACCC) administers and enforces economy-wide competition, fair trading and consumer protection laws, which will apply to business activity under the mechanism. The ACCC has received additional funding of $12.8 million over four years for additional resources to deal with false and misleading claims about the carbon price.

The Australian Securities and Investments Commission (ASIC) administers and enforces Australia's financial services laws, which will cover emissions units, as these will be defined as financial products. It will also have responsibility for the regulation of related trading markets.

The Regulator will also have powers to work with the Australian Transaction Reports and Analysis Centre (Austrac), the Australian Federal Police and the Commonwealth Director of Public Prosecutions concerning activities that may contravene the requirements of the mechanism and be linked with fraud and criminal activity, such as money laundering.

The bill's operation and background

Simplified outlines

The bill includes a simplified outline of the mechanism and each Part of the bill includes a simplified outline of that Part's contents.

Date of effect and application

Once passed:

- clauses 1 and 2 will commence on the date the bill receives the Royal Assent;
- the substantive provisions of the bill (clauses 3 to 303 and 304 to 311) will commence on a date to be proclaimed; and
- clauses 303A, 303B and 312 will commence on the day after the bill receives the Royal Assent.

The first year for which entities will be liable under the mechanism will commence on 1 July 2012. This is achieved by use of the phrase 'eligible financial year' which is defined to mean the financial year beginning on 1 July 2012 or a later financial year.

Prompt commencement will allow liable entities and the Regulator to prepare for the mechanism and for the Regulator to prepare for its functions as the responsible agency for the CFI and the Registry. The timeframe will also provide time for:

- education and assistance for entities which are likely to be liable and their representatives; and
- receipt and assessment of applications, for example, for certificates of eligibility for coal-fired generation assistance, Registry accounts, obligation transfer numbers, emissions-intensive trade-exposed assistance and for reforestation.

Proposal announced

The measures are based on the announcement on 10 July 2011 and the publication of *Securing a clean energy future: The Australian Government's climate change plan*.

Transitional provisions and consequential amendments

The transitional provisions and consequential amendments are included in the Consequential Amendments bill. There is a separate Explanatory Memorandum for that bill.

Financial impact

The financial impact associated with the legislative proposals in the Clean Energy Legislative Package, is reflected in **Fiscal Tables 1 to 4** below.[14]

Further detail on the financial implications of these measures is provided in *Securing a clean energy future: The Australian Government's climate change plan* and related documents.

The Government will use all of the revenue it receives from the sale of emissions units to help households and businesses adjust and move Australia to the low pollution economy of the future.

[14] Please note that these tables have been revised to take account of changes since 10 July 2011, which reflect policy changes.

Fiscal Table 1: Plan for a clean energy future

	Fiscal Impact ($m)				Fwd Est's.
	2011-12	2012-13	2013-14	2014-15	
Revenue from the sale of units	**0**	**7,740**	**8,690**	**9,190**	**25,620**
Revenue from the application of carbon price via other measures[15]	**0**	**290**	**320**	**320**	**930**
Fuel tax credit reductions[16]	**0**	**570**	**70**	**70**	**710**
Household assistance measures	**-1,534**	**-4,230**	**-4,809**	**-4,830**	**-15,403**
Assistance for low- to middle-income households	-1,470	-4,125	-4,672	-4,700	-14,967
Increases in transfer payments[17]	-1,470	-775	-2,302	-2,380	-6,927
Tax reform	0	-3,350	-2,370	-2,320	-8,040
Low Carbon Communities - redesign and extension	-5	-39	-83	-90	-217
Other household energy efficiency measures[18]	-7	-13	-15	-13	-48
Household assistance implementation	-51	-54	-39	-28	-172
Support for jobs	**-26**	**-3,017**	**-3,475**	**-3,773**	**-10,291**
Jobs and Competitiveness Program	0	-2,851	-3,059	-3,312	-9,222
Clean Technology Program[19]	-19	-142	-245	-312	-717
Increased small business instant asset write-off	0	0	-100	-100	-200
Regional structural adjustment	0	-10	-50	-30	-90
Other business energy efficiency measures[20]	-7	-15	-21	-19	-62
Clean Energy Finance Corporation[21]	**-2**	**-21**	**-467**	**-455**	**-944**
Energy security and transformation[22]	**-1,009**	**-1**	**-1,003**	**-1,042**	**-3,054**
Land and biodiversity measures	**-69**	**-131**	**-506**	**-489**	**-1,194**
Carbon Farming Initiative	0	-47	-65	-81	-193
Biodiversity Fund	-37	-35	-250	-251	-572
Carbon Farming Futures Program	-31	-30	-113	-102	-276
Carbon Farming Initiative Non-Kyoto Carbon Fund	0	-1	-50	-47	-97
Regional Natural Resource Management Planning	0	-13	-23	-4	-40
Other land and biodiversity measures[23]	-1	-5	-5	-4	-16
Governance	**-78**	**-90**	**-106**	**-107**	**-382**
Clean Energy Regulator	-68	-68	-61	-59	-256
Coverage of synthetic greenhouse gases	-1	-2	-26	-31	-60
Climate Change Authority	0	-6	-9	-9	-25
Productivity Commission Reviews	-4	-4	-5	-5	-18
Other governance	-5	-9	-5	-4	-23
Total impact	**-2,717**	**1,110**	**-1,285**	**-1,116**	**-4,008**

15 Includes revenue from synthetic greenhouse gases and changes to aviation excise.

16 Ongoing fuel tax credit reductions with permanent shielding for heavy on-road transport, agriculture, fisheries and forestry and net of fuel tax credit increase for aviation that opts-in to the mechanism.

17 Includes transfer payments for pensioners and beneficiaries, income support for veterans, Essential Medical Equipment payment, CPI indexation and residential aged care assistance.

18 Includes development of a national energy savings initiative, ABS Household Energy Consumption and Expenditure Survey, Household Advice and Support - extension of Living Greener website and the Remote Indigenous Energy Program.

19 Includes the Clean Technology Investment Program, the Clean Technology Food and Foundries Investment Program and the Clean Technology Innovation Program.

20 Includes Energy Efficiency Information Grants and Clean Technology Focus for Supply Chain Programs. The Clean Energy Skills Package has been allocated $32 million over four years, which is to be fully offset from existing resourcing.

21 Assumes investment of $2 billion per annum from 2013-14. The new Australian Renewable Energy Agency has been allocated $3.2 billion over the period to 2019-20 from existing grant funding programs.

22 Includes the Energy Security Fund and loans to generators for the purchase of future vintage carbon units at advance auctions.

23 Includes the Indigenous Carbon Farming Fund, the Carbon Farming Skills Initiative and the Land Sector Carbon and Biodiversity Advisory Board.

Fiscal Table 2: Plan for a clean energy future

	Underlying Cash Balance Impact ($m)				Fwd Est's.
	2011-12	2012-13	2013-14	2014-15	
Total receipts (net of free units)	0	4,270	6,680	7,211	18,161
Total payments	-2,683	-4,779	-7,078	-7,303	-21,843
Total impact	**-2,683**	**-509**	**-398**	**-92**	**-3,682**

Fiscal Table 3: Plan for a clean energy future including Government measures

	Fiscal Impact ($m)				Fwd Est's.
	2011-12	2012-13	2013-14	2014-15	
MPCCC agreed measures	**-2,717**	**1,110**	**-1,285**	**-1,116**	**-4,008**
Additional Government measures	**-223**	**-48**	**-322**	**178**	**-416**
Coal Sector Jobs Package	-222	0	-231	-243	-696
Coal Mining Abatement Technology Support Package	0	-11	-16	-15	-41
Steel Transformation Plan	-1	-38	-75	-75	-189
Additional fuel tax credit reductions for heavy on-road transport from 2014-2015	0	0	0	510	510
Total impact	**-2,940**	**1,061**	**-1,607**	**-938**	**-4,424**

Fiscal Table 4: Plan for a clean energy future including Government measures

	Underlying Cash Balance Impact ($m)				Fwd Est's.
	2011-12	2012-13	2013-14	2014-15	
MPCCC agreed measures	-2,683	-509	-398	-92	-3,682
Additional Government measures	-223	-48	-304	124	-452
Total impact	**-2,907**	**-558**	**-701**	**32**	**-4,134**

Regulation impact statement

The Regulation Impact Statement, entitled *Australia's plan for a clean energy future*, is available at http://ris.finance.gov.au. The RIS was prepared by the Department and has been assessed as adequate by the Office of Best Practice Regulation.

Part 1
Design of the carbon pricing mechanism

Chapter 1
Liable entities and covered emissions

Outline of chapter

1.1 Chapter 1 explains:

- which greenhouse gas emissions give rise to liability;
- which entities are responsible for those emissions;
- how obligations may be transferred voluntarily from one entity to another, to allow liability to be met more efficiently; and
- the arrangements allowing entities using specified fuels to choose to opt into coverage by the mechanism.

This chapter covers Part 3.

Context

1.2 The mechanism covers emissions from stationary energy, industrial processes, fugitive emissions (except from decommissioned coal mines) and non-legacy waste. Amendments to other legislation covering fuel tax and synthetic greenhouse gases apply an equivalent carbon price to some business transport emissions, non-transport use of transport fuels, and synthetic greenhouse gases.

1.3 Around 60 per cent of Australia's emissions will be directly covered by the mechanism, and around two-thirds are covered by a combination of the mechanism and equivalent carbon pricing arrangements. Together, these approaches cover all six greenhouse gases counted under the Kyoto Protocol.

1.4 This broad coverage will ensure that the economy as a whole starts moving towards a clean energy future and that the cheapest ways of reducing pollution will be implemented, thereby lowering the overall cost to the Australian economy.

1.5 Treasury modelling shows that a broad-based carbon price will encourage pollution reductions across all sectors of the economy. If

sectors are excluded, Australia misses out on their full contribution to the pollution reduction task.

1.6 Agricultural emissions are not covered by the mechanism. However, the CFI will give farmers and other land managers an opportunity to generate income from taking action to store carbon in the landscape and to reduce their pollution.

1.7 To minimise costs to business and reduce administrative complexity, only firms that directly release large amounts of greenhouse gas emissions or are natural gas suppliers (and are responsible for potential greenhouse gas emissions embodied in the natural gas) will pay the carbon price. It is expected that around 500 large polluters will be liable entities under the mechanism.

Summary of new law

Liability of direct emitters

1.8 Part 3, Division 2 deals with the liability of direct emitters under the mechanism. Liable entities include those who operate a facility which emits more than a specified amount of greenhouse gases, and those who are liable for emissions from a facility because they are members of a JV or hold an LTC. It also deals with the way in which landfill operators are covered by the mechanism.

Liability for emissions embodied in natural gas

1.9 Part 3, Division 3 deals with the liability under the mechanism for emissions embodied in natural gas.

1.10 Part 3, Division 4 deals with the way in which an OTN is issued and used. An OTN is used to transfer liability for emissions arising from the use of natural gas from the supplier to the user of that gas. An OTN is used to keep track of liability so that it is not imposed twice on the same emissions. For example, it ensures that emissions from the use of natural gas that count towards a facility's emissions do not count towards a gas supplier's liability. OTNs also ensure that liability is not imposed on natural gas that is used in a way that does not result in emissions.

Direct emitters - Liability for participants in unincorporated joint ventures

1.11 Part 3, Division 5 deals with unincorporated JVs which operate facilities covered by the direct emitters provisions. These may be 'mandatory designated JVs' and 'declared designated JVs':

- A 'mandatory designated JV' is designated when a facility is operated by a JV, but no one party has operational control of that facility. The liability for emissions from the facility is shared between participants in proportion to their interest in the JV. Applying liability directly to JV participants will facilitate the pass-through of the carbon price under contracts for sale of the output of the facility held by the JV participants.

- A 'declared designated JV' is declared when a facility is operated exclusively for a JV by an operator and the JV participants voluntarily assume the liability for emissions, with the current operator's consent. This will provide JV participants more flexibility to manage emissions obligations from a facility by allowing them to directly assume those obligations if they wish to do so.

Direct emitters - Transfers of liability by liability transfer certificates

1.12 Part 3, Division 6 covers LTCs. LTCs are used to transfer liability for a facility from the facility operator to another member of the corporate group or to a person who has financial control of a facility.

Opt in arrangements for entities covered by the fuel tax system

1.13 Part 3, Division 7 allows the Minister to make regulations establishing the Opt-in Scheme. This will allow entities who use significant quantities of liquid petroleum fuels to opt into the mechanism to manage their carbon emissions liability for specified fuels instead of paying the equivalent carbon price through the fuel tax system. The Opt-in Scheme will start from 1 July 2013.

Detailed explanation of new law

Liability for emissions under the mechanism

1.14 Under the mechanism a person may be liable as:

- a 'direct emitter' for greenhouse gas emissions directly emitted by a facility; or

- a 'natural gas supplier' for greenhouse gas emissions embodied in natural gas supplied to another person; or

- a person that opts-in under the Opt-in Scheme for greenhouse gas emissions embodied in specified fuels. ***[Part 3, clause 19], [Part 1, clause 5, definition of 'covered emission'], [Part 1, clause 5, definition of 'facility'], [Part 1, clause 5, definition of 'greenhouse gas'], [Part 1, clause 5, definition of 'natural gas']***

Such a person is a 'liable entity'. ***[Part 1, clause 5, definition of 'liable entity']***

Direct emitters

1.15 A person is liable for greenhouse gases emitted from the operation of a facility if:

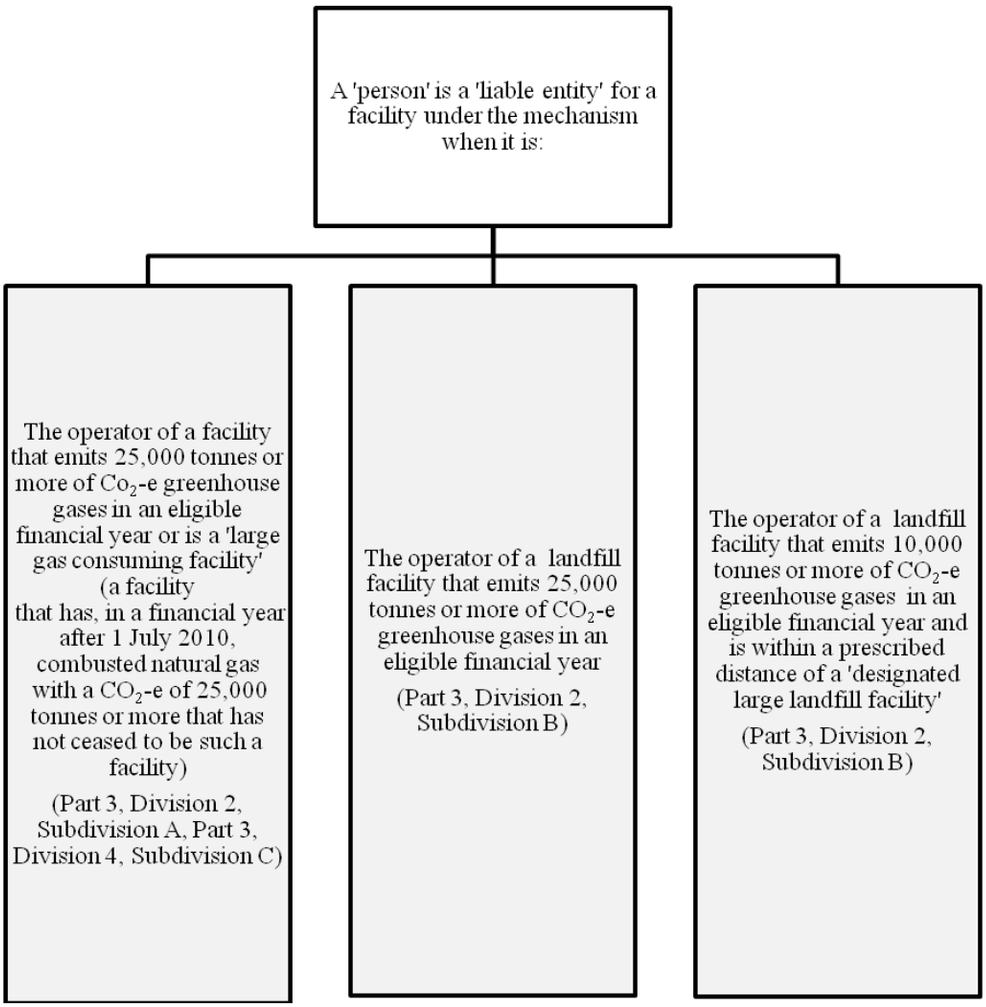
- the person has operational control of that facility (with specific arrangements for JVs or LTC holders (see below)); and

- the facility produced covered emissions (see below); and

- the amount of those covered emissions exceeds a threshold or the facility is a 'large gas consuming facility' (see below). ***[Part 3, clause 20(1)-(3)], [Part 3, clause 21(1)-(3)], [Part 3, clause 22(1)-(3)], [Part 3, clause 23(1)-(3)], [Part 3, clause 24(1)-(3)], [Part 3, clause 25(1)-(3)], [Part 3, clause 55A]***

The types of liability for direct emitters are set out in **Diagram 1.1**.

Diagram 1.1 Liability of direct emitters under the carbon pricing mechanism



Operational control

1.16 Generally, a person with liability for emissions from a facility is the person with 'operational control' of that facility. Operational control has the same meaning as in section 11 of the NGER Act. ***[Part 1, clause 5, definition of 'operational control']*** Operational control is generally held by the person that:

- has the greatest ability to introduce and implement operational, environmental and health and safety policies for a facility; and
- is declared to have operational control by the Regulator.

1.17 The Consequential Amendments bill broadens the range of entities that can have operational control for the purposes of the NGER Act from 'a controlling corporation or another member of the corporation's group' to 'a person' (see Schedule 1, Part 2, items 340-348 of the Consequential Amendments bill).[24] ***[Part 1, clause 5, definition of 'group']***

1.18 The person with operational control will generally have the greatest ability to bring about emissions reductions. This person will also generally hold the contracts for sale of the output of the facility, and will be in the best position to pass through the carbon price to customers of the facility. If liability was placed on another party then carbon price clauses in existing contracts may not be triggered.

1.19 Exceptions to this approach are provided through LTCs and designated JVs (see below). These exceptions aim to address situations where a person other than the operator can more efficiently manage carbon liabilities.

Direct (facility) emissions covered by the mechanism

Covered emissions

1.20 'Covered emissions' are those greenhouse gas emissions that count towards facility thresholds and give rise to liability under the mechanism. Broadly, these are 'scope 1 emissions', where:

- the greenhouse gas is released into the atmosphere as a direct result of the operation of the facility;

[24] Further amendments concerning the definition and assignment of operational control for a facility in the NGER Act are discussed in the Explanatory Memorandum for the Consequential Amendments bill.

- the greenhouse gas is released in Australia; and
- a method or criteria for measurement has been provided to measure those emissions under the NGER Act (currently the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*);
- the greenhouse gas is not one of the excluded types of emissions (see below). ***[Part 3, clause 30(1) and (2)], [Part 1, clause 5, definition of 'covered emissions'], [Part 1, clause 5, definition of 'scope 1 emission']***

Scope 1 emissions

1.21 'Scope 1 emissions' are defined by reference to section 10 of the NGER Act and regulation 2.23 of the NGER Regulations, and for which methods or criteria for measurement are provided under the *NGER (Measurement) Determination 2008*. Scope 1 emissions are those that are the direct result of an activity or series of activities (including ancillary activities) that constitute the facility (for example the emissions produced when coal is burned at a power station).

Greenhouse gases

1.22 'Greenhouse gas' has the same meaning as in section 7 of the NGER Act. ***[Part 1, clause 5, definition of 'greenhouse gas']*** Greenhouse gases include:

- carbon dioxide;
- methane;
- nitrous oxide;
- sulphur hexafluoride;
- hydrofluorocarbons specified in the regulations; or
- perfluorocarbons specified in the regulations.

1.23 However, as explained below, most synthetic greenhouse gas emissions are excluded from the meaning of 'covered emissions' and are covered by alternative arrangements under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

1.24 The Consequential Amendments bill amends the NGER Act to provide for additional gases to be included through regulations (see Schedule 1, Part 2, item 323 of the Consequential Amendments Bill).

This allows additional greenhouse gases which are internationally recognised to be brought into the mechanism in the future.

Direct (facility) emissions not covered by the mechanism

1.25 Some scope 1 emissions from facilities are not covered emissions for the purposes of the mechanism and give rise to no liability under it. ***[Part 3, clause 30(2)-(12)]***

Fuels subject to excise or customs

1.26 Where liquid petroleum fuel, LPG, LNG or CNG are combusted and are subject to excise or customs duty, the resulting emissions will not count as covered emissions. ***[Part 3, clause 30(2)], [Part 1, clause 5, definition of 'compressed natural gas'], [Part 1, clause 5, definition of 'liquified petroleum gas'], [Part 1, clause 5, definition of 'liquified natural gas']***

1.27 This ensures that emissions from transport fuels that are excluded from a carbon price, for example, emissions from private passenger vehicles, are not subject to a carbon price. It also ensures that fuels subject to an equivalent carbon price under fuel tax legislation are not also subject to a carbon price under the mechanism.

1.28 An equivalent carbon price will be applied to some uses of excisable liquid petroleum fuels, LPG, LNG and CNG under the Clean Energy (Excise Tariff Legislation Amendment) Bill 2011, Clean Energy (Customs Tariff Amendment) Bill 2011 and Clean Energy (Fuel Tax Legislation Amendment) Bill 2011. ***[Part 1, clause 5, definition of 'liquid petroleum fuel']***

1.29 Where liquid petroleum fuel, LPG, LNG or CNG are combusted and are *not* subject to excise or customs duty, the resulting emissions *will* count as covered emissions. ***[Part 3, clause 30(2)], [Part 1, clause 5, definition of 'compressed natural gas'], [Part 1, clause 5, definition of 'liquified petroleum gas'], [Part 1, clause 5, definition of 'liquified natural gas']*** For example, certain fuels are combusted at petroleum refineries and are exempt from excise – the emissions from the combustion of these fuels are covered emissions.

Combustion of biomass, biofuels and biogas

1.30 Emissions from the combustion of biomass, biofuels and biogas are not covered emissions. Carbon dioxide produced from these sources is part of the natural carbon cycle and does not count towards Australia's emissions obligations. Other greenhouse gases from the combustion of these sources are a minor source of emissions and are excluded for administrative simplicity. ***[Part 3, clause 30(3)]***

Agriculture

1.31 Emissions from agricultural sources are excluded from the mechanism. ***[Part 3, clause 30(4)]*** Agricultural emissions correspond to many of the emissions sources covered by the CFI Act, which broadly correspond to the agricultural emissions that countries are required to report under international accounting rules.

1.32 The exclusion of soil-related emissions is limited to emissions that arise from, or that are produced in, soil. Emissions that result from carbon capture and storage, or emissions attributable to the operation of a landfill facility are not exempted. ***[Part 3, clause 30(5)]***

Other emissions from land

1.33 Emissions, other than emissions attributable to the operation of a landfill facility, from changes in the levels of carbon sequestered in living biomass, dead organic matter or soil and that are attributable to land use, changes in land use (including land clearing) or forestry activities, are not covered emissions. ***[Part 3, clause 30(6) and (7)]***

Fugitive emissions from decommissioned underground mines

1.34 Fugitive emissions from decommissioned underground mines are not covered emissions. A 'decommissioned underground mine' will be defined in the NGER Regulations, and this definition will be used to determine whether an underground coal mine has been decommissioned or not. ***[Part 1, clause 5, definition of 'decommissioned underground mine'], [Part 1, clause 5, definition of 'fugitive emissions'], [Part 3, clause 30(8)]***

Legacy emissions from landfill facilities

1.35 Emissions attributable to waste deposited in a landfill facility prior to 1 July 2012 are not included in a landfill facility's liability. ***[Part 3, clause 30(9)], [Part 1, clause 5, definition of 'landfill facility'], [Part 1, clause 5, definition of 'legacy emissions']***

1.36 These legacy emissions are excluded from liability because, in many cases, there is little or no opportunity for landfill operators to recover the cost of meeting a liability for waste that was deposited in the past. However, as discussed below legacy emissions do count for the purpose of determining whether a landfill facility exceeds emission thresholds.

1.37 Details on developing a legacy emissions profile to allow liable landfill facilities to determine the ongoing annual emissions from legacy waste will be set out in regulations. ***[Part 3, clause 32]***

Closed landfill facilities

1.38 Landfill facilities which no longer accept waste and closed prior to 1 July 2012 are excluded from the mechanism. ***[Part 3, clause 30(10)]***

1.39 The operator of a landfill facility that closed after 30 June 2011 will be a liable entity if the facility meets one of the thresholds outlined below. If there is a change in operational control after the facility is closed, obligations transfer to the new entity with operational control. In many cases, this will be the land owner. The liable entity will be determined through the operational control definition.

Synthetic greenhouse gases

1.40 Emissions of synthetic greenhouse gases (hydrofluorocarbons, perfluorocarbons and sulphur hexafluouride) are excluded from the mechanism, except for emissions of perfluorocarbons emitted as a result of aluminium production. ***[Part 3, clause 30(11) and (9)]*** Synthetic greenhouse gases emissions that are excluded from the mechanism will face an equivalent carbon price using existing import and manufacture controls under the Ozone Act (which is covered by the Consequential Amendments bill).

Scope 2 and 3 emissions

1.41 Indirect scope 2 emissions, such as those concerning electricity use, and scope 3 emissions are not included in the definition of a facility's emissions. This ensures that there is no double counting of emissions. . Scope 2 emissions are defined in section 10 of the NGER Act and regulation 2.23 of the NGER Regulations. Scope 3 emissions are not defined in the NGER legislation; they are greenhouse gas emissions that are generated in the wider economy as a consequence of a facility's activities but that are physically produced by another facility and that are not scope 2 emissions (for example, a gas-fired electricity generator will not be liable for fugitive emissions associated with the production and transport of the natural gas that it uses). ***[Part 1, clause 5, definition of 'covered emissions'], [Part 1, clause 5, definition of 'scope 1 emission']***

Facilities covered by the mechanism

1.42 The mechanism covers three types of facilities:

- landfill facilities;
- large gas consuming facilities; and
- facilities that are neither landfill or large gas consuming facilities.

Different rules apply to liability for emissions from each of these types of facilities.

Facilities that emit greenhouse gases with a CO_2-e of 25,000 tonnes or more

1.43 A person is a liable entity if a facility it operates emitted covered greenhouse gases with a CO_2-e of 25,000 tonnes or more during an eligible financial year. ***[Part 3, clause 20(4)], [Part 3, clause 21(4)], [Part 3, clause 22(4)]*** This threshold broadly aligns with the facility threshold in section 13 of the NGER Act.

Example 1.1 Application of 25,000 tonnes of CO_2-e threshold

During a financial year HosCo Ltd operates a facility that emits 20,000 tonnes of CO_2-e from the combustion of coal, and 15,000 tonnes of CO_2-e from cement clinker production (an industrial process).

The total covered emissions from the facility total 35,000 tonnes of CO_2-e. HosCo Ltd is a liable entity.

Large gas consuming facilities

1.44 A person is a liable entity if it operates a facility that is a 'large gas consuming facility', which is a facility that has, in a financial year after 1 July 2010, combusted natural gas with a CO_2-e of 25,000 tonnes or more. A facility ceasesto be a large gas consuming facility when it satisfies the conditions specified in the regulations. ***[Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 55A], [Part 1, clause 5, definition of 'large gas consuming facility']***

1.45 The arrangements for large gas consuming facilities are designed to ensure that facilities do not move in and out of coverage from year to year. They provide certainty as to when an OTN quotation should be used and will ensure that gas suppliers will know that they are not liable for emissions from particular facilities in advance of a financial year.

1.46 The threshold for large gas consuming facilities is based on emissions in an earlier financial year. Once a facility reached this threshold it is considered to be a large gas consuming facility for all future years until such time that it satisfies the conditions specified in the regulations. The regulations will provide that facilities that have consistently reduced their natural gas combustion emissions to below 25,000 tonnes CO_2 equivalence will cease to be a large gas consuming facility.

Example 1.2 Liability for facility with natural gas emissions

Brick Factory is operated by NG Limited, which receives supplies of natural gas for use at the facility from GasCo. In 2012-13, covered emissions from the operation of the facility comprise:

- 10,000 tonnes of CO_2-e from use of natural gas; and
- 20,000 tonnes of CO_2-e from other sources.

Natural gas emissions from Brick Factory have never been over 25,000 tonnes of CO_2-e in previous financial years. Therefore Brick Factory is not a large gas consuming facility and NG does not have to quote an OTN.

Brick Factory has total covered emissions of 30,000 tonnes of CO_2-e. Because the facility is over the direct emitters threshold, NG is liable for emissions from the operation of the facility in 2012-13.

Since NG did not quote an OTN for natural gas used at Brick Factory, it has a total liability of 20,000 tonnes of CO_2-e for Brick Factory.

Landfill facilities that exceed an emissions threshold

1.47 A landfill facility may be a liable entity if it meets one of two thresholds:

- the landfill facility emits covered *plus* legacy waste emissions with a CO_2-e of 25,000 tonnes or more; or
- the landfill facility emits covered *plus* legacy waste emissions with a CO_2-e of 10,000 tonnes or more in an eligible financial year, and is located within a prescribed distance of another landfill facility which:
  - is a 'designated large landfill facility'; and
  - accepts a similar classification of waste. ***[Part 3, clause 23(4) and (10)], [Part 3, clause 24(4) and (10)], [Part 3, clause 25(4) and (8)]***

1.48 A 'designated large landfill facility' is a landfill facility that triggered the 25,000 tonnes of CO_2-e threshold in the previous eligible financial year'. The Regulator may publish a list of designated large landfill facilities and their locations to assist landfill operators to determine whether the 10,000 tonnes of CO_2-e threshold applies to them for an eligible financial year. ***[Part 1, clause 5, definition of 'designated large landfill facility'], [Part 9, clause 206]***

1.49 The additional, lower threshold is intended to prevent diversion of waste from designated large landfill facilities to smaller facilities nearby.

Example 1.3 Application of 10,000 tonnes of CO_2-e threshold for landfill facilities

LandfillCo, a landfill facility, emits 14,000 tonnes of CO_2-e in an eligible financial year.

LandfillCo is within the prescribed distance of another open landfill facility, operated by TipCorp, which accepts the same classification of waste and in the previous eligible financial year emitted 25,000 tonnes or more of CO_2-e.

LandfillCo is covered by the mechanism and is a liable entity.

Emissions that count towards determining whether thresholds are met

1.50 All covered emissions count when determining whether a facility meets the relevant threshold. To avoid doubt, for those facilities that are not landfill facilities, their emissions from solid waste disposal count for the purposes of determining whether that facility meets the threshold.

1.51 For landfill facilities, all covered emissions plus legacy waste emissions from the facility count for the purposes of determining whether that facility meets the threshold for inclusion in the mechanism. This includes covered emissions from combustion of energy sources at the facility.

Facilities that exceed a pro-rata emissions threshold

1.52 A pro-rata threshold is applied where the liable entity for a facility changes during an eligible financial year. If a facility's emissions reach or exceed the relevant pro-rata threshold, then the operator of that facility will be a liable entity. This also applies when an entity holds an LTC for a facility for only part of the year, or when there is a designated JV concerning the facility for only part of a year. ***[Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)]***

1.53 The pro-rata threshold ensures that facilities that would reach a threshold during an entire financial year continue to be covered under the mechanism for the full compliance year even when the operator changes. This maintains consistent coverage under the mechanism and prevents entities from avoiding thresholds, deliberately or otherwise, by changes in operational control or the issue of an LTC.

1.54 Pro-rata thresholds are calculated using a specified formula. ***[Part 3, clause 20(5)], [Part 3, clause 21(5)], [Part 3, clause 22(5)], [Part 3, clause 23(5)], [Part 3, clause 24(5)], [Part 3, clause 25(5)]*** The calculation is:

$$\frac{25{,}000 \times \text{number of control days or certificate days (whichever is relevant)}}{365} = \text{pro-rata threshold}$$

1.55 'Control days' are the days in the financial year, where this is less than the full year, that a facility was under the operational control of one or more members of a controlling corporation's group. ***[Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 1, clause 5, definition of 'group']***

1.56 'Certificate days' are the days in the financial year, where this is less than the full year, that a person was the holder of an LTC for a facility. ***[Part 3, clause 22(1)], [Part 3, clause 25(1)]***

Example 1.4 Pro rata threshold

A.M.Y Limited had operational control of a facility for 100 days of the year. A.M.Y's pro-rata threshold for that facility is worked out as follows:

25,000 × 100 control days ÷ 365 = 6,849 tonnes of CO_2-e

If the emissions from that facility are 6,849 tonnes of CO_2-e or more during the 100 control days then those emissions will count towards A.M.Y's liability.

Provisional emissions numbers

1.57 If an entity is liable for a facility, then the number of tonnes of covered emissions in CO_2-e emitted from the facility will be a PEN for that facility. PENs are used to work out an entity's total liability under the mechanism, and therefore the number of eligible emissions units the entity must surrender (see Chapter 4). ***[Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)], [Part 1, clause 5, definition of 'provisional emissions number']***

1.58 However, to ensure that emissions from natural gas combustion are not counted twice - once by the liable entity for the facility and once by the natural gas supplier to the facility - covered emissions that are from the combustion of natural gas will not count towards the facility PEN when a natural gas supplier is responsible for emissions embodied in the natural gas. A liable entity for a facility will know whether they are responsible for the natural gas combustion emissions from the facility as follows:

- the liable entity for the facility will be responsible for the emissions if an OTN has been quoted for the gas supplied to the facilty;

- the supplier of gas to the facility will be responsible for the embodied emissions if an OTN has *not* been quoted for the gas supplied to the facilty.

In the case of a large gas consuming facility OTN quotation is mandatory and therefore liability will always rest with the liable entity for the facility.

Further information about OTNs is provided below.

Re-allocation of liability for direct emitters under the mechanism

1.59 In certain circumstances liability for a covered facility will be shared between two or more entities. In other circumstances a liable entity may transfer its liability to one or more other persons. The situations covered by the bill are:

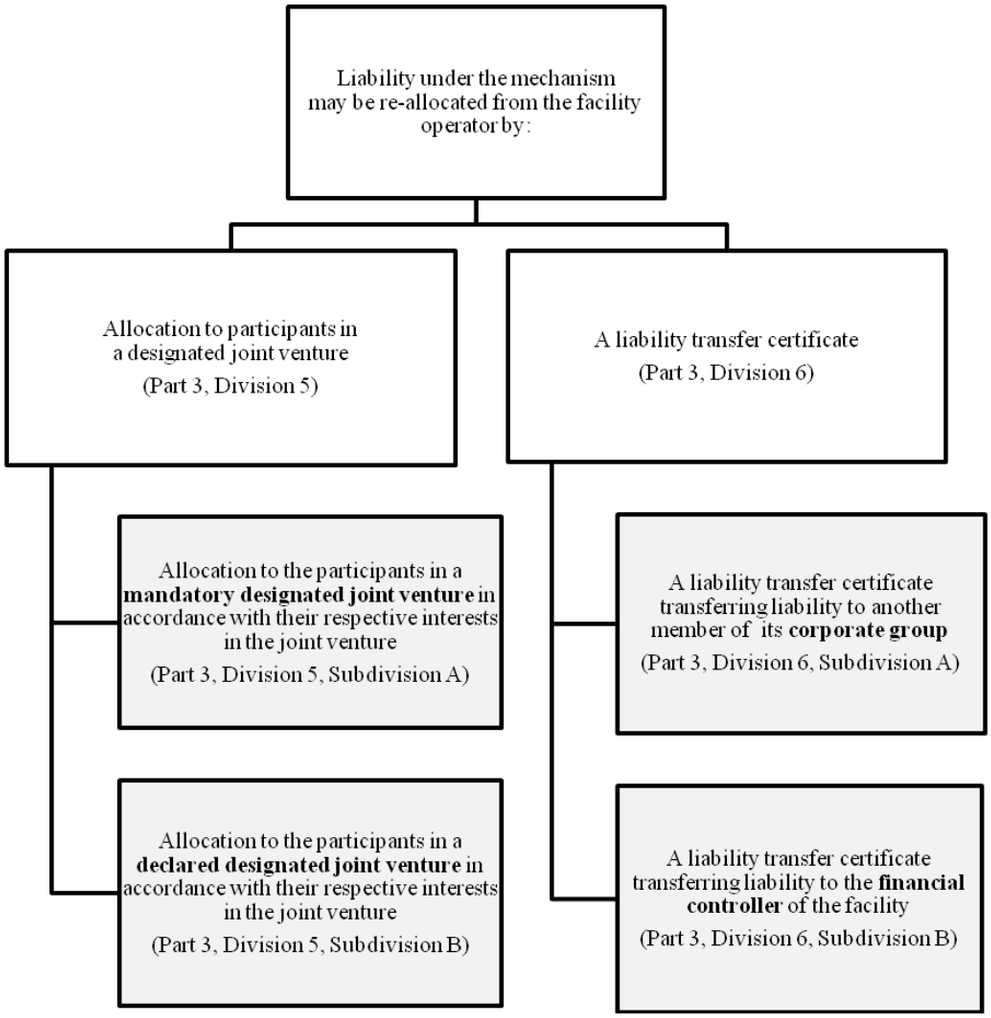
- where the JV participants in a JV collectively operate a facility, liability will be allocated amongst those participants.

- a direct emitter may share or transfer liability to the participants in a JV.

- a direct emitter may transfer liability to another member of its corporate group or the financial controller of the facility outside of the corporate group by means of a LTC.

These arrangements are shown in **Diagram 1.2**.

Diagram 1.2 Re-allocation of liability by direct emitters



Designated joint ventures

1.60 Where a JV has a covered facility, specific rules apply to the way in which liability for that facility's emissions will be treated under the mechanism. These rules ensure that liability for a facility is allocated where the JV participants collectively operate a facility and assist with the efficient management of liability under the mechanism. Where there is a distinct operator the treatment of JVs differs, depending on whether the JV is a:

- mandatory designated JV; or
- declared designated JV. ***[Part 1, clause 5, definition of 'designated joint venture'], [Part 1, clause 5, definition of 'joint venture']***

Mandatory designated joint ventures

1.61 A mandatory JV exists where:

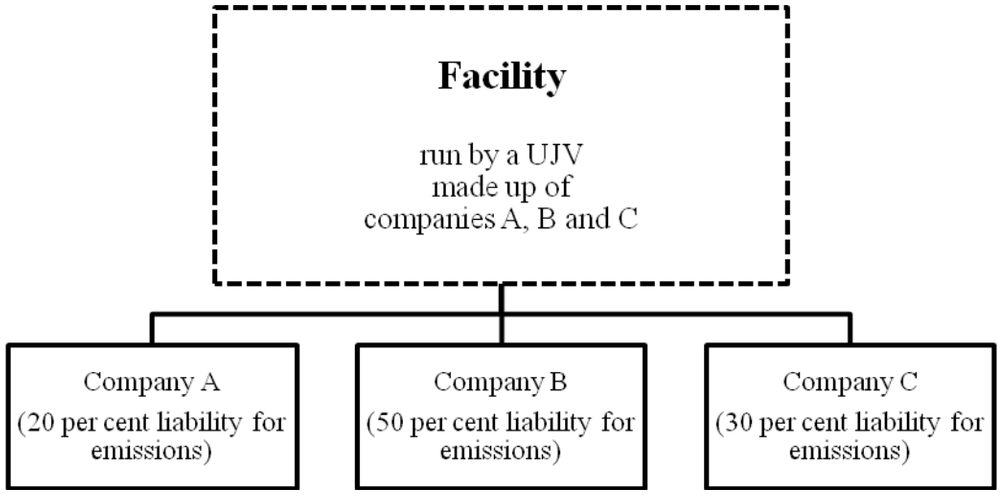
- a JV has a facility; and
- the JV participants have an agreement concerning the facility; and
- two or more persons have the ability to introduce the operational, health and safety and environmental policies at the facility (that is, satisfy the requirements of section 11(1)(a) of the NGER Act); and
- no one person has greater authority to introduce the operational, health and safety and environmental policies (and no declaration has been made by the Regulator under sections 55 or 55A the NGER Act that a person has operational control of the facility),

(see **Example 1.5**). ***[Part 3, clause 65], [Part 1, clause 5, definition of 'mandatory designated joint venture']***

1.62 Where there is no one party with operational control of a facility operated by a JV, JV participants are likely to hold separate contracts for the sale of outputs of the facility and may not have arrangements in place that allow for the pass-through of the carbon price in those contracts.

1.63 Imposing mandatory liability on each of the JV participants will maximise the chance that change of law or price pass-through clauses in contracts will be triggered, so as to allow for pass-through of the price to customers.

Example 1.5 Mandatory designated joint venture



Companies A, B and C are members of an unincorporated JV that operates an emitting facility. They receive shares in the output of the facility of 20 per cent, 50 per cent and 30 per cent respectively. They collectively operate the facility, and no one party has the most authority to implement operational, health and safety and environmental policies.

Accordingly, liability for the emissions from the facility will be allocated to cach company in proportion to its interest.

1.64 The requirements that:

- a JV has a facility; and
- that JV participants have an agreement in place for the facility,

are intended to ensure that the JV is sufficiently related to the facility, and that the JV participants should have liability for the facility, even if the JV participants do not formally own the facility. ***[Part 3, clause 65(1)(a)]***

1.65 The JV participants must notify the Regulator that they are participants in a JV, and of the facility to which the JV relates, by 31 July 2012 (where a facility already exists on 1 July 2012), or within 30 days of the JV coming into existence (for a JV that comes into existence after 1 July 2012). ***[Part 3, clause 66(1), (2) and (3)]***

1.66 Where a JV ceases after 1 July 2012to be a mandatory designated JV and it would be reasonable to expect that, were the JV a company (rather than a JV), the company would be a liable entity, then the JV participants must jointly notify the Regulator within 30 days if a JV ceases to fulfil the requirements for a mandatory designated JV. A JV will cease to be a mandatory designated JV is any of the requirements of clause 65 are no longer satisfied. ***[Part 3, clause 66(4)]***

1.67 The participants must also apply for a 'participating percentage determination', which is used to allocate liability for the emissions from the facility between the JV participants. ***[Part 3, clause 66(5)]***

1.68 If a person fails to notify the Regulator of the JV, or of the cessation of a JV that has previously been declared a mandatory designated JV, then they are liable to pay a civil penalty. ***[Part 3, clause 66(6)]***

Declared designated joint ventures

1.69 A declared designated JV is where:

- the JV has a facility; and
- the JV participants are parties to an agreement concerning the facility; and
- a facility is operated exclusively for the JV by a person who may be a JV participant; and
- none of the participants is an individual; and
- the JV is not a mandatory designated JV.

(see **Example 1.6**). For the purposes of the mechanism, this is the 'joint venture declaration test'. ***[Part 3, clause 67], [Part 1, clause 5, definition of 'declared designated joint venture']***

1.70 This transfer of liability recognises the potential complexity of JV arrangements and facilitates efficient management of emissions liabilities by the participants.

1.71 As the operator of the facility may change over time, and that accordingly provisions that refer to the operator should refer it is the current operator (the 'relevant operator') that is involved in processes such as consenting to the start date of a JV declaration. ***[Part 3, clause 67A]***

1.72 The JV participants can apply to the Regulator for a declaration that the JV is a declared designated JV if they have the written consent of

the relevant operator and have provided any other documents required by the regulations or information requested by the Regulator. ***[Part 3, clause 68], [Part 3, clause 69]***

1.73 Before making a declaration, the Regulator can require the participants to provide more information about the application, and must not make a declaration unless satisfied that the JV meets the required criteria, namely:

- the JV passes the JV declaration test;
- the applicants have, and are likely to continue to have, the capacity, the access to information and the financial resources necessary for them to comply with the mechanism; and
- such other requirements as are specified in regulations. ***[Part 3, clause 70]***

1.74 If a JV participant has previously been subject to obligations under the Clean Energy Act (once enacted) or associated legislation, the Regulator must also be satisfied that the participant has a satisfactory record of complying with those obligations. This provision is intended to provide additional assurance that the participants in the JV will meet their obligations under the mechanism by excluding participants that, irrespective of their capacity to meet obligations, might have a history of not meeting those obligations.

1.75 The declaration of the designated JV may come into effect from an earlier date than the declaration is made, as long as that date is within the same financial year. The declaration may also come into effect in the future, at a date up to the end of the following financial year. In each case the applicants and the relevant operator must consent to the start date. This provides additional flexibility around the application to facilitate forward planning and certainty for participants, and to reduce time pressure on processing applications. ***[Part 3, clause 71]***

1.76 The declaration continues indefinitely, although the Regulator must revoke the declaration if:

- requested by the JV participants, with the consent of the current operator of the facility;
- the Regulator is satisfied that the JV no longer meets the JV declaration test for that facility; or
- there is a continuing failure by one of the JV participants to pay a unit shortfall. If a JV participant has an outstanding shortfall

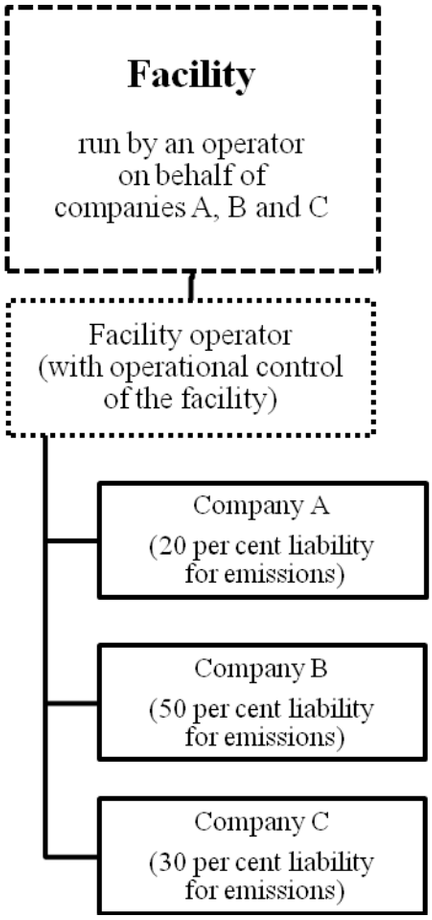
charge for more than 3 months the Regulator must notify all of the JV participants that their declaration will be revoked by the next 1 July unless the shortfall charge is paid, If the payment is not made by 1 July the Regulator must revoke the declaration by written notice to the JV participants. ***[Part 3, clause 72]***

1.77 In the last case, The liability for the emissions from the facility *from* 1 July will return to the operator of the facility, but the liabilities for emissions up to that time will remain separately with the JV participants (that is, the operator and the other JV participants will not have liability for the default on emissions, which will remain with the defaulting participant).

1.78 This provision is intended to ensure that a JV participant cannot fail to meet its obligations indefinitely. The declared designated JV is allowed to continue until 1 July to allow an opportunity for the JV participants to seek to bring the defaulter back into compliance, and to provide certainty for the operator and JV participants about emissions liabilities for the remainder of the financial year. ***[Part 3, clause 67], [Part 3, clause 71], [Part 3, clause 72]***

1.79 The participants in a declared designated JV will also be required to jointly notify the Regulator within 30 days if the JV ceases to pass the designated JV declaration test in relation the facility. A JV will cease to pass the test if any of the requirements in clause 67 are no longer satisfied. ***[Part 3, clause 71A]***

Example 1.6 Designated declared JV arrangements



Companies A, B and C are JV participants.

A facility is operated for the JV, but the party with operational control (and therefore liability) is an independent contractor that operates the facility (this transfer would also apply if the operator was owned by the JV participants or if one of the JV participants was the operator).

The JV members apply to the Regulator for a declaration and, if granted, each is liable for the facility's emissions in proportion to its interest in the facility.

Participating percentage declaration

1.80 Designated JV participants must make an application to the Regulator for a participating percentage declaration. This sets out the shares of liability for emissions from the facility for each JV participant. The application must be made in an approved form and the Regulator may request further information concerning the application. ***[Part 3, clause 73], [Part 3, clause 74], [Part 3, clause 75]***

1.81 The Regulator must make a determination of the 'participating percentage' of emissions for each participant in the JV, with the percentages adding up to 100 per cent of the facility's emissions. ***[Part 3, clause 76]***

1.82 The participating percentage determination must be made according to a hierarchy of criteria, namely:

- the share of goods each participant receives from the facility; then
- if the first criterion does not apply, the share of access to services that each participant has; then
- if the second criterion does not apply, any criteria set out in regulations. ***[Part 3, clause 78]***

1.83 The participants in a designated JV may also apply for a replacement participating percentage determination to replace an existing one. This is intended to allow for changes in the interests of the participants over time, for instance if it is known that the amount of the output of the facility taken by each participant will change as the JV progresses. The percentages must always add up to 100 per cent so that all covered emissions from a facility are accounted for. ***[Part 3, clause 79]***

1.84 The determination can also be specified as a formula, for instance based on participant shares of a variable product mix from the facility. This flexibility recognises that JVs may be complex and evolve over time. A static allocation of percentages might not reflect changing interests, and require frequent changes to the determination. ***[Part 3, clause 76]***

1.85 The Regulator may also make a determination on its own initiative, but before making any such determination must provide a copy to the JV participants and have regard to submissions made within a specified period, which is not to be less than 28 days. ***[Part 3, clause 77]***

1.86 At each step the Regulator can accept an alternative percentage if it is satisfied that this reflects equally well or better the economic

benefits received by JV participants. The determination may also be varied by the Regulator issuing a replacement determination. ***[Part 3, clause 78], [Part 3, clause 79]***

1.87 This approach is intended to provide flexibility to recognise the wide range of JV arrangements, while ensuring that the sharing of emissions liability between JV participants accurately reflects the economic benefits participants receive from the facility and minimising risks of avoidance activities concerning the distribution of liability for emissions from the facility.

1.88 The participating percentage determination will come into force on a date specified in the determination. For a new designated JV this date must be the same as the date of the declaration of the JV (that is, the participating percentage must apply from the start date of the designated JV).

1.89 For a designated JV which is already in existence but is receiving a replacement participating percentage determination, the determination may come into force at an earlier date than the determination, as long as it is in the same financial year, or a later date as long as it is before the end of the next financial year. In either case the JV participants and the operator of the facility must consent to the date. This is intended to allow flexibility for JV participants to apply for a determination in advance, or to backdate the determination to reflect the timing of a change in circumstances of the designated JV. ***[Part 3, clause 78A]***

Liability transfer certificates

1.90 The operator of a facility that is a direct emitter may transfer its liability to a range of other specified entities by means of an LTC. LTCs take two forms: corporate group transfers and financial control transfers. ***[Part 1, clause 5, definition of 'liability transfer certificate']***

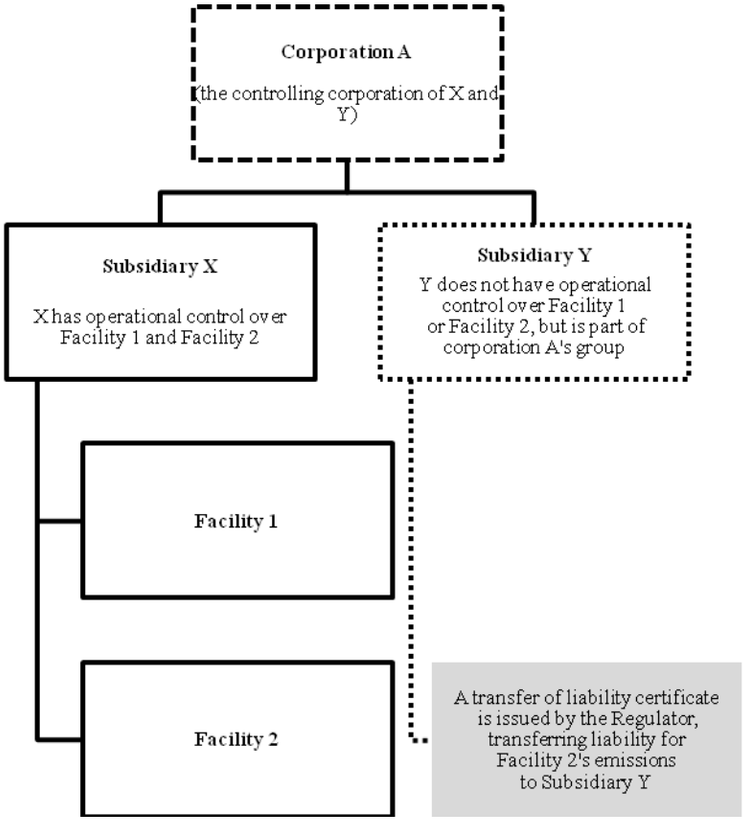
Corporate group transfer test

1.91 A registered company can apply to the Regulator for an LTC to transfer to itself liability for a facility, where the facility is under the operational control of another company within the same corporate group. ***[Part 3, clause 80], [Part 3, clause 81], [Part 1, clause 5, definition of 'corporate group transfer test']***

1.92 Where an LTC is issued, the operator is taken to have guaranteed the payment of any unit shortfall charge or associated late payment penalty which is payable by the holder of the LTC for the relevant financial year. ***[Part 6, clause 138]*** This ensures that there is always

a liable entity for a covered facility and prevents the transfer being used to avoid emission liabilities.

Example 1.7 Corporate group liability transfer



A corporate group LTC is issued for Subsidiary Y concerning Facility 2.

Subsidiary Y takes on the emissions liability for Facility 2 under the mechanism. As a liable entity subsidiary Y also has requirements to provide reports, under the NGER Act, to the Regulator for the purposes of determining emissions obligations (see Schedule 1, Part 2, Item 367 of the Consequential Amendments bill).

Corporation A will not have emissions obligations or liability for Facility 2 but, as the controlling corporation of the corporate group, will continue to have reporting obligations under the NGER Act.

Subsidiary X will, however, have consented to the application for the transfer and in doing so will have guaranteed the payment of shortfall charges incurred by Subsidiary Y.

Facility 2 will continue to form part of Corporation A's group for the purposes of meeting the NGER Act group thresholds, and Corporation A will retain general reporting obligations under the NGER Act.

Financial control transfer test

1.93 Liability may be transferred from the operator of a facility to another person who has 'financial control' (see below) over the facility. ***[Part 3, clause 84], [Part 1, clause 5, definition of 'financial control'], [Part 1, clause 5, definition of 'financial control transfer test']*** As the person with financial control of a facility may also have an influence over its emissions, it is appropriate to let that person accept liability with the agreement of the operator.

1.94 Transfers are not allowed to certain persons:

- the person cannot be an individual person; this avoids complications that may arise when an individual person is liable, such as the person's death or incapacity.

- the person cannot be a foreign person; this prevents liability from being transferred to a person overseas to avoid compliance under the mechanism, recognising that it would be more difficult enforce obligations against a foreign person. ***[Part 1, clause 5, definition of 'foreign person']***

- the person cannot be within the same controlling corporation's group as the operator; this is because an application for a transfer in this instance is intended to be made under the corporate group transfer test,

(see **Example 1.8**). ***[Part 3, clause 84]***

1.95 In many circumstances the operator of a facility has financial control of that facility. However, in some circumstances, for example contract mining and pipeline operations, the person with financial control of a facility contracts out the operation of a facility to another person.

1.96 'Financial control' covers a person that has a significant ability to control a facility through financial means only and, therefore, can give effect to decisions concerning emissions reductions. It is not intended to include an agent or person acting on behalf of an entity that has financial or operational control of a facility that does not have any direct influence on emissions reductions. ***[Part 3, clause 92]***

1.97 'Financial control' recognises that more than one person may have financial control over a facility. For example, several persons may be participants in a JV or partnership that collectively have financial

control of a facility. In these circumstances, the person with the equal or greatest share in the economic benefits from a facility will have financial control for the purposes of the mechanism. ***[Part 3, clause 92]***

Criteria for the issue of a liability transfer certificate

1.98 An entity must meet the same criteria for the issue of an LTC by the Regulator for a corporate group transfer (see above). ***[Part 3, clause 87]*** These criteria are included to ensure that an entity has the capacity, access to financial resources and information to comply with its obligations under the mechanism, as well as the NGER Act.

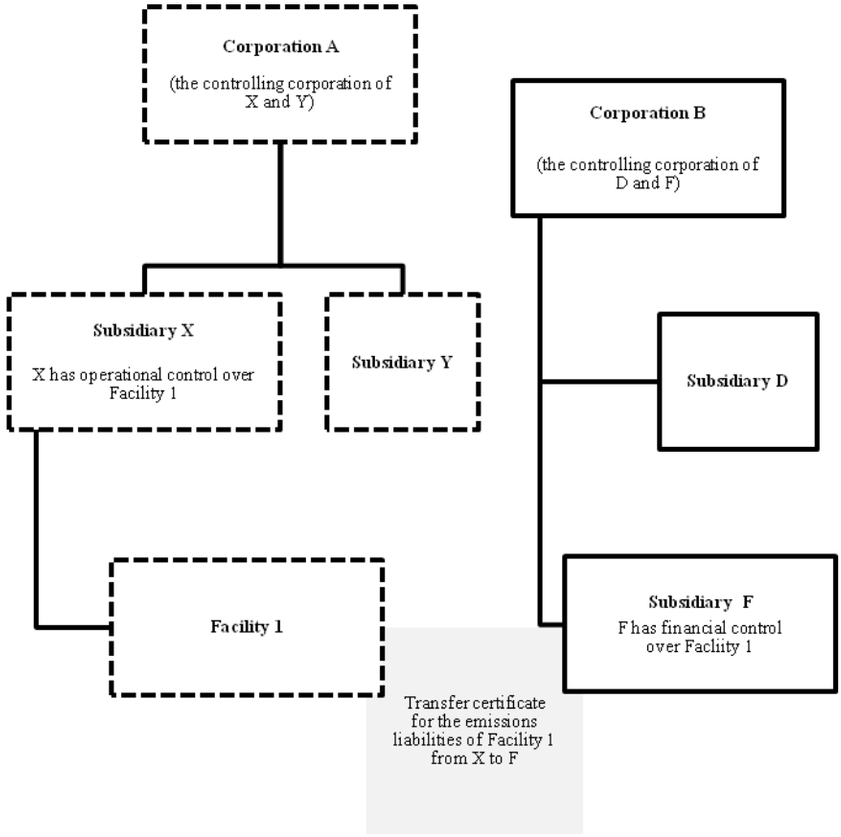
1.99 The financial criterion ensures that a person does not transfer liability to a person that cannot meet mechanism obligations in order to avoid or delay compliance. This test is not, however, intended to involve an exhaustive explanation by the applicant of its financial situation. ***[Part 3, clause 87]***

Reporting obligations and liability transfer certificates

1.100 The LTC holder will take on any obligation to report under the NGER Act for a facility under a financial control LTC. This includes reporting obligations concerning not only greenhouse gas emissions, but also energy production and energy consumption where currently required under the NGER Act. This is given effect by the Consequential Amendments bill (see Schedule 1, Part 2, items 175-181 of the Consequential Amendments bill).

1.101 The LTC holder will not take on any obligation to report under the NGER Act for a facility which is the subject of a corporate group LTC because general reporting obligations under the NGER Act do not follow the transfer, but remain with the controlling corporation of the corporate group.

Example 1.8 Transfer of liabilities from the operator to the financial controller of a facility



Subsidiary F, which is part of Controlling Corporation B's group, has financial control over Facility 1. Subsidiary F (with consent from Corporation A and Corporation B) applies for an LTC.

An LTC is issued and Subsidiary F takes on all obligations and liability for Facility 1 under the mechanism and under the NGER Act — this includes reporting concerning emissions, energy production and energy consumption.

Corporation A will not have obligations or liability for Facility 1 under the mechanism or under the NGER Act.

Application process for a liability transfer certificate

1.102 An application for an LTC must be made in writing in a form approved by the Regulator and include specific information:

- An application for a corporate group LTC must be accompanied by a written statement from the operator of the facility that it has operational control of the facility, is a member of the same corporate group as the transferee and consents to the transfer. ***[Part 3, clause 81(c)], [Part 1, clause 5, definition of 'member']***

- An application for a financial control LTC must include the written consent of the controlling corporation of the corporate group (if the operator is a member of a corporate group), or the facility operator. In either case, the application must include any information and documents specified in the regulations. This is intended to include information and documents that support an entity's application and demonstrate that the entity meets the criteria for the issue of an LTC. ***[Part 3, clause 85(3)]***

1.103 To assist the Regulator's decision making, the Regulator may request further information about an application within a period specified in a notice given by the Regulator. The Regulator must ensure that the information requested is relevant to its consideration of the application and must exercise this power reasonably. ***[Part 23, clause 297]*** If the applicant does not provide the information in the time required, then the Regulator may refuse to consider the application or refuse to take any action, or any further action, concerning the application. ***[Part 3, clause 82], [Part 3, clause 86]***

1.104 The Regulator must take all reasonable steps to ensure that a decision is made on an application for an LTC within 90 days of receiving an application or within 90 days of being given further information. The Regulator must inform an applicant in writing if it decides to refuse to issue an LTC. ***[Part 3, clause 83], [Part 3, clause 87]***

Duration of a liability transfer certificate

1.105 The start date may be at an earlier date within the same financial year as the day on which the LTC is issued, or a later date up to the end of the next financial year if the applicant and the relevant parties consent to that start day. This ensures that all persons that may be liable under the mechanism know who is liable for a given period. It also provides flexibility for advance applications to increase certainty for applicants and assist with forward planning to meet obligations under the mechanism. This flexibility may also even out the spread of applications over the year

and consequently spread the workload for the Regulator in assessing applications ***[Part 3, clause 88]***

1.106 Once made, an LTC remains in force indefinitely unless it is surrendered or cancelled. ***[Part 3, clause 88(4)]***

Voluntary surrender of liability transfer certificate

1.107 If an entity wants to surrender an LTC it must obtain written consent from the Regulator. The Regulator must not consent to the surrender unless:

- where applicable, the controlling corporation(s) or facility operator that agreed to the making of the application for the LTC agrees to the surrender; and
- the LTC has been in force for at least four years; or
- the LTC has been in force for less than four years, but the Regulator is satisfied that there are special circumstances that warrant the giving of its consent to the surrender. ***[Part 3, clause 89]***

1.108 If the Regulator refuses its consent, then it must give written notice to the person. ***[Part 3, clause 89(5)]***

1.109 Special circumstances are unlikely to include a change of operator or contract, as these changes are normal business practice and are foreseeable by a person at the time of their application for an LTC. The four year requirement ensures that the liable entity remains consistent and prevents multiple transfers of liability aimed at avoiding liability. ***[Part 3, clause 89]***

Cancellation of liability transfer certificate

1.110 The Regulator must, by written notice, cancel an LTC in the following circumstances:

- if a company ceases to pass a corporate group or financial control liability transfer tests;
- in the case of corporate group LTC, the company is no longer a member of the controlling corporation's group;
- in the case of a financial control LTC, the holder of the LTC ceases to be a member of the corporate group of the controlling corporation that consented to the application;

- if a company has not paid a unit shortfall charge more than 30 days after it became due for payment;

- if the company has become an externally-administered body corporate (within the meaning of the *Corporations Act 2001*); or

- if regulations specify one or more other grounds for cancellation and at least one of those grounds is applicable to entity. ***[Part 3, clause 90]***

1.111 The cancellation or surrender of an LTC will result in future obligations and liability returning to the person that would have had obligations and liability in the absence of the LTC. The Regulator will be required to provide written notice of the cancellation to the person with operational control of the facility of the cancellation of an LTC to ensure that the operator is aware that it has reassumed liability for the emissions from the facility. ***[Part 3, clause 89], [Part 3, clause 90]***

1.112 Each LTC relates to a single facility. This allows a person to apply for the transfer of liability for particular facilities at different times, as the person's circumstances change. ***[Part 3, clause 80], [Part 3, clause 81]***

1.113 An LTC transfers significant obligations concerning a facility. For this reason an LTC can only be issued by the Regulator and is not transferable. ***[Part 3, clause 91]***

Definitions relevant to direct emitters

'Persons' that may be liable entities

1.114 The mechanism applies to liable entities, which are responsible for their emissions of greenhouse gases. The way in which these entities are liable is set out in Part 3. ***[Part 3, clause 19]***

1.115 A liable entity may be any type of legal person, including an individual, a trust (a trustee or trust estate), a body corporate, corporation sole, a body politic (that is, the Australian, state and territory governments) and a local governing body. ***[Part 1, clause 5, definition of 'person'], [Part 1, clause 5, definition of 'local governing body'], [Part 1, clause 5, definition of 'trust'], [Part 1, clause 5, definition of 'trustee'], [Part 1, clause 5, definition of 'trust estate']***

1.116 The Australian Government and the state, territory and local governments are bound by the bill. In line with normal practice, the Crown is not subject to prosecution for a criminal offence or a pecuniary penalty, with the exception of penalties for late payment of shortfall

charge and for failure to meet relinquishment requirements. This protection does not apply to an authority of the Crown, such as a body conducting a business activity. ***[Part 1, clause 8]***

1.117 Government bodies may be liable under the mechanism if they fall within the criteria set out in Part 3.

Meaning of 'facility'

1.118 'Facility' is defined in section 9 of the NGER Act. Broadly, a facility is an activity, or a series of activities, where:

- greenhouse gas emissions are produced; or
- energy is produced; or
- energy is consumed.

1.119 The activity or activities must form a single undertaking or enterprise and meet requirements in the regulations, or they must be declared to be a facility by the Regulator.[25]

1.120 A 'landfill facility' is defined as a facility for the disposal of solid waste as landfill, and includes a facility that is closed for the acceptance of waste. ***[Part 1, clause 5, definition of 'landfill facility']***

1.121 The landfill provisions are not intended to cover facilities for which disposal of solid waste is a secondary purpose, for example a mine that disposes of mine-generated waste on-site. It should be noted that direct emissions from waste still count towards emissions thresholds and emissions liabilities for facilities that are not landfills.

Measurement of covered emissions

1.122 Under the mechanism, greenhouse gases emitted from the operation of a facility will be measured using methods to be determined under subsection 10(3) of the NGER Act, or methods which meet criteria under that subsection, where the use of those methods satisfies any conditions specified under that subsection. ***[Part 3, clause 31]***

1.123 The Consequential Amendments bill provides for subsection 10(3) of the NGER Act to allow the Minister to determine the methods and criteria for methods by which amounts of emissions are to be

[25] The GEDO's functions will become part of the functions of the Regulator. References to the GEDO in the NGER Act and Regulations will become references to the Regulator (see items 107, 111-143, 157-165, 168-192, 199 and 203 of the Consequential Amendments bill)

measured. A single determination will apply for the mechanism and the NGER Act (see Schedule 1, Part 2, items 337-339 of the Consequential Amendments bill). These methods are currently published in the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*.

Liability for emissions from natural gas

Overview

1.124 Natural gas is used by large facilities, small and medium-sized businesses, and households. Given the significant amount of natural gas used beyond large facilities, a two-tiered approach applies to provide efficient and complete coverage of greenhouse gas emissions embodied in natural gas:

- large users of natural gas are responsible for their own emissions; and
- natural gas suppliers are responsible for the remaining emissions from natural gas used by other end-use customers.

Applying liability to a relatively small number of suppliers is an effective way of applying a carbon price to the natural gas emissions of many small to medium end-users.

1.125 To ensure that there is no double counting of emissions OTNs are used to let suppliers and end-users know who is responsible for the emissions that will result from a particular supply of gas. In some circumstances, there is also flexibility for medium sized gas users to quote an OTN and assume liability for their natural gas emissions, instead of their supplier.

Responsibility for emissions from natural gas combustion

1.126 Under the mechanism liability for natural gas applies to the following entities:

- to a *natural gas supplier* when it supplies gas to another person who does not quote an OTN and when it may reasonably be expected that the gas is wholly or partly for use by that other person ***[Part 1, clause 5, definition of 'distribution pipeline']***
- to a *person who is a liable entity for a large gas consuming facility* (see above); in this case a natural gas supplier is not liable for the emissions when that person quotes an OTN to the supplier;

- other *OTN holders* who are permitted to quote an OTN for natural gas supplied to them. Typically the OTN holder will purchase gas for a facility under its operational control (which is not a large gas consuming facility) and will want to assume liability from the supplier.

These types of liable entities are set out in **Diagrams 1.4** and **1.5**.

1.127 For natural gas suppliers gas liability applies to potential emissions embodied in natural gas and not actual emissions. This is because liability generally arises before the gas is combusted and emissions are released. In practice, there is little difference between the actual emissions arising from the combustion of natural gas among different customers: the use of potential emissions does not lead to material inaccuracies compared with actual emissions.

Diagram 1.3 Liability for gas supplied

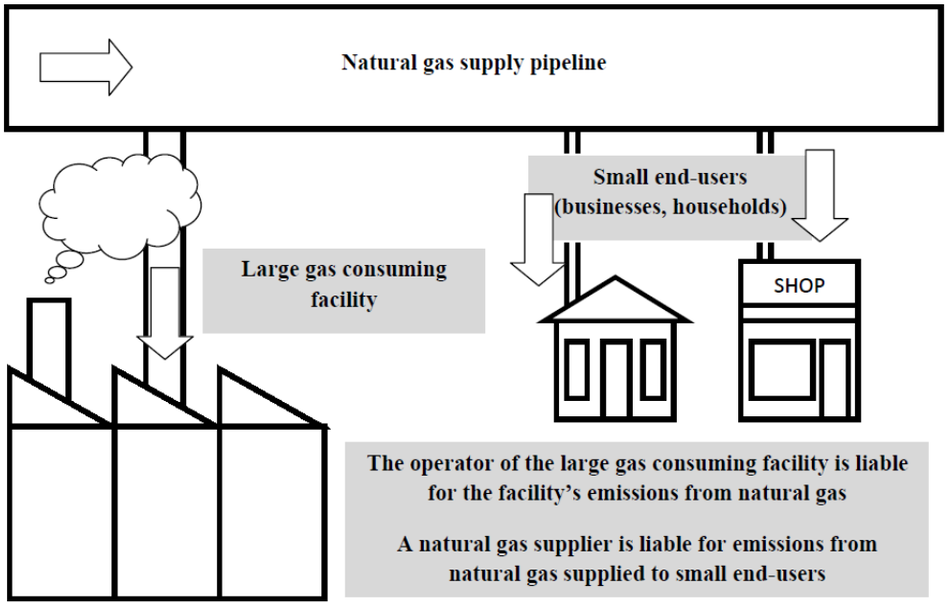
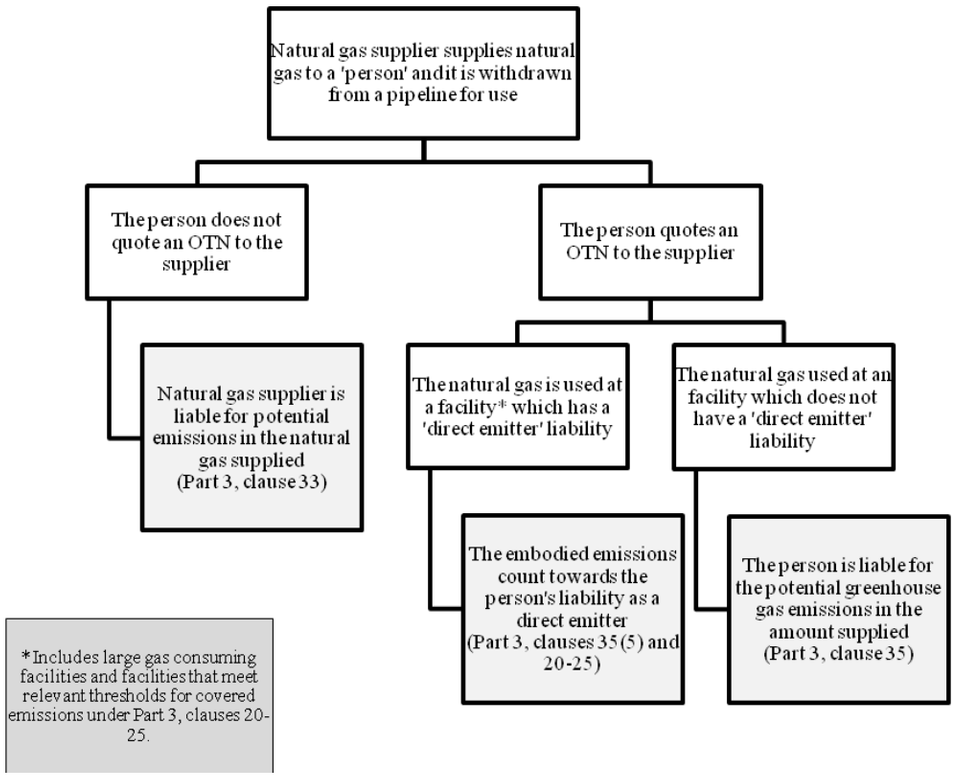


Diagram 1.4 Liability for natural gas



Liability for natural gas suppliers

1.128 Natural gas suppliers are liable where:

- the natural gas has been withdrawn from a natural gas supply pipeline to supply to a customer; and
- it may reasonably be expected that the customer will consume all or part of the gas; and

- the customer does not quote an OTN to the supplier for that natural gas[26];***[Part 3, clause 33], [Part 1, clause 5, definition of 'supply'], [Part 1, clause 6], [Part 1, clause 5, definition of 'natural gas supplier']***

1.129 Any supplies that occur within the natural gas supply pipeline system (which would include both transmission and distribution pipelines), such as wholesale gas supplies between gas producers and gas retailers, do not involve consumption of the gas and, therefore, do not create a liability for the natural gas supplier (in this case, the producer).

1.130 Gas supplies that may result in liability for the gas supplier (assuming no OTN is quoted) include, but are not limited to, supplies to:

- a residential customer;
- a business customer, such as an office building or a small to medium business that uses gas for heating;
- the operator of a gas pipeline, where gas is supplied to the pipeline operator for use in compressors that are attached to the pipeline.

1.131 A supply occurs when the natural gas passes a point ascertained in accordance with the regulations. If the regulations do not specify such a point, a supply occurs at the point when the gas is delivered to the customer. ***[Part 1, clause 6]***

Preliminary and provisional emissions numbers

1.132 Each supply of natural gas for which a natural gas supplier is liable gives rise to a preliminary EN. A preliminary EN is equal to the amount of greenhouse gas emissions in tonnes of CO_2-e embodied in the amount of natural gas supplied, and which is withdrawn from a gas supply pipeline for the purpose of the supply to the customer.

1.133 The PEN of the natural gas supplier is the sum of the supplier's preliminary ENs for the financial year. ***[Part 3, clause 33]***

1.134 The regulations may specify that the natural gas supplier can 'net out' certain amounts of natural gas from their PEN. ***[Part 3, clause 33(3)]*** This allows for 'fine tuning' of a supplier's liability, which addresses specific circumstances where the general rules result in liability being applied in situations when it should not.

[26] OTNs are described below under the heading 'Obligation transfer numbers'

Example 1.9 Natural gas supplier

In a financial year, a GasCorp supplies a total amount of natural gas to its customers with potential emissions embodied in the natural gas of 150,000 tonnes of CO_2-e. Of this amount of natural gas:

- natural gas with embodied emissions of 70,000 tonnes of CO2-e is withdrawn by customers who quote an OTN to the supplier. The supplier is not liable for this amount of emissions – liability rests with the OTN holders.

- natural gas with embodied emissions of 80,000 tonnes of CO2-e is withdrawn by small residential customers who are not required or permitted to quote an OTN. GasCorp is liable for this amount of emissions.

Liability for large gas consuming facilities

1.135 Large gas consuming facilities are responsible for their own emissions (see above). A large gas consuming facility is a facility that, in any previous financial year starting from 2010-11, had emissions from natural gas of at least 25,000 tonnes of CO2-e, or the amount specified in the regulations. This regulation making power allows for the definition of a large gas consuming facility to change to reflect, among other things, future industry arrangements.

1.136 To ensure natural gas suppliers have no liability for these emissions the recipient of natural gas that is for use in the operation of a large gas consuming facility must quote an OTN for the supply of natural gas for use at that facility. ***[Part 3, clause 55A], [Part 3, clause 55B]*** The recipient of the natural gas does not need to be the operator of the large gas consuming facility to be subject to this requirement. Failure to quote an OTN will result in a civil penalty. ***[Part 3, clause 55B(3)]***

1.137 To give a natural gas supplier time to make any necessary supply arrangements, a customer must notify the supplier of its intention to quote an OTN. The notice must be in writing and given to the supplier at least 28 days before the first OTN quotation, or within a shorter time agreed by the supplier and the customer. ***[Part 3, clause 55B(2)]*** A natural gas supplier must accept an OTN quotation made in this way. ***[Part 3, clause 59(4)], [Part 3, clause 60(4)]***

Example 1.10 Large gas consuming facilities

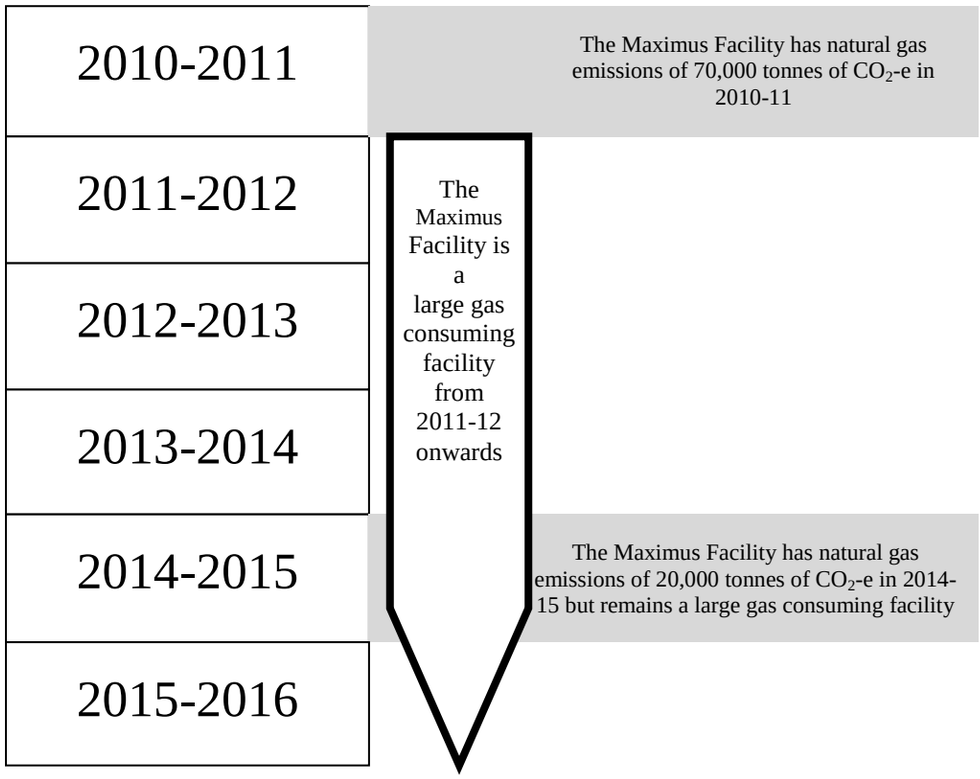
Maximus Gas operates the Maximus Facility, a large facility. Another company, AntheCo, is the recipient of supplies of natural gas from GasCorp for combustion at the Maximus Facility.

In the 2010-2011 financial year, the Maximus Facility had emissions from natural gas combustion of 70,000 tonnes of CO_2-e.

From the 2011-12 financial year onwards (that is, from 1 July 2011), the Maximus Facility is a large gas consuming facility, because its emissions from natural gas combustion in the previous financial year were greater than 25,000 tonnes of CO_2-e.

As the recipient of natural gas for use at a large gas consuming facility, AntheCo is required to quote its OTN to GasCorp. 28 days before the start of the mechanism, AntheCo notifies GasCorp in writing of its intention to quote its OTN. AntheCo quotes its OTN to GasCorp on 1 July 2012 to take on liability for the natural gas supplied.

For a few months during the 2014-2015 financial year, the Maximus Facility temporarily closes, and the natural gas emissions from its operation are only 20,000 tonnes of CO_2-e during that financial year. In 2015-16, the Maximus Facility's natural gas emissions return to 70,000 tonnes of CO_2-e. The Maximus Facility remains a large gas consuming facility, despite dropping below the threshold in 2014-15, because it passed the threshold test in a previous financial year. The OTN quotation by AntheCo remains in place in 2014-15 and future financial years.



Preliminary and provisional emissions numbers

1.138 In some situations natural gas consumed at a facility is purchased by an entity other than the facility operator. In such cases, double counting of liability is avoided by ensuring that where an OTN is quoted for the gas, whether by the facility operator or another person, liability always rests with the liable entity for the facility. ***[Part 3, clause 35(2)], [Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)], [Part 3, clause 20(8)-(9)], [Part 3, clause 21(7)-(8)], [Part 3, clause 22(6)-(7)], [Part 3, clause 23(8)-(9)], [Part 3, clause 24(7)-(8)], [Part 3, clause 25(6)-(7)]***

1.139 In the above circumstances, if some of the natural gas is not ultimately combusted at the facility, the OTN holder will be liable for that portion of natural gas not combusted at the facility. For example, this would apply where a facility owner purchases gas for use at a facility that is operated by another person, but also uses some of the gas at its own smaller facility nearby.

Example 1.11 Large gas consuming facility, where all natural gas received is combusted at the facility

Steel Mill is a large gas consuming facility operated by JCL Limited. Another company, Danmetals Limited, receives supplies of natural gas from a natural gas supplier for combustion at Steel Mill.

In 2012-13, covered emissions from Steel Mill comprise 90,000 tonnes of CO_2-e from use of natural gas.

In a given financial year, Danmetals receives three supplies of natural gas. The amount of natural gas in each supply has embodied emissions of 30,000 tonnes of CO_2-e. All of these amounts of natural gas are combusted at Steel Mill.

Danmetals must quote its OTN to its natural gas supplier, and the supplier must accept the quotation. Usually, under clause 35(1), a preliminary EN arises for OTN holders who quote their OTNs. However, since Danmetals is not the operator of the facility it is not a liable entity.

JCL Limited is liable for Steel Mill's emissions, because the facility has total covered emissions of 90,000 tonnes of CO_2-e.

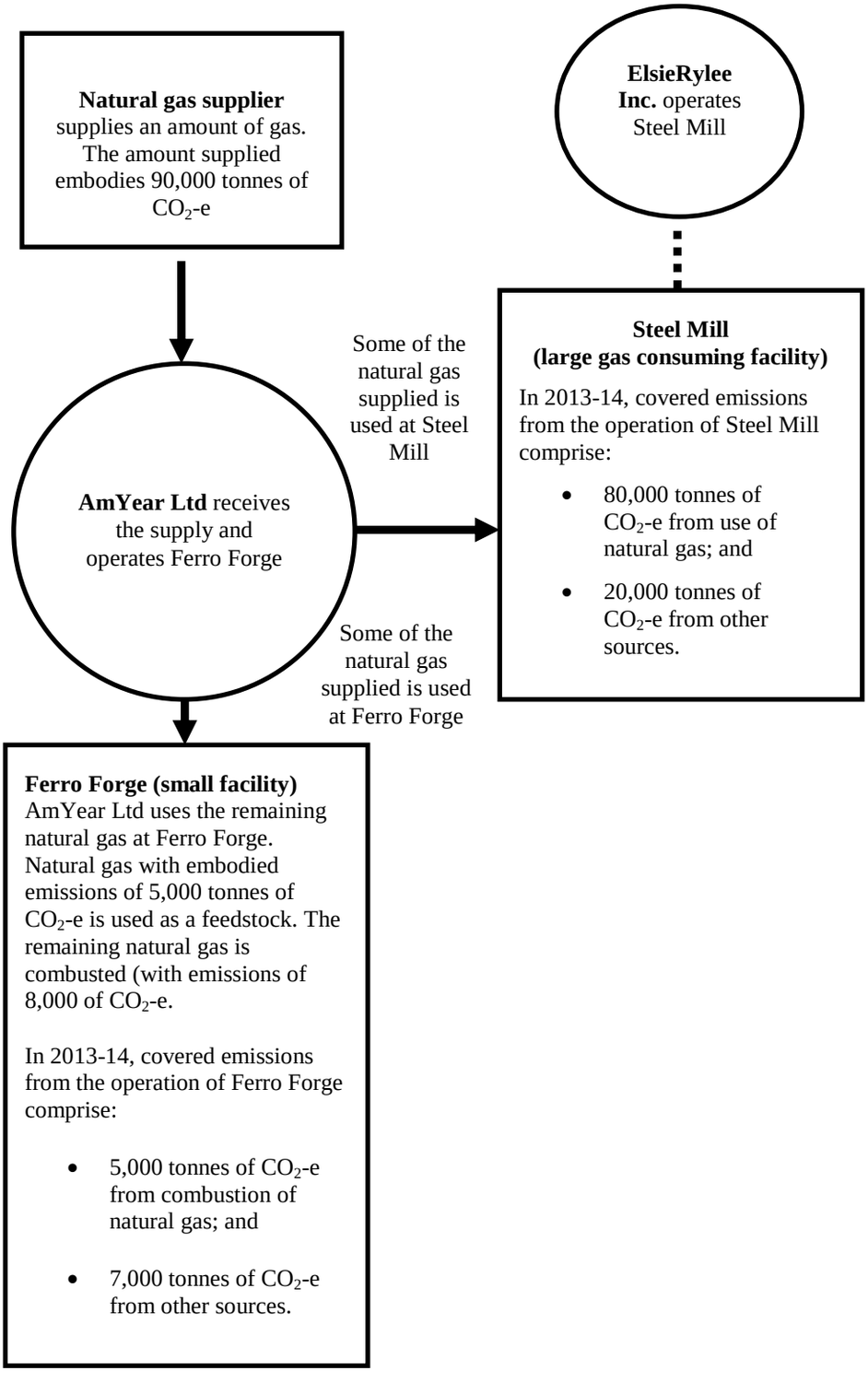
Example 1.12 Liability where some of the gas is not used at the facility

In 2013-14, ElsieRylee Inc. operates Steel Mill and AmYear Ltd receives supplies of natural gas from a natural gas supplier for combustion at Steel Mill.

In 2013-14, AmYear receives supplies of natural gas with total embodied emissions of 90,000 tonnes of CO2-e. Most of this gas is combusted at Steel Mill, resulting in emissions of 80,000 tonnes of CO2-e. The rest of the gas, embodying emissions of 10,000 tonnes of CO2-e, is used by AmYear at Ferro Forge which is under its operational control. AmYear combusts half of this gas at Ferro Forge, resulting in emissions of 5,000 tonnes of CO_2-e. The other half of the gas, embodying emissions of 5,000 tonnes of CO_2-e, is used at Ferro Forge as a feedstock. There are no other emissions from the facility. See diagram below which represents these arrangements.

AmYear must quote its OTN to its natural gas supplier, as the recipient of natural gas to be used at a large gas consuming facility. It is liable for emissions of 5,000 tonnes of CO_2-e from Ferro Forge. No liability arises for natural gas used as a feedstock.

ElisieRylee is liable for emissions of 80,000 tonnes of CO_2-e at Steel Mill.


Natural gas supplier supplies an amount of gas. The amount supplied embodies 90,000 tonnes of CO_2-e
ElsieRylee Inc. operates Steel Mill
Steel Mill (large gas consuming facility)
In 2013-14, covered emissions from the operation of Steel Mill comprise:
• 80,000 tonnes of CO_2-e from use of natural gas; and
• 20,000 tonnes of CO_2-e from other sources.
Some of the natural gas supplied is used at Steel Mill
AmYear Ltd receives the supply and operates Ferro Forge
Some of the natural gas supplied is used at Ferro Forge
Ferro Forge (small facility)
AmYear Ltd uses the remaining natural gas at Ferro Forge. Natural gas with embodied emissions of 5,000 tonnes of CO_2-e is used as a feedstock. The remaining natural gas is combusted (with emissions of 8,000 of CO_2-e.
In 2013-14, covered emissions from the operation of Ferro Forge comprise:
• 5,000 tonnes of CO_2-e from combustion of natural gas; and
• 7,000 tonnes of CO_2-e from other sources.

Liability for OTN holders who voluntarily take on liability

1.140 In certain situations, entities can quote an OTN and take on liability for natural gas emissions where the natural gas is not for use in a large gas consuming facility. In these circumstances OTN quotation is voluntary. ***[Part 3, clause 56], [Part 3, clause 57], [Part 3, clause 58], [Part 3, clause 59], [Part 3, clause 60]***

1.141 There are two types of voluntary OTN quotation:

- the first is where a supplier must accept the OTN quotation. This is the case where natural gas will be used in a way that does not result in emissions (including as a feedstock) or where the gas is converted into LPG, LNG or CNG that will subsequently fall within the fuel tax system.

- the second is where a supplier *may* accept an OTN quotation but they are not required to do so. This applies where a person is permitted to quote an OTN for a large gas consuming facility and has other facilities under their operational control that are not large gas consuming facilities. This also applies where a person expects that a facility under their operational control will become a large gas consuming facility in the future.

Voluntary OTN quotations

Eligibility to quote an OTN where quotation is voluntary

1.142 Entities eligible to voluntarily quote an OTN to a natural gas supplier and assume liability for embodied emissions from natural gas are:

- large users of natural gas; ***[Part 3, clause 56(1)(e)(ii)]***

- persons approved by the Regulator; ***[Part 3, clause 56(1)(e)(i)]***

- users of natural gas as a feedstock; ***[Part 1, clause 5, definition of 'feedstock']***

- users of natural gas in manufacturing CNG, LNG or LPG. ***[Part 3, clause 56(1)], [Part 3, clause 57], [Part 3, clause 58]***

Large user of natural gas

1.143 A person is a large user of natural gas if they are required to quote their OTN because they are the recipient of natural gas for use at a large gas consuming facility. ***[Part 3, clause 55B]***

1.144 If a person is a large user of natural gas, they may quote an OTN to their natural gas supplier to assume liability for natural gas supplied for use at other facilities which are under their operational control which do not meet the 'large gas consuming facility' threshold. ***[Part 3, clause 56]***

1.145 This approach allows large users of natural gas to manage all their liability for natural gas, as long as one facility for which they receive natural gas was a large gas consuming facility. This will simplify billing arrangements where a large fuel user purchases natural gas from one supplier for use at more than one facility.

Example 1.13 Large user of natural gas

SDK has operational control over a large manufacturing plant and is supplied natural gas for use at the plant which it withdraws from a natural gas supply pipeline. In 2010-11 emissions from the plant comprise 40,000 tonnes of CO_2-e from use of natural gas.

In 2012-13, SDK is required to quote an OTN to take on liability for emissions from this supply of natural gas because the plant is a large gas consuming facility.

SDK also has operational control over another smaller plant which is a facility in its own right. In 2011 emissions from this second plant comprise 15,000 tonnes of CO_2-e from use of natural gas.

In 2012-13, SDK is permitted to quote an OTN to its natural gas supplier for the natural gas supplied to it at the smaller plant. It is permitted to do this because it is required to quote its OTN as the recipient of natural gas for use at a large gas consuming facility.

The company makes an OTN quotation in its natural gas supply contract, and the OTN quotation is accepted by the natural gas supplier. SDK must manage mechanism obligations for all natural gas supplied under this contract.

Approved person

1.146 An 'approved person' can also quote an OTN for natural gas supplied to them by a natural gas supplier. ***[Part 3, clause 56(3)]*** Entities can apply to the Regulator to become an approved person in accordance with the specified procedures and requirements. ***[Part 3, clause 56(4), (5) and (6)]*** The Regulator will only approve an application if satisfied that the person

operates a facility and it is likely that this facility will have emissions from natural gas of at least 25,000 tonnes of CO_2-e, or an amount specified in the regulations. ***[Part 3, clause 56(8)]***

1.147 This allows entities that do not yet qualify as a 'large user' to quote an OTN if a facility that they operate is likely to exceed the large gas consuming facility threshold. This might occur, for example, where an entity expects to permanently increase production at an existing facility or where they are setting up a new facility.

Example 1.14 Start-up company that expects to be a large user of natural gas

NatGas is in the process of commissioning a manufacturing plant. It expects to emit 50,000 tonnes of CO_2-e of greenhouse gases from the combustion of natural gas withdrawn from a distribution pipeline in its first year of operation. NatGas applies to the Regulator for an OTN and submits all information and documents specified in the regulations.

The Regulator assesses the application and decides that it is likely that NatGas's emissions from natural gas combustion will exceed the threshold value specified in the regulations. The Regulator, by written notice, declares that the company is an *approved person*. NatGas is permitted to quote an OTN for the natural gas it purchases for its new electricity plant.

User of natural gas as a feedstock

1.148 If a person uses natural gas as a feedstock, they may quote an OTN to their natural gas supplier to assume liability for embodied emissions in natural gas supplied to them. ***[Part 3, clause 57]*** 'Feedstock' is defined as 'a substance that is converted by a chemical process into another substance that is not a greenhouse gas'. ***[Part 1, clause 5, definition of 'feedstock']***

1.149 The person may 'net out' from their gross liability any amounts of natural gas which are used as a feedstock and which therefore do not result in greenhouse gas emissions. No liability arises for uses of natural gas which ultimately do not result in the release of greenhouse gas into the atmosphere.

User of natural gas in manufacturing CNG, LNG or LPG

1.150 An equivalent carbon price applies to CNG, LNG and LPG at the point that these fuels attract excise and customs duty through fuel taxation legislation.

1.151 Some entities manufacture these fuels from natural gas supplied by a natural gas supplier. Without special provision, liability under the

mechanism might arise for these fuels twice: once through the mechanism when the fuel is supplied by a natural gas supplier, and again when an 'equivalent carbon price' is applied at the time that excise or customs duty is paid on the CNG, LNG or LPG.

1.152 Therefore, if a person receives natural gas from a supplier, and carries on a business manufacturing CNG, LNG or LPG, the person may quote an OTN to the natural gas supplier for the natural gas supplied. ***[Part 3, clause 58]***

1.153 As with users of natural gas as a feedstock, the person can 'net out' from their gross liability for the emissions embodied in any amounts of natural gas which are used to manufacture these fuels. This will avoid applying a carbon price twice to these fuels.

Mandatory acceptance of OTN quotation for natural gas used as a feedstock or in manufacturing CNG, LNG or LPG

1.154 To ensure that a carbon price is not applied to non-emissive uses of natural gas, and that a carbon price is not applied twice to fuels which enter the excise system, natural gas suppliers are required to accept an OTN quotation for a supply of natural gas which is used as a feedstock or in manufacturing CNG, LNG or LPG. ***[Part 3, clause 59(4)], [Part 3, clause 60(4)]***

1.155 Where a person makes an OTN quotation that a supplier must accept the OTN holder must provide the supplier with a written declaration that sets out that quotation is being made under a relevant section of the Bill. ***[Part 3, clause 59(3)], [Part 3, clause 60(3)]*** It is an offence to make a false or misleading declaration. The maximum penalty is a period of imprisonment for up to 12 months. ***[Part 3, clause 62]***

Preliminary and provisional emissions numbers

1.156 Each supply of natural gas for which an OTN is quoted gives rise to a preliminary EN for the OTN holder. The exception to this rule is where natural gas is supplied for use in a large gas consuming facility (see above). A preliminary EN is equal to the number of tonnes of potential greenhouse gas emissions embodied in the amount of natural gas supplied, in CO_2-e.

1.157 The PEN of the OTN holder is the sum of the OTN holder's preliminary ENs for the financial year. ***[Part 3, clause 35(3)]*** If an OTN holder has a PEN, they are a liable entity under the mechanism.

Netted-out numbers

1.158 Particular amounts of natural gas can be 'netted out' from an OTN holder's PEN. The OTN holder's PEN is reduced by the netted-out numbers (but not below zero). ***[Part 3, clause 35(4)-(9)]*** The purpose of netted out numbers is to reduce the PEN (but not below zero) to take account of:

- the need to avoid double counting, that is to account for where a PEN has arisen for that gas under another provision of the Bill; and

- uses of natural gas which do not result in greenhouse gas emissions; and

- amounts of natural gas that will be manufactured into a substance which will have a carbon price applied through alternative arrangements (i.e CNG, LNG or LPG). ***[Part 3, clause 35(4)-(8)]***

1.159 In particular, if an OTN holder quotes an OTN for an amount of natural gas, a netted-out number arises for the OTN holder where:

- the OTN holder used an amount of that natural gas as a feedstock or in a way that did not result in greenhouse gas emissions; ***[Part 3, clause 35(5)]***

- an amount of that natural gas counts towards the OTN holder's 'direct emitter' liability under Division 1 of Part 3; ***[Part 3, clause 35(6)]*** Note that this netted out number does not apply to amounts of natural gas combusted at a large gas consuming facility as these amounts do not give rise to a PEN under clause 35(3) in the first place.

- the OTN holder manufactures CNG, LNG or LPG from an amount of that natural gas, and the OTN holder holds a licence under the *Excise Act 1901* to manufacture that fuel, and that fuel is entered for home consumption and attracts excise duty; and ***[Part 3, clause 35(7)]***

- the OTN holder supplies an amount of that natural gas to another person who quotes their OTN concerning the supply. ***[Part 3, clause 35(8)]***

- the regulations provide for additional netted out numbers. These will be included where necessary provided they are consistent with the purposes of clause 35. ***[Part 3, clause 35(9)]***

1.160 Once netted-out numbers are taken into account, a person may have a PEN that is greater than zero. This will represent the potential greenhouse gas emission embodied in amounts of natural gas that are combusted at facilities that are not covered facilities.

Example 1.15 Feedstock user of natural gas

JBurn Limited (JBurn) receives an amount of natural gas from AK Gas. JBurn uses a portion of the natural gas as a feedstock in a fertiliser manufacturing process that completely sequesters the natural gas into the fertiliser. JBurn also uses a portion of the natural gas for heating purposes.

JBurn quotes its OTN to AK Gas concerning the supply. AK Gas is required to accept this OTN quotation, as it is made by a feedstock user of natural gas.

The emissions embodied in the portion of gas which is used as a feedstock is a netted-out number. JBurn will not be liable for these potential emissions. However, JBurn will be liable for greenhouse gas emissions released from the portion of fuel combusted for heating purposes. It will have a PEN which is equal to the potential emissions embodied in the natural gas supplied by AK Gas minus the netted-out number representing the use of gas as a feedstock.

Example 1.16 OTN quotation for natural gas used to produce CNG

The WA Facility is operated by JW Pty Limited (JW). In 2012-13, JW receives a number of supplies of natural gas from its supplier with total embodied emissions of 30,000 tonnes of CO_2-e.

In 2012-13, covered emissions from the operation of the WA Facility comprise:

- 15,000 tonnes of CO_2-e from use of natural gas; and
- 5,000 tonnes of CO_2-e from other sources.

In 2012-13, natural gas with embodied emissions of 15,000 tonnes of CO_2-e is converted into CNG at the WA Facility and on-sold to another company.

JW quotes its OTN to its natural gas supplier because it creates CNG from natural gas. The supplier is required to accept the OTN quotation.

JW (as the OTN holder) receives a preliminary EN under clause 35(1) for each supply of natural gas in 2012-13. JW is a liable entity under clause 35(3).

JW adds the preliminary ENs to give a PEN of 30,000 tonnes of CO_2-e, however it nets-out from this amount 15,000 tonnes of CO_2-e for natural gas converted to CNG under clause 35(7). Therefore under clause 35, JW is a liable entity but has a PEN of 15,000. This amount represents the gas which is combusted at the facility.

JW is not liable for the other emissions of 5,000 tonnes of of CO_2-e from the facility as the WA Facility does not exceed the 25,000 tonne threshold.

Using OTNs

Issuing an OTN

1.161 An OTN may be issued in one of two ways; as a result of an application, or on the Regulator's own initiative. ***[Part 3, clause 37]***

1.162 The Regulator may issue an OTN to a person if satisfied that the person is likely to be permitted or required to quote an OTN and the Regulator has carried out an identification procedure that enables the Regulator to verify the identity of the person. ***[Part 3, clause 40], [Part 3, clause 41]*** Once issued, an OTN is not transferable. ***[Part 3, clause 44]***

1.163 The power for the Regulator to issue OTNs without an application will simplify the process for entities that the Regulator can readily identify as needing an OTN. For example, the Regulator can identify many entities that are large users of natural gas from emissions data reported under the NGER Act.

1.164 Where the Regulator is not able to readily identify a person that needs an OTN, the person can apply for an OTN. ***[Part 3, clause 39]***

1.165 If the Regulator refuses to issue an OTN, it must give written notice of the refusal to the person. ***[Part 3, clause 42(4)]***

Cancelling or surrendering an OTN

1.166 OTN holders no longer permitted or required to quote an OTN may continue to hold their OTNs except where the Regulator decides to cancel an OTN. ***[Part 3, clause 43]***

1.167 The Regulator may, by written notice, cancel an OTN:

- that is held by a person not permitted or required to quote it and who is unlikely to be permitted or required to quote it in the future; and ***[Part 3, clause 43(2)(a)]***

- if a person has contravened a provision of the bill or an associated provision. It is anticipated that the Regulator may take this step where there is an unacceptably high risk of further breaches of the bill or associated provisions concerning the use of that OTN. ***[Part 3, clause 43(2)(b)], [Part 1, clause 5, definition of 'associated provisions']***

1.168 The Regulator must cancel an OTN if the person to whom it was issued has ceased to exist. ***[Part 3, clause 43(3)]***

1.169 Where a person is no longer required or permitted to quote an OTN and is not likely to be required or permitted to quote an OTN in the future they may surrender their OTN with the written consent of the Regulator. ***[Part 3, clause 42]***

Example 1.17 Cancellation of an OTN and grace period for OTN quotation

From 1 July 2012, NatGas makes weekly supplies of natural gas under an OTN quotation to Davidson Ltd. Davidson Ltd has previously quoted its OTN and advised NatGas in writing that it intends to use the natural gas as a feedstock. Davidson Ltd is liable for emissions from its use of the gas.

The Regulator discovers that Davidson Ltd is not permitted to quote an OTN, as the company is combusting all of the natural gas rather than using it as a feedstock.

The Regulator cancels Davidson Ltd's OTN on 1 August 2012. The Regulator removes Davidson Ltd's entry on the OTN Register and lists the OTN and the time of cancellation on its website. The Regulator sends an email to all natural gas suppliers that are listed on the OTN Register, notifying the suppliers of the cancellation and the time of its effect.

Davidson Ltd and NatGas agree that the grace period before liability reverts to NatGas will be 21 days, rather than the default period of 28 days.

During these 21 days, NatGas supplies gas to Davidson Ltd with embodied emissions of 1000 tonnes of CO_2-e. Davidson Ltd remains liable for emissions resulting from its use of this gas. After this time, NatGas is liable for emissions embodied in the natural gas it supplies to Davidson Ltd.

1.170 If an OTN quotation is in effect, and the OTN is cancelled or surrendered, a 28-day grace period applies, during which further supplies of gas made to the OTN holder will be treated as if the OTN were still in effect. As such, during the grace period, liability for emissions embodied

in the gas will accrue to the OTN holder, not the supplier. The grace period may be reduced by agreement of the supplier and the OTN holder.

The OTN Register

1.171 The Regulator must keep an electronic register called the OTN Register. The OTN Register will enable suppliers to confirm that an OTN is valid, and that it belongs to the person that quotes it. This register will be available for public inspection on the Regulator's website. It will contain an entry for every current OTN. When an OTN is cancelled or surrendered the Regulator must remove the entry from the register. ***[Part 3, clause 45]***

1.172 An entry in the OTN Register will include an OTN, the identity of the person that was issued with that OTN, that person's last known address, and their ABN if they have one. ***[Part 1, clause 5, definition of 'ABN'], [Part 3, clause 45]***

1.173 The OTN Register will also include a list of natural gas suppliers.

1.174 The listing of natural gas suppliers on the OTN Register will serve two main purposes. It will assist users of natural gas to find a supplier who may be willing to accept their OTN quotation. It will also provide the Regulator with list of supplier who wish to be notified of any changes to the OTN Register, such as when an OTN is cancelled, surrendered, when the name of an OTN holder changes, or when a new entry is made in the register. This will lower compliance costs for suppliers as they will be sent up-to-date information on changes to the OTN Register.

1.175 The Regulator must, if requested by a natural gas supplier, include an entry for that supplier in the register. An entry for a natural gas supplier will include the name of the supplier, their last known address, their telephone number, their website address, their ABN and any conditions the supplier places on the acceptance of OTN quotations which the supplier is not required to accept. ***[Part 3, clause 45]***

1.176 An OTN holder (or a natural gas supplier with an entry in the Register) who changes their name or address as set out in the register must within 28 days notify the Regulator of the change. A person who fails to meet this requirement may incur a civil penalty. ***[Part 3, clause 47***]The regulator may make an alteration to the OTN Register when an OTN holder changes their name ***[Part 3, clause 47]***

Quotation of an OTN by a natural gas customer

1.177 A person quotes an OTN concerning a supply or a class of supplies of natural gas by making a statement in writing concerning the supply or class of supplies. The statement may be included in a contract, order or similar document and may be in electronic form. ***[Part 3, clause 48]***

1.178 A quotation must set out:

- the words 'quotation of OTN' followed by the OTN;
- the person's name;
- if the person has an ABN, the person's ABN; and
- any other information that is specified in the regulations. ***[Part 3, clause 48(1)]***

1.179 Where the acceptance of an OTN is mandatory, it is mandatory for a supplier to accept an OTN for natural gas that is for use:

- in the operation of a large gas consuming facility; or
- as a feedstock or in other ways that do not result in emissions; or
- to manufacture CNG, LNG or LPG.

In this situation, the OTN holder must provide notice on the first occasion on which they quote their OTN.

1.180 This is intended to allow natural gas suppliers time to make any necessary supply arrangements, including reading the customers meter. This notice must be in writing and must be given to the supplier at least 28 days before the first OTN quotation, or a shorter time if agreed by the supplier and the recipient. ***[Part 3, clause 55B(2)], [Part 3, clause 57(2)], [Part 3, clause 58(2)]***

1.181 In other circumstances OTN acceptance is voluntary and there is no requirement for the OTN holder to give written notice.

1.182 A person must not purport to quote a number as if it was that person's OTN if it is not that person's OTN. This is a 'bogus OTN'. ***[Part 3, clause 64(1)]***

1.183 If a person purports to quote a bogus OTN, and that number is not shown in the OTN Register as the person's OTN, the natural gas supplier must not supply natural gas to that person. ***[Part 3, clause 64(3)]***

1.184 Natural gas suppliers will therefore need to check the OTN register at the time an OTN quotation is made and ensure that the person quoting the OTN is the person listed on the OTN register against that OTN.

1.185 A person is liable to pay a civil penalty if a court finds that the person has quoted a bogus OTN or aided a person who quotes a bogus OTN. ***[Part 3, clause 64], [Part 21, clause 252]***

1.186 If an OTN holder purports to quote a number as an OTN (that is, quotes an incorrect OTN) and the purported quotation is due to an honest mistake, then the Regulator may determine that the Act has, and is taken to have had, effect as if the OTN holder had quoted the correct OTN concerning the supply. A determination by the Regulator must be in writing and must be given to the OTN holder and the natural gas supplier. ***[Part 3, clause 53]***

Process of acceptance

1.187 For an OTN quotation to take effect it must be accepted. Acceptance of an OTN quotation involves the supplier giving a written notice to the OTN holder that the OTN quotation is accepted.

1.188 This may be included in a contract, order or similar document and may be in electronic form. This formal process of acceptance ensures that both the OTN holder and supplier understand when an OTN quotation comes into effect. ***[Part 3, clause 59], [Part 3, clause 60]***

1.189 The notice of acceptance must set out:

- the words 'acceptance of quotation of OTN' followed by the OTN;
- the OTN holder's name;
- if the OTN holder has an ABN, that ABN;
- a description of the supply or class of supplies;
- the name of the natural gas supplier;
- if the natural gas supplier has an ABN, that ABN; and
- any other information that is specified in the regulations. ***[Part 3, clause 59(5)], [Part 3, clause 60(5)]***

1.190 If the acceptance is voluntary and the supplier chooses not to accept the quotation, the supplier may still choose to supply to the OTN

holder, however the supply would take place as if the quotation had not been made. ***[Part 3, clause 59], [Part 3, clause 60]*** That is, the supplier would be liable for the potential greenhouse gas emissions embodied in the gas supplied to that customer.

Example 1.18 Notice period for OTN quotation where acceptance of quotation is mandatory

> Anastasios Enterprises Limited (AEL) operates the TS Factory, a medium-sized facility. In the 2012-13 financial year, PY Gas will supply natural gas with embodied emissions of 15,000 tonnes of CO2-e to AEL for use at the TS Factory.
>
> During this financial year, AEL intends to use some of this natural gas as a feedstock at the TS Factory, which will result in no emissions.
>
> Upon application by AEL, the Regulator issues the company an OTN because AEL intends to use natural gas as a feedstock.
>
> AEL intends to quote its OTN to PY Gas on 1 July 2012 to take on liability for the supply of natural gas. In this case, acceptance of an OTN quotation by PY Gas is mandatory, and AEL must notify PY Gas of its intention to quote its OTN. AEL and PY Gas agree on a notice period of 14 days rather than the default 28 days. AEL notifies PY Gas in writing of its intention to quote its OTN on 17 June 2012. AEL then quotes its OTN to PY Gas on 1 July 2012 to take on liability for emissions from natural gas from this date.

Withdrawal of OTN quotation

1.191 An OTN quotation can be withdrawn and, when withdrawn, an OTN quotation ceases to be in place. An OTN holder may withdraw an OTN quotation by notifying the supplier in writing when either:

- an OTN holder ceases to be permitted to quote their OTN concerning a supply or class of supplied to which the quotation relates***[Part 3, clause 51];*** or
- an OTN holder has a voluntary OTN quotation in effect and the natural gas supplier agrees to the withdrawal of a quotation concerning a supply or class of supplies. ***[Part 3, clause 52]***

1.192 An OTN quotation is deemed to have been withdrawn if a person's OTN is surrendered or cancelled and a quotation of that OTN was in effect immediately prior to the surrender or cancellation. ***[Part 3, clause 49], [Part 3, clause 50]***

1.193 In these circumstances, the natural gas supplier would have little notice of the withdrawal. Therefore, to enable the supplier time to read

the customers meter and begin a new billing period (in the case that the supplier continues to supply the customer), the OTN holder will be liable for the potential greenhouse gas emissions in any supply that occurs in the 28 days from when the surrender or cancellation takes effect. However if the supplier and OTN holder agree to an earlier date, the OTN holder will only be liable for supplies that occur up to that date. ***[Part 3, clause 54], [Part 3, clause 55]***

1.194 To provide suppliers with early notice of the cancellation or surrender of OTNs, suppliers may apply to the Regulator to be in the OTN Register. Suppliers who register in this way will receive an email from the Regulator informing them of any cancellations and surrenders.

Misuse of OTN

1.195 The fact that the Regulator issues an OTN does not permit a person to quote it. When a person quotes an OTN for a particular supply or class of supplies the person must, at the time of quotation, be required or permitted to do so. An OTN holder breaches the provisions in the bill if they quote an OTN in circumstances where they are not required or permitted to do so. ***[Part 3, clause 63]*** For the avoidance of doubt, a person does not misuse their OTN if they are no longer permitted or required to to quote an OTN concerning a supply but an OTN quotation is in effect concerning that supply because the person was permitted or required to quote an OTN at the time that the quotation was made.

1.196 If a person quotes an OTN in circumstances where they are not required or permitted to do so, the validity of the transaction is not affected by the breach. This ensures that a supplier accepting the quotation of a valid OTN is not penalised by having a liability for emissions embodied in natural gas supplied under an OTN quotation that the supplier believed was permitted or required under the Bill. That is, the quotation will relieve the supplier of liability concerning that supply. However, unlike a quotation which is required or permitted, a person who misuses an OTN is liable for the potential greenhouse gas emissions embodied in the fuel supplied and does not have the benefits of any netted out numbers. ***[Part 3, clause 36], [Part 3, clause 63(4)]***

1.197 A person is liable to pay a civil penalty, if a court finds that the person has contravened the requirement not to quote an OTN in circumstances where it is not required or permitted or has, for example, aided such a contravention.[27] ***[Part 3, clause 63(1)], [Part 21, clause 252]***

[27] See 'Civil penalties' in Chapter 7 below

Definitions relevant to liability for emissions from natural gas

1.198 Liability for fugitive emissions from pipelines will apply through the general facility rules. ***[Part 3, clause 20], [Part 3, clause 21], [Part 3, clause 22]***

1.199 'Natural gas' will be defined in amended regulations to the NGER Act. ***[Part 1, clause 5, definition of 'natural gas']*** This definition will exclude substances which are not intended to be captured by the upstream liability arrangements but which can be conveyed in a pipeline, for example, pure ethane.

1.200 'Supply' is defined as supply (including re-supply) by way of sale, exchange or gift. ***[Part 1, clause 5, definition of 'supply']*** A supply of natural gas will be taken to occur when the natural gas passes a point specified in the regulations or, if this does not apply, when the gas is physically delivered. ***[Part 1, clause 6]***

1.201 It is intended, where possible, to align a gas supplier's emissions liability with metering arrangements for end-use customers, so that the measurement occurs when the gas supplied passes through a meter used to measure the volume of gas supplied for billing purposes. However, in the absence of a meter, liability for emissions should reflect the amount of gas delivered to the customer under the contract, noting that the gas must also be withdrawn from a gas supply pipeline.

1.202 These arrangements are not intended to apply outside the natural gas supply pipeline system (including both transmission system and distribution networks). For this reason, gas must be withdrawn from a 'gas supply pipeline'. A 'gas supply pipeline' will be defined, for these purposes, in the regulations and will exclude specified types of pipelines to which these arrangements will not apply, including pipelines that convey natural gas between a gas well and a gas processing plant, or a gas well and an LNG export plant. ***[Part 1, clause 5 definition of gas supply pipeline']*** For the avoidance of doubt, any emissions from the combustion of natural gas at facilities that are supplied by way of such excluded pipelines will count towards the covered emissions of those facilities.

1.203 Certain types of 'natural gas supply pipeline' can be excluded in the regulations. This allows for the exclusion of gas supplies in pipelines which do not form part of the wider system that conveys gas to end-use customers, for example, gas that is transferred along a pipeline from a gas well to a gas production facility and sold to the production facility.

1.204 'Withdrawal' will be defined in the regulations. This definition will encompass situations where:

- natural gas is taken out of a natural gas supply pipeline for combustion at residential and commercial properties and upstream facilities; and

- amounts of gas are combusted by pipeline operators in pipeline compressors in the process of operating the pipeline. Including this situation in the definition of 'withdrawal' will ensure comprehensive mechanism coverage of natural gas.

Potential greenhouse gas emissions

1.205 Liability for natural gas is based on potential greenhouse gas emissions, rather than actual emissions, except where direct emitters are liable for emissions from natural gas. This is because the liability generally arises before the fuel is combusted and emissions are released ***[Part 3, clause 33(1)(e)], [Part 3, clause 35(1)(d)], [Part 3, clause 36(1)(e)]***

1.206 The potential greenhouse gas emissions embodied in an amount of natural gas means the amounts of the greenhouse gas or gases that would be released into the atmosphere as a result of its combustion. This is defined by reference to the NGER Act, which will be amended to define this concept ***[Part 1, clause 5, definition of 'potential greenhouse gas emissions']*** (see Schedule 1, Part 2, items 309, 323 of the Consequential Amendments bill).

1.207 It is intended that the potential greenhouse gas emissions embodied in an amount of natural gas will be calculated in two ways (see Schedule 1, Part 2, item 323 of the Consequential Amendments bill).

- Under the first method, known as the default method, the calculation will involve multiplying the amount of natural gas by a value specified in the regulations.

- Alternatively, a person may elect to use a prescribed alternative method which involves, among other things, testing one or more samples of the natural gas.

Opt-in arrangements for entities otherwise covered by the fuel tax system

1.208 During the public exposure period for the Package industry stakeholders expressed a desire to manage their carbon liability for fuels under the carbon pricing mechanism instead of paying the equivalent carbon price through the fuel excise and fuel tax credit systems. This arrangement is given effect through the Opt-in Scheme.

1.209 The Regulator will be responsible for administering the Opt-in Scheme. It will work with the Australian Taxation Office and Australian

Customs Service to ensure entities comply with their obligations under the mechanism and the fuel tax system.

Establishment of the Opt-in Scheme

1.210 Regulations may establish an Opt-in Scheme that allows a person who meets the criteria under the Scheme to choose to have emissions from fuels covered directly under the mechanism instead of paying an equivalent carbon price through the fuel tax system. The regulations will specify the types of fuels that are eligible for the Opt-in Scheme. ***[Part 3, clause 92A]***

1.211 The bill sets out the parameters of the Opt-in Scheme and its main design features. The regulations would prescribe matters such as the eligibility criteria for opting-in (including which other persons would need to consent to the opt-in), the timeframes for opting-in and opting-out, and how the arrangement will take into account the pollution cap setting process.

1.212 The use of regulations will allow the Government to consult with stakeholders on the detailed design of the technical requirements for the Opt-in Scheme, and to allow for their adaptation over time to respond to changing regulatory and business circumstances. This is particularly important given the need to maintain a degree of flexibility in the arrangements to ensure the ongoing effectiveness of the interaction between the mechanism and the fuel tax system.

1.213 The Minister must take all reasonable steps to ensure that the regulations establishing the Opt-in Scheme are made before 15 December 2012. The phrase 'take all reasonable steps' is used because, despite his or her best endeavours, a Minister cannot guarantee that the Governor-General will make regulations. ***[Part 3, clause 92A(5)]***

Main design features of the Opt-in Scheme

1.214 The regulations establishing the Opt-in Scheme will provide:

- that the Regulator may declare a person a designated opt-in person for an amount of fuel of a specified kind; ***[Part 3, clause 92A(1)(a)(i),(ii), (iii) and (5)]***

- the requirements that must be met before the Regulator may declare a person a designated opt-in person; ***[Part 3, clause 92A(1)(a)(v)]***

- that a designated opt-in person will be liable for the potential greenhouse gas emissions in the fuel (of a kind specified in

the regulations) for which they are opting-in. ***[Part 3, clause 92A(1)(a) and (b)]***

1.215 As well as meeting criteria specified in regulations, the designated opt-in person must, for the fuel for which they are opting in:

- be a member of a GST group where that GST group is entitled to the fuel tax credits for that fuel; or ***[Part 3, clause 92A(4)(a)]***
- be a member of a GST joint venture where that GST joint venture is entitled to the fuel tax credits for that fuel; or ***[Part 3, clause 92A(4)(b)]***
- if neither of these criteria apply, then be the entity entitled to the fuel tax credits for that fuel. ***[Part 3, clause 92A(4)(c)]***

1.216 The Clean Energy (Fuel Tax Legislation Amendment) Bill 2011 provides that a designated opt-in person will no longer pay an equivalent carbon price through the fuel excise and fuel tax credit systems for the amount of fuel for which they have opted-in.

1.217 To ensure that a person liable under the Opt-In Scheme is not liable for emissions that are not included in the carbon price, the regulations will also allow for liability to be reduced if certain conditions are met. ***[Part 3, clause 92B]***

1.218 The regulations will also be able to provide for opting-out of the Opt-in Scheme. The regulations will set out the process for doing so and the obligations on the Regulator. ***[Part 3, clause 92A(1)(a)(v)]***

1.219 To ensure consistency between the mechanism and the taxation, excise and tariff systems, the Regulator will be required to notify the Commissioner of Taxation and the Chief Executive Officer of Customs when the Regulator makes a declaration under the Opt-in Scheme. ***[Part 3, clause 92G]***

1.220 Application procedures, times and fees will be set out in regulations. ***[Part 3, clause 92E]***

1.221 To the extent that it is necessary t supplement the reporting and record-keeping requirements for liable entities under the NGER Act, further requirements will be set out in regulations. ***[Part 3, clause 92C and 92D]***

Commencement of the Opt-in Scheme

1.222 The Opt-in Scheme will take effect from 1 July 2013, so that the 2013-14 financial year is the first year in which designated persons can

manage the liability for their fuel emissions under the carbon pricing mechanism. ***[Part 3, clause 92A(2)]***

1.223 The commencement of the Opt-in Scheme on 1 July 2013 will facilitate its implementation, enabling detailed consultation on its practical requirements and implementation. For the 2012-13 financial year, entities that would opt-in if the Opt-in Scheme was in operation are liable for emissions under the fuel tax system.

Anti-avoidance

1.224 Chapter 7 outlines the provisions addressing schemes entered into with the substantial purpose of obtaining the advantage of a threshold. Put briefly, attempts to avoid the mechanism's operation may result in any benefit of the threshold provision being lost.[28] ***[Part 3, clause 29]***

[28] This is described in further detail under the heading 'Anti-avoidance' in Chapter 7.

Chapter 2
Pollution caps

Outline of chapter

2.1 Chapter 2 explains pollution caps. It covers Part 2.

Context

2.2 The pollution cap is a limit on the total number of carbon units issued in an eligible financial year under the mechanism. Pollution caps only apply to the flexible price period.

2.3 Pollution caps are fundamental to the operation of the mechanism, the achievement of national targets and meeting Australia's international obligations.

2.4 Pollution caps will be reduced over time and will contribute to meeting Australia's emission reduction targets. Pollution caps can reflect different trajectories towards the same emissions target.

2.5 In the first stage of the mechanism (covering the eligible financial years beginning on 1 July 2012, 1 July 2013 and 1 July 2014), there will be no pollution caps. Liable entities can purchase carbon units at a fixed charge and the Commonwealth will allocate a limited number of free carbon units as industry assistance.

2.6 In the second stage of the mechanism (starting on 1 July 2015) there will be a pollution cap for each eligible financial year. Liable entities can buy a limited number of carbon units at auction and the Commonwealth will allocate a limited number of free carbon units as industry assistance.

2.7 Covered emissions can exceed the pollution cap where they are offset by the surrender of other eligible emissions units, such as eligible international units or eligible ACCUs.

Summary

2.8 Pollution caps will be set in regulations, which are to be prepared in accordance with the requirements of Part 2.

2.9 If regulations setting pollution caps are not tabled or are disallowed by Parliament, default pollution caps apply. The default caps are consistent with a trajectory implied by Australia's unconditional target of reducing national emissions to 5 per cent below 2000 levels by 2020.

Detailed explanation of new law

Setting national pollution caps

2.10 The Government sets a 'pollution cap' for each eligible financial year (except for fixed charge years) of the mechanism, and issues carbon units equal to the pollution cap. ***[Part 2, clause 13]*** The 'pollution cap number' for an eligible financial year is set as a quantity of greenhouse gases that has a carbon dioxide equivalence of a specified number of tonnes. ***[Part 2, clause 13], [Part 1, clause 5, definition of 'carbon dioxide equivalence']***

2.11 Pollution cap numbers for each eligible financial year (except for fixed charge years) will be specified in regulations. ***[Part 2, clause 14]*** The Government intends that these should be consistent with Australia's national emissions reduction targets.

2.12 As the basis for pollution caps may be subject to considerations which may change over time, it is appropriate that they be set out in regulations. The regulations are subject to a number of controls:

- in setting pollution caps, the Minister must have regard to specific matters and may have regard to thirteen other matters (see below); ***[Part 2, clause 14(2)]***
- one of the matters the minister must have regard to is the most recent report of the Authority, which must, in making recommendations to the Minister about pollution caps, consider specific matters identified in the legislation; ***[Part 22, clause 289], [Part 22, clause 292]***
- the regulations may be disallowed if either House of Parliament passes a resolution within 15 days of the regulations being tabled. ***[Part 2, clause 15]***

2.13 The Authority will make recommendations to the Government about pollution caps (see Chapter 10), having regard to each of the specified matters. ***[Part 22, clause 289]*** The Government must respond to these recommendations and table its response in Parliament. This would include justification for any differences from the recommendations of the Authority.

2.14 The Minister must take all reasonable steps to ensure that regulations specifying the pollution cap numbers for the first five flexible charge years of the mechanism (that is, the eligible financial years beginning on 1 July 2015, 1 July 2016, 1 July 2017, 1 July 2018 and 1 July 2019) are tabled in Parliament no later than 31 May 2014. ***[Part 2, clause 16(1)]*** The Government will include the pollution caps and its response to the Authority's recommendations in the 2014-15 Budget. This will be in a new budget paper.

2.15 If not made or tabled by 31 May 2014, the initial regulations setting pollution caps for the first five flexible charge years must not be made or tabled. ***[Part 2, clause 16(2)]***

2.16 If regulations establishing the first five years of pollution caps did not come into effect by May 2015, then the Minister must, on an annual basis by 31 May, take all reasonable steps to table regulations setting pollution caps for five years until the regulations come into effect. ***[Part 2, clause 16(3) and (4)]***

2.17 Once regulations establishing five years of pollution caps have come into effect, the Minister must take all reasonable steps to ensure that regulations setting the pollution cap and declaring the pollution cap number are in place at least five years before the end of the relevant year. ***[Part 2, clause 16(5)]*** That is, the five years of pollution caps will be extended by a year every year so that five years of pollution caps are always known. This will provide a level of certainty to investors and the market.

2.18 The phrase 'take all reasonable steps' is used because, despite his or her best endeavours, a Minister cannot guarantee that the Governor-General will make regulations.

Default pollution caps

2.19 Default pollution caps exist in the event the regulations setting pollution caps do not take effect. This is only a concern when regulations setting pollution caps are either not tabled in the Parliament by the deadline or are tabled and then disallowed.

2.20 Having a default in the legislation ensures that the mechanism continues to operate in the event that regulations setting pollution caps do

not come into effect. The default caps follow a trajectory consistent with Australia's unconditional target of reducing national emissions to five per cent below 2000 levels by 2020, taking into account projections for emissions from uncovered sectors (including the impact of emissions reduction measures on those sectors).

2.21 The default pollution cap for the first flexible charge year, beginning 1 July 2015, is set at 38 megatonnes (Mt) less than the total covered emissions from liable entities for the year beginning 1 July 2012. The total covered emissions for the year beginning 1 July 2012 will be taken from the Liable Entities Public Information Database administered by the Regulator. ***[Part 2, clause 17]***

2.22 The default pollution caps for all years beginning on or after 1 July 2016 will be 12 Mt less than the previous year's pollution cap. ***[Part 2, clause 18]***

Example 2.1 Regulations not in place for the first five flexible price years

The Minister tables regulations setting the pollution caps for the financial years beginning in 2015, 2016, 2017, 2018 and 2019 by 31 May 2014.

These regulations are disallowed by the House of Representatives in June 2014. Because the 31 May 2014 deadline has passed, the Minister is not able to table further regulations.

The carbon pollution cap for the year beginning 1 July 2015 will be the default as set in the legislation: the emissions for the financial year beginning 1 July 2012 less 38,000,000.

By 31 May 2015, the Minister must take all reasonable steps to ensure the tabling of regulations declaring the pollution caps for the financial years beginning in 2016, 2017, 2018, 2019 and 2020.

If these regulations are not disallowed by either house of Parliament, the pollution caps set in those regulations will be the pollution caps for the respective years and the Minister will be required to table regulations containing the pollution cap for 2021-22 by 30 June 2017.

Example 2.2 Regulations not in place for a subsequent flexible price year

It is 2017 and the pollution caps have previously been set in regulations for the flexible price years beginning 2015, 2016, 2017, 2018, 2019 and 2020. The Minister has tabled regulations setting the pollution cap for the flexible price year beginning 1 July 2021. In July 2017, these regulations are disallowed by the Senate. As it is now less

than five years before the end of the financial year beginning 1 July 2021 (that is, 30 June 2017 has passed), the Minister is not permitted to table or make further regulations setting the pollution cap for the year beginning 1 July 2021.

The carbon pollution cap number for 2021-22 will therefore be the default as set in the bill: the pollution cap number for 2020-21 (as was set in regulations) minus 12,000,000.

The Minister must then take all reasonable steps to ensure that regulations setting the next pollution cap (2022-23) are tabled by 30 June 2018.

Matters to be taken into account when setting pollution caps

2.23 In recommending to the Governor-General that she make the regulations, the Minister must have regard to:

- Australia's international obligations under international climate change agreements. ***[Part 2, clause 14(2)(a)], [Part 1, clause 5, definition of 'international climate change agreement']***
  - The mechanism will be the primary means by which Australia will meet its international obligations. This includes the Climate Change Convention, Kyoto Protocol and allows for future agreements to which Australia becomes a party.
- the most recent report outlining recommendations for pollution caps and carbon budgets by the Authority. ***[Part 2, clause 14(2)(b)]***
  - Pollution caps are a fundamental component of the mechanism, and the provision of independent expert advice enhances the transparency and accountability of cap setting process. ***[Part 22, clause 292]***
  - A carbon budget is defined as the total amount of net Australian emissions of greenhouse gases during a specified period. ***[Part 1, clause 5, definition of 'carbon budget']***

2.24 The Authority's recommended carbon budgets will be important in quantifying Australia's short and long term emissions reduction objectives and demonstrating how particular pollution caps contribute to those objectives.

2.25 While taking into account Australia's international obligations and the most recent report of the Authority plays a central role in setting

pollution caps, the Minister may also have regard to thirteen additional factors (as set out below).

2.26 **Factor 1:** Australia's undertakings concerning the reduction of greenhouse gas emissions that Australia has given under international climate change agreements. ***[Part 2, clause 14(2)(c)(i)]***

- In addition to binding obligations under international agreements, Australia may make high-level political undertakings concerning the reduction of greenhouse gas emissions, such as under the Climate Change Convention. Although not legally binding, Australia implements these undertakings solemnly and in good faith and expects other countries to do likewise. Where such undertakings relate to greenhouse gas emissions reductions, the Minister may take these into account when setting pollution caps. For example, subject to a further international agreement which quantifies Australia's 2020 emissions reduction obligations, the Government intends to take into account its emissions reduction pledges made to the Climate Change Convention under the Copenhagen Accord and the Cancun Agreements.

2.27 **Factor 2:** Australia's medium-term and long-term emissions reduction targets. ***[Part 2, clause 14(2)(c)(ii)]***

- The mechanism is the primary means for achieving the national emissions reduction targets. Pollution caps therefore need to be set at a level consistent with the carbon price playing its role in achieving these targets.

2.28 **Factor 3:** Australia's progress toward emissions reductions. ***[Part 2, clause 14(2)(c)(iii)]***

- The Minister may want to consider whether the Australian economy has sufficiently reduced its emissions intensity and adopted low carbon practices to reach medium and long-term emissions reduction targets. The Minister may also want to ensure that such a transition to a low carbon economy is as smooth as possible.

2.29 **Factor 4:** global action to reduce greenhouse gas emissions. ***[Part 2, clause 14(2)(c)(iv)]***

- This includes progress towards, and development of, comprehensive global action under which all major economies commit to substantially restrain emissions and advanced economies take on reductions comparable to Australia. It

includes consideration of the actions committed to and action which has been implemented through domestic mitigation policies.

- Actions by major economies are relevant to decisions on the trajectory of Australia's emissions and so should be considered when setting pollution caps.

2.30 **Factor 5:** Estimates of the global greenhouse gas emissions budget. ***[Part 2, clause 14(2)(c)(v)]***

- This is to take into account Australia's share in global efforts to reduce emissions as well as the rate of progress in global action.

2.31 **Factor 6:** The economic and social implications associated with various levels of pollution caps, including implications of the carbon price. ***[Part 2, clause 14(2)(c)(vi)]***

- Different levels of pollution caps will have different economic and social implications, including the flow of funds outside Australia to purchase eligible international emissions units.

- Decisions on the appropriate level of caps may take into account the carbon price and economic and social impacts arising from observing the actual operation of the cap in previous years.

- The carbon price may be higher or lower than expected as a result of a number of factors. For example, technological developments may mean that economic costs are lower than expected as new unanticipated abatement opportunities come into play.

2.32 **Factor 7:** The extent of actions voluntarily taken to reduce Australia's greenhouse gas emissions. ***[Part 2, clause 14(2)(c)(vii)]***

- Voluntary action to reduce greenhouse gas emissions can help ameliorate the economic implications associated with various levels of national pollution caps, increasing the likelihood that more stringent caps can be set over time.

- The Government acknowledges that its national emissions target does not include voluntary action, meaning that Australia can achieve emissions abatement beyond its national emissions target.

- Voluntary action can be achieved through voluntary cancellation of units, whereby a person voluntarily gives up a greater number

of units than they would otherwise have to (voluntary cancellation is covered by Part 6 of the ANREU Act).

- As a matter of policy, the Government is committed to taking account of GreenPower purchases in setting pollution caps. Households and businesses that purchase GreenPower increase the demand for renewable energy and assist in the transition to cleaner energy sources. To recognise individual action in purchasing GreenPower, the Government will take all GreenPower purchases into account in setting future pollution caps.

- In the fixed charge period the Government will measure GreenPower purchases on an annual basis and take these into account when setting the initial pollution caps. The Authority must provide recommendations on the initial pollution caps by 28 February 2014. The Authority will take into account the GreenPower purchases that have been reported by that time.

- In the flexible price period, the Government would measure GreenPower purchases on an annual basis and directly take these into account in setting pollution caps five years into the future.

- Voluntary action in addition to GreenPower and voluntary cancellation of units may also be recognised, on advice from the Authority on whether a robust methodology can be developed to recognise additional voluntary action.

2.33 **Factor 8:** Estimates of emissions that are not covered by the mechanism. ***[Part 2, clause 14(2)(c)(viii)]***

- The Government will set pollution caps based on the difference between the indicative national emissions trajectory (that is, its proposed path for national emissions) and the latest projection of emissions that are not covered by the mechanism (excluding abatement from the CFI). In this way, sufficient 'room' is left for uncovered emissions, and national targets can still be met. This will take into account the impact of emissions which come into the mechanism through the opt-in provisions in Part 3, Division 7.

2.34 **Factor 9:** Estimates of the likely issue of ACCUs. ***[Part 2, clause 14(2)(c)(ix)], [Part 1, clause 5, definition of 'Australian carbon credit unit']***

- Abatement from the CFI will decrease emissions from the uncovered sectors and ACCUs will either be exported, voluntarily cancelled or used to offset increased emissions

covered by the mechanism, which will impact the accounting for national emissions targets.

- The Government will therefore need to be mindful of the likely volume of ACCUs expected to be generated when setting pollution caps to ensure that these emission reductions are not double counted.

2.35 **Factor 10:** The extent of non-compliance under the mechanism. ***[Part 2, clause 14(2)(c)(x)]***

- To comply, liable entities can either surrender eligible emissions units or pay a charge for each tonne of pollution that they generate (see Chapter 4). If liable entities do not meet their obligations for an eligible compliance year their emissions will not have been accounted for through the surrender of eligible emissions units or through paying the charge.

- To ensure Australia meets its national emissions targets, the Government may tighten the pollution cap that will be set to make up for these unaccounted for emissions.

2.36 **Factor 11:** The extent (if any) to which liable entities have failed to surrender sufficient units to avoid liability for unit shortfall charge. ***[Part 2, clause 14(2)(c)(xi)]***

- If liable entities do not surrender sufficient units, but instead meet their obligations through payment of unit shortfall charges, the emissions will not be backed by an emissions unit.

- To ensure Australia meets its national emissions targets, the Government may choose to use some of the revenue raised from the charge to purchase emissions units to account for these emissions or tighten the next pollution cap to account for the emissions.

2.37 **Factor 12:** Any past or planned government purchase of international units. ***[Part 2, clause 14(2)(c)(xii)]***

- If the Government chooses to purchase eligible international units to meet national emissions targets, the pollution cap could be increased to reflect those purchases.

2.38 **Factor 13:** When setting caps, the Minister may take into account such other matters (if any) as the Minister considers relevant. For example, the Minister could take into account the precautionary principle or considerations of intergenerational equity. ***[Part 2, clause 14(2)(c)(xiii)]***

Chapter 3
Emissions units

Outline of chapter

3.1 Chapter 3 explains the nature of the various emissions units (domestic and international) recognised under the mechanism. It also explains the ways in which carbon units are issued under the mechanism and key provisions around eligible international emissions units. This chapter covers Part 4 of the bill.

Context

3.2 The central element of the mechanism is the ability of liable entities to make a payment for or surrender eligible emissions units for each tonne of emissions for which they are liable during an eligible financial year (see Chapter 4).

3.3 A carbon unit is an eligible emissions unit issued by the Regulator on behalf of the Commonwealth. Other eligible emissions units include eligible ACCUs issued under the CFI and eligible international units.

3.4 During the fixed charge period from 1 July 2012 to 30 June 2015, the Regulator will allocate free carbon units under Parts 7 and 8 (see Chapters 5 and 6) and entities can purchase carbon units for a fixed charge from the Regulator. Entities cannot use eligible international emissions units to meet domestic liabilities during the fixed charge period.

3.5 On 1 July 2015 the mechanism will transition to an emissions trading scheme and a limited number of carbon units will be issued which equals the pollution cap (see Chapter 2). Carbon units are tradeable, establishing a carbon market that allows these units to be allocated to the most highly valued uses across the economy.

3.6 Letting liable entities use eligible ACCUs from 1 July 2012 and eligible international units from 1 July 2015 to meet their liabilities gives them additional flexibility under the mechanism. It means that covered emissions can exceed the pollution cap, provided they are offset by an eligible ACCU or eligible international unit.

3.7 Letting liable entities surrender eligible ACCUs links the mechanism and the CFI. This will provide an incentive for those actions that reduce emissions or increase carbon sinks to be part of the CFI.

3.8 Letting liable entities surrender international units links the mechanism and international markets for emissions units. It lets liable entities access lower cost abatement opportunities and allows for emission reduction targets to be achieved in a flexible and cost-effective way. However, the use of international units is subject to qualitative and quantitative restrictions, to ensure the environmental integrity and ongoing credibility of the mechanism.

3.9 Allowing for the sale and transfer to foreign registries of Australian emissions units, such as carbon units and ACCUs, will open up the mechanism to foreign markets and has the potential to increase the flow of foreign capital, providing a stimulus for domestic abatement and investment in low-pollution technologies. Export of ACCUs will be permitted from 1 July 2012. Export of carbon units will not be permitted during the fixed charge period and will also be restricted until 1 July 2018, except where expressly permitted under a bilateral link to an international emissions trading scheme.

3.10 In the first three flexible charge years, there will be a transitional price ceiling and price floor. A price ceiling is a maximum carbon price, while a price floor is a minimum carbon price. The Government's intention is that these be set at a level significantly higher than the expected price for the price ceiling and lower than the expected price for the price floor.

Summary

Issuing of carbon units

3.11 Part 4, Division 2 sets out the way in which carbon units are issued, when they may be issued and limits on the number of units that may be issued.

Property in carbon units

3.12 Part 4, Division 3 deals with property in carbon units and the processes for transferring carbon units, including arrangements for international transfers of carbon units.

Auctioning carbon units

3.13 Part 4, Division 4 provides for the auctioning of carbon units. The design of the auction process is to be set out in regulations.

Cancellation and buy-back of carbon units

3.14 Part 4, Division 5 provides for the cancellation and buy-back of free carbon units issued under Part 7 (the Jobs and Competitiveness Program) and Part 8 (assistance to coal-fired electricity generators).

International linking

3.15 Eligible international emissions units are defined under section 4 of the ANREU Act. Restrictions on the surrender of these units are set out in Part 6, Divisions 2 and 3 of the bill.

Detailed explanation of new law

Eligible emissions units

3.16 The Regulator may issue carbon units, which a liable entity may surrender to meet its obligations under the mechanism. ***[Part 4, clause 93], [Part 1, clause 5, definition of 'carbon unit'], [Part 1, clause 5, definition of 'surrender']***

3.17 An 'eligible emissions unit' is a carbon unit, an eligible international emissions unit, or an eligible ACCU issued under the CFI. ***[Part 1, clause 5, definition of 'Australian carbon credit unit'], [Part 1, clause 5, definition of 'carbon unit'], [Part 1, clause 5, definition of 'eligible Australian carbon credit unit'], [Part 1, clause 5, definition of 'eligible emissions unit']***

Link to the CFI

3.18 A liable entity may surrender eligible ACCUs to meet its liabilities under the mechanism (see Chapter 4):

- in the fixed charge period, a liable entity may surrender eligible ACCUs up to an amount equal to five per cent of its total emissions liability; and
- in the flexible charge period, a liable entity may surrender as many eligible ACCUs as it wants to meet its emissions liability. ***[Part 1, clause 5, definition of 'eligible Australian carbon credit unit']***

Carbon units

Issue of carbon units and entry in the Registry

3.19 The Regulator may issue carbon units on behalf of the Commonwealth. ***[Part 4, clause 94], [Part 1, clause 5, definition of 'carbon unit']***

3.20 To hold a carbon unit, a person must have a Registry account. ***[Part 4, clause 98(3)]*** Such a person is the 'registered holder' of the units. ***[Part 1, clause 5, definition of 'registered holder']*** The Regulator issues a carbon unit by making an entry for the carbon unit against a Registry account in the Registry. ***[Part 1, clause 5, definition of 'Registry'], [Part 1, clause 5, definition of 'Registry account'], [Part 4, clause 98(1)]*** The carbon unit is represented by an electronic entry in the Registry, and not by any form of paper certificate. ***[Part 4, clause 98(2)]***

3.21 Each carbon unit will have a unique number known as the 'identification number'. ***[Part 4, clause 95], [Part 1, clause 5, definition of 'identification number']*** An entry in the Registry for that unit will consist of its identification number. ***[Part 4, clause 98(2)]***

Vintage year of a carbon unit

3.22 Each carbon unit will have a specific vintage year, which will be an eligible financial year. ***[Part 1, clause 5, definition of 'eligible financial year'], [Part 1, clause 5, definition of 'vintage year']*** Part of the identification number of a carbon unit will represent the vintage year of that carbon unit. ***[Part 4, clause 96]***

3.23 The Regulator may issue a carbon unit with a particular vintage year at any time before the end of 1 February following the vintage year. ***[Part 4, clause 97]***

Example 3.1 Allocation of a carbon unit

The Regulator may, at any time before the end of 1 February 2014, issue a carbon unit with the vintage year that ends on 30 June 2013. This will allow for an auction of units in the interval between the end of the relevant financial year and 1 February, the final date for surrender.

Units issued for flexible charge years

3.24 Carbon units that have a vintage year that is a flexible charge year do not have a 'use by' date. They can be used for surrender in their vintage year and any year after that. This is referred to as 'banking'. There is also limited capacity to surrender carbon units which are of the following vintage year ('borrowing'). ***[Part 6, clause 122(4)]***

3.25 The purpose of allowing banking and limited borrowing is to allow liable entities to shift the timing of their emissions and abatement activities to reduce their costs. It will also have the effect of smoothing the unit price over time (see Chapter 4 for an explanation of the payment and surrender process).

Units issued in fixed charge years

3.26 An unlimited number of carbon units whose vintage year is a fixed charge year will be available to liable entities at a fixed charge. These units will not be able to be banked for use in future years. ***[Part 1, clause 5, definition of 'fixed charge year']***

3.27 Those carbon units that are issued free of charge under Parts 7 and 8 (see Chapters 5 and 6) can only be surrendered for the eligible financial year corresponding to their vintage year and, if not surrendered, will be cancelled at the end of 1 February of the next financial year. ***[Part 4, clause 115], [Part 6, clause 122(7)], [Part 1, clause 5, definition of 'eligible financial year']***

3.28 'Borrowing' will not be allowed during the fixed charge years. ***[Part 6, clause 122(6)]*** A liable entity cannot surrender a carbon unit of a later vintage to meet its obligations for a fixed charge year.

3.29 Carbon units issued for a fixed charge are automatically surrendered for the eligible financial year corresponding to their vintage year. ***[Part 4, clause 100(7)]*** They cannot be banked.

Circumstances in which the Regulator can issue carbon units

3.30 The Regulator can only issue carbon units in the following circumstances: ***[Part 4, clause 99]***

- as the result of an auction conducted by the Regulator;
- when it issues units for a fixed charge;
- under Part 7 (see Chapter 5); and
- under Part 8 (see Chapter 6).

Vintage years and pollution caps

3.31 The Regulator must ensure that, when a particular vintage year is a flexible charge year and there is a pollution cap for that year, then the sum of carbon units for that vintage year:

- offered at auction (whether before or during that year); ***[Part 1, clause 5, definition of 'auction']***

- allocated under Part 7 (see Chapter 5); and

- allocated under Part 8 (see Chapter 6),

does not exceed the pollution cap for that vintage year. ***[Part 4, clause 102]*** This provision does not apply to carbon units with vintage years that are fixed charge years, as there will be no pollution cap for those years.

A carbon unit is a property right

3.32 A carbon unit issued by the Regulator is personal property and, subject to the requirements of the mechanism, transmissible by assignment (that is, as a result of some form of agreement to transfer the units to another person), by will (that is, as part of a deceased person's estate) and by other forms of transfer permitted by law. ***[Part 4, clause 103]***

3.33 While a carbon unit is always equivalent to one tonne of carbon dioxide equivalent emissions, the value of that unit will be determined by the demand for that unit in the market. It is envisaged that any decisions made under the mechanism concerning its operation, such as the setting of pollution caps and allocation of free carbon units, may affect the value of units, and that regard should be had to that in making those decisions (see Chapter 10).

3.34 If there is an entry for a carbon unit in a person's Registry account, then that person is the legal owner of the unit, subject to the requirements of the ANREU Act. ***[Part 4, clause 103A]*** Furthermore, a transfer of a carbon unit is of no force until it is registered in the Registry. This provision protects a bona fide purchaser of carbon units, if they purchased the units for value and without knowledge of any defects in the registered holder's title to the affected carbon units. It would, for example, permit the person to sell the units or use them as security. ***[Part 4, clause 103A]***

Example 3.2 Defects in title

Defects in title might arise, for example:

- if a carbon unit was transferred by the registered holder in error and sold on by an unintended recipient before the error is detected;
- if a carbon unit was transferred fraudulently, such as if evidence of a transmission by operation of law was false; or
- there is unauthorised access to a Registry account.

3.35 Transparent and secure property rights over and legal interests in carbon units will promote confidence in the integrity of the units and reduce uncertainty for their holders, and further promote confidence in the development of the market for carbon units. Similar provisions have been made for ACCUs, Kyoto units and prescribed international units in consequential amendments to the CFI Act and ANREU Act.

3.36 The bill does not affect the creation or enforcement of, or any dealings with (including transfers of), equitable interests in carbon units. ***[Part 4, clause 110]*** This provision has been included for the avoidance of doubt. In addition, the bill does not prevent the taking of security over carbon units.

3.37 Regulations may provide that legal interests in carbon units that are conferred upon the registered holder are subject to any equitable interests that might be registered, in the Registry, concerning the units. Security interests for carbon units would be registered in the Personal Property Securities Register in accordance with the *Personal Property Securities Act 2009*. ***[Part 4, clause 109A]***

3.38 Once a carbon unit is surrendered, it is cancelled (see Chapter 4). ***[Part 6, clause 122(10)]*** Some units are cancelled following their relinquishment (see Chapter 7). ***[Part 11, clause 210]***

Transfer and transmission of carbon units

3.39 A person may transfer carbon units, except for those that are issued for a fixed charge. In general, a transfer occurs when the Regulator removes an entry for the unit from the Registry account of the transferor and makes an entry for the unit in the Registry account of the transferee. ***[Part 4, clause 104], [Part 1, clause 5, definition of 'transfer']***

3.40 A person may:

- transmit carbon units by assignment; ***[Part 4, clause 105]***
- transmit carbon units by operation of law; ***[Part 4, clause 106]***
- transfer carbon units between Registry accounts that are both in the name of that person; and ***[Part 4, clause 107]***
- transfer carbon units to an account in a prescribed foreign registry held by that person or another person, provided the instruction is on or after 1 July 2018, the units have a flexible charge vintage year and the conditions specified in regulations are met. ***[Part 4, clause 108], [Part 1, clause 5, definition of 'foreign account']***

3.41 A transfer is initiated by an electronic instruction from the transferor to the Regulator. The Regulator then removes the entry for the carbon unit from the transferor's account and makes a new entry for that unit in the transferee's account.

Transfers of carbon units by operation of law etc

3.42 Transmissions that occur as a result of a will or by operation of law (that is, a transfer that does not occur by assignment) give rise to some additional issues arising from the nature of that transfer, as the recipient of the units may need to prove his or her entitlement to the units and may not have a Registry account of his or her own. ***[Part 4, clause 106]***

Example 3.3 Transfer from a deceased estate

Transmission of a unit to a person as the trustee of a deceased person's estate will require the transferee to establish evidence of transmission and, if necessary, open a Registry account.

3.43 A person must provide the Regulator with a 'declaration of transmission', along with evidence of the transmission, within 90 days, to ensure that the new holder of the carbon units has ample time to provide the proof of that ownership. The Regulator may extend the period either on the application of the transferor or transferee or on its own initiative. ***[Part 4, clause 106(7)]*** Should the Regulator refuse to extend the period, then it must give the transferor or the transferee (as the case may be) notice in writing. ***[Part 4, clause 106(2) and (8)]***

3.44 A transferee must, if he or she does not have a Registry account, also request that an account be opened in his or her name. ***[Part 4, clause 106(5)]***

3.45 The Regulator must effect the transfer of carbon units as soon as possible after receiving a declaration of transmission and the required

evidence from the transferee and set out a record of that transmission. ***[Part 4, clause 106(9), (10) and (11)]*** If the Commonwealth is the transferee of the units, then the Minister may give the declaration of transmission and provide any required evidence. ***[Part 4, clause 106(12)]***

Fixed charge carbon units, including those issued under price ceiling arrangements

Fixed charge carbon units

3.46 The Regulator will issue fixed charge carbon units with vintage years that are a financial year between 1 July 2012 and 30 June 2018. This includes fixed charge carbon units issued for the fixed charge years and fixed charge carbon units issued in the first three flexible charge years under price ceiling arrangements. ***[Part 4, clause 100]***

The fixed charge for a unit

3.47 The fixed charge per carbon unit is:

- $23.00 in 2012-13;
- $24.15 in 2013-14; and
- $25.40 in 2014-15. ***[Part 4, clause 100], [Part 1, clause 5, definition of 'charge']***

3.48 These charges rise by 2.5 per cent in real terms allowing for 2.5 per cent inflation per year, which is the midpoint of the Reserve Bank of Australia's target range (that is, the fixed charge for the preceding year × 1.025 × 1.025, rounded to the nearest 5 cents). ***[Part 4, clause 100(1)]***

Price ceiling

3.49 A price ceiling will apply to the first three flexible charge years and be implemented by issuing carbon units at a fixed charge. The amount of the fixed charge for carbon units issued in 2015-16 will be prescribed in regulations. ***[Part 4, clause 100(1)], [Part 1, clause 5, definition of 'flexible charge year']*** The Government has announced that this will be set at $20 above the expected international price in 2015-16. These regulations are to be made before the end of 31 May 2014 and can be amended before 1 June 2015, in case the expected international price has moved considerably from that originally estimated. ***[Part 4, clause 100(14) and (15)]***

3.50 The reason why regulations will set the level of the price ceiling is so that circumstances in the period prior to 2015-16 can be taken into account in setting the level, including decisions about what eligible

international emissions units can be surrendered, and what their expected prices are.

3.51 The level of the price ceiling for fixed charge units issued in 2016-17 and 2017-18 will rise by 5 per cent in real terms per year, allowing for 2.5 per cent inflation per year, which is the midpoint of the Reserve Bank of Australia's target range (that is, the carbon price for the preceding year × 1.05 × 1.025, rounded to the nearest 5 cents). ***[Part 4, clause 100(1)]***

3.52 To provide liable entities with certainty over the level of the price ceiling, the Regulator will publish its exact value in advance of each compliance year. ***[Part 4, clause 100(9)]*** This will allow liable entities to determine the maximum cost of compliance.

Acquisition of fixed charge units

3.53 In fixed charge years, a liable entity may apply to the Regulator for an allocation of fixed charge carbon units for a particular compliance year from 1 April in that compliance year until 15 June. ***[Part 4, clause 100(1)], [Part 1, clause 5, definition of 'acquire']*** These carbon units are for a liable entity to meet their liability to surrender carbon units by 15 June (see Chapter 4).

3.54 A liable entity may also access fixed charge units for a fixed charge year from a date that its emissions number is published until 1 February of the following year (the final surrender date). These carbon units are for a liable entity to meet its liability to surrender carbon units by 1 February. ***[Part 4, clause 100(1)]***

3.55 In the first three flexible charge years, a liable entity may apply to the Regulator for an allocation of fixed charge carbon units under the price ceiling for a particular compliance year from 1 July in that compliance year until 1 February in the following compliance year. ***[Part 4, clause 100(1)]***

3.56 The period in which fixed charge carbon units (including units issued under the price ceiling) can be issued may be extended in certain circumstances; for example, as a result of a fault or malfunction concerning a computer system under the control of the Regulator. ***[Part 4, clause 100A]***

Safeguards

3.57 There are safeguards to prevent liable entities from acquiring more fixed charge units than they need to meet their liabilities under the mechanism. This is important because, as discussed below, fixed charge units are automatically surrendered (see Chapter 4). ***[Part 4, clause 100(7)]***

3.58 The number of fixed charge carbon units that can be acquired by a liable entity is limited as follows:

- in the first issue period in a given year (1 April to 15 June), the limit is the amount that must be surrendered at the provisional surrender date less the number of eligible emissions units that have already been surrendered; and ***[Part 4, clause 100(3)]***

- in the second issue period (from the emissions number publication date to 1 February), the number of fixed charge units that can be acquired by a liable entity is limited to the emissions number for the liable entity minus the number of eligible emissions units that have already been surrendered. This also applies to carbon units issued under price ceiling arrangements. ***[Part 4, clause 100(4)], [Part 1, clause 5, definition of 'emissions number publication time']***

3.59 The Regulator must not issue a fixed charge carbon unit to a person unless the person pays the charge. ***[Part 4, clause 99]*** This avoids the need for the Regulator to collect debts owing on fixed charge carbon units, and lowers the cost of administering the mechanism.

Auctions

3.60 The Regulator may issue carbon units through auctions. ***[Part 4, clause 111], [Part 4, clause 112], [Part 1, clause 5, definition of 'auction']***

3.61 The primary policy objectives of the auction are to promote allocative efficiency and efficient price discovery. Auctions will also raise revenue that can be used for other policy objectives, such as providing assistance to households and businesses.

3.62 The detailed policies, procedures and rules for the conduct of auctions will be determined by the Minister in a legislative instrument. ***[Part 4, clause 113], [Part 1, clause 5, definition of 'auction']*** This will be a disallowable legislative instrument for the purposes of the LI Act and will be finalised following consultation. The Regulator may conduct auctions even when a legislative instrument is not in force but it is intended that a legislative instrument be made. ***[Part 4, clause 113(9)]***

3.63 The instrument may deal with, but is not limited to, any or all of the following matters:

- the types of auction;

- the timing of auctions and advertising;

- participants and entry fees (provided such fees do not amount to taxation);
- proxy bidding and representatives of bidders;
- minimum number of units in bids;
- variation of bids;
- the total number of carbon units with a specific vintage year that may be auctioned;
- limits on the number of carbon units of a type that may be acquired;
- reserve prices for secondary market auctions of relinquished carbon units;
- deposits and refunds of deposits;
- guarantees for payments and securities that may be provided;
- the timing and method of payment; and
- penalties for defaulting purchasers and collateral matters. ***[Part 4, clause 113(2), (3) and (4)]***

3.64 In particular, the Regulator is able to have regard to the past behaviour of prospective participants in deciding whether they can participate in auctions. ***[Part 4, clause 113(6)]***

3.65 The Government has announced that there will be advance auctions of future vintage carbon units. Advance auctions can assist the development of forward price signals and help promote business certainty about future carbon prices.

3.66 The Regulator must not issue a carbon unit as the result of an auction unless the person pays the charge for the issue of units to the Regulator on behalf of the Commonwealth. ***[Part 4, clause 111(2)]*** This avoids the need for the Regulator to collect debts owing on units issued following an auction, and lowers the cost of administering the mechanism.

3.67 The amount of the charge payable for a carbon unit issued as the result of an auction must be an amount that the person bid in the course of an auction, which was then accepted by the Regulator in the course of the auction. This approach to defining the charge payable allows for the prescription of forms of auction in which the clearing price is not

necessarily the final price bid by the person or the final price bid in the auction. ***[Part 4, clause 111(6)]***

Advance auctions of carbon units

3.68 In fixed charge years, the Regulator may auction carbon units with vintage years that are flexible charge years. The amount of carbon units that can be auctioned is limited to a maximum of 15 million carbon units for each vintage per year, where the auction occurs more than 6 months before the beginning of the relevant vintage year and there are no regulations in force declaring a carbon pollution cap and the carbon pollution cap number (see Chapter 2). ***[Part 4, clause 101]***

3.69 Fifteen million carbon units is equivalent to approximately 3 per cent of total Australian emissions in 2000, and so does not limit the Government's ability to set pollution caps. It is also greater than one sixteenth of the total amount of units that are expected to be auctioned in a particular vintage year.

3.70 The pollution cap for a vintage year will be known with certainty no later than six months before the start of that year (either by being set in regulations or by the operation of a default cap). This means that the regulator will then be able to auction carbon units consistent with the pollution cap, so no other limit is required.

3.71 The detailed auction schedule will be set out in the auction design instrument. ***[Part 4, clause 113]*** This arrangement will allow for the auction of carbon units with a flexible year vintage during the fixed charge years in such a way that these auctions do not limit the ability to set pollution caps.

Secondary auctions

3.72 The Regulator may auction carbon units which have been relinquished under Parts 10 and 11. Auctions of these units can be combined with other auctions. ***[Part 4, clause 112]***

3.73 In certain situations where excess carbon units have been issued, a person may be required to relinquish carbon units (see Chapters 5 and 7). These situations are:

- where a person has received excess carbon units for emissions-intensive trade-exposed activities that have ceased; and
- the issue of carbon units as a result of fraudulent conduct by the recipient.

Benchmark average auction charge

3.74 The benchmark average auction charge is calculated and published by the Regulator as soon as practicable after the end of each financial year. ***[Part 4, clause 114], [Part 1, clause 5, definition of 'benchmark average auction charge']*** It is used to calculate:

- the administrative penalty for a failure to comply with relinquishment requirements; ***[Part 11, clause 212], [Part 11, clause 213]***

- the unit shortfall charge in a flexible price year (as specified in the Charges bills, see Chapter 4); and

- the manufacture levy and import levy of synthetic greenhouse gases (as set out in the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011 and the Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011 (see the Explanatory Memorandum for the Consequential Amendments bill for an explanation of these bills)).

3.75 In order for the benchmark average auction charge to be close to the level of the carbon price paid by most liable entities, it is the maximum of two numbers:

- the average auction charge for the whole financial year (calculated by dividing the auction proceeds by the number of units sold, including units sold with a future vintage); and

- the average auction charge for the final auction where the units auctioned have the same vintage as the year of auctioning (also calculated by dividing the auction proceeds by the number of units sold, including units sold with a future vintage). ***[Part 4, clause 114], [Part 1, clause 5, definition of 'benchmark average auction charge']***

3.76 The auction reserve price will be prescribed in regulations. ***[Part 4, clause 111(5)]*** The reason why the reserve price will be prescribed in regulations rather than in legislation is that detailed auctioning arrangements are dealt with in a legislative instrument, so there needs to be flexibility when determining reserve prices. In 2015-16, 2016-17, and 2017-18, there will also be a minimum reserve price (see below).

Publication of auction results

3.77 The Regulator will publish and maintain a record of all auction results (see also Chapter 9). This will include that date of each auction,

the vintages of carbon units issued at the auction, the per unit charges for the carbon units that are auctioned, and the number of carbon units auctioned for a given per unit charge. ***[Part 9, clause 195]***

3.78 From 2015 onwards, the Regulator will publish the average auction charge for the 6 months leading up to the end of May, and the 6 months leading up to the end of November. For the 6 months leading up to May 2015, this average will take into account all auctions (including advance auctions). For every other 6 month period, this average will only take into account auctions of carbon units whose vintage is the same as the financial year in which the auction took place. ***[Part 9, clause 196]*** Publication of price relevant information is discussed in more detail in Chapter 9.

Charges for the issue of units

3.79 If a charge for the issue of a unit is taxation within the meaning of section 55 of the Constitution, the charge is not imposed by the bill but by the relevant Charges bill (see the Explanatory Memorandum for the Charges bills). ***[Part 4, clause 100(11)], [Part 4, clause 111(4)]***

3.80 The Commonwealth does not consider that the charges for the auction of carbon units amount to taxation. However, separate bills impose the charges so far as they are taxation to ensure that there can be no argument that there has not been compliance with section 55 of the Constitution.

3.81 If a charge is a tax, the Regulator must not exercise powers or functions in a way which would contravene the constitutional requirement that taxation must not be arbitrary. ***[Part 4, clause 111(7)]***

Price Floor

3.82 A price floor will apply for the first three years of the flexible charge period. A price floor is a minimum carbon price. The responsible Minister will request the Authority to review, by 30 June 2017, the role of the price floor beyond the first three years of the flexible price period.

3.83 The price floor will be implemented through a minimum auction reserve price and a fee on the surrender of international units. If regulations establishing the fee on surrender of international units are not made or are disallowed there will be no price floor in operation. ***[Part 4, clause 111(5)]***

3.84 The level of the price floor, and the minimum auction reserve price, will be:

- $15 in 2015-16;
- $16 in 2016-17; and
- $17.05 in 2017-18.

3.85 These prices increase by 4 per cent in real terms allowing for 2.5 per cent inflation per year, which is the midpoint of the Reserve Bank of Australia's target range (that is, the carbon price for the preceding year × 1.04 × 1.025, rounded to the nearest 5 cents). ***[Part 4, clause 111(5)]***

3.86 For the first three flexible charge years, there will be a charge imposed on the surrender of eligible international units. This charge is imposed by the Clean Energy (International Unit Surrender Charge) Bill 2011. ***[Part 6, clause 124]***

3.87 The surrender charge will be established through regulations and based on the difference between the estimated international price for a unit type and the price floor, such that:

- If the price for a type of eligible international unit is equal to or above the price floor, the charge will be equal to zero.
- If the price for a type of eligible international unit is below the price floor, the charge will be equal to the amount specified in regulations so that it is equal to the difference between the price floor and the estimated price for that type of unit.

3.88 If regulations setting a surrender charge for eligible international units are not in effect, then there will not be a minimum auction reserve price, but the Regulator may still choose to have an auction reserve price for reasons other than implementing a price floor. ***[Part 4, clause 111(5)]***

Free carbon units during the fixed charge period

3.89 Free carbon units may be allocated to liable entities under Parts 7 and 8 (see Chapters 5 and 6). The rules for these free carbon units ensure the integrity of future pollution caps. ***[Part 1, clause 5, definition of 'free carbon unit']***

3.90 These free carbon units:

- can only be surrendered for their vintage year; ***[Part 6, clause 122(7)]***
- must be cancelled by the Regulator if they have not been surrendered at the end of 1 February of the eligible financial

year after their vintage year; ***[Part 4, clause 115], [Part 1, clause 5, definition of 'eligible financial year']***

- may, on request, be bought-back and cancelled by the Regulator during the period between 1 September of their vintage year and 1 February of the financial year following from their vintage year at the fixed charge for the relevant year discounted by a factor in the regulations; and ***[Part 4, clause 116]***

- are cancelled if they are relinquished, rather than transferred to the Commonwealth relinquished units account. ***[Part 11, clause 210(3)]***

3.91 Some liable entities that receive free carbon units with fixed charge vintage years may not want to surrender these units against a liability for that vintage year.

3.92 To ensure that persons who hold carbon units (which can include persons who are not liable entities under the mechanism) can sell these units when they do not wish to surrender them, the mechanism allows the Regulator to 'buy-back' these units. ***[Part 4, clause 116(2)]***

Example 3.4 Circumstances where a person may not want to surrender free carbon units

A person may receive units for the cost increase it faces from, for example:

- its use of electricity in an emissions-intensive trade-exposed activity; or

- from the cost increase it faces that is related to the upstream emissions from the extraction, processing and transportation of natural gas and its components used as feedstock in an emissions-intensive trade-exposed activity.

The person may wish to sell these units to receive cash, which can then be used to offset the increase in monetary costs it faces due to its use of electricity or natural gas and its components as a feedstock, rather than hold these units for surrender.

3.93 The buy-back facility will be open from 1 September of the vintage year of the carbon units until 1 February of the next calendar year. It lets persons receive the corresponding level of the fixed charge for each free carbon unit he or she wants to sell back to the Regulator, discounted by a factor specified in the regulations. ***[Part 4, clause 116(2)]***

3.94 In certain circumstances, the Regulator may, by legislative instrument, grant an extension to the period in which the buy-back facility

can be accessed. This will be a disallowable legislative instrument for the purposes of the LI Act. If such an extension is granted, the automatic cancellation of freely allocated units issued for fixed charge years would also be extended. An extension may be granted, for example, because of a fault or malfunction concerning a computer system under the control of the Regulator. ***[Part 4, clause 116A]***

3.95 For buy-backs occurring in the period before 15 June of the relevant eligible financial year, the Government proposes that the price paid by the Regulator for these carbon units will be discounted to 15 June of the relevant eligible financial year by the latest Reserve Bank of Australia index of the BBB corporate bond rate, so that the buy-back price reflects the present market value of the carbon unit. From 15 June onwards the price paid will be equal to the fixed charge carbon units of that vintage. ***[Part 1, clause 5, definition of 'eligible financial year']***

3.96 If the Regulator receives a request to buy-back free carbon units, then it must, within a time period specified by the Regulations, cancel the units and remove the entries for those units from the Registry account of the liable entity that held them and, as soon as practicable after that day, pay the buy-back amount to the person and set out a record of that cancellation. ***[Part 4, clause 116(3) and (4)]***

3.97 There will be a standing appropriation for the Regulator for the purpose of making payments for the buy-back of free carbon units. ***[Part 4, clause 116(5)]*** The scope of this standing appropriation is limited in two ways:

- firstly, the amount of the buy-back facility cannot exceed the maximum number of units that can be issued under Parts 7 and 8 for fixed charge years (see Chapters 5 and 6) for which the price is fixed in each year; and

- secondly, it is limited to the fixed charge years (that is from 1 July 2012 to 30 June 2015), and does not carry on indefinitely.

Linking to international markets

3.98 The mechanism is linked to international emissions trading markets by allowing liable entities to surrender eligible international emissions units from the commencement of the flexible price period. These links are, however, subject to certain conditions:

- eligible international emissions units cannot be surrendered during the fixed charge period; ***[Part 6, clause 122(8)]***

- a liable entity may surrender eligible international emissions units to meet its surrender obligations under the mechanism in the flexible charge period, subject to certain quantitative and qualitative restrictions; and ***[Part 6, clause 133(7)], [Part 6, clause 123]***

- export of carbon units will not be allowed in the fixed price period, nor, generally, in the first three years of the flexible price period (that is, not prior to 1 July 2018). ***[Part 4, clause 108(3)]*** Exports of carbon units may however be allowed in the period from 1 July 2015 where a bilateral linking agreement with another country is in place. ***[Part 4, clause 108(3)]***

Quantitative restriction on the use of international units

3.99 In the flexible charge period, until 2020, liable entities must meet at least 50 per cent of their annual liability with domestic carbon units. During this period, if a liable entity surrenders a number of eligible international emissions units that exceeds 50 per cent of its emissions number, then the excess does not count toward the calculation of the emissions number for that financial year. Instead, the excess counts toward the calculation of the emissions number for the subsequent financial year. ***[Part 6, clause 133(7)], [Part 1, clause 5, definition of 'eligible international emissions unit']***

Initial list of eligible international emissions units

3.100 A unit is an 'eligible international emissions unit' if it is defined to be such under section 4 of the ANREU Act. ***[Part 1, clause 5, definition of 'eligible international emissions unit']*** The initial list of eligible international emissions units includes currently traded Kyoto units which are likely to continue to be traded through to 2015.

3.101 The ANREU Act currently defines eligible international emissions units to include:

- certified emission reductions (CERs), other than long-term or temporary CERs;

- emission reduction units (ERUs);

- removal units (RMUs);

- any further prescribed units issued in accordance with the Kyoto rules; and ***[Part 1, clause 5, definition of 'Kyoto rules']***

- any other international unit (which is prescribed in regulations).

Adding to the list of eligible international units

3.102 Section 4 of the ANREU Act provides for addition of further credible units from bilateral and/or other international agreements, as well as any further Kyoto units (if agreed internationally). ***[Part 1, clause 5, definition of 'eligible international emissions unit']*** The Government may allow other international units by regulation where:

- the addition does not compromise the environmental integrity of the mechanism;
- the addition is consistent with the objective of the mechanism and with Australia's international objectives; and
- there has been consultation with stakeholders, and analysis of the expected impact on the carbon unit price, by the Authority, and advance notification to the market by the Government.

3.103 The Government has announced that the types of units accepted and qualitative restrictions on use imposed by the European Union Emissions Trading Scheme and the New Zealand Emissions Trading Scheme will be taken into account when determining what international units may be accepted for compliance under the mechanism (as the considerations of these jurisdictions can be drawn upon to maintain the integrity of the mechanism).

Qualitative restrictions on the use of international units

3.104 The bill provides a power for the Government to disallow, by regulation, eligibility of certain international units to ensure that only credible international emissions units are used for compliance, supporting the environmental integrity of Australia's pollution reduction efforts. ***[Part 6, clause 123], [Part 6, clause 122(9)]*** The Authority will play a key advisory role on the integrity of international units and recommend which units should be accepted and which should be prohibited.

3.105 The bill sets out key criteria that the Minister may consider concerning prohibiting the surrender of eligible international units. These include:

- Australia's international objectives and obligations (to ensure that credits accepted can be counted towards international commitments);
- the environmental integrity of the mechanism;
- the expert recommendations of the Authority;

- whether the units are accepted by either the European Union or New Zealand emissions trading schemes; and

- such other matters (if any) as the Minister considers relevant. ***[Part 6, clause 123(2)], [Part 1, clause 5, definition of 'associated provisions'], [Part 1, clause 5, definition of 'international climate change agreement']***

3.106 The concept of 'environmental integrity' is not specifically defined in the bill. However, the objects of the bill are relevant to this concept, in that they explain the purpose of the mechanism and define its environmental objectives. International units derived from poorly designed emissions trading schemes may undermine the mechanism's ability to achieve these objectives.

3.107 Including these provisions is consistent with the policy that a type of eligible international emissions unit can be disallowed for surrender at any time to ensure the environmental integrity of the mechanism and consistency with Australia's international objectives and obligations. However, the regulation-making power is restricted in that if an eligible international emissions unit is disallowed, liable entities holding such units in their Registry accounts will be able to surrender those units for the compliance year in which the unit was disallowed, but not subsequently. ***[Part 6, clause 123(3)], [Part 1, clause 5, definition of 'eligible international emissions unit']***

3.108 In addition to the exclusion of time limited CERs (that is, long term or temporary CERs), the Government has already announced[29] that CERs and ERUs if they arise from:

- nuclear projects;

- the destruction of trifluoromethane;

- the destruction of nitrous oxide from adipic acid plants; and

- large-scale hydro-electric projects not consistent with criteria adopted by the EU (based on the World Commission on Dams guidelines).

Surrender charge

3.109 For the first three flexible charge years, there will be a charge potentially imposed on the surrender of eligible international units. This

[29] Australian Government (2011) *Securing a clean energy future: The Australian Government's climate change plan* Table 8 on p.107

charge is imposed by the Clean Energy (International Unit Surrender Charge) Bill 2011 where if observed international unit prices fall below the specified price for the relevant year a charge will be imposed on users of international units, representing the difference between the observed price and the floor price. (See also the section headed 'Price Floor'.) ***[Part 6, clause 124]***

Linking to other schemes

3.110 The Government has stated that linking with other credible trading schemes, including the New Zealand and European Union schemes, is in Australia's national interest. The ability to prescribe other additional units could be used to make other schemes' units eligible, should linking arrangements be agreed. Provision exists for recognising such agreements through prescribing foreign registries by regulation. This is done under the ANREU Act (as amended by the Consequential Amendments bill), which defines 'foreign registry'.

3.111 The Government will only consider future bilateral links with schemes that are of a suitable standard, based on a range of criteria including:

- an internationally acceptable (or, where applicable, a mutually acceptable) level of mitigation commitment;
- adequate and comparable monitoring, reporting, verification, compliance and enforcement mechanisms; and
- compatability in design and market rules.

Chapter 4
Assessing and meeting liabilities

Outline of chapter

4.1 Chapter 4 explains how a liable entity determines its liability for emissions under the mechanism and the process by which it meets its liabilities through the payment and surrender process. This chapter covers Parts 5, 6 and 11.

Context

4.2 The mechanism imposes a liability on a liable entity for the emissions or potential emissions for which they are responsible.

4.3 Liable entities must report emissions or potential emissions under the NGER Act, which is to be amended by the Consequential Amendments bill (these changes are explained in a separate Explanatory Memorandum for that bill).

4.4 The mechanism creates a system for:

- assessing liability for emissions, which is how a liable entity knows whether it is liable for emissions;
- meeting liability for emissions through payment and surrender processes for eligible emissions units, which cover the fixed charge and the flexible charge periods of the mechanism; and
- in certain circumstances, relinquishing units, which is where units are returned to the Commonwealth without them being surrendered.

4.5 The surrender of eligible emissions units is relevant to unit banking (where carbon units can be surrendered in years that are later than their vintage year); unit borrowing; international linking; linking with the CFI; and the price floor.

4.6 If a liable entity does not meet its emissions obligations through the surrender of eligible emissions units, then it will be subject to a unit shortfall charge for those units it has not surrendered. This charge is set at 130 per cent of the fixed charge for the relevant fixed charge year. Once

the mechanism moves to the flexible charge phase, the unit shortfall charge will be up to 200 per cent of the benchmark average auction price for the relevant period. The amount of the charge is designed to provide a clear incentive to liable entities to surrender units, and thereby avoid the need to pay any charge.

4.7 Unit shortfall charges are imposed through the Charges bills, so as to ensure compliance with the requirements of section 55 of the Constitution.

4.8 Quantitative and qualitative restrictions are also imposed on the surrender of eligible international emissions units which help safeguard the environmental integrity of Australia's pollution reduction efforts. (Chapter 3 sets out in detail the operation of these restrictions.)

Summary

Emissions numbers

4.9 Part 5 deals with emissions numbers, the way in which they are determined and what happens if a liable entity provides an incorrect emissions number which the Regulator considers to be incorrect or does not provide one at all.

Surrender of eligible emissions units

4.10 Part 6, Division 2 sets out the process by which eligible emissions units are surrendered, restrictions on surrender and the charge applicable to surrendering eligible international units.

Unit shortfalls

4.11 Part 6, Division 3 deals with the way in which liable entities meet their liabilities for unit shortfalls under the mechanism. Subdivision A sets out the payment and surrender process in fixed charge years, including the provisional payment or surrender point on 15 June of each eligible fixed charge year. Subdivision B sets out the payment and surrender process in flexible charge years.

Unit shortfall charges

4.12 Part 6, Division 4 deals with the way in which liable entities pay units shortfall charges, including provisions about what happens when payments are made late or not at all. Unit shortfall charges are also

addressed in the Charges bills (see the separate Explanatory Memorandum for an explanation of these bills).

4.13 Part 6, Division 5 deals with the way in which the Regulator assesses unit shortfalls and unit shortfall charges.

Extension of surrender deadline

4.14 Part 6, Division 6 provides for the extension of the surrender deadline in certain circumstances.

Relinquishment of carbon units

4.15 Part 11 deals with the process by which carbon units may be relinquished. Relinquishment may occur voluntarily or as a result of a court order to relinquish units.

Detailed explanation of new law

Emissions number

4.16 Liability will be based on the emissions number which liable entities must include in their report to the Regulator in accordance with new section 22A of the NGER Act (see Schedule 1, Part 2, item 367 of the Consequential Amendments bill). A person's emissions number for an eligible financial year is defined to be the sum of the person's Provisional Emissions Number (PENs) for the eligible financial year. ***[Part 4, clause 117], [Part 4, clause 118], [Part 1, clause 5, definition of 'emissions number']***

4.17 A PEN represents the emissions which give rise to liability under the mechanism. Part 3 of the bill describes the situations which result in a PEN. The person with operational control of a facility, or the holder of an LTC or a designated JV concerning a facility, may have a PEN calculated by reference to the emission of greenhouse gases from that facility during a financial year (Part 3, Division 2). Natural gas suppliers and others may have PENs calculated by reference to potential emissions embodied in natural gas supplied during a financial year (Part 3, Division 3). PENs are discussed in Chapter 1 of this Explanatory Memorandum.

Example 4.1 Calculation of emissions number

In 2014-15, Elhu Ltd has operational control over three facilities.

The NSW Facility emits less than 25,000 tonnes of CO_2-e per annum and the facility is therefore not covered by the mechanism.

The Queensland Facility emits 530,000 tonnes of CO_2-e per annum.

The Victorian Facility emits 220,000 tonnes of CO_2-e per annum.

Elhu Ltd has PENs of 530,000 and 220,000, and an emissions number of 750,000.

Example 4.2 Calculation of emissions number

WilkCo is a natural gas supplier that supplies natural gas with a CO_2-e of 30,000 tonnes. It supplies the gas to customers, none of which quote an obligation transfer number.

WilkCo has a PEN of 30,000. If it does not engage in any other activity which gives it a PEN, its emissions number is 30,000.

Assessment of a liable entity's liability for emissions

4.18 There are two circumstances in which the Regulator may make an assessment of the person's emissions number for a financial year and provide the person with written notice of it:

- when a liable entity has provided a report under new section 22A of the NGER Act by 31 October but the Regulator has reasonable grounds to believe that the number specified in the report as the person's emissions number is incorrect; ***[Part 5, clause 119]***
- where no such report has been provided by 31 October and the Regulator has reasonable grounds to believe that the person is a liable entity for the financial year. ***[Part 5, clause 120]***

4.19 An assessment may be done by the Regulator either on the application of the person to whom the assessment relates, or on the Regulator's own initiative. Should the Regulator refuse to make an assessment or refuse to amend the assessment, then it must give notice in writing to the person. ***[Part 5, clause 119(5) and (7)], [Part 5, clause 120(5) and (7)]***

4.20 If an assessment is made before 1 February following the relevant eligible financial year, it will be accompanied by a statement

explaining that the person may need to acquire and surrender eligible emissions units to avoid being liable for a unit shortfall charge and late payment penalty. If an assessment is made after 1 February following the relevant eligible financial year, it will be accompanied by a statement explaining that the person may be liable to pay a unit shortfall charge and late payment penalty. ***[Part 5, clause 119(3)], [Part 5, clause 120(3)]***

4.21 Each of these assessments may be amended by the Regulator at any time. If this is done, then written notice of it must be provided. ***[Part 5, clause 119(4) and (6)], [Part 5, clause 120(4) and (6)]***

4.22 The original and any amended assessments are advisory in nature. ***[Part 5, clause 119(9)], [Part 5, clause 120(9)]*** In other words, the legal liability is not set by the assessment. The number of units that need to be surrendered to avoid a unit shortfall charge depends on the emissions number (emissions measured and attributable to the liable entity in accordance with the law), not on any action taken by the Regulator.

Meeting liabilities under the mechanism

4.23 Liable entities meet their liabilities under the mechanism by either surrendering units or paying a shortfall charge. This process differs between the fixed charge years and flexible charge years (see **Diagrams 4.1 and 4.2**). ***[Part 6, clause 121]***

Diagram 4.1 Payment and surrender process in fixed charge years

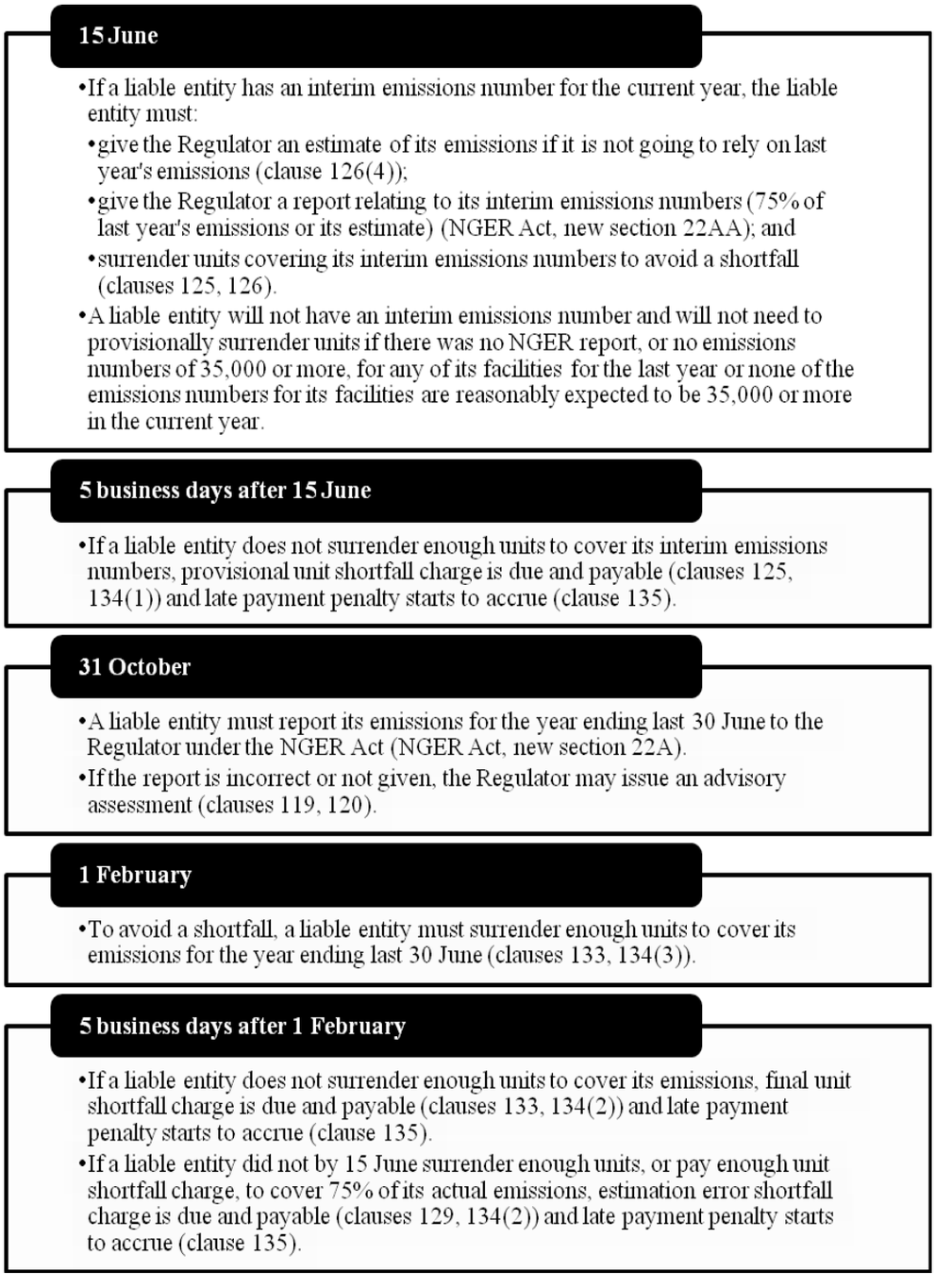
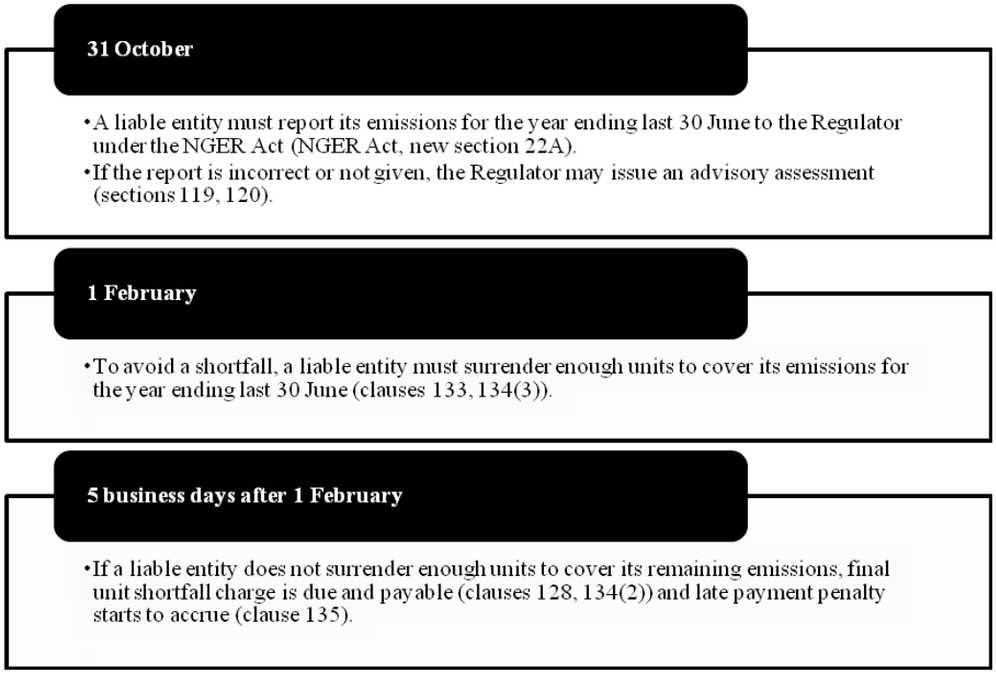


Diagram 4.2 Payment and surrender process in flexible charge years



Surrender: unit shortfall and excess surrender

4.24 In each financial year, each liable entity must surrender the number of eligible emissions units equal to its emissions number to avoid a unit shortfall. ***[Part 1, clause 5, definition of 'unit shortfall']*** In general, liable entities must surrender eligible emissions units by 1 February of the following financial year in order to avoid having a unit shortfall. If the liable entity has a unit shortfall, it will be required to pay a charge. The mechanism is designed so that paying a charge would be more expensive than surrendering units.

The provisional surrender obligation

4.25 In the fixed charge period, most liable entities must surrender sufficient units by 15 June to account for 75 per cent of the entity's estimated emissions for the current financial year. If a liable entity does not meet its provisional surrender obligation, it will have a provisional unit shortfall and be required to pay a unit shortfall charge. ***[Part 6, clause 125], [Part 6, clause 134]***

4.26 All liable entities will be required to make a provisional surrender, with the exception that a provisional surrender will not be required concerning direct emissions from facilities that:

- were not required to provide a report under the NGER Act for the previous financial year (noting that this exception does not apply to natural gas suppliers, which will be required to make a progressive payment for supplies of natural gas);

- had covered emissions of less than 35,000 tonnes in the previous year; or

- are reasonably expected to have covered emissions of less than 35,000 tonnes in the current financial year.

4.27 The emissions from these facilities will be excluded from the calculation of interim emissions numbers. ***[Part 6, clause 127]***

4.28 Liable entities will then surrender the rest of the eligible emissions units by 1 February of the following year, in order to avoid a shortfall (the 'true-up'). Where liable entities were not required to make a provisional surrender concerning a facility they will be required to surrender units for the total emissions from that facility by 1 February. ***[Part 6, clause 128]***

4.29 The estimated emissions number used for the provisional surrender obligation is known as the 'interim emissions number'. ***[Part 6, clause 126], [Part 1, clause 5, definition of 'interim emissions number']*** Liable entities that are required to make a provisional surrender will be required to submit a report to the Regulator by 15 June providing interim emission numbers for each facility, or supplies of natural gas, for which they are liable to make a progressive payment, under new section 22AA of the NGER Act (see Consequential Amendments bill, Schedule 1, Part 2, item 367).

4.30 Entities with liabilities for direct emissions from facilities under Part 2, Division 3 will have the option of estimating their interim emissions numbers based on the reported PEN of each facility in the previous year's NGER report, or choosing to provide a reasonable alternative estimate for one or more facilities. ***[Part 6, clause 126]*** The interim emissions number concerning those facilities will be the total of the PENs multiplied by 0.75.

4.31 If a liable entity provides an estimate that is not based on the previous year's NGERS report, then that estimate will be subject to an estimation error calculation that may give rise to a unit shortfall, as discussed below.

4.32 The use of the previous year's report for a facility under the NGER Act is intended to be simple and minimise administrative and compliance costs associated with the progressive obligation. However, in

some cases use of the previous year's emissions as an estimate for the current year may result in an overestimate of the progressive obligation (if emissions have decreased from the previous year). In this case the liable entity will be able to choose to use an alternative estimate of emissions.

4.33 Natural gas suppliers will not have the option of using a previous year's NGERS report but will instead be required to provide an estimate of actual emissions for the first three quarters of the financial year. As these entities do not currently report under the NGER Act, natural gas suppliers will not have a report on which to base an estimate in the first year of the scheme. In addition, these entities are expected to have well-developed reporting systems for the purposes of billing and accordingly have capacity to estimate emissions in the current year.

4.34 The provisional surrender obligation during the fixed charge period is similar to the approach taken to payments for some forms of taxation, such as company tax and the GST. With a provisional surrender of 75 per cent, it is expected that the cash flow impact on business should be minimal as they should receive revenue from production before they need to meet their surrender obligation.

Example 4.3 The provisional surrender obligation

A liable entity submits a report of its interim emissions numbers under section 22AA of the NGER Act for the financial year 2013-14.

The report estimates the entity's PEN based on the previous year's reported emissions for 2012-13 of 100,000.

By 15 June 2014, the liable entity will be required to surrender 75,000 units (75 per cent of its PEN for 2012-13) in order to discharge its provisional surrender obligation. In other words, the liable entity's interim emissions number for 2013-14 is 75,000.

Alternatively, the liable entity may elect to provide an alternative estimate of emissions from a facility. If the liable entity does so and estimates that its emissions number for 2013-14 will be 80,000, the liable entity will be required to surrender 60,000 units in order to discharge its provisional surrender obligation.

Unit shortfalls for fixed charge years

4.35 Because of provisional surrender, unit shortfall works slightly differently in fixed charge years compared to flexible charge years.

4.36 For fixed charge years, there will be a unit shortfall calculated in accordance with the obligation to surrender permits by 15 June during the compliance year – this is known as the 'provisional unit shortfall'. The

provisional unit shortfall is equal to the total interim emissions numbers minus the number of eligible emissions units surrendered for the liable entity, rounded to the nearest whole number. If this number is zero, there is no unit shortfall; if this number is negative, the entity has a 'provisional surplus surrender number' which is positive and equal to this number; if this number is positive, the entity has a unit shortfall, which is the provisional unit shortfall. ***[Part 6, clause 125]***

4.37 During the fixed charge period, there will also be a unit shortfall calculated in accordance with the obligation to surrender permits by 1 February following the compliance year. This is known as the 'final unit shortfall'. The final unit shortfall for a liable entity is calculated by starting with the liable entity's emissions number and then subtracting:

- the number of eligible emissions units surrendered after 15 June and before 1 February;
- the number of units that needed to be surrendered to avoid having a provisional unit shortfall (in other words, to comply with the provisional surrender obligation); and
- the surplus and estimation error adjustment. ***[Part 6, clause 128]***

4.38 If the final unit shortfall is calculated to be zero, the liable entity does not have a shortfall; if it is calculated to be negative, the entity has a 'final surplus surrender number', which is positive and equal in magnitude to the final unit shortfall; if the final unit shortfall is calculated to be positive, the liable entity has a final unit shortfall for the eligible financial year. ***[Part 6, clause 128]***

4.39 If a liable entity has a positive final surplus surrender number corresponding to a fixed charge year, the liable entity will be refunded in cash. The refund is equal to the final surplus surrender number multiplied by the level of the fixed charge for that year. The Consolidated Revenue Fund is appropriated for the purpose of making these refunds. ***[Part 6, clause 132]***

4.40 For the provisional surrender, it is possible for a liable entity to provide its own estimate of emissions. ***[Part 6, clause 126]*** If the estimate is incorrect, then there may be an estimation error unit shortfall on which unit shortfall charge will be payable. The estimation error for each facility will be equal to the difference between the estimated facility emissions (which was 75 per cent of estimated emissions for the year) and 75 per cent of the actual emissions from the facility for that year. ***[Part 6, clause 129], [Part 6, clause 134]***

4.41 If a liable entity relies on its estimated emissions from the NGERS Report and surrenders sufficient units to discharge this liability but the estimated emissions do not represent the actual emissions for the current compliance year, then that entity does not have a unit shortfall arising from the discrepancy.

4.42 The purpose of the estimation error shortfall is to provide a strong incentive for entities that choose to provide an alternative estimate of emissions to provide an accurate estimate. However, the amount of an estimation error is netted off against any surplus of units acquitted in the provisional surrender (that is, the surplus can be used to reduce or eliminate the estimation error) via the calculation of the surplus and estimation error adjustment. This netting off is carried out as it could be unfair to impose a 130 per cent charge for an estimation error where the liable entity had in total surrendered more than 75 per cent of actual emissions for the year as a progressive payment. ***[Part 6, clause 128], [Part 6, clause 131]***

4.43 The Regulator has power to remit some or all of a unit shortfall charge arising out of an estimation error (but not any other form of shortfall charge). ***[Part 6, clause 130]*** This allows the Regulator to respond to particular circumstances where it would be unfair or unreasonable to impose the estimation error unit shortfall charge. However, when considering whether to remit the charge the Regulator must have regard to:

- whether the person took reasonable steps to avoid having the unit shortfall;
- the extent to which the unit shortfall is attributable to an increase in emissions that could not reasonably have been foreseen by the person when the person gave the Regulator an estimate under sub-clause 126(3);
- whether the person has had a unit shortfall under clause 129 for a previous eligible financial year;
- such other matters (if any) as the Regulator considers relevant.

Example 4.4 Unit shortfall and the provisional surrender obligation

PK Limited has provided an alternative estimate of its emissions number for the 2012-13 financial year of 80,000.

PK Limited must surrender 60,000 units by 15 June 2014 to avoid a provisional unit shortfall. The liable entity surrenders the required 60,000 units on 15 June, and therefore has no provisional unit shortfall or surplus.

When PK Limited submits its final emissions report for the year to the Regulator, its actual emissions number reported for the financial year 2012-13 is 100,000.

This means that PK Limited's estimation error unit shortfall will be 15,000 (the difference between the 75 per cent of its actual emissions number (75,000) and the 60,000 units surrendered to meet the provisional surrender obligation).

PK Limited will be required to surrender a further 25,000 units to meet its final surrender obligation, and will have an estimation error shortfall of 15,000 that will give rise to a shortfall charge of 1.3 times the shortfall multiplied by the fixed charge for that year.

Unit shortfalls for flexible charge years

4.44 During the flexible charge period, the unit shortfall corresponds to the obligation to surrender permits by 1 February. The unit shortfall is calculated by taking the liable entity's emissions number, subtracting the number of units surrendered before 1 February, and subtracting the final surplus surrender number. If the unit shortfall is zero, the liable entity has no unit shortfall; if the unit shortfall is positive, the liable entity has a unit shortfall; if the unit shortfall is negative, the liable entity has a surplus surrender number equal in magnitude to the unit shortfall. ***[Part 6, clause 133]***

Unit shortfall charges

4.45 When a liable entity has a unit shortfall, a unit shortfall charge is imposed, and is payable five business days after the surrender date. ***[Part 6, clause 134], [Part 1, clause 5, definition of 'business day'], [Part 1, clause 5, definition of 'unit shortfall charge']*** The amount of unit shortfall charge is specified by clause 9 of the Clean Energy (Charges—Customs) Bill 2011 (so far as the charge is a duty of customs), clause 9 of the Clean Energy (Charges—Excise) Bill 2011 (so far as the charge is a duty of excise) or clause 8 of the Clean Energy (Unit Shortfall Charge—General) Bill 2011 (so far as the charge is not a duty of customs or excise). ***[Part 1, clause 5, definition of 'unit shortfall charge']***

4.46 For the fixed charge period, the amount charged for each unit in the shortfall is 130 per cent of the relevant fixed charge issue charge under clause 100(1).

4.47 For the flexible charge period, the amount charged for each unit in the shortfall is 200 per cent of the benchmark average auction charge for the previous financial year. The charge can also be set in regulations, but cannot be lower than 130 per cent, or exceed 200 per cent, of the benchmark average auction charge for the previous financial year (see clause 9(3) and (4) of the Clean Energy (Charges—Customs) Bill 2011,

clause 9(3) and (4) of the Clean Energy (Charges—Excise) Bill 2011 or clause 8(3) and (4) of the Clean Energy (Unit Shortfall Charge—General) Bill 2011).

4.48 After the time the unit shortfall charge becomes payable, a late payment penalty will accrue at a rate of 20 per cent per annum (or a lower rate if prescribed in regulations). The Regulator may remit the late payment penalty in whole or part. ***[Part 6, clause 135]***

4.49 The unit shortfall charge and the late payment penalty are debts due to the Commonwealth which can be recovered by the Regulator in a court with the relevant jurisdiction. ***[Part 6, clause 136]***

4.50 Amounts of a kind specified in regulations and due from the Commonwealth may be set off against the amount due to the Commonwealth arising from the unit shortfall charge or late payment penalty. ***[Part 6, clause 137]***

4.51 Overpayments of the unit shortfall charge or late payment penalty can be refunded. ***[Part 6, clause 140]***

4.52 Where liability has been transferred to another member of a corporate group under an Liability Transfer Certificate (LTC), the controlling corporation which consented to the transfer is taken to have guaranteed the payment of the unit shortfall charge and late payment penalty. ***[Part 6, clause 138]***

Remission of unit shortfall charge – voluntary disclosure of error

4.53 The Regulator may remit part of a unit shortfall charge if the liable entity voluntarily discloses to the Regulator that its reported emissions number was underestimated. ***[Part 6 clause 134A]*** For the Regulator to consider any remittal, the disclosure must:

- be made after 1 February next following the relevant eligible financial year; and
- be made before any relevant investigative action takes place.

4.54 The Regulator cannot remit the unit shortfall charge by more than an amount that would result in the remaining charge being less than:

- for a fixed charge year, the number of units in the unit shortfall multiplied by the fixed charge for that year; or

- for a flexible charge year, the number of units in the unit shortfall multiplied the benchmark average auction charge for the previous financial year. ***[Part 6 clause 134A(4)]***

Assessment of unit shortfall and unit shortfall charge

4.55 The Regulator may make an assessment of a liable entity's unit shortfall and unit shortfall charge for a financial year and provide the entity with written notice of its assessment. The Regulator may rely on a report provided under the NGER Act in making the assessment. ***[Part 6, clause 141(2) and (5)]***

4.56 The assessment may be amended by the Regulator at any time either on the application of the person to whom the assessment relates or the Regulator's own initiative. If this is done, then written notice of it must be provided. ***[Part 6, clause 141(3) and (4)]***

4.57 The original and any amended assessments are advisory in nature. ***[Part 6, clause 141(9)]*** In other words, the legal liability is not set by the assessment. Calculation of a unit shortfall and unit shortfall charge depends on the operation of the law (the bill and related legislation), not on any action taken by the Regulator.

Surrender of units

Which units are eligible emissions units

4.58 Only 'eligible emissions units' can be used for surrender. ***[Part 6, clause 122(1)]*** This phrase is defined to mean carbon units, eligible international emissions units and eligible Australian Carbon Credit Units (ACCUs). ***[Part 1, clause 5, definition of 'eligible emissions unit'], [Part 1, clause 5, definition of 'eligible international emissions unit']*** 'Eligible international emissions units' is defined to have the same meaning as in section 4 of the *Australian National Registry of Emissions Units Act 2011* (ANREU Act) (see further below). ***[Part 1, clause 5, definition of 'eligible international emissions unit']***

Limits on surrender

4.59 In any financial year, units can be surrendered only for that financial year or an earlier financial year. ***[Part 6, clause 122(3)]***

4.60 Carbon units of the current, later or the immediately preceding vintage years may be surrendered. ***[Part 6, clause 122(4)]*** This in effect allows for 'banking' of units.

4.61 In the fixed charge period, a carbon unit cannot be surrendered unless it has a vintage year of that financial year. ***[Part 6, clause 122(6)]***

4.62 A carbon unit with a vintage year that is a fixed charge year, which was issued in accordance with Parts 7 or 8, can only be surrendered with respect to that year (see Chapters 5 and 6). ***[Part 6, clause 122(7)]***

Borrowing limit for flexible charge years

4.63 There is a limit on the number of 'borrowed' units (that is, units of the next vintage year) which can be used for surrender. If surrendered carbon units representing more than 5 per cent of the emissions number are 'borrowed', then the excess number of units over the 5 per cent is not regarded as surrendered for the relevant financial year when calculating the unit shortfall and is instead treated as surrendered at the next surrender date. ***[Part 6, clause 133(6)]***

4.64 In addition, 'borrowed' units can only be surrendered within a specified period when the entity's emissions number is known. ***[Part 6, clause 122(5)]***

Example 4.5 Calculation of shortfall

On 31 October 2018, PN Corp submits its report under the NGER Act for the financial year 2017-18. The report indicates that PN Corp's emissions number is 100,000. On 15 December 2018, PN Corp transmits a notice to the Regulator specifying the surrender of the following units for the financial year 2017-18:

Vintage of units	Number of units
2015-16	10,000
2016-17	10,000
2017-18	70,000
2018-19	10,000
Total	100,000

The surrender of units with vintages belonging to the current year and previous financial years will be accepted. However, only 5 per cent of 100,000 units, or 5,000 units, with a 2018-19 vintage may be surrendered for the year 2017-18. PN Corp will therefore have a unit shortfall of 5,000 for the financial year 2017-18.

Limits on linking with the CFI

4.65 During the fixed charge period, liable entities may surrender eligible ACCUs totalling no more than 5 per cent of their obligation. There are provisions that ensure that if a liable entity surrenders ACCUs that are in excess of 5 per cent of the liable entity's emissions number or interim emissions number, the excess does not contribute to addressing any unit shortfall. Excess ACCUs that are surrendered before 30 June are

treated as if they are surrendered as part of the 'true up' before 1 February of the following year. Excess ACCUs that are surrendered after 15 June and before 1 February are treated as if they are surrendered in the corresponding period of the next financial year. ***[Part 6, clause 125(7)], [Part 6, clause 128(7)-(9)]***

4.66 In the flexible charge period, there will be no limit on the surrender of ACCUs.

Quantitative restrictions on eligible international emissions units

4.67 In the flexible charge period, until 2020, liable entities must meet at least 50 per cent of their annual liability with domestic carbon units. Chapter 3 sets out in more detail the operation of the quantitative restriction. ***[Part 6, clause 133(7)], [Part 1, clause 5, definition of 'eligible international emissions unit']***

Qualitative restrictions on eligible international emissions units

4.68 Eligible international units cannot be surrendered in the fixed charge period as the fixed charge period is intended to provide certainty over the price for carbon units over the period. ***[Part 6, clause 122(8)]*** During the flexible price period such units can be surrendered subject to any restrictions. Any restrictions placed on the acceptance of international units will be to ensure the stability and ongoing credibility of the mechanism, and consistency with Australia's international objectives and obligations. Chapter 3 sets out in detail the operation of qualitative restrictions on eligible international emissions units.

How eligible emissions units are surrendered

4.69 A person may surrender eligible emissions units by electronic notice transmitted to the Regulator. ***[Part 6, clause 122(1)]***

4.70 What constitutes an 'electronic notice transmitted to the Regulator' is described in clause 7. ***[Part 1, clause 7], [Part 1, clause 5, definition of 'electronic notice transmitted to the Regulator']*** This allows the Regulator to require the use of particular information technology requirements. ***[Part 1, clause 8]***

4.71 The notice must specify the eligible emissions units being surrendered, the financial year to which the surrender relates and the person's relevant account number. ***[Part 6, clause 122(2)], [Part 1, clause 5, definition of 'account number']***

When eligible emissions units must be surrendered

4.72 As indicated above, eligible emissions units must be surrendered by 15 June or 1 February. However, to provide for the remote possibility that entities cannot gain computer access to the Regulator in the period shortly before the deadline, the Regulator is empowered to extend the deadline by legislative instrument. If an extension is granted, the automatic cancellation of freely allocated units issued for fixed charge years would also be extended. ***[Part 6, clause 142]***

What happens when a unit is surrendered

4.73 When a carbon unit is surrendered, it is cancelled and the Regulator must remove the entry for the unit from the Registry account of the person who has surrendered it. ***[Part 6, clause 122(10)]***

4.74 When an eligible ACCU is surrendered, it is cancelled and the Regulator must remove the entry for the unit from the Registry account of the person who has surrendered it. ***[Part 6, clause 122(12)]***

4.75 When an eligible ACCU is surrendered, it is cancelled and the Regulator must remove the entry for the unit from the Registry account of the person who has surrendered it. ***[Part 6, clause 122(12)]***

4.76 However, different processes are required concerning eligible international emissions units. When an eligible international emissions unit is surrendered, the Regulator must remove the unit from the Registry account of the person who has surrendered it. In addition:

- If any other international emissions unit is surrendered, then the action required of the Regulator will be specified in the regulations. ***[Part 6, clause 122(11)]*** It is necessary to provide that this action will be specified in the regulations because the concept of an 'eligible international emissions unit' provides for units issued under future international agreements and units issued outside Australia under a law of a foreign country. ***[Part 1, clause 5, definition of 'eligible international emissions unit'], [Part 1, clause 5, definition of 'foreign country'], [Part 1, clause 5, definition of 'prescribed international unit'], [Part 1, clause 5, definition of 'international agreement']*** This provision therefore seeks to provide for future recognition of new and additional units without the need to amend the Act.

Surrender charge for eligible international units

4.77 During the first three years of the flexible charge period, there will be a price floor – a minimum carbon price. The price floor will be implemented through a minimum reserve auction price and a surrender

charge for international units. ***[Part 6, clause 124]*** The price floor is described in more detail in Chapter 3.

Relinquishment

When is relinquishment required?

4.78 The situations in which relinquishment of carbon units can be required are discussed in Chapters 5 and 7. In brief, persons will be required to relinquish units in the following situations:

- in the Jobs and Competitiveness Program, where, for example, units are provided at or before the beginning of each financial year but planned production ceases during a year. Relinquishment prevents windfall gains from units associated with production that does not take place and reductions in the supply of units that would otherwise be available for auction (see Chapter 5); ***[Part 7, clause 146], [Part 11, clause 211]***

- where a court has ordered relinquishment following conviction under specified provisions of the Criminal Code, including those concerning false or misleading statements in information provided to the Regulator. In this case, relinquishment is required because the units would not have been issued if fraudulent conduct had not occurred (see Chapter 7). ***[See Part 10, clause 208(2)]***

How carbon units are relinquished

4.79 A person who holds carbon units can relinquish them by electronic notice transmitted to the Regulator. The notice must specify, among other things, the reason for relinquishment. ***[Part 1, clause 5, definition of 'relinquish'], [Part 11, clause 210(1) and (2)]***

What happens to relinquished units

4.80 For a carbon unit for a fixed charge year, if it is relinquished, then it is cancelled and the Regulator must remove it from its owner's Registry account. ***[Part 11, clause 210(3)]***

4.81 For a carbon unit for a flexible charge year, if it is relinquished, then it is transferred to the Commonwealth relinquished units account (which is the Commonwealth Registry account designated for this purpose) and property is transferred to the Commonwealth. ***[Part 11, clause 210(4)], [Part 1, clause 5, definition of 'Commonwealth relinquished units account'], [Part 1, clause 5, definition of 'Commonwealth Registry account']*** The Regulator may auction the units (see Chapter 3). ***[Part 4, clause 112]***

Failure to comply with relinquishment requirements

4.82 The consequences of a failure to comply with a relinquishment requirement are comparable to the consequences of a unit shortfall described above. The most significant difference is that the liable entity pays a penalty rather than a charge and that the penalty is calculated at double the unit charge (subject to regulations to the contrary in a flexible period year). ***[Part 11, clause 212], [Part 11, clause 213], [Part 11, clause 214], [Part 11, clause 215], [Part 11, clause 216]***

Part 2
Industry assistance

Chapter 5
Jobs and Competitiveness Program

Outline of chapter

5.1 Chapter 5 explains the Jobs and Competitiveness Program (the Program). The Government may make regulations which allocate free carbon units to persons who conduct emissions-intensive trade-exposed activities. This chapter covers Part 7 and elements of Parts 9 and 11 of the bill.

Context

5.2 As Australia moves towards a clean energy future, a carbon price may impact on the international competitiveness of its industries which undertake activities that are both emissions-intensive and trade-exposed. The Program provides significant support for jobs and protects the competitiveness of these emissions-intensive trade-exposed industries from risks for emissions-intensive trade-exposed activities to be located in, or relocated to, foreign countries as a result of different climate change policies applying in Australia compared to foreign countries. The Program also ensures that industry, local communities and workers have a smooth transition to a clean energy future.

5.3 The Program is designed to target assistance in as practical and effective a fashion as possible, within a transparent assistance framework.

5.4 The Program is designed to provide assistance in an economically and environmentally efficient manner. It accommodates growth in industries conducting emissions-intensive trade-exposed activities by directly linking allocations to the production levels of existing and new entities. The Program is based on the expectation that all industries should contribute to the national emissions reduction effort and maintains a strong price signal for all entities to pursue abatement opportunities to reduce the pollution intensity of their products.

5.5 Accordingly, the Program is:

- targeted towards industries that conduct trade-exposed activities and have the most significant exposure to a carbon price;

- provided on an activity basis to ensure that assistance is targeted to the emissions-intensive transformation taking place;
- linked to production levels and provided on the basis that production continues in Australia;
- balanced against the needs of non-assisted sectors and households; and
- consistent with Australia's international trade obligations.

5.6 Assistance is designed to preserve the incentives for entities conducting emissions-intensive trade-exposed activities to transition to a clean energy future by:

- providing assistance only for the most emissions-intensive activities carried out by an entity;
- providing assistance on the same basis to all entities, new and existing, conducting a given eligible activity; and
- providing assistance on the basis of historical information on the emissions from these activities, to ensure that entities have an ongoing incentive to reduce their emissions.

5.7 The linking of assistance to production levels, and not future emissions levels, means that the allocation of free carbon units will maintain the financial incentives for firms to reduce their emissions intensity — that is, the number of emissions generated per unit of output produced. Entities conducting emissions-intensive trade-exposed activities, like all other entities in the economy, will therefore retain the incentive to pursue abatement opportunities that are cost effective relative to the full carbon price.

5.8 Assistance will be provided to entities that conduct emissions-intensive trade-exposed activities through the issuance of free carbon units by the Regulator early in each compliance period.

5.9 During the fixed charge period, all of the allocations for indirect emissions and 75 per cent of the allocations for direct emissions will be made early in a compliance year. The remaining 25 per cent of the allocations for direct emissions will be deferred until early in the following financial year. This is consistent with the payment and surrender obligations of the mechanism (see Chapter 4). The Regulations will provide detail on when this deferred payment will take place.

5.10 Assistance will be provided on an activity basis to ensure that it is well targeted and is equitably distributed within and across industries. The assistance will be provided for the following:

- the direct emissions associated with an activity, that gives rise to an obligation under the mechanism, which can be discharged by surrendering eligible emissions units;
- the emissions associated with the use of steam in an activity;
- the cost increase associated with the indirect emissions from the use of electricity in an activity, which is assessed as resulting from the introduction of the mechanism;
- the cost increase related to the upstream emissions from the extraction, processing and transportation of natural gas and its components, such as methane, used as feedstock and sequestered by an activity.

5.11 Eligibility for assistance will be assessed based on an emissions intensity and trade exposure test:

- Trade-exposure is to be assessed for trade shares (the ratio of the value of imports and exports to the value of domestic production) being greater than 10 per cent in any one of the 2004-05, 2005–06, 2006–07 or 2007–08 financial years, or there being a demonstrated lack of capacity to pass-through costs due to the potential for international competition.
- Emissions-intensity is to be assessed as to whether the industry-wide weighted average emissions intensity of an activity is above a threshold of:
  - 1,000 tonnes CO_2-e per million dollars of revenue; or
  - 3,000 tonnes CO_2-e per million dollars of value added.

5.12 Activity assessments and activity definitions that were completed in the context of the Renewable Energy Target or the 2009-10 CPRS will remain valid and will be specified in the Regulations.

5.13 A Guidance Paper called *Assessment of activities for the purposes of emissions-intensive trade-exposed assistance program* was published on 18 February 2009. Any revisions to this Guidance will continue to advise entities on the process and information required by Government to make an informed decision on the eligibility of an activity for Program assistance and the rate of assistance provided to the activity.

5.14 In making its decision on the eligibility of activities and the allocative baselines for eligible activities (that is, the number of free carbon units that will be issued for each unit of production or eligible inputs, as specified by the regulations, of an emissions-intensive trade-exposed activity), the Government will consider, in addition to data supplied by entities, publicly available information on pricing, trade and emissions intensity from Australian and international sources.

5.15 An Expert Advisory Committee is in place and provides advice to the Government on the definition of activities and the assessment of eligibility for the Program. Decisions taken by the Government on the eligibility of activities were most recently published in March 2011, in an explanatory paper called *Establishing the eligibility of emissions-intensive trade-exposed activities*. This paper will be updated and reflect additional activities as they become eligible under the Program.

5.16 The Program will provide assistance at two different rates, reflecting the need to provide relatively more assistance to relatively more emissions-intensive activities in order to reduce the likelihood of carbon leakage.

5.17 Initial assistance to eligible activities will be set in the regulations at:

- 94.5 per cent of the allocative baseline for activities that have an emissions intensity of at least 2,000 tonnes of CO_2 e/million dollars of revenue or 6,000 tonnes of CO_2 e/million dollars of value added in the specified assessment period; or

- 66 per cent of the allocative baseline for activities that have an emissions intensity between 1,000 tonnes CO_2 e/million dollars of revenue and 1,999 tonnes of CO_2 e/million dollars of revenue, or between 3,000 tonnes of CO_2 e/million dollars of value added and 5,999 tonnes of CO_2 e/million dollars of value added in the specified assessment period.

5.18 The initial rates of assistance accorded each emissions-intensive trade-exposed activity will be reduced in the Regulations by the 'carbon productivity contribution' of 1.3 per cent a year. This is intended to broadly ensure that entities conducting emissions-intensive trade-exposed activities share in the national improvement of carbon productivity.

5.19 The Program will deliver carbon units in accordance with an entity's payment and surrender obligations (see Chapter 4). However, the units issued for each of the fixed charge years cannot be banked for use in future years. In recognition that firms receiving assistance are likely to want to use some units to meet increased electricity costs, the units are

transferable and the Regulator will operate a buy-back mechanism for these units (see Chapter 3).

5.20 The allocative baselines for each activity will be set in the regulations. They will take into account historic emissions and production information submitted to the Department about emissions and production levels in 2006-07 and 2007-08. To maximise abatement incentives, the baselines for allocations will not be updated over time for changes in the emissions intensity of entities conducting emissions-intensive trade-exposed activities.

5.21 For electricity use baselines, an electricity allocation factor will be set at one unit per megawatt hour (MWh) nationwide for the purpose of the eligibility assessment and when setting allocative baselines. This factor may be adjusted for existing large electricity supply contracts for entities consuming greater than 2,000 gigawatt hours (GWh) per annum, and where contractual arrangements entered into before 3 June 2007 are still in force (without having been renegotiated or reviewed) by a date to be set by regulations. In such a situation, these contracts will be considered by the Regulator with a view to determine an entity-specific electricity allocation factor as outlined in the regulations.

5.22 Allocations of assistance to entities conducting emissions-intensive trade-exposed activities will be directly linked to the level of production of individual entities conducting an activity. In any given year, the number of free carbon units to be issued to an entity will be determined using the previous financial year's production of the activity by that entity adjusted for any over or under allocation in the previous year, with the following exceptions:

- concerning new entrants and significant expansions, the Regulator will be afforded the discretion to determine an allocation for the expected production in a given year;
- entities operating newly established facilities who will have their allocations limited by regulations in a manner to avoid windfall gains from assistance;
- sub-threshold facilities will have assistance adjusted through regulations such that assistance is not provided for emissions which do not attract carbon costs; and
- LNG projects will receive a supplementary allocation to ensure that they receive an effective rate of assistance at or above 50 per cent.

5.23 To retain the full incentive to invest in emissions reductions technologies, unit allocations will be uncapped for existing facilities.

5.24 If an entity ceases conducting an emissions-intensive trade-exposed activity, it will be required to relinquish carbon units that had been issued to it for production that did not occur.

5.25 Where an emissions-intensive trade-exposed activity is conducted at a single facility, the entity which has, or would have, direct emissions liability from the facility may apply for assistance. Where more than one entity has liability or potential liability, there must be a joint application including each of those entities, and that joint application must specify how the entities request that the assistance be allocated.

5.26 The Program will be reviewed by the Productivity Commission in the third year of the mechanism (2014-15) and thereafter consistent with the timing of general mechanism reviews.

5.27 A review of assistance provided to a particular activity could be conducted earlier than 2014-15 if requested by the Government. Where the Government refers specific activities to the Productivity Commission for priority reviews, priority could be given as follows:

- industry sectors receiving the greatest level of assistance;
- industry sectors experiencing the fastest rates of growth in assistance; or
- industry sectors where there is strong evidence of windfall gains as a result of the assistance.

5.28 The Productivity Commission reviews will consider:

- the operation of assistance arrangements under the Program; and
- the impact of the Clean Energy Act and associated provisions on emissions-intensive trade-exposed industries; and
- the economic and environmental efficiency of assistance arrangements under the Program.

5.29 Changes made to regulations concerning the Program will be made in a way which has regard to:

- the aims of the Program, including to provide assistance in an economically and environmentally efficient manner to reduce the risks of carbon leakage from emissions-intensive trade-

exposed industries and help these industries transition under a carbon price;

- the most recent reports from the Productivity Commission on matters concerning the Program;

- the principle that changes to regulations that will have a negative effect on recipients of assistance under the Program should not take effect before the later of the following:

  – 1 July 2017;

  – the end of the 3-year notice period that begins when the reduction is announced; and

- other matters (if any) as the Minister considers relevant. These matters could, for example, include Australia's ongoing international trade obligations. However, the Government's intention is that the factors listed in the legislation are the primary criteria that determine that assistance is no longer warranted.

5.30 Changes to regulations that will have a negative effect on recipients of assistance means changes to the assistance rates, beyond the carbon productivity contribution, or other elements of the program set out in the regulations which results in a net decrease in assistance. The Government has also agreed to implement the approach proposed by the Garnaut Review Update 2011 if the Productivity Commission recommends that it is the most effective and efficient means of preventing carbon leakage and assisting the industry to transition and that it is feasible and data is available for the Government adopt this approach. This would be subject to the considerations and minimum notice period set out above.

5.31 The Government will publish draft regulations to set up the Program and engage with relevant entities. As at September 2011, 31 activities were found to be eligible under the criteria and process outlined above.

Summary

Introduction

5.32 Part 7, Division 1 provides that the Program recognises the issues concerning the impact that the mechanism may have on the international competitiveness of emissions-intensive trade-exposed activities carried on in Australia.

5.33 An object of the Program is to provide transitional assistance to entities conducting emissions-intensive trade-exposed activities in a manner that is both economically and environmentally efficient in order to reduce the risk of carbon leakage.

Formulation of the Jobs and Competitiveness Program

5.34 Part 7, Division 2 sets out the core components of the Program. In particular it provides for:

- the creation of a program in regulations that involves the allocation of free carbon units for activities that are taken to be emissions-intensive trade-exposed activities and are carried on in Australia during a particular financial year;
- a requirement under the Program that those persons who are issued free carbon units relinquish units in specified circumstances. This is intended to be used to provide for relinquishment of units on the closure of a facility;
- the imposition of reporting and record-keeping requirements for persons issued free carbon units under the Program. This is intended to be used to ensure that the Regulator is aware of potential closures and whether production levels claimed in assistance applications were actually achieved; and
- comprehensive application and assessment requirements under the Program.

Compliance

5.35 Part 7, Division 3 requires that persons comply with reporting and record-keeping requirements under the Program. Failure to comply will incur a civil penalty.

Special information-gathering powers

5.36 Part 7, Division 4 allows the Minister to request from constitutional corporations information relevant to decisions about the formulation of the assistance under the Program. This information gathering power is limited to the circumstances where an activity is not yet listed as an emissions-intensive trade-exposed activity and a party has requested that the activity be added to the regulations.

Productivity Commission inquiries

5.37 Part 7, Division 5 provides for a series of reviews of the assistance under the Program to be undertaken by the Productivity Commission.

5.38 Part 7, Division 5 outlines the timing of such reviews, the matters to be considered and the requirements for the Government response to the report.

5.39 These reviews will consider whether an alternative pattern and level of assistance would meet the Program's objectives, particularly economic and environmental efficiency, more effectively. Further details of the issues to be taken into account are set out below.

5.40 During the general reviews the Productivity Commission must consult with the Authority on whether the established pattern of assistance is avoiding carbon leakage and facilitating industry transition, and whether it is supporting emissions reduction objectives.

Aspects of the Jobs and Competitiveness Program outside of Part 7

5.41 Part 9 requires the Regulator to publish information about the Program. The general enforcement and accountability framework for the Regulator is also relevant to the Program.

5.42 Part 11, Divisions 2 and 3 set up the legal architecture around compliance with the relinquishment requirements which will operate on the closure of a facility. Accordingly, if a person does not relinquish carbon units as necessary they will be required to pay a penalty, for any units not relinquished, of 200 per cent of the benchmark average auction

charge of the previous financial year or another amount specified in regulations. In the fixed charge period, the penalty charge will be specified for each year. If this is not paid, a penalty of 20 per cent per annum is payable or another lower rate specified in regulations.

Detailed explanation of provisions

Introduction

Aims and objects

5.43 The aim of Part 7 is to recognise issues concerning the impact of the mechanism on the international competitiveness of emissions-intensive trade-exposed activities carried on in Australia. ***[Part 7, clause 143(1)]*** References to assistance in this chapter are references to assistance under Part 7, unless otherwise indicated.

5.44 Unless the Program is implemented, the costs associated with the mechanism may adversely impact the competitiveness of entities conducting emissions-intensive trade-exposed activities in Australia in the period before broadly comparable emissions reduction policies or carbon constraints are applied in other countries at an industry or economy-wide level. Entities conducting these activities may be constrained in their ability to pass on the costs of the carbon price, while competitors do not face similar costs which have been imposed through market based or regulatory mechanisms.

5.45 Part 7 allows the delivery of assistance for emissions-intensive trade-exposed activities. ***[Part 7, clause 144], [Part 7, clause 143(2)(a)]*** Carrying out defined activities in Australia creates eligibility for assistance, rather than a firm's historic or future emissions.

5.46 The Government provides assistance to reduce the risks for emissions-intensive trade-exposed activities to be located in, or relocated to, foreign countries as a result of different climate change policies applying in Australia compared to foreign countries. ***[Part 7, clause 143(2)(b)], [Part 1, clause 5, definition of 'foreign country']*** This risk exists for both current businesses and new investments in the future. The Government also provides assistance to give transitional support to entities undertaking such activities when they are carried out in Australia. ***[Part 7, clause 143(2)(c)]*** Given the significant differences between the emissions profiles of industries, the impact of the carbon price will be greater for some than for others. Transitional assistance is provided through the administrative allocation of free carbon units under the Program to the most emissions-intensive and trade-exposed of Australia's industries.

5.47 Assistance will be given in a way that ensures that the level of assistance for emissions-intensive trade-exposed activities is both economically and environmentally efficient. ***[Part 7, clause 143(2)(d)]***

5.48 The objects of Part 7 recognise that circumstances may change such that assistance may no longer be warranted. In particular, it outlines two important considerations in determining where this may be the case:

- where comparable or more stringent measures to reduce emissions of carbon dioxide and other greenhouse gases have been implemented for the markets in which entities conducting emissions-intensive trade-exposed activities in Australia compete; and ***[Part 7, clause 143(2)(e)]***

- where other countries responsible for a substantial majority of global emissions have implemented comparable measures to reduce those emissions. ***[Part 7, clause 143(2)(f)]***

5.49 The Government will determine whether the assistance is no longer warranted after considering advice from the Productivity Commission review of the assistance under the Program.

5.50 Measures to reduce emissions do not necessarily need to consist of a cap on emissions, and other approaches to reduce emissions are also intended to be considered in the analysis. It will be important to consider whether all relevant market-based and regulatory measures, taken together, impose broadly comparable carbon constraints as those in Australia, taking into account assistance arrangements in both Australia and in these competitor countries.

5.51 Other factors may also come into play which renders the assistance unwarranted in terms of its aim and primary objective of reducing carbon leakage and providing transitional assistance. ***[Part 7, clause 143(2)(g)]*** However, the Government's intention is that the factors listed in the legislation are the primary criteria that determine that assistance is no longer warranted.

Formulation of the Jobs and Competitiveness Program

5.52 Part 7, Division 2 lets the Government set up the Program in regulations. ***[Part 7, clause 145], [Part 1, clause 5, definition of 'Jobs and Competitiveness Program']*** This approach reflects the wide range of activities covered by the Program, the extensive consultation being undertaken as part of its development and the need to ensure that the treatment of each activity is appropriately geared to its specific circumstances.

5.53 The technical aspects of precisely defining the range of emissions-intensive trade-exposed activities, the eligibility criteria and relevant production units, and the need for flexibility to make changes and to include new activities over time, make it appropriate to set out the detail of the Program's operation and application in regulations, within the broad framework of Part 7. The regulations may be disallowed if either House of Parliament passes a resolution within 15 sitting days of the regulations being tabled.

5.54 After the Government has assessed detail on emissions, electricity use, revenue and/or value added for a given activity, the regulations can provide a relatively simple allocation methodology per unit of production which provides investment certainty, minimises ongoing compliance costs and reduces the risk of assistance decisions being subject to lengthy appeal and review processes which may divert resources.

Creating the Program

5.55 The Program will allow for the issue of free carbon units for defined emissions-intensive trade-exposed activities. ***[Part 7, clause 145(1)(a)]***

5.56 Such activities must be carried on in Australia during an eligible financial year. ***[Part 7, clause 145(1)(b)]*** For this purpose, Australia includes external territories, the exclusive economic zone, the continental shelf and the Joint Petroleum Development Area.[30] ***[Part 1, clause 5, definition of 'Australia'], [Part 1, clause 5, definition of 'Joint Petroleum Development Area']*** Assistance may be delivered before an activity is carried on so long as the activity is actually carried out in the relevant eligible financial year.

5.57 While the eligibility of activities will be determined by the Government in decisions on whether or not to list activities in the regulations, the individual eligibility requirements for the assistance will be specified in the Program. ***[Part 7, clause 145(2)(a)]***

5.58 A Registry account is a prerequisite to receiving assistance. ***[Part 7, clause 145(2)(b)]*** Without a Registry account, it would not be possible for the Regulator to issue the free carbon units. Otherwise it is intended that eligibility will essentially rest upon whether a defined emissions-intensive trade-exposed activity is being carried out, what relevant levels of production have been achieved and that the person applying is the one

[30] The *Acts Interpretation Act 1901* was amended by the *Acts Interpretation Amendment Act 2011* to define the terms 'continental shelf', 'exclusive economic zone' and 'territorial sea' in section 2B by reference to the *Seas and Submerged Lands Act 1973*. The bill is expected to commence after the *Acts Interpretation Amendment Act 2011* commences.

ordinarily liable for the emissions from the relevant activity under the mechanism.

5.59 Coal mining is not to be defined as an eligible emissions-intensive trade-exposed activity. ***[Part 7, clause 145(3)]*** The Government has outlined its intention to provide a separate program of transitional assistance to support emissions-intensive coal mines.[31]

5.60 The Minister must take all reasonable steps to establish the Program in regulations before 1 March 2012. ***[Part 7, clause 145(4)]*** Activities found eligible after this point will be added to the Program through amendments to the regulations.

5.61 Reviews of the assistance under the Program will play an important role in advising the Government on the consistency of the assistance with these aims and objects and the likelihood of the assistance being unwarranted because of international developments. The Minister, in making a recommendation to the Governor-General about changes to the regulations, will have regard to:

- the aims of the Program, including to provide assistance in an economically and environmentally efficient manner to reduce the risks of carbon leakage from emissions-intensive trade-exposed industries and help these industries transition under a carbon price;
- the most recent reports from the Productivity Commission on matters concerning the Program;
- the principle that changes to regulations that will have a negative effect on recipients of assistance under the Program should not take effect before the later of the following:
  - 1 July 2017;
  - the end of the 3-year notice period that begins when the reduction is announced; and
- other matters (if any) as the Minister considers relevant. These matters could, for example, include Australia's international trade obligations. However, the Government's intention is that the factors listed in the legislation are the primary criteria that

[31] Australian Government (2011) *Securing a clean energy future: The Australian Government's climate change plan*, pp 133 and 134.

determine that assistance is no longer warranted. ***[Part 7, clause 145(5)]***

5.62 Changes to regulations that will have a negative effect on recipients of assistance means changes to the assistance rates, beyond the carbon productivity contribution or other elements of the Program set out in the regulations, which results in a net decrease in assistance.

Relinquishment requirement

5.63 The Program may provide for the relinquishment of free carbon units. ***[Part 7, clause 146]*** This is intended to be utilised for the closure of a facility. Accordingly, where free carbon units are issued early in a financial year attributable to production that is to take place in that year, and production ceases during the year (other than for maintenance or similar temporary closures), units attributable to the production which did not take place will be required to be relinquished.

5.64 Such a requirement may be defined about events, circumstances or a decision of the Regulator according to criteria in the Program. ***[Part 7, clause 146(1)(b)]*** This provision will ensure that the assistance is contingent upon continued production by the activity and will avoid the potential for an entity to receive a windfall gain from being issued free carbon units for production which is then closed or moved offshore.

5.65 Relinquishment requirements only apply to persons issued units under the Program ***[Part 7, clause 146(1)(a)]*** and cannot exceed the number of units issued to the person under the Program. ***[Part 7, clause 146(2)]***

5.66 The relinquishment of units to comply with the Program can be done by submitting an electronic notice to the Regulator. ***[Part 11, clause 210]*** The relinquishment process is described in Chapter 4.

Reporting requirements

5.67 The Program can include reporting requirements on persons issued units under it, which will allow the Regulator to adequately monitor situations where a closure may have occurred and be alerted to situations where it may need to trigger a relinquishment requirement. ***[Part 7, clause 147]***

Record-keeping requirements

5.68 The Program can include record-keeping requirements on persons issued units under it. ***[Part 7, clause 148]*** This will allow the Regulator to monitor any closure of a facility and ensure that the production records which determined assistance levels are kept for

subsequent validation or investigation. These records are needed because production levels will be the central factor which determines the levels of assistance and these levels will not be collected and reported under the NGER Act.

5.69 Part 14, also gives power to impose record-keeping requirements (see Chapter 7). However, it is intended that these requirements will relate to the broader carbon price mechanism. The record-keeping obligations for the Program will not duplicate other reporting mechanisms or significantly increase the regulatory burden on business.

Other matters and ancillary or incidental provisions

5.70 Other aspects of the Program will be in the regulations. ***[Part 7, clause 149], [Part 7, clause 150]*** In particular, the regulations can provide for the form and content of applications for assistance.

5.71 Given the value of the free carbon units to be issued, it will be important for the Regulator to have enough verified information about relevant production levels to allow it to determine how many free carbon units to issue as assistance to a particular person in a particular year. ***[Part 7, clause 149(1)-(3)]***

5.72 Verification could include that a relevant company officer verify the information by statutory declaration or that the information is accompanied by particular documents or reports, such as an assurance report as to whether the level of production was actually undertaken in the previous financial year or engineering reports to demonstrate that a particular activity is in fact conducted.

5.73 The regulations may prescribe in full the process and procedural requirements for the Regulator to deal with applications. It is anticipated that applications will be made between 1 July and 31 October of each year and assessed by the Regulator on a case-by-case basis. Entities will be able to apply for an extension of this timeline to allow them until 31 December to apply. The Regulator will be able to issue units to applicants as soon as it is satisfied about each application.

5.74 The Regulator may also issue guidelines to assist entities in including information in their applications for assistance under the Program, such as how production should be measured, and other information that would assist the Regulator in assessing an application for assistance. ***[Part 7, clause 149(4)]***

5.75 The Program can also include ancillary or incidental provisions to facilitate its operation. ***[Part 7, clause 150]***

5.76 It is also intended that the Program will, where necessary, adopt various industry standards and confer administrative decision making functions on the Regulator. ***[Part 23, clause 309], [Part 23, clause 310]***

Compliance with reporting and record-keeping requirements under the Jobs and Competitiveness Program

Compliance with record-keeping and reporting requirements

5.77 There is a direct obligation on persons under the Program to comply with any record-keeping or reporting requirements. A person under such an obligation, along with others involved, who contravenes reporting or record-keeping requirements is liable for their behaviour. ***[Part 7, clause 151]*** This is a civil penalty provision (see Chapter 7). ***[Part 7, clause 151(4)]***

Special information-gathering powers

5.78 The simplicity, effectiveness, fairness and timely implementation of the Program will be greatly helped when the Government has the verified detailed information it needs to decide whether an activity is covered by the Program.

5.79 The Government has received verified information about a number of activities, which is sufficient for the Government to make decisions on them. There are a number of potential emissions-intensive trade-exposed activities that are yet to be formally assessed.

5.80 It is important that all participants in an industry that may have information that may materially impact an assessment have provided that information to the Government. This ensures that historical information can be the primary input into the decision-making process. Good quality historical information will reduce the need for detailed comparison of international information as part of decisions on eligibility and baselines.

5.81 Division 4 deals with situations where an entity has come forward and requested an assessment of an emissions-intensive trade-exposed activity and the Government cannot decide whether to include that activity in the regulations without formally requesting information from other companies with information relevant to the decision.

5.82 If a person has indicated to the Government that an activity, which is not listed in the regulations as being covered by the Program, may be or should be covered by it, then the Minister may issue notices to a constitutional corporation to provide information and verify reports relevant to the activity. ***[Part 7, clause 152], [Part 1, clause 5, definition of 'constitutional corporation']*** It is intended that this power would be exercised

as a last resort where a potential recipient of assistance is unwilling to provide the necessary information.

5.83 If only information is requested, then the Minister must give at least 30 days to a corporation to comply with the notice. If a report is also requested to accompany that information, then the Minister must give 60 days to comply with the notice. ***[Part 7, clause 152(5)], [Part 7, clause 152(3)]***

5.84 If a corporation refuses or fails to comply with a notice, then it may be ineligible for assistance under the Program for the first two eligible financial years which begin after the date of the notice. The corporation will be ineligible for assistance if they were capable of complying with the notice and the Minister informs the Regulator that its non-compliance was significant. ***[Part 7, clause 153]*** This consequence is proportionate, given the potential for the withholding of such information to result in windfall gains for a particular entity over the course of the Program.

5.85 The Minister may also disclose this information to the Regulator to assist it in the exercise of its functions and powers. ***[Part 7, clause 154]***

Compliance with relinquishment requirements

5.86 A person who does not relinquish carbon units as required under the Program will be subject to an administrative penalty (see Chapter 7). ***[Part 11, clause 212]***

Public information on the Jobs and Competitiveness Program

5.87 The Regulator must inform the public about carbon units issued under the Program (see also Chapter 9). ***[Part 9, clause 198], [Part 9, clause 199]*** This will inform the market as to how many units are available for auctioning and will provide public accountability for the application of the assistance for emissions-intensive trade-exposed activities.

5.88 In particular, the Regulator must publish on its website:

- a notice when carbon units are issued to a person under the Program which includes the number of units issued to that person and the activity for which they were issued; ***[Part 9, clause 198(1)]***
- the total number of carbon units issued during a particular quarter for each activity; and ***[Part 1, clause 5, definition of 'quarter'], [Part 9, clause 199]***

- the total number of carbon units claimed under the Program but for which no decision has been made, so as to indicate to the market the potential number of units which may not be available for auctioning. ***[Part 9, clause 199(c)]***

Administration, enforcement and monitoring of the Program

5.89 The Regulator will run the Program, in keeping with governance arrangements in the Regulator bill. These include the secrecy provisions to protect confidential information submitted concerning the Program, subject to disclosure in specified circumstances.

5.90 The Regulator's decisions on eligibility and delivery of carbon units under the Program will be subject to a review procedure, including merits review in the Administrative Appeals Tribunal (see Chapter 8).

5.91 The Regulator will be able to draw upon its investigation and enforcement powers in Parts 13 to 21 to enforce the requirements of the Program. This will support the application requirements to ensure that the Regulator has clear, verified and comprehensive information to make decisions under the Program.

Productivity Commission reviews

5.92 Part 8, Division 5 covers the Productivity Commission's role in conducting scheduled reviews of the assistance under the Program.

5.93 The Government will ask the Productivity Commission to conduct reviews of the Program and advise the Government on whether the Program is meeting the aims and objectives of the Program.

5.94 The first review by the Productivity Commission (the 'first scheduled review') will be conducted in the 2014-15 financial year. ***[Part 7, clause 155(1)(a)]*** Subsequent reviews will be consistent in timing with general mechanism reviews. ***[Part 7, clause 155(1)(b) – (e)]***

5.95 In accordance with the *Productivity Commission Act 1998* (PC Act), the Minister responsible for the Productivity Commission, currently the Assistant Treasurer (referred to in the bill as the Productivity Minister) must, during the reviews mentioned above, refer matters about the operation of the assistance under the Program, the impact of the Act and associated provisions on emissions-intensive trade-exposed industries and the economic and environmental efficiency of the assistance to the Productivity Commission for enquiry. ***[Part 7, clause 155(2)(a) to (c)], [Part 1, clause 5, definition of 'Productivity Minister']*** This does not limit the Productivity Minister's powers under the PC Act. ***[Part 7, clause 158]***

5.96 The Productivity Minister must specify the review period to which each inquiry applies which includes the timeframe within which the Productivity Commission must submit its report. ***[Part 7, clause 155 (3)]***

5.97 Under the PC Act, each matter the Productivity Commission review covers must relate to industry, industry development and productivity. ***[Part 7, clause 155(4)]***

5.98 The Productivity Commission must have regard to, but is not limited to, the following matters in conducting each review of the Program: ***[Part 7, clause 156]***

- the aims and objects of the Program and the objects of the Act;
- the feasibility, and data availability, of amending the emissions-intensive trade-exposed assessment framework to one based on an assessment of the estimated expected global uplift of prices of individual emissions-intensive trade-exposed products if other countries had implemented a carbon price equivalent to that applied in Australia, as proposed by the Garnaut Review Update 2011. This review will consider whether it is the most effective and efficient means of preventing carbon leakage and assisting the industry to transition and whether the Government should adopt this approach;
- whether emissions-intensive trade-exposed activities are making progress towards best practice energy and emissions efficiency for the industrial sector to which those activities relate;
- whether additional activities should be added to the Program on account of commodity price movements or other relevant matters;
- whether windfall gains are being conferred on entities carrying out emissions-intensive trade-exposed activities;
- the effect of existing facilities having no cap on unit allocations;
- the growth in the emissions-intensive trade-exposed sector and implications for total free unit allocations under an emissions cap;
- whether the assistance under the Program is supporting Australia's emissions reduction objectives including the medium-term and long-term targets and other targets that are adopted;

- the existence of broadly comparable carbon constraints applying internationally;

- the appropriateness of the LNG supplementary allocation policy;

- the impact of carbon pricing on the competitiveness of emissions-intensive trade-exposed industries, including an analysis of carbon cost pass-through, the level of abatement achieved and the effect of the carbon productivity contribution on emissions-intensive trade-exposed activities over time, and whether the carbon productivity contribution should be changed for a specific industry; and

- whether less than 70 per cent of relevant competitors in each industry have introduced comparable carbon constraints, taking into account all mitigation policies and relevant assistance policies, and hence whether the application of the carbon productivity contribution rate for a specific industry should pause when the assistance rate for a particular activity reaches 90 per cent for highly emission-intensive activities, or 60 per cent for moderately emissions-intensive activities.

5.99 In responding to the Productivity Commission's recommendations, the Government may have regard to advice from the Regulator, particularly concerning the implementation of any recommended changes to assistance, and the Authority, particularly concerning broader issues such as pollution caps. ***[Part 7, clause 156(5)]***

5.100 The Productivity Commission must publish review reports on its website as soon as practicable after those reports are tabled in Parliament. ***[Part 7, clause 157(6)]***

5.101 The Productivity Commission will also be commissioned under the *Productivity Commission Act 1998* to undertake:

- ongoing work to quantify mitigation policies in other major economies;

- a review of assistance provided to a particular activity earlier than 2014-15, if requested by the Government, if this is appropriate having regard to industry sectors receiving the greatest level of assistance, experiencing the fastest rates of growth in assistance or where there is strong evidence of windfall gains as a result of the assistance;

- an examination of the impact of a carbon price and associated Government assistance measures on the coal mining sector,

taking into account advice from the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and industry on the availability of cost-effective abatement technology;

- ad hoc assessments of impacts of the mechanism on particular industries once the mechanism has commenced. Firms may make a request to the Government to have the impact of the mechanism on their sector assessed. These assessments will take into account the industry's circumstances, including a range of factors related and unrelated to the mechanism that affect the competitiveness of the industry, and any assistance provided to the industry; and make recommendations to the Government about whether it should adjust support to the industry and the appropriate mechanism for that assistance; and

- a review of fuel excise/taxation, with any changes to be implemented after three years (that is, 2015-16). It is anticipated that this review will include examination of the merits of a regime based explicitly and precisely on the carbon/energy content of fuels.

Chapter 6
Energy security

Outline of chapter

6.1 Chapter 6 explains the provision of free carbon permits to coal-fired generators under the Energy Security Fund (the Fund), including:

- the way that the Regulator will determine the number of free carbon units to issue to eligible coal-fired electricity generators under the Fund;
- the issue of free carbon units subject to compliance with certain conditions, namely the 'power system reliability test' and the submission of a clean energy investment plan (CEI plan); and
- the interaction of the allocation of free carbon units under this Part with the Government's policy that it proposes to enter into closure contracts with very highly emissions-intensive coal-fired generators, which forms another component of the Fund.

6.2 Chapter 6 also covers the appropriations for:

- loans to coal-fired electricity generators for the purchase of future year carbon units at advance auctions;
- loans to coal-fired generators for refinancing existing debt; and
- contracts and arrangements to protect energy security.

6.3 Chapter 6 covers Part 8 and Part 23, insofar as it concerns special appropriations.

Context

Energy Security package

6.4 The Government announced a package of measures to address energy security under carbon pricing in *Securing a clean energy future: the Australian Government's climate change plan*. The package

comprises three key elements: the Fund, Government loans and an Energy Security Council.

6.5 The Fund comprises:

- assistance to highly emissions-intensive coal-fired generators in the form of 41.705 million free carbon units provided annually over 2013-14 to 2016-17 under Part 8;
- assistance to highly emissions-intensive coal-fired generators in the form of $1 billion in cash payments in 2011-12; and
- payments for the closure of some of Australia's most emissions-intensive generation capacity, which the Government will seek to negotiate to make room for investment in lower pollution plant.

6.6 Part 8 deals with the provision of free carbon units to highly emissions-intensive coal fired generators.

6.7 The provision of cash assistance and payments for closure are largely dealt with outside the bill, except that:

- the interaction between any payments for closure and the allocation of free carbon units is dealt with under Part 8, Division 6; and
- the application form, eligibility criteria and allocation methodology for cash payments in 2011-12 will be the same as that outlined in Part 8.

6.8 To further underpin energy security and recognising difficult borrowing conditions faced by coal-fired generators the Government also outlined in the *Securing a clean energy future: the Australian Government's climate change plan* complementary measures to address risks to energy security under carbon pricing. These include the establishment of the Energy Security Council and a commitment to offer Government loans in certain circumstances.

- The Government announced the establishment of an Energy Security Council, which will include energy and financial market experts to advise the Government in the event that systemic risks to energy security emerge from the financial impairment of power stations arising from any source, including form the introduction of carbon pricing. The Energy Security Council is largely dealt with outside the bill.

- The Government also announced loans for the purchase at auction of future carbon units and that it may make loans available where generators need to refinance their debt but finance is not available from the market on reasonable terms. Applications for loans for refinancing will be considered by the Energy Security Council.

- While details of these arrangements are largely dealt with outside the bill, Part 23 provides special appropriations to underpin them.

Free carbon units and energy security

6.9 The transition to a carbon price has significant transformational implications for the electricity generation sector. The object of providing assistance in the form of free carbon units under Part 8 and associated cash payments is to help maintain energy security by reducing the negative impacts of a carbon price on the operation of highly emissions-intensive generators in the short-term.

6.10 This will help generators that face sizable losses in the value of their assets. This assistance will also support investor confidence in the electricity generation sector, which will underpin investment in the new energy infrastructure needed to meet our future energy needs.

6.11 The mechanism will make fossil fuel-fired electricity generators pay for the cost of the carbon pollution they emit.

6.12 Highly emissions-intensive coal-fired generators are likely to face an increase in their operating costs greater than the general increase in the level of electricity prices. Competition from less emissions-intensive generators, which face lower costs under the mechanism, may cause more emissions-intensive generators to lose profitability.

6.13 With the start of the mechanism, investors in new generation assets can account for the impact of a carbon price in their investment decisions. For this reason, the issue of free carbon units is only available for highly emissions-intensive coal-fired generation assets operating between 1 July 2008 and 30 June 2010.

6.14 In this way, allocations of free carbon units and cash support a smooth transition for highly emissions-intensive coal-fired generators to a carbon price by reducing the short-term financial impact on them and maintaining long-term investor confidence in the sector, without supporting investment in new coal-fired generation.

6.15 Allocations of free carbon units and cash payments under the Fund are not designed to change incentives of recipient generators to reduce emissions. The liabilities of recipient generators are not reduced by the allocation of carbon units under the Fund. Recipient generators are free to sell the carbon units that they receive from the Government, bank them for future use, or use them to meet liabilities under the mechanism. This is achieved by delivering assistance based on the historical energy and emissions intensity of eligible generation complexes and not on ongoing production or ongoing emissions.

6.16 In this regard, assistance under the Fund is unrelated to ongoing liabilities of recipients under the mechanism and is separated from assistance provided in respect of the Program.

6.17 The allocation of free carbon units is conditional on eligible generators complying with a power system reliability test. This will support energy security during the shift to a carbon price by minimising the risk of premature retirement of emissions-intensive generation capacity ahead of sufficient replacement capacity being available.

6.18 The allocation of free carbon units will also be conditional on the publication of a CEI plan, to identify proposals by recipients of assistance to reduce their emissions, invest in research and development, invest in new low emissions capacity, and to include possible projects identified under the Energy Efficiency Opportunities program.

6.19 The Government also recognises the importance of the proper regulation of electricity markets to ensure continued efficient investment in the generation sector. The issue of free carbon units complements the continued reform of energy market regulatory frameworks to promote efficient investment in and reliable supply by Australia's electricity markets.

Summary

Issue of free carbon units

6.20 Part 8, Division 2 requires the Regulator to issue free carbon units for particular generation complexes based on the annual assistance factors set out in certificates of eligibility for coal-fired generation assistance for those complexes. It also clarifies those persons who may be allocated free carbon units by the Regulator.

Certificate of eligibility for assistance

6.21 Part 8, Division 3 sets out the circumstances in which the Regulator should issue a certificate of eligibility for coal-fired generation assistance. It also sets out how the Regulator should determine an annual assistance factor in each of those certificates.

Power system reliability

6.22 Part 8, Division 4 provides that generation complexes covered by certificates of eligibility for coal-fired generation assistance must comply with the power system reliability test before they can receive free carbon units.

Clean Energy Investment Plans

6.23 Part 8, Division 5 provides that no free carbon units will be issued to a generator unless it gives a CEI plan to the Minister for Resources and Energy for a particular generation complex.

Closure contracts

6.24 Part 8, Division 6 provides that the Regulator cannot issue carbon units to generators that have separately entered into a closure contract with the Commonwealth, where this contract acknowledges that these units will be withheld.

Energy security – special appropriation

6.25 Part 23 provides that the Consolidated Revenue Fund is appropriated for amounts payable under contracts or arrangements authorised by the Treasurer for the purpose of protecting energy security in Australia. The Consolidated Revenue Fund is appropriated for making loans authorised by the Treasurer to persons who own, control or operate an emissions-intensive coal-fired generation complex, for the purpose of refinancing existing debt or for the purchase of future carbon units.

Detailed explanation of new law

6.26 The objective of Part 8 is to support energy security and maintain investor confidence through financial support for highly emissions-intensive coal-fired generators in adjusting to a carbon price. ***[Part 8, clause 159], [Part 8, clause 160]***

Important definitions used in this Part

6.27 Assistance under Part 8 is not provided for a particular person, such as the person making an application for assistance, but rather is provided for a collection of equipment used for the generation of electricity known as a 'generation complex'. ***[Part 1, clause 5, definition of 'generation complex']*** References to assistance in this chapter are references to assistance under Part 8, unless otherwise indicated.

6.28 The concept of a 'generation complex' is not the same as the concept of a 'facility' as defined in the NGER Act. Assistance is focused on coal-fired electricity generators, which must meet certain eligibility criteria. However, a 'facility' under the NGER Act could include, for example, the activities of a co-located coal-fired generator and coal mine. For this reason, the separate definition of a 'generation complex' is used to capture those elements of a facility that may be eligible for coal-fired generation assistance.

6.29 For operational reasons, equipment used for the generation of electricity is often engineered such that, within a 'generation complex', there are multiple sets of equipment that can generate electricity independently of one another (although they may share some common infrastructure, such as cooling systems or coal conveyor belts). Each independent set of generating equipment is a 'generation unit'. ***[Part 1, clause 5, definition of 'generation unit']*** A 'generation complex' consists of one or more 'generation units' at the same location.

6.30 Assistance under Part 8 is provided for 'generation complexes' rather than 'generation units'. There is no requirement for applicants for assistance to aggregate generation units at the same location together to form one generation complex, although it may be practical to do so.

Applying for assistance

6.31 If a person wants to apply to the Regulator for a certificate of eligibility for coal-fired generation assistance covering a particular generation complex, then he or she must do so within 30 days of the commencement of the provision. ***[Part 8, clause 162(1)]*** The provision is one of the substantive provisions of the bill (clauses 3 to 303, 304 to 311) which will all commence on the same date. ***[Part 1, clause 2]***

6.32 A person must own, operate or control a generation complex to make an application for assistance. ***[Part 8, clause 162(2)]*** Each application for assistance must cover different generation units. Multiple applications for the same generation units cannot be made. ***[Part 8, clause 162(3)]***

6.33 The Regulator may extend the time limit for applications by up to 30 days, but may only do so up to an extended time limit of 60 days after the commencement of the provision and provided the application does not cover generation units which are the subject of other applications. ***[Part 8, clause 162(7)]***

6.34 If an application is submitted after the time limit (whether extended or not), then it is not a valid application and the Regulator cannot issue a certificate of eligibility for coal-fired generation assistance for that generation complex.

6.35 An application must be made for a generation complex, not the applicant. ***[Part 8, clause 162(1)]*** The act of applying for assistance does not entitle the applicant to free carbon units issued for a given generation complex. Instead, the recipient of assistance is defined by reference to the relationship of a person to a generation complex receiving assistance, not by reference to the applicant. ***[Part 8, clause 161(6)and (7)]***

6.36 The concept of 'owning, controlling or operating' a generation complex is intended to have the same meaning as the equivalent terms in laws on the regulation of energy markets that require the registration of electricity generators. The primary laws (and subordinate instruments) relevant to the application of Part 8 are:

- for the National Electricity Market (NEM), the National Electricity Rules as made and amended under Part 7 of the Schedule to the *National Electricity (South Australia) Act 1996* (SA) and given force of law in other jurisdictions through application legislation; and

- for the Western Australian Wholesale Electricity Market (WA WEM), the Wholesale Electricity Market Rules provided for under section 123 of the *Electricity Industry Act 2004* (WA) and the *Electricity Industry (Wholesale Electricity Market) Regulations 2004* (WA).

6.37 A person may not make multiple applications for all or part of a generation complex. ***[Part 8, clause 162(3)]*** Overlapping assistance could lead to the Regulator issuing too many certificates of eligibility for coal-fired generation assistance and annual assistance factors and delivering additional, unwarranted assistance for some generation complexes.

6.38 An application must be made in the approved combined form for free carbon units under Part 8. ***[Part 8, clause 163(1)(b) and 163(2)]*** This is also the same form for applications for cash assistance of $1 billion to be provided in 2011-12 from the Fund.

6.39 In addition an application for free carbon permits must satisfy specific requirements set out in regulations. These include particular information, documents or prescribed reports to be provided with an application for coal-fired generation assistance. ***[Part 8, clause 163(1)(c)-(e)]*** The information, document and prescribed report requirements will be the same for applications for cash assistance of $1 billion to be provided under the Fund.

6.40 Having received an application, the Regulator may consider that it needs more information to assess it properly. ***[Part 8, clause 164]*** The Regulator must ensure that any additional information requested is relevant to its consideration of the application and must exercise this power reasonably. ***[Part 23, clause 297]***

The Regulator's assessment

6.41 Ordinarily, the Regulator will use its best endeavours to assess an application within 90 days of the date of the application. ***[Part 8, clause 165(4)(b)(i)]*** However, the Regulator may make its assessment up to 150 days after the commencement of the substantive provisions of the bill. ***[Part 8, clause 165(4)(b)(ii)]*** This is because the Regulator cannot reasonably ensure that an application is mutually exclusive in its coverage of generation units until it has all valid applications.

6.42 To ensure that the Regulator has sufficient time to make a decision, it may have an additional 90 days to decide on an application where it has requested additional information. ***[Part 8, clause 165(4)(a)]***

6.43 This may be an iterative process in which the Regulator requests information more than once to clarify the issues involved. The time for making a decision may be extended multiple times. Where more than one request for information is made, the extension of time applies to the last of those requests. However, nothing prevents the Regulator from making a decision before the end of the initial or extended period where it can do so.

6.44 The Regulator's assessment of an application has two key elements:

- determining the eligibility of the generation complex for assistance; and
- determining an 'annual assistance factor' for that generation complex.

The annual assistance factor is needed to determine the total number of free carbon units to be issued for that generation complex.

Determining eligibility

6.45 The Regulator must apply the 'generation complex assistance eligibility test' to decide whether to issue a certificate of eligibility for coal-fired generation assistance. ***[Part 8, clause 165(2)], [Part 8, clause 166(1)]***

6.46 The test has two elements:

- A generation complex must have been in operation at any time during the period beginning on 1 July 2008 and ending on 30 June 2010. ***[Part 8, clause 166(2)(a)]*** This ensures that a new generation complex that entered service after 1 July 2010 is not eligible for assistance. Similarly, this requirement ensures that a generation complex that retired from service prior to 1 July 2008 is not eligible for assistance.

- A generation complex must also have an emissions intensity of greater than 1.0 kilotonnes (kt) of CO_2-e per GWh of electricity generated. ***[Part 8, clause 166(2)(c)]*** Emissions intensity is defined in the same way as when determining the annual assistance factor of a generation complex (see below). ***[Part 1, clause 5, definition of 'emissions intensity']***

  – This requirement is needed to ensure that assistance is effectively targeted to the most emissions-intensive generation complexes. The most acute impacts of a carbon price are likely to emerge for highly emissions-intensive coal-fired generators, and therefore assistance to these generators will be most effective in addressing energy security risks.

6.47 Assistance is only available for coal-fired electricity generators. To be eligible, a generation complex must use coal as its primary energy supply, such that 95 per cent of the electricity it generated in the period from 1 July 2008 to 30 June 2010 is attributed to the combustion of coal. ***[Part 8, clause 166(2)(b)]***

6.48 To warrant assistance under the Fund, the Government has decided that a generation complex must be connected to an electricity grid of a size sufficient to expose it to significant competition. Emissions-intensive coal-fired generators not exposed to competition from low emissions generation are likely to be able to pass on carbon costs to electricity consumers and therefore will are not likely to be acutely impacted in a way that impacts energy security.

6.49 On this basis, generation complexes must be connected to a grid with a capacity of at least 100 MW to pass the generation complex

assistance eligibility test. ***[Part 8, clause 166(2)(a)]*** This is the same as the threshold size of an electricity grid used in the *Renewable Energy (Electricity) Act 2000* (Renewable Act) to determine the sales of electricity liable under that Act. The method for calculating the capacity of a grid is also the same as that used in the Renewable Act and regulations made under the Renewable Act, in that it excludes standby and privately-owned domestic generation sources. ***[Part 8, clause 166(3)]***

6.50 If the Regulator refuses to issue a certificate of eligibility for coal-fired generation assistance, it must notify the applicant of the decision. ***[Part 8, clause 165(5)]***

Determining the annual assistance factor

6.51 A certificate of eligibility for coal-fired generation assistance must include an 'annual assistance factor'. ***[Part 8, clause 165(3)]*** This is used to determine the correct number of carbon units to issue for a particular generation complex. ***[Part 8, clause 161(2) and (3)]***

6.52 The two key elements used in the formula to determine the annual assistance factor for a generation complex are its 'historical energy' and its 'emissions intensity'. ***[Part 8, clause 167(a)], [Part 1, clause 5, definition of 'emissions intensity']***

6.53 These elements are combined such that the annual assistance factor for a generation complex is the product of its historical energy and the difference between its emissions intensity in kilotonnes (kt) of carbon dioxide equivalence of emissions per GWh of electricity and 0.86 kt of CO_2-e per GWh of electricity generated. 0.86 kt of CO_2-e per GWh of electricity generated reflects the average estimated emissions intensity of electricity generation in Australia. ***[Part 1, clause 5, definition of 'carbon dioxide equivalence'], [Part 1, clause 5, definition of 'emissions intensity']***

Historical energy

6.54 For generation complexes that entered service on or before 1 July 2008, the measure of 'historical energy' is actual output over the two year period from 1 July 2008 to 30 June 2010. ***[Part 8, clause 167(a)]***

6.55 Importantly, historical energy for these assets is defined as being the amount of electricity generated 'as measured in GWh at all generator terminals of the generation complex', including electricity associated with auxiliary use (that is, electricity consumed by the generation complex). ***[Part 8, clause 167(a)]*** Historical energy is determined on an 'as generated' basis, rather than a 'sent out' basis.

6.56 Using this measure for generation complexes that entered service after 1 July 2008 would unfairly reduce their annual assistance

factor, and the number of free carbon units they receive. Therefore, for generation complexes or generation complex projects that entered service after 1 July 2008, the 'nameplate rating' of the generation complex is used to calculate a proxy for its likely energy output over a notional two year period. ***[Part 8, clause 167(b)]***

6.57 The nameplate rating of a generation complex is its maximum generation capacity in megawatts published by the Australian Energy Market Authority (AEMO) or the Independent Market Operator of WA (IMOWA). ***[Part 1, clause 5, definition of 'nameplate rating']*** Accordingly, the output of the generation complex can be estimated by considering its nameplate rating and its likely 'capacity factor', that is, the percentage of its maximum output that an asset produces on average over a period of time.

6.58 Multiplying the nameplate rating of the generation complex in MW by 14.016 approximates the energy output in GWh of such a generation complex over a notional two year period, if it operates at an 80 per cent capacity factor over that period (that is, if its average output over the period is 80 per cent of its maximum output).

6.59 The number 14.016 is worked out as follows:

$$14.016 = \frac{(365 \text{ days} \times 24 \text{ hours} \times 2 \text{ years}) \times 0.8}{1{,}000}$$

Emissions intensity

6.60 The 'emissions intensity' of a generation complex is its emissions divided by the amount of electricity it generates, estimated over a specified period of time. ***[Part 1, clause 5, definition of 'emissions intensity']***

6.61 For the purposes of calculating a generation complex's annual assistance factor, its emissions intensity is estimated by reference to its actual emissions and actual energy output over the two year period from 1 July 2008 to 30 June 2010. ***[Part 8, clause 168(1)], [Part 1, clause 5, definition of 'emissions intensity']***

6.62 Importantly, these emissions must be 'emitted from the combustion of fuel in the generation complex' and do not include, for example, emissions from the combustion of fuel to operate mining equipment. Further, fuel combustion must be for 'the purposes of the generation of electricity' and does not include, for example, emissions created for the purposes of the production of steam in a cogeneration plant.

6.63 The concept of 'gigawatt hours of electricity generated', which is used as the denominator for calculating the emissions intensity of these generation complexes, is defined as being the amount of electricity generated 'as measured at all generator terminals of the generation complex'. ***[Part 8, clause 168(1)]*** The emissions intensity estimate derived in this way is therefore defined on an 'as generated' basis, rather than a 'sent out' basis.

6.64 For a generation complex that entered service on or before 1 July 2008, the energy output of the generation complex (described as the 'gigawatt hours of electricity generated') is exactly the same number as its 'historical energy'. ***[Part 8, clause 167]*** However, for a generation complex that entered service after 1 July 2008, historical energy and 'gigawatt hours of electricity generated' will differ.

6.65 For the purposes of assistance, the emissions intensity of a generation complex cannot exceed 1.3 kt of CO2-e per GWh. ***[Part 8, clause 168(2)], [Part 1, clause 5, definition of 'carbon dioxide equivalence']*** This ensures that assistance is not inappropriately skewed towards the most emissions-intensive generation complexes.

Example 6.1 A generation complex that entered service on or before 1 July 2008

To estimate the historical energy of a generation complex that entered service on or before 1 July 2008, the applicant should provide, and the Regulator should assess, historical data concerning the generation of electricity by that generation complex over the period from 1 July 2008 to 30 June 2010.

The Regulator could verify this data through comparison with data publicly available from independent bodies such as the market operator in the market in which the generation complex operates. For example, this investigation might find that the historical energy of a generation complex over the two year period in question was 16,000 GWh of electricity.

To estimate the emissions intensity of a generation complex, the applicant should also provide, and the Regulator should assess, historical information concerning the emissions produced by the generation complex over the period 1 July 2008 to 30 June 2010.

The primary source for this information is likely to be information reported to the Australian Government as required under the NGER Act. For example, data provided under the NGER Act might substantiate that the generation complex in question produced approximately 20,000 kt of CO_2-e over the two year period in question.

Based on these estimates, the Regulator's reasonable estimate of the generation complex's emissions intensity would be:

$$\frac{\text{20,000 kt of } CO_2\text{-e per GWh}}{\text{16,000 GWh}} = \text{1.250 kt of } CO_2\text{-e per GWh}$$

Accordingly, the Regulator would find the generation complex's annual assistance factor to be:

$16{,}000 \times (1.250 - 0.86) = 6{,}240$

Example 6.2 A generation complex that entered service after 1 July 2008

To estimate the historical energy of a generation complex that entered service after 1 July 2008, the applicant should provide the Regulator with the nameplate rating of the generation complex as registered with the relevant market operator as of 1 July 2010.

For example, the generation complex's nameplate rating might be 500 MW. This being the case, the Regulator would estimate the historical energy of the generation complex over a notional two year period to be:

$500 \times 14.016 = 7{,}008$ GWh

However, the Regulator must use the actual emissions and actual electricity output of this generation complex over the period 1 July 2008 to 30 June 2010 for the purpose of determining its emissions intensity. If the generation complex did not generate any electricity during this period it would not be eligible for assistance and so it does not matter that it would not be possible to estimate its emissions intensity in this way.

Accordingly, the applicant should provide, and the Regulator should assess, historical information concerning the emissions produced by the generation complex over the period 1 July 2008 to 30 June 2010 such as that reported under the NGER Act. This data might substantiate that the generation complex produced approximately 4,000 kt of CO_2-e over the two year period in question.

To estimate the 'GWh of electricity generated' by this generation complex the applicant should provide, and the Regulator should assess, historical data concerning the generation of electricity by that generation complex over the period from 1 July 2008 to 30 June 2010.

In this example, the Regulator finds that the historical energy of the generation complex over the two year period in question was 3,750 GWh (this number is less than the deemed 'historical energy' of

the generation complex, reflecting that it was not in service for the full two year period from 1 July 2008 to 30 June 2010).

Based on these estimates, the Regulator's reasonable estimate of the generation complex's emissions intensity would be:

$$\frac{\text{4,000 kt of } CO_2\text{-e per GWh}}{\text{3,750 GWh}} = \text{1.067 kt of } CO_2\text{-e per GWh}$$

Based on these estimates, the Regulator would find the generation complex's annual assistance factor to be:

$$7{,}008 \times (1.067 - 0.86) = 1{,}450.656$$

Issuing assistance

6.66 The Regulator must decide whether to issue a certificate of eligibility for coal-fired generation assistance for each application it receives and, if so, what the annual assistance factor in the certificate should be. ***[Part 8, clause 165]*** Each of these decisions may be reconsidered or reviewed under Part 21 (see Chapter 8).

6.67 The number of free carbon units that should be issued for a generation complex is a function of both the annual assistance factor specified for that generation complex and of all other annual assistance factors for all other generation complexes. ***[Part 8, clause 161(2)]***

6.68 This is because the Regulator must take the annual assistance factor in each certificate of eligibility for coal-fired generation assistance and divide it by the sum of all annual assistance factors in all such certificates (the 'total annual assistance factors for that eligible financial year').

6.69 For the eligible financial years beginning on 1 July 2013, 1 July 2015 and 1 July 2016, the result of this calculation (which must be less than 1) is then multiplied by 41,705,000 (being the total number of free carbon units that may be issued) to determine the share of the total pool of free carbon units available in those years to be issued for a generation complex. ***[Part 8, clause 161(2)]*** This calculation is subject to rounding provisions. ***[Part 8, clause 161(4)]***

6.70 In the eligible financial year beginning on 1 July 2014, a different formula is adopted (see below).

6.71 In this way, the available pool of free carbon units per year is distributed among all eligible recipients of these units in each year in

which allocations of free carbon units are made, which achieves the Government's policy of 'capping' the total number of free carbon units to be issued under the Fund.

Example 6.3 Calculating the number of free carbon units to issue to particular generation complexes

Example 6.1 and Example 6.2 outlined the calculation of annual assistance factors for two hypothetical generation complexes. These generation complexes, which we shall call 'Generation complex A' and 'Generation complex B', had annual assistance factors of 6,240 and 1,450.656 respectively.

Other generation complexes are likely to be found to be eligible for assistance, and to be issued certificates of eligibility for coal-fired generation assistance containing annual assistance factors. For example, these annual assistance factors, including those of Generation complex A and Generation complex B, might add up to 39,100.000.

In this case, Generation complex A and Generation complex B would receive the following number of free carbon units in each of the eligible financial years beginning on 1 July 2013, 1 July 2015 and 1 July 2016 (provided they comply with the power system reliability test, that a CEI plan has been submitted for these generation complexes, and that they are not party to a closure contract fitting the requirements of Part 8, Division 6 that specifies units will be withheld in given years):

Generation complex A

$$\frac{6{,}240}{39{,}100} \times 41{,}705{,}000 = 6{,}655{,}734.015$$

$$= 6{,}655{,}700 \text{ (after rounding)}$$

Generation complex B

$$\frac{1{,}450.646}{39{,}100} \times 41{,}705{,}000 = 1{,}547{,}293.898$$

$$= 1{,}547{,}300 \text{ (after rounding)}$$

In the year beginning on 1 July 2014, the number of free carbon units issued to these generation complexes would depend on changes to the

number of units issued as a result of review events. In the event that no successful reviews of annual assistance factors were concluded prior to 1 September 2014, these generation complexes would effectively receive the same number of units as calculated above in that year (with some slight difference possible due to rounding).

6.72 Ordinarily, a review that changes the annual assistance factor determined for a generation complex would change the 'total annual assistance factors for that eligible financial year'. This would change the number of free carbon units that should have been issued for all other generation complexes with certificates of eligibility for coal-fired generation assistance. This may create uncertainty for recipients of assistance as it could, for example, involve the relinquishment of incorrectly issued units.

6.73 To prevent alterations to all previous issues of assistance, the definition of the 'total annual assistance factors for that eligible financial year' includes certificates purportedly issued by the Regulator. This means that it includes annual assistance factors in certificates later found through a review process to have been issued incorrectly. ***[Part 8, clause 161(2)]***

6.74 The 'total annual assistance factors for that eligible financial year' cannot change after 1 September of each financial year and previous provisions of assistance to a given generation complex cannot be altered due to a review of an annual assistance factor for a different generation complex.

6.75 A review could require the issue or relinquishment of additional free carbon units for the generation complex subject to review. The fact that other allocations are not adjusted could mean that the number of units issued in a given financial year exceeds the Government's cap for that year.

6.76 If, after a review, no adjustment is made, the Regulator could issue more free carbon units than was intended by the Government in setting up the Fund. While the number of units to be issued for the eligible financial years beginning on each of 1 July 2013, 1 July 2015 and 1 July 2016 is set at 41,705,000, the total number of units allocated in the eligible financial year beginning 1 July 2014 may differ from this amount and is calculated according to a different formula. ***[Part 8, clause 161(3)]***

6.77 The formula firstly looks at the number of free carbon units that would be issued for a given generation complex for the eligible financial years beginning on 1 July 2013 and 1 July 2014, in the event that that all annual assistance factors for all generation complexes had never varied from their value on 1 September 2014. This amount is equal to:

$$\frac{\text{annual assistance factor in respect of that generation complex as of 1 September 2014}}{\text{total annual assistance factors for that eligible financial year}} \times 83{,}410{,}000$$

6.78 To determine the amount of free carbon units that should be allocated for each generation complex on 1 September 2014, the Regulator then must consider how many free carbon units have already been issued for that generation complex (term 'A'), and how many units would have been issued for that generation complex but were not due to the operation of various other provisions of the bill (term 'B'). ***[Part 8, clause 161(3)]***

6.79 The amount of units already issued in term 'A' should include units issued on 1 September 2013 and any additional units allocated as a result of a review of a decision on the generation complex's annual assistance factor. This formula ensures that no more than 83,410,000 free carbon units can be issued over the first two years of allocations, and that the total allocation to individual assets over those two years reflects their annual assistance factor as of 1 September 2014 (including any adjustments as a result of a review of decisions).

6.80 The full formula is given as:

$$\left[\frac{\text{annual assistance factor in respect of that generation complex as of 1 September 2014}}{\text{total annual assistance factors for that eligible financial year}} \times 83{,}410{,}000 - \text{the total number of free carbon units issued before 1 September 2014 for the generation complex ('A')} - \text{the Regulator's reasonable estimate of the number of free carbon units with a vintage year beginning on 1 July 2013 that were not issued for a generation complex because of the operation of Part 8, Divisions 4, 5, or 6 ('B')}\right]$$

6.81 However, the number of free carbon units issued could still exceed the level anticipated by the Government, notwithstanding the true up arrangements in the payment and surrender process (see Chapter 4), in the unlikely event that a review of a generation complex's annual assistance factor did not conclude until after 1 September 2014.

6.82 The Regulator's allocation decisions under clause 161 are not subject to review by the Authority as they simply involve the mechanical application of a formula to determine the correct number of free carbon units to issue for a generation complex, and the correct application of the provisions that determine the correct recipient of assistance for that generation complex. Judicial review is available if, for example, the incorrect number of units is issued for a generation complex or free carbon units are issued to the wrong recipient. ***[Part 8, clause 161(6) and (7)]***

6.83 The Regulator must publish each certificate of eligibility for coal-fired generation assistance as soon as practicable after it is issued. ***[Part 8, clause 165(6)]*** This is important because, as outlined above, the number of free carbon units issued for a generation complex is a function

of not only the annual assistance factor specified in the certificate of eligibility for coal-fired generation assistance issued for that asset, but also all other annual assistance factors specified for all other generation complexes.

6.84 The public disclosure of the issue of all certificates of eligibility for coal-fired generation assistance, and the annual assistance factors in those certificates, is important to ensure that all potential recipients of assistance have access to information that impacts on the allocation of units. This means that the Regulator can publish annual assistance factors despite the secrecy provisions of Part 4 of the NGER Act.

6.85 Free carbon units issued for a particular generation complex are issued to the entity that was liable for the emissions created from the operation of that asset as of the end of the previous financial year. To achieve this, it is assumed that the generation complex was a facility as defined under the NGER Act, and that this facility created sufficient greenhouse gas emissions to meet the mechanism's threshold for liability (see Chapter 1).

6.86 The rules for determining liability for emissions under the mechanism are then applied to identify the person who would be liable for the emissions from the generation complex given those assumptions (see Chapter 1). This person is the recipient of assistance. ***[Part 8, clause 161(6)]*** In this way, the recipient of assistance identified under this clause is one of three possible persons:

- the controlling corporation of a group where one or more members of the group has operational control of the generation complex; or ***[Part 1, clause 5, definition of 'controlling corporation']***

- the non-group entity with operational control of the generation complex; or ***[Part 1, clause 5, definition of 'non-group entity']***

- the person with an LTC for the facility that includes the generation complex (for example, a company with financial control of the facility). ***[Part 1, clause 5, definition of 'financial control']***

6.87 In the case of a 'designated joint venture' the recipient of free carbon units may be two or more participants, divided in respect of their respective interests in the facility. ***[Part 8, clause 161(7)], [Part 1, clause 5, definition of 'designated joint venture'], [Part 1, clause 5, definition of 'participating percentage']***

6.88 The issue of free carbon units for a generation complex is subject to:

- compliance with the power system reliability test; and ***[Part 8, clause 161(10)]***

- a CEI plan being provided to the Resources and Energy Minister for that generation complex; or ***[Part 1, clause 5, definition of 'Resources and Energy Minister'], [Part 8, clause 161(11)]***

- whether a person who owns, controls or operates the generation complex has entered into a 'closure contract' and recognised in that contract that the effect of doing so is to forego some or all of their free carbon units under Part 8. ***[Part 8, clause 161(12)]***

Where a person who owns, controls or operates a generation complex has entered into a 'closure contract' for that generation complex, free carbon units are subject to conditions outlined in the contract and not to the power system reliability test and the CEI plan. ***[Part 8, clause 181A]***

Power system reliability test

6.89 To ensure energy security at the beginning of the mechanism, the Government has imposed conditions on assistance. This is designed to reduce the risk of unexpected behaviour from owners, controllers or operators of generation assets (or their creditors) affecting the supply reliability in Australia's electricity markets. For example, a reduction in asset value of a generator may cause its creditors to force it to shut down even though it still has to operate to maintain sufficient supply in an electricity market.

6.90 Generation complexes must comply with the 'power system reliability test' in order to receive assistance. The power system reliability test uses the value of free carbon units to influence the decisions of owners, operators or controllers of some generation complexes about when to withdraw generating capacity, to promote the secure supply of electricity. ***[Part 8, clause 169], [Part 8, clause 170]***

6.91 Depending on electricity market conditions, a decision to withdraw generating capacity could affect energy security by reducing the maximum amount of electricity that can be generated below the level needed to reliably meet peak demand.

6.92 The power system reliability test focuses on changes to a generation complex's 'nameplate rating' because the reliability of a power system depends, in part, on the maximum continuous electrical output of all generators connected to the system being sufficient to supply the maximum likely demand for electricity in the system, allowing for contingencies like malfunctions of generators and technical constraints on the safe system operation.

6.93 The power system reliability test is structured around concepts and processes set out in laws regulating energy markets. The primary laws (and instruments made under those laws) likely to be applied in the Regulator's assessments of the power system reliability test are:

- for the NEM, the National Electricity Rules; and
- for the WA WEM, the Wholesale Electricity Market Rules.

6.94 These laws require generators to register with the operator of the energy market in which they operate:

- Rule 2.2 of the National Electricity Rules requires a person who engages in the activity of owning, controlling or operating a generator in the NEM to register with AEMO, unless it is the subject of an exemption.
- Regulations 14 and 19 of WA's Electricity Industry (Wholesale Electricity Market) Regulations 2004 require a person who engages in the activity of owning, controlling or operating a generator in the WA WEM to register with IMOWA, subject to exemptions and a minimum capacity requirement.

Registration as a generator under these two laws requires compliance with a range of technical and operational conditions, which supports the reliable and safe operation of the NEM and WA WEM, and gives AEMO and IMOWA powers necessary to manage system security.

6.95 By using the value of assistance to create incentives that influence the decision of a recipient of assistance to cease its registration as a generator, or reduce its nameplate rating, the power system reliability test supports the reliable and safe operation of the NEM and WA WEM.

6.96 A generation complex's 'nameplate rating' is defined as its maximum generation in MW, as published by AEMO or an equivalent number defined by the Regulator in consultation with IMOWA. The National Electricity Rules and the WA Wholesale Electricity Market Rules require registered generators to register various parameters concerning the generating capacity of their various generation units and generation complexes. ***[Part 1, clause 5, definition of 'nameplate rating']***

6.97 If AEMO performs the functions of the energy market operator in the place where the generation complex is located, the nameplate rating is the maximum generation in MW of the generation complex, as published by AEMO. ***[Part 1, clause 5, definition of 'nameplate rating']***

6.98 If the IMOWA performs the functions of the energy market operator in the place where the generation complex is located, the nameplate ratin is the maximum generation in MW of the generation complex as determined by the Regulator. The Regulator in making this determination may have regard to any information provided to the Regulator by IMOWA. ***[Part 1, clause 5, definition of 'nameplate rating']*** The Regulator's determination on the nameplate ratings in the WEM is intended to be equivalent in concept to the nameplate rating published by AEMO.

6.99 Where a generator provides a particular parameter for individual generation units, the various values might need to be aggregated to the level of the generation complex (to which assistance applies) for the purpose of the power system reliability test.

6.100 The Regulator must not issue free carbon units for a generation complex where it does not meet the power system reliability test. ***[Part 8, clause 169(2)]*** This test must be applied to each generation complex individually each time carbon units are issued for that asset. ***[Part 8, clause 161(2) and (3)], [Part 8, clause 161(10)]***

6.101 A generation complex can pass the power system reliability test in three ways:

- the nameplate rating of the generation complex is not reduced over time, meaning that it continues to contribute to power system reliability (the status quo approach); or

- the nameplate rating of the generation complex is reduced over time, but AEMO or IMOWA certifies that, despite these reductions, there is unlikely to be a breach of relevant power system reliability standards within two years (the 'certification approach'); or

- the nameplate rating of the generation complex is reduced, but the person that is registered as a generator for that generation complex also constructs new 'replacement capacity' that complies with relevant requirements set out in the bill and regulations (using the Low Emissions Transition Incentive).

The status quo approach

6.102 A generation complex passes the power system reliability test if the nameplate rating of that generation complex remains the same as, or exceeds, the level it was on 1 July 2010.

6.103 In this case, the generation complex receiving assistance has not reduced its maximum continuous generation capacity, and so has not reduced its ability to contribute to satisfying the maximum likely demand for electricity within the system. Further, the generation complex that is registered with this capacity is, through the act of remaining registered, required to comply with technical and operational requirements that improve the likelihood that it will be physically capable of supplying that amount of electricity at times of high demand when it is most required.

6.104 Therefore, breaches of relevant power system reliability standards cannot be reasonably attributed to the actions of generation complexes that comply with these clauses, but are more likely to be due to insufficient investment in new generation capacity to satisfy growth in demand for electricity.

The certification approach

6.105 It is possible that the mechanism will change the relative cost of different generators in an energy market such that the owner, operator or controller of a generation complex will seek to retire all or part of that generation complex from service.

6.106 Such a retirement is generally necessary to ensure a gradual transition to a lower emissions electricity generation sector. However, such a retirement would be concerning if it were to be likely to lead to a breach of relevant power system reliability standards, and jeopardise energy security.

6.107 Given this, the certification approach to passing the power system reliability test lets a generator reduce the nameplate rating of a generation complex where there is unlikely to be a breach of relevant power system reliability standards within two years after that event, taking into account the reduction in generation capacity from the generation complex. ***[Part 8, clause 170(2)(c)]***

6.108 The power system reliability test also lets a generator cease its registration where there is unlikely to be a breach of relevant power system reliability standards applicable to the energy market it operates in within two years, taking into account the removal of the generation capacity of the generation complex from the market. ***[Part 8, clause 170(2)(d)]***

6.109 Both the National Electricity Rules and the WA Wholesale Electricity Market Rules set out various power system reliability standards that assess the likelihood of the system being able to satisfy the maximum likely demand within the system. However, not all of these power system reliability standards will be relevant to an assessment of whether a change

in the nameplate rating of a generation complex will affect energy security. In assessing the likely maximum demand the impact of policies which reduce that demand are taken into account.

6.110 Assessing whether the reduction in the nameplate rating of a generation complex is likely to breach power system reliability standards, and which power system reliability standards are relevant to that assessment, are best performed by AEMO or IMOWA, rather than the Regulator.

6.111 For this reason, the Regulator must rely on an appropriate certification by AEMO or IMOWA, rather than on its own judgement of the circumstances. ***[Part 8, clause 170]*** Owners, operators or controllers of generation complexes receiving assistance must obtain appropriate documentation from AEMO or IMOWA to the satisfaction of the Regulator if they wish to cease their registration as a generator or reduce the nameplate rating of a generation complex.

6.112 A person who owns, controls or operates a generation complex may apply to AEMO or IMOWA for a certification to the effect that a reduction in the generation complex's nameplate rating, or a cessation of its registration, would pass the power system reliability test. ***[Part 8, clause 174], [Part 8, clause 175]***

6.113 AEMO or IMOWA may consider a range of power system reliability standards that might be affected by a reduction in a generation complex's nameplate rating, or the cessation of a generator's registration, when:

- considering whether to provide such a certification; and
- making a judgement as to which power system reliability standards are relevant to the assessment,

because they are directly impacted by changes to the nameplate rating of the generation complex in question. AEMO or IMOWA may choose not to certify positively or negatively in response to the application.

6.114 If, within 120 days after the application, AEMO or IMOWA has not certified positively or negatively in response to the application, the Regulator must take AEMO or IMOWA to have certified that the reduction or cessation is unlikely to breach relevant power system reliability standards within two years of the reduction or cessation. ***[Part 8, clause 174(4)], [Part 8, clause 175(4)]***

6.115 This places an effective time limit on the considerations of AEMO or IMOWA, giving recipients of assistance certainty that their

applications for certifications for the power system reliability test will be considered in a timely manner.

6.116 Nothing prevents a person who owns, controls or operates a generation complex from applying to AEMO or IMOWA for a certification in writing after a reduction in a generation complex's nameplate rating has already taken place, or after a cessation of its registration has occurred.

6.117 If the person does not receive the certification before 1 September of a given eligible financial year, free carbon units available to be issued in that year for the generation complex in question would be withheld under the power system reliability test, except where AEMO or IMOWA has not certified or refused to certify the application within 120 days of receiving an application. ***[Part 8, clause 174(4)], [Part 8, clause 175(4)]***

The Low Emissions Transition Incentive (LETI)

6.118 As an alternative to the certification approach, a generator may also seek to reduce the registered capacity of a generation complex, or cease its registration, using the LETI. This approach sharpens incentives for these generators receiving assistance to invest in low emissions replacement capacity by allowing them to receive direct credit for such investments when assessing compliance with the power system reliability test.

6.119 The LETI allows recipients of assistance to retire existing emissions-intensive generation capacity without relying on a certification from AEMO or IMOWA (which takes into account a range of factors in the energy market that are beyond the control of the recipient of assistance, such as growth in demand and retirement of other generation units). As a result, the LETI supports a smooth and timely transition to a lower carbon generation sector, whilst protecting energy security.

6.120 To use the LETI, the generator that is registered for a generation complex subject to a certificate of eligibility for coal-fired generation assistance must also be registered for one or more new generation units that satisfy a range of conditions set out in the bill and therefore constitute replacement capacity for the purpose of the incentive. ***[Part 8, clause 170(2)(e)], [Part 8, clause 171], [Part 8, clause 172]***

6.121 A generation complex is deemed to pass the power system reliability test if it has:

- previously passed the power system reliability test using the LETI and satisfies particular conditions in subsequent years; ***[Part 8, clause 170(2)(f) and (g)]***

- previously reduced its nameplate rating, has been found to have passed the power system reliability test using the LETI and has not subsequently reduced its nameplate rating. ***[Part 8, clause 170(2)(f)]*** This reflects that the passing of the test in the earlier year occurred through the full replacement of the retiring generation capacity at that time, protecting energy security, and that no reductions in the capacity of the generation complex have occurred since that time;

- has previously ceased its registration and has been found to have passed the power system reliability test under the LETI. ***[Part 8, clause 170(2)(g)]*** This reflects the fact that the generation complex was fully retired from service on the cessation of its registration, and that capacity was fully replaced at that time. As the nameplate rating of a retired generation complex cannot reduce any further, the generation complex can appropriately be considered to pass the power system reliability test in all future years.

6.122 It is not necessary to consider the existence of replacement capacity if a particular generation complex passes the power system reliability test because it has never reduced its nameplate rating. ***[Part 8, clause 171(2) and (3)]***

6.123 If replacement capacity is needed to pass the power system reliability test, the generation unit(s) providing the replacement capacity must be registered by the same person who is registered for the generation complex subject to a certificate of eligibility for coal-fired generation assistance. ***[Part 8, clause 171(4)]*** Replacement capacity must have been nominated by that person for this purpose. ***[Part 8, clause 171(4)(a)]*** The requirements for nomination are specified. ***[Part 8, clause 172]***

6.124 Replacement capacity must not be part of the generation complex subject to a certificate of eligibility for coal-fired generation assistance. ***[Part 8, clause 171(4)(b)]*** Otherwise, the replacement capacity would be counted twice for the purpose of the power system reliability test:

- as part of the nameplate rating of the generation complex that is subject to a certificate of eligibility for coal-fired generation assistance; and ***[Part 8, clause 171(5)(a)]***

- as replacement capacity. ***[Part 8, clause 171(5)(b)]***

6.125 This does not mean that generation units providing replacement capacity cannot be co-located with the generation complex subject to a certificate of eligibility for coal-fired generation assistance.

6.126 A new generation unit built at the same location should not be considered to form part of the generation complex subject to a certificate of eligibility for coal-fired generation assistance. This is because the extent of this generation complex was defined at the time the certificate was issued. A new generation unit can be built at the same location without being considered to be part of the original generation complex.

6.127 Replacement capacity must also be connected to the same interconnected electricity system as the generation complex subject to a certificate of eligibility for coal-fired generation assistance. ***[Part 8, clause 171(4)(c)]*** If the market related to the system is divided into regions, replacement capacity must be located in the same region. ***[Part 8, clause 171(4)(d)]*** This is because retiring capacity can only be replaced in a way that maintains power system reliability when the new generation unit or units supply electricity to the same interconnected electricity system.

6.128 The NEM is divided into regions, which generally reflect physical constraints on the transmission of electricity between different parts of the system. Replacement capacity located in a different region to the retiring capacity would be unlikely to provide the same amount of electricity to that region at times of high demand because of transmission constraints. For this reason, replacement capacity must be located in the same region to maintain energy security.

6.129 To maintain energy security, replacement capacity must enter service on or before 1 December of a given financial year. ***[Part 8, clause 171(4)(e)]*** This is because extreme peaks in electricity demand are most likely to occur on very hot summer days when air-conditioning loads peak.

6.130 The difficulty of meeting these summer peaks is compounded because some generation units cannot produce their maximum electrical output on very hot days. This feature of the power system reliability test allows a generator to retire capacity after 1 April of a given year (1 April being the date against which the power system reliability test is assessed).

6.131 The generator can then bring replacement capacity into service on or before 1 December of that same calendar year (the subsequent eligible financial year). This replacement capacity would then be assessed on the subsequent 1 April to determine whether carbon units should be issued for a given generation complex on the subsequent 1 September. ***[Part 8, clause 161(2)]*** The concept of entering service is defined in the bill. ***[Part 8, clause 171(9)]***

6.132 Finally, it is essential that the generation capacity of the replacement capacity equals or exceeds the amount of capacity that is being retired so as to maintain energy security. Without this, there is a

risk of shortfalls to supply that may jeopardise energy security. This broad requirement can be fulfilled in a range of ways set out in the bill. ***[Part 8, clause 171(5)]***

6.133 This assessment relies on looking at the amount of generation capacity that a particular generator can provide to the system at a particular point in time to support energy security. Accordingly, the nameplate rating of the generation complex which has a certificate of eligibility for coal-fired generation assistance is assessed on the various days on which the power system reliability test is applied, that is, on 1 April of each relevant eligible financial year. ***[Part 8, clause 171(5)(a)]*** Changes to this nameplate rating indicate a situation where the ability of that generation complex to contribute to energy security has changed, and therefore where it may be in breach of the power system reliability test.

6.134 Firstly, if a generation complex's nameplate rating has not reduced since the previous 1 April, the generation complex passes the power system reliability test in the absence of any replacement capacity having been commissioned. ***[Part 8, clause 170(2)(a)], 170(2)(b), 170(2)(c) and 170(2)(f)(iii)]*** Where this is not the case, the nameplate rating of the generation complex will reflect some reduction in generating capacity that must be made up with replacement capacity. This reduced nameplate rating is summed with the replacement capacity that satisfies the various requirements set out in the bill. ***[Part 8, clause 171(5)(b)]***

6.135 Replacement capacity can only be taken into account once for the purpose of the power system reliability test. ***[Part 8, clause 171(4)(f)]*** The nameplate rating of the generation complex can also be summed with any 'relevant excess megawatts', where this is an amount of replacement capacity that was excess to requirements when the LETI was used previously. ***[Part 8, clause 171(5)(c)]***

6.136 To pass the power system reliability test using the LETI, the amounts added together under paragraphs 171(5)(a)-(c) must equal or exceed the lowest of three different 'target' generation capacities. ***[Part 8, clause 171(5)(a)-(c)], [Part 8, clause 171(5)(d)-(f)]***

6.137 These target generation capacities reflect the minimum amount of generation capacity that must be retained in the system (consisting of both the original generation capacity and some replacement capacity) to maintain energy security under three difference circumstances, these being when:

- the nameplate rating of the generation complex is reduced for the first time; ***[Part 8, clause 171(5)(d)]***

- the nameplate rating of the generation complex has previously been reduced but the generation complex has satisfied the power system reliability test under the certification approach; or ***[Part 8, clause 171(5)(e)]***

- the nameplate rating of the generation complex has previously been reduced but the generation complex has satisfied the power system reliability test using the LETI. ***[Part 8, clause 171(5)(f)]***

6.138 When the nameplate rating of the generation complex is reduced for the first time, the sum of the (reduced) nameplate rating as of the most recent 1 April and the nameplate rating of all generation unit(s) that constitute replacement capacity must equal or exceed the original nameplate rating to maintain energy security. ***[Part 8, clause 171(5)(d)]***

6.139 In that case, the reduction in capacity has been fully replaced and energy security has been maintained. Where the original nameplate rating is exceeded, the excess constitutes the relevant excess MW and can be used subsequently, if needed. ***[Part 8, clause 171(5)]***

6.140 When the nameplate rating of the generation complex has previously been reduced and the generation complex has passed the power system reliability test under the certification approach, maintaining energy security requires the sum of:

- the (reduced) nameplate rating as of the most recent 1 April;

- the nameplate rating of all generation unit(s) that constitute replacement capacity; and

- any relevant excess MW,

to equal or exceed the reduced nameplate rating that applied at the most recent time the certification was awarded. ***[Part 8, clause 171(5)(e)]***

6.141 In that event, the replacement capacity will overcome the reduction in capacity since AEMO or IMOWA last certified that power system reliability standards were not likely to be breached, and will therefore maintain that situation.

6.142 When the nameplate rating of the generation complex has previously been reduced and the generation complex has passed the power system reliability test using the LETI, maintaining energy security requires the sum of:

- the (reduced) nameplate rating as of the most recent 1 April; and

- the nameplate rating of all generation unit(s) that constitute replacement capacity; and

- any relevant excess MW,

to equal or exceed the reduced nameplate rating that applied following the most recent retirement and replacement of capacity. ***[Part 8, clause 171(5)(f)]***

6.143 In that event, the replacement capacity will overcome the reduction in capacity that has occurred since that prior reduction, thereby maintaining energy security.

6.144 The structure of the power system reliability test involves the 'target' nameplate rating required to maintain energy security being 'reset' each time the generator passes the power system reliability test using the certification approach or the LETI. Once replacement capacity has been used to pass the test once using the LETI, this capacity has contributed to lowering the 'target' nameplate rating used in subsequent assessments of the test, and so should not be considered again. As a result, replacement capacity can only be counted once under the LETI. ***[Part 8, clause 171(4)(f)]*** This is illustrated in Example 6.4 and Example 6.5 below.

Example 6.4 Complying with the power system reliability test using the certification approach and the Low Emissions Transition Incentive

A generation complex, 'Hillside A', is a coal-fired electricity generator consisting of four units of 400 MW each. It is located in the NEM region of NSW. It is owned and operated by the company Hillside Electricity.

Following the introduction of the mechanism, Hillside Electricity decide to progressively retire units of Hillside A from service due to their high emissions intensity.

Hillside Electricity seeks a certification from AEMO that a reduction in Hillside A's nameplate rating from 1,600 MW to 1,200 MW on 2 April 2013 (reflecting the retirement of one unit) will be unlikely to cause a breach of power system reliability standards in the two year period ending on 2 April 2015.

AEMO certifies that application in accordance with clause 174(3), and so Hillside Electricity reduces Hillside A's nameplate rating to 1,200 MW on 2 April 2013. On 1 September 2014, the Regulator assesses whether or not Hillside A complied with the power system reliability test on 1 April 2014.

The Regulator finds that, by virtue of the certification, Hillside A does comply with the test and so Hillside Electricity can continue to receive Fund assistance for the Hillside A generation complex, providing they also meets the other conditions of receiving the assistance.

In the meantime, Hillside Electricity has progressed development of three 180 MW open cycle gas turbine generation units that are necessary to meet increasing peaking demand in NSW. The gas turbines are not co-located with Hillside A, but remain within the NEM region of NSW.

Anticipating this development, Hillside Electricity retires a second generation unit at Hillside A from service on 2 April 2014, reducing the nameplate rating of Hillside A to 800 MW. Hillside Electricity progresses development of the three open cycle gas turbine generation units such that they enter service during November 2014.

Before 1 April 2015, Hillside Electricity nominates these three units under clause 172(2). On 1 September 2015, the Regulator considers whether or not Hillside A passed the power system reliability test on 1 April 2015.

The Regulator finds that Hillside A did pass the power system reliability test because:

- the three new open cycle gas turbine generation units satisfied the conditions set out in clause 171(4) and so constitute replacement capacity of 540 MW;

- the sum of the nameplate rating of Hillside A as of 1 April 2015 (800 MW) and the nameplate rating of the three new generation units (540 MW) is 1,340 MW; and

- this sum exceeds the nameplate rating of Hillside A on 1 April 2014 (1,200 MW), and so satisfies clause 171(5)(e).

Hillside Electricity would continue to receive allocations of free carbon units for the Hillside A generation complex, providing it also meets the other conditions of receiving the assistance, and would have a 'relevant excess megawatts' amount of 140 MW as provided for by clause 171(5).

Hillside Electricity subsequently retires a third unit at Hillside A on 2 April 2015 while it constructs and commissions a new combined cycle gas turbine generation unit of 500 MW at the same site. This new generation unit enters service during November 2015. Hillside Electricity nominates this new unit under clause 172(2) before 1 April 2016.

On 1 September 2016, the Regulator finds that Hillside A passed the power system reliability test as of 1 April 2016 because:

- the new combined cycle gas turbine generation unit satisfies the conditions set out in clause 171(4) and so constitutes replacement capacity of 500 MW;

- the sum of the nameplate rating of Hillside A as of 1 April 2016 (400 MW), the nameplate rating of the new generation unit (500 MW) and the relevant excess MW (140 MW) is 1,040 MW; and

- this sum exceeds the nameplate rating of Hillside A on 1 April 2015 (800 MW) (satisfying clause 171(5)(f)).

Hillside Electricity receives its final allocation of free carbon units on 1 September 2016, providing it also meets the other conditions of receiving the assistance.

Example 6.5 Complying with the power system reliability test using the Low Emissions Transition Incentive to retire a generator

A generation complex, "Smithtown power station", is a coal-fired electricity generator consisting of four units of 100 MW each. It is located in the NEM Region of Queensland. It is owned and operated by the company Smithtown Energy.

Following the start of the mechanism, Smithtown Energy decides to retire the entire Smithtown power station as soon as it can be replaced under the LETI.

Smithtown Energy constructs four 120 MW open cycle gas turbines, which enter service during November 2015. Before 1 April 2015, Smithtown Energy nominates these four units under clause 172(2).

Anticipating this development, Smithtown Energy retires the Smithtown power station on 2 April 2015. On 1 September 2015, the Regulator considers whether or not the Smithtown power station passed the power system reliability test on 1 April 2015.

The Regulator finds that the Smithtown power station did pass the power system reliability test because:

- the four new open cycle gas turbine generation units satisfied the conditions set out in clause 171(4) and so constitute replacement capacity of 480 MW;

- the sum of the nameplate rating of the Smithtown power station as of 1 April 2015 (0 MW) and the nameplate rating of the four new generation units (480 MW) is 480 MW; and

- this sum exceeds the nameplate rating of the Smithtown power station on 1 April 2014 (400 MW) (satisfying clause 171(5)(e)).

> The Smithtown power station is now fully retired and its registration as a generation complex has ceased.
>
> On 1 September 2016, the Smithtown power station will be able to pass the power system reliability test under clause 170(2)(g) and Smithtown Energy will receive its final allocation of free carbon units for that generation complex, providing they also meet the other conditions of receiving the assistance.

6.145 Replacement capacity may need to comply with further conditions in the regulations. ***[Part 8, clause 171(6)]***

6.146 The replacement capacity provisions consider new generation units separately, rather than considering combinations of generation units as a generation complex. For the purpose of these provisions, the term 'nameplate rating' is defined with respect to generation units. ***[Part 8, clause 171(7)]*** By contrast, the definition of 'nameplate rating' generally applies with respect to generation complexes throughout the bill. ***[Part 1, clause 5, definition of 'nameplate rating']***

6.147 To make clear that a particular generation unit is being used to provide replacement capacity, the person who owns, controls or operates that generation unit (the 'first person') must nominate it for this purpose. ***[Part 8, clause 172(1)(a) and (2)]***

6.148 The first person must also have been registered as a generator for that generation unit when it was first registered under a law concerning the regulation of energy markets. ***[Part 8, clause 172(1)(a) and (c)]*** This is intended to ensure continuity of registration from the time the generation unit is first registered until it is used as replacement capacity, thereby increasing the coordination between the decision to develop the new generation unit and the decision to retire existing generation capacity.

6.149 If this provision was not in place, new generation units developed by persons who are not potential recipients of assistance would be able to be transferred into the control of a person registered for a generation complex that is subject to a certificate of eligibility for coal-fired generation assistance and then used as replacement capacity. In such an instance, the new generation unit could not be genuinely considered to have been developed for the purpose of replacing a particular quantum of generation capacity, and so would not support the objectives of sharpening incentives for recipients of free carbon units to invest in new low emissions capacity to replace existing emissions-intensive capacity.

6.150 To provide replacement capacity, a generation unit must have been first registered on or after 1 July 2011. ***[Part 8, clause 172(1)(b)]*** Further, this project should not have been fully committed as of 1 July 2011 having regard to a range of factors reflecting the definition of a

'committed project' set out in the National Electricity Rules. ***[Part 8, clause 172(1)(d)]*** These provisions ensure that replacement capacity is genuinely new capacity and had not been committed to be constructed prior to the announcement of the LETI.

6.151 To maintain energy security, replacement capacity must have output that is readily predictable and not significantly dependent on factors beyond the control of the operator. ***[Part 8, clause 172(1)(e)]*** If these conditions are not satisfied, there is a significant risk that the replacement capacity will not be able to generate electricity near its maximum output at times of peak demand when it is most needed to maintain energy security.

6.152 These conditions broadly reflect the definitions of 'intermittent' generation in the National Electricity Rules and WA's Wholesale Electricity Market Rules, such that the replacement capacity must not be intermittent. Some technologies may not be used as replacement capacity, most likely wind generation and some solar and hydro technologies, unless proponents can realistically demonstrate that the output is readily predictable and not significantly dependent on factors beyond the control of the operator.

6.153 Solar or hydro generation with significant storage capability could be considered to be suitable as replacement capacity if the storage capacity allows its output to be readily predictable and significantly within the control of the operator. It is expected that gas-fired generation technologies could generally satisfy these conditions and be used as replacement capacity.

6.154 To ensure that the LETI supports a transition to a lower emissions generation sector, replacement capacity must also have an emissions intensity lower than the emissions intensity of current best-practice coal-fired generation capacity in Australia.

6.155 This emissions intensity is set at the level of 0.80 kt of CO_2-e of emissions per GWh of electricity generated. ***[Part 8, clause 172(1)(f)]*** This is mathematically equivalent to 0.80 tonnes of CO_2-e of emissions per MWh of electricity generated. To substantiate that this condition is satisfied, a nomination must be accompanied by a report setting out an independent estimate of the likely emissions intensity of the replacement capacity over the two year period beginning when the generation unit enters service. ***[Part 8, clause 172(3) and (4)]***

6.156 The report must focus on the generation unit's likely emissions intensity over its first two years of service, because longer-term technological developments (such as carbon capture and storage) or fuel substitutions (such as gas for coal) could substantially alter the emissions

intensity of a particular generation unit. Accordingly, this assessment is focused on the more immediate technical characteristics of the generation unit in question and cannot take into account more uncertain longer-term developments.

6.157 Within 60 days of receiving a nomination the Regulator must take all reasonable steps to inform the person of whether or not the Regulator is satisfied that the nomination or purported nomination is validly made. ***[Part 8, clause 173]*** This will give generators greater certainty as to whether their nomination is likely to be valid, and therefore greater certainty to pursue plans to retire existing generation capacity.

Dealing with intermediaries

6.158 Compliance with the power system reliability test requires a person who owns, controls or operates the generation complex to be registered as a generator under a law of the Commonwealth, a State or Territory on the regulation of energy markets.

6.159 In respect of some generation complexes, an 'intermediary' may be registered instead of the owner, controller or operator of the asset. There may be legal doubt as to whether the intermediary either operates or controls the generation complex. This applies particularly to intermediaries registered under rule 2.9.3 of the National Electricity Rules as well as intermediaries created by jurisdictional derogations (such as rule 9.34.6 of the National Electricity Rules).

6.160 To remove any legal doubt, the provisions apply as if the intermediary controlled the generation complex. ***[Part 8, clause 176]*** A generation complex that is registered in the name of the intermediary under a law of the Commonwealth, a State or a Territory concerning the regulation of energy markets will be able to comply with one of the necessary conditions of the power system reliability test. ***[Part 8, clause 170(2)(a)(i)], [Part 8, clause 170(2)(b)(i)], [Part 8, clause 170(2)(c)(ii)], [Part 8, clause 170(2)(d)(ii)], [Part 8, clause 171(4)]***

6.161 This deeming provision will not have effect for other purposes, such as the application for assistance elsewhere under the Part. ***[Part 8, clause 162(2) and 162(3)]***

Clean Energy Investment Plans (CEI plans)

6.162 Generators that receive assistance must develop and submit a CEI plan for publication. This provides a transparent public statement of the measures these companies are taking to reduce their emissions and transition to lower-carbon energy sources.

6.163 A person who owns, controls or operates a generation complex must give the Resources and Energy Minister a CEI plan to receive assistance for that generation complex. ***[Part 8, clause 177], [Part 8, clause 178]*** This must occur by 15 August of a given financial year, in order for free carbon units to be issued on 1 September of the same financial year.

6.164 The person must submit a CEI plan in each eligible financial year. ***[Part 8, clause 177(1)]*** The plan for any given year can be an updated version of the previous year's plan. There are no specific requirements on the extent of updating required to substantiate that the updated plan is in fact a new plan. For example, if only limited changes to the generation complex's circumstances or related corporate entities occurred in the intervening year, then the updated plan could outline this and set out the reasons.

6.165 The Minister for Resources and Energy must provide a copy of the CEI plan to the Regulator. ***[Part 8, clause 179]***

6.166 A CEI plan could include a range of information about the steps that the person who owns, controls or operates the generation complex in question, or related corporate entities, is undertaking to reduce emissions from its operations.

6.167 A CEI plan should include the following information:

- the plans (if any) the person has for investment in new generation capacity. This new generation capacity could be co-located with, or entirely separate from, the generation complex in question. Technically, a generation complex could be owned, controlled or operated by another person (for example, due to the choice of corporate structure), in which case it would not be mandatory for such investment to be reported. However, in such circumstances it would be best practice for this to be included in the CEI plan. ***[Part 8, clause 178(a)(i)]***

- the plans (if any) the person has for investing to reduce the emissions intensity of the generation complex for which free carbon units are issued. For example, efficiency improvements and use of alternative fuels or installation of a carbon capture unit with future storage or CO_2 re-use applications could be used to reduce the emissions intensity of these generation complexes. ***[Part 8, clause 178(a)(ii)]***

- the plans (if any) the person has for investment in research and development in clean energy technologies. For example this could include trials or pilots taking place at the generation complex in question, or at another generation complex, or could

include in kind or direct support for research and development programs undertaken elsewhere. ***[Part 8, clause 178(a)(iii)]***

- a copy of, or internet URL for, the most recent publicly available report outlining energy efficiency opportunities identified for the generation complex or related corporate entity in question as required under the *Energy Efficiency Opportunities Act 2006*. ***[Part 8, clause 178(b)]***

6.168 The CEI plan must be published on the website by the Department administered by the Minister for Resources and Energy. ***[Part 8, clause 180]***

Closure contracts

6.169 As part of the Fund, the Government will also seek to negotiate the closure of some of Australia's most emissions-intensive coal-fired power stations. This initiative will contribute to the process of transforming the Australian electricity generation sector to cleaner technologies.

6.170 The Government intends that eligibility to participate in negotiations is limited to very highly-emissions-intensive coal-fired generators with an emissions intensity greater than 1.2 tonnes of CO_2-e per MWh of electricity on an 'as generated' basis.

6.171 This initiative will be implemented outside of the bill, and provisions on closure arrangements are not included in the bill. The Government intends to make cash payments to honour closure contracts, in return for commitments by the generator counter-parties, such as a schedule of retirement, requirements that support energy security during the retirement process, payment of workers' entitlements and arrangements for appropriate remediation of the site of the power station (and related coal mines where appropriate).[32]

6.172 Without specific provisions, it could be possible that the obligations of Part 8 could conflict with the terms and conditions contained in closure contracts. For example, the power system reliability test established in Part 8, Division 4 requires a generator to seek certification from AEMO or IMOWA before deregistering generation capacity, or to replace this capacity with new low-emissions capacity.

[32] Australian Government (2011) *Securing a clean energy future: The Australian Government's climate change plan* pp.74-75

6.173 Failure to do either of these things would result in free carbon units being withheld for that generation complex. As a closure contract will require deregistration of generation capacity, it may be difficult for the generation complex to comply with both the power system reliability test and the requirements of a closure contract.

6.174 The Government intends to negotiate closure contracts that replace the value of free carbon units for the generation complex in question, with additional payments as needed to secure closure and compliance with the associated conditions.[33]

6.175 To this end, there is a mechanism to prevent the allocation of free carbon units for generation complexes subject to a closure contract, if this is specified in the contract. ***[Part 8, clause 181(1)]***

6.176 Withholding of free carbon units under Part 8, Division 6 is triggered by the act of entering into a closure contract, not the ongoing operation of a closure contract. ***[Part 8, clause 181(1)(a) and (2)(a)]*** This is needed to give the Government certainty at the time the contract is struck that it will not duplicate payments to the generation complex through both payments under the closure contract and allocations of free carbon units.

6.177 The person who enters into the contract must own, control or operate the generation complex. ***[Part 8, clause 181(1)(a) and (2)(a)]*** Unless the person fits this description they could not give effect to the closure as anticipated by the closure contract. The Commonwealth must be the other party to the contract.

6.178 The contract must explicitly acknowledge that it is a closure contract for the purposes of the mechanism. ***[Part 8, clause 181(1)(b) and 181(2)(b)]*** This ensures that the person who owns, controls or operates the generation complex in question is aware of and has consented to the possible withholding of free carbon units, and gives other generators confidence that other contracts they enter into as a normal part of their operations are not inadvertently deemed to be closure contracts for the purposes of Part 8, Division 6.

6.179 The bill provides for two separate circumstances to apply:

- where the closure contract indicates the withholding of free carbon units in all four years they are available; and ***[Part 8, clause 181(1)]***

[33] Australian Government (2011) *Securing a clean energy future: The Australian Government's climate change plan* pp.74-75

- where the closure contract indicates that free carbon units are provided in respect of all or some years. ***[Part 8, clause 181(2)]***

6.180 These provisions do not adjust or remove the annual assistance factor of the relevant generation complexes in any way. Importantly, this means that the annual assistance factor of a generation complex that is party to a closure contract is still captured in the definition of 'total annual assistance factors for that eligible financial year'. ***[Part 8, clause 161(2) and (3)], [definition of 'total annual assistance factors for that eligible financial year']***

6.181 In turn, this ensures that the pro-rata allocation approach implemented in Division 2 is not distorted by the operation of Division 6 and that units that are withheld as a result of Division 6 are not then distributed to other generation complexes.

Fixed charge carbon units

6.182 Persons who are issued free carbon units should note the special nature of the carbon units issued with a vintage year beginning on 1 July 2013 or 1 July 2014. In particular, free carbon units allocated in these eligible financial years cannot be used for subsequent years of the mechanism. ***[Part 6, clause 122(6)]***

6.183 The limited nature of the carbon market during the fixed charge years means that it is necessary to implement a buy-back arrangement for carbon units issued for the fixed charge years. ***[Part 4, clause 116]*** The facility will be open to requests from 1 September to 1 February in the relevant eligible financial year. It allows persons to receive the fixed charge applying for carbon units in the relevant eligible financial year for each unit they wish to sell back to the Regulator, discounted by a factor specified in the regulations.

6.184 Further information on the buy-back facility is contained in Chapter 3.

Energy security – special appropriation

6.185 In addition to the Energy Security Fund, the Government is implementing complementary measures to address any further risks to energy security under carbon pricing. These include the establishment of an Energy Security Council and government loans.

6.186 The Energy Security Council and possible government loans are largely dealt with outside the bill. However, Part 23 provides special appropriation mechanisms for:

- any contracts or arrangements authorised by the Treasurer for the purpose of protecting energy security in Australia; and

- any loans authorised by the Treasurer to persons who own, control or operate an emissions-intensive coal-fired generation complex, for the for purpose of refinancing existing debt or the purchase of future carbon units. ***[Part 23, clause 303A], [Part 23, clause 303B]***

6.187 While the Treasurer already has the executive power to authorise the making of relevant loans, contracts or arrangements, an appropriation is authorised for associated payments required under these instruments. This ensures that any such measures can be funded and implemented quickly if required. As the provisions are limited to arrangements entered into with constitutional corporations, and therefore rely on the corporations power of the Constitution, the alternative constitutional bases for the bill do not apply. ***[Part 23, clause 303A(3)], [Part 23, clause 303B(8)]***

6.188 The bill does not limit, nor is it intended to limit, any other powers of the Treasurer to authorise the making of contracts or arrangements, or the making of loans, by the Commonwealth.

Contracts and arrangements to protect energy security

6.189 The Treasurer may authorise the making of contracts and arrangements by the Commonwealth, where the contract or arrangement is made with a constitutional corporation for the purpose of protecting energy security in Australia. ***[Part 23, clause 303A(1)]***

6.190 Examples of outcomes that may be relevant when considering entering into a contract or arrangement for the purpose of protecting energy security in Australia include:

- continued physical supply of electricity to consumers – that is, actions could be for the purpose of protecting the reliability and security of supply of electricity; or

- the avoidance of systemic risks to electricity markets or associated financial markets (electricity derivatives markets) caused by financial impairment – that is, actions could be for the purpose of protecting Australia's electricity markets, or associated financial markets, from systemic risks that may emerge from the financial impairment of one or more market participants. This could include ensuring financial settlement of obligations of the financially impaired participant on these markets.

6.191 If a contract or arrangement is authorised under this section, an appropriation is made from the Consolidated Revenue Fund for the purpose of paying amounts payable by the Commonwealth under the contract or arrangement. ***[Part 23, clause 303A(2)]***

6.192 While it is expected that this provision would be only be used in rare circumstances following receipt of advice from the Energy Security Council, the Treasurer's power to act is not restricted to cases where such advice has been received. Similarly, it is expected, but not required, that the Treasurer will consult with the Resources and Energy Minister after receiving advice from the Energy Security Council.

Loans to purchase future carbon units or to refinance existing loans

6.193 There are two situations where the Treasurer may authorise loans of money by the Commonwealth to a constitutional corporation that owns, controls or operates an emissions-intensive coal-fired generation complex: ***[Part 23, clause 303B]***

- the Treasurer may authorise loans for the purpose of purchasing future carbon units at advance auctions conducted by the Regulator during the first financial year during which future carbon units are issued or in either of the next two financial years. ***[Part 23, clause 303B(1)]*** Future carbon units are units of a particular vintage year, issued in an auction by the Regulator before the start of that year. ***[Part 23, clause 303B(6)]***

- during the period of three years from commencement, the Treasurer may authorise loans for the purpose of refinancing another loan that relates (in whole or in part) to an emissions-intensive coal fired generation complex. ***[Part 23, clause 303B(2)]***

6.194 In each case, if the Treasurer authorises a loan, an appropriation is made from the Consolidated Revenue Fund for the purposes of making the loan. ***[Part 23, clause 303B(3)]***

6.195 An 'emissions-intensive coal-fired generation complex' is a complex where 95 per cent of electricity has been generated from coal in the period from 1 July 2008 to 30 June 2010, and is a complex that has an emissions-intensity that exceeds 0.80 tonnes of carbon dioxide equivalence per megawatt hours (tCO_2-e/MWh) of electricity generated. ***[Part 23, clause 303B(4)]*** For the purposes of working out emissions intensity reference may be had to clause 168, but clause 168(2) does not apply in this situation. ***[Part 8, clause 168], [Part 23, clause 303B(5)]***

6.196 These arrangements commence on the day after the date on which the bill receives the Royal Assent. ***[Part 1, clause 2]*** A transitional

provision ensures that relevant definitions apply from commencement of the section until the definitions commence. ***[Part 23, clause 303B(7)]***

6.197 The potential provision of Government loans is not intended to act as a substitute for private sector financing, if that is available, even if it is at a price that the generator finds unattractive. The Government has indicated that loans would be available where a coal-fired generator with an emissions intensity that exceeds 0.80 tCO_2-e/MWh needs finance but is unable to obtain it from the market on reasonable terms. Loans will be on terms that encourage generators to obtain finance from private lenders, with interest rates set above a relevant commercial benchmark rate. Loans will be subject to an assessment that there is a clear capacity to repay the loan by the recipient. The Energy Security Council will provide advice on loans for refinancing of existing debt. Loans and loan terms will be subject to the approval of the Treasurer.

Part 3
Administration

Chapter 7
Compliance and enforcement

Outline of chapter

7.1 Chapter 7 explains the way in which the mechanism is supported through measures promoting compliance and providing for enforcement. These include provisions on information gathering, record keeping, monitoring, enforceable undertakings, administrative penalties, infringement notices, civil penalties, criminal sanctions, liability of company officers, and anti-avoidance. Chapter 7 covers Parts 3, 10, 11 and 13 to 21.

Context

7.2 Effective enforcement arrangements are vital to promote compliance with the mechanism and to achieving its objectives.

7.3 The Regulator is responsible for administering the mechanism. It has investigation and enforcement powers to enforce the rules governing the mechanism's operation to ensure compliance by those covered by it. These powers give it a range of proportionate tools to use when administering the mechanism, which are similar to those available to other regulators under Commonwealth laws.

Summary

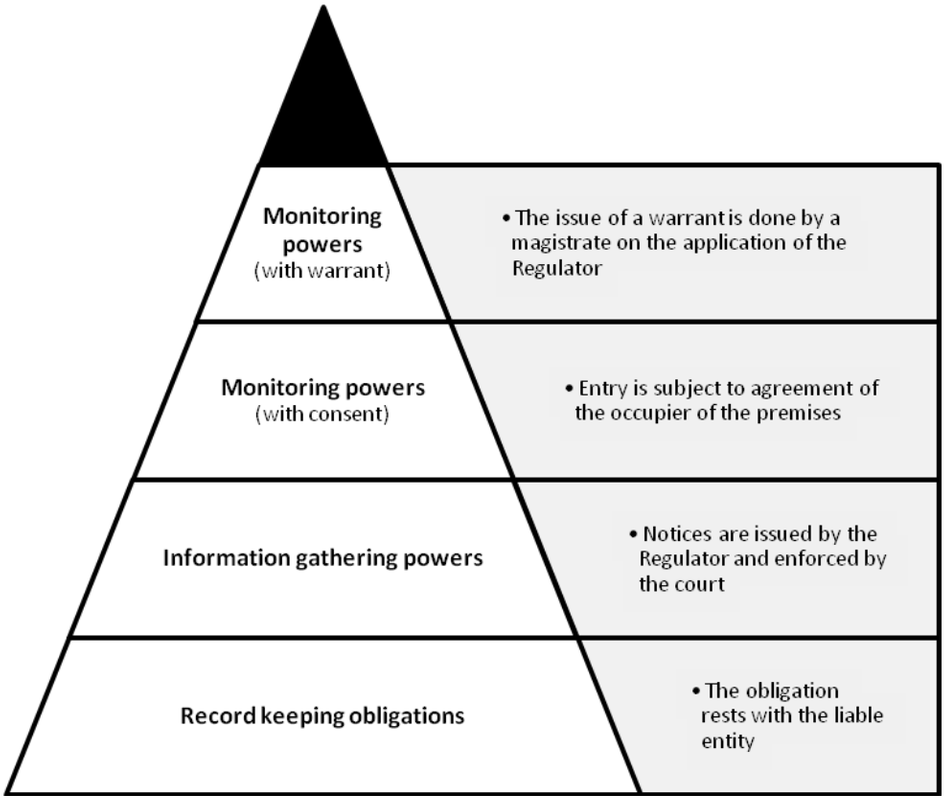
Information obligations and investigation powers

7.4 Liable entities are subject to general obligations to keep records, and the Regulator has powers to seek and obtain information to ensure compliance with the mechanism. In some cases, the exercise of these powers is subject to court supervision.

7.5 The relevant parts of the bill are:

- requirements to make and keep records; ***[Part 14, clause 226]***
- information-gathering powers; and ***[Part 13, clause 220]***

- monitoring powers. ***[Part 15, clause 229]***



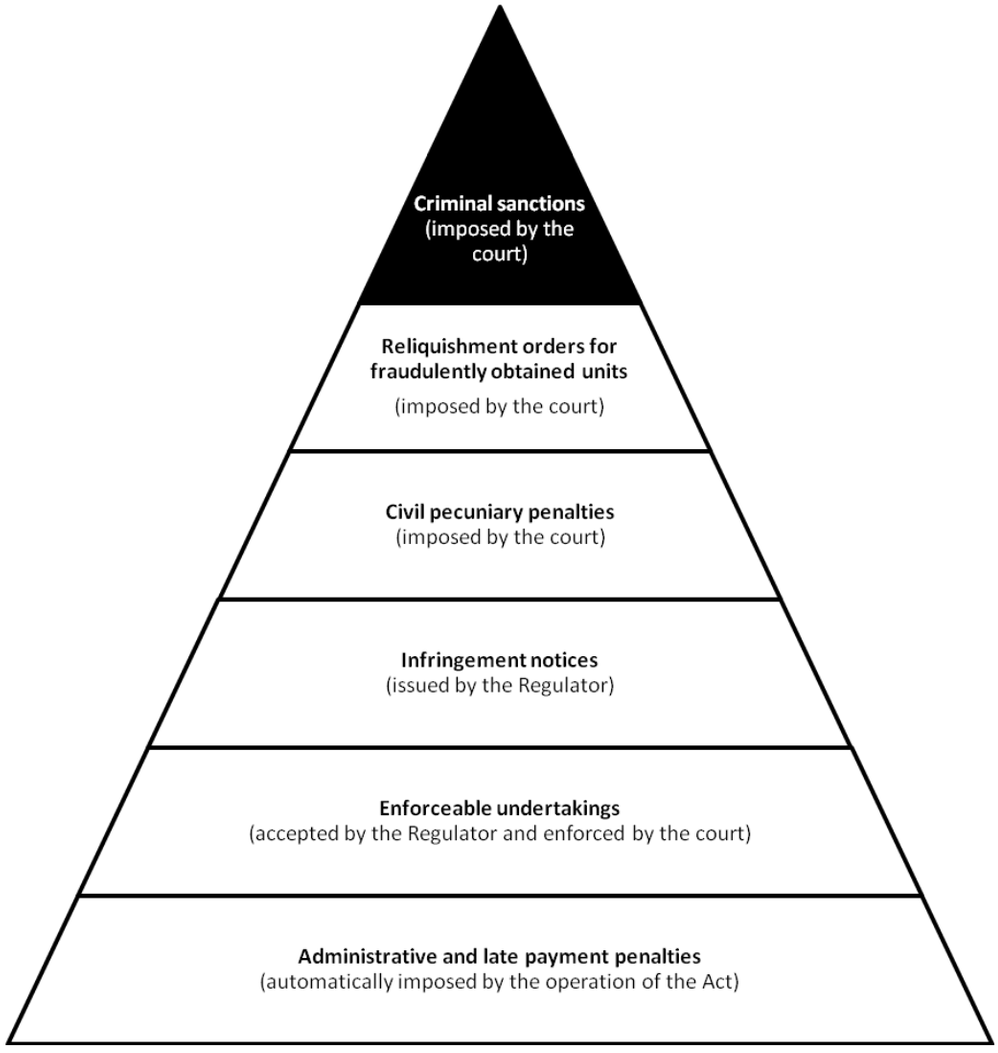
Enforcement powers, civil penalties and criminal sanctions

7.6 Enforcement powers range in seriousness from administrative penalties for failing to pay on time, to criminal sanctions for dishonest or fraudulent behaviour. The relevant parts of the bill are:

- administrative and late payment penalties; ***[Part 19, clause 272], [Part 6, clause 135], [Part 11, clause 213]***
- enforceable undertakings; ***[Part 20, clause 277]***
- infringement notices; ***[Part 18, clause 264]***
- civil penalties; ***[Part 17, clause 250]***
- relinquishment orders; ***[Part 11, clause 209]***
- offences, including offences concerning administrative penalties and fraudulent conduct; ***[Part 10, clause 207], [Part 19, clause 272]***

- provisions concerning liability of officers of bodies corporate; and ***[Part 16, clause 247]***

- anti-avoidance provisions. ***[Part 3, clause 29]***



7.7 The Regulator's investigation and enforcement powers, such as those covering information gathering and monitoring, are consistent with those of other national economic regulators.

Detailed explanation of new law

7.8 The Regulator has broad powers to gather information to let it monitor compliance with the mechanism, investigate possible contraventions and, where necessary, take enforcement action. These powers reflect the nature of the mechanism, under which liable entities must actively comply with its requirements, as well as avoid contravening the law.

The Regulator's information-gathering powers

7.9 If the Regulator believes on reasonable grounds that a person has information or a document that is relevant to the mechanism, then it may require, by written notice, that person to give information or documents, or to provide copies of documents, within at least 14 days of the notice. ***[Part 13, clause 220], [Part 13, clause 221]*** A person, in complying with a notice, is entitled to reasonable compensation for making copies of documents. ***[Part 13, clause 222]***

7.10 A failure to respond to a notice is subject to a civil penalty. A court may order the payment of pecuniary penalties of up to 10,000 penalty units for a corporation and up to 2,000 penalty units for any other person.[34] ***[Part 17, clause 252(5) and (6)]***

7.11 Once a person has complied with a notice, the Regulator may inspect the documents or copies produced and make its own copies of or take extracts from those documents. It may retain possession of any copies it makes. ***[Part 13, clause 223]***

7.12 The Regulator may take and retain possession of documents produced for as long as is necessary. If a person is otherwise entitled to possess the document (for example, the person who supplied it), then that person is also entitled to a certified copy of the document provided by the Regulator. ***[Part 13, clause 224]***

7.13 A person is not excused from giving information or producing a document because it might incriminate them or expose them to a penalty.

[34] An explanation of the level of civil penalties in the bill is set out below, under the heading 'Reasons for the level of civil penalties'.

However, the information or documents produced are not admissible in evidence against an individual in:

- civil proceedings for the recovery of a pecuniary penalty under a civil penalty order; and

- criminal proceedings, unless the proceedings are for an offence that relates to information-gathering by the Regulator, involving the provision of false or misleading information or documents.[35] ***[Part 13, clause 225]***

Record-keeping requirements for liable entities

7.14 To support the operation of the mechanism, participants must keep records to record and support their compliance with their obligation to report to the Regulator. ***[Part 14, clause 226]*** The Regulator and, where relevant, inspectors and auditors, may check the accuracy and completeness of information provided by participants, for example information provided in applications leading to the administrative allocation of free carbon units.

7.15 The Regulator's ability to audit emissions data is essential to monitoring compliance and ensuring the integrity of the mechanism. The NGER Act includes obligations for liable entities to maintain records concerning greenhouse and energy reports. These obligations are expanded to cover the new requirements of the mechanism through amendments in the Consequential Amendments Bill.

7.16 Record-keeping obligations may be prescribed in regulations, where additional specified information is relevant to the Act and related legislation. ***[Part 14, clause 227]***

7.17 Records must be kept by natural gas suppliers:

- where a recipient quotes its OTN for the supply and the supplier accepts the quotation, thereby passing liability to the recipient; and ***[Part 14, clause 228]***

- where the recipient has quoted its OTN but the supplier has rejected the quotation in order to retain liability. ***[Part 14, clause 228]***

[35] An explanation of the approach taken to the privilege against self-incrimination in the bill are set out below, under the heading 'Self-incrimination'.

7.18 The OTN reporting provisions will allow the Regulator to ensure that OTN requirements are being met and OTNs are not misused by either suppliers or purchasers of natural gas.

7.19 Records must be kept for five years. This period is consistent with obligations under the taxation system. A failure to comply is subject to a civil penalty. ***[Part 14, clause 227], [Part 14, clause 228]*** A court may order the payment of pecuniary penalties of up to 10,000 penalty units for a corporation and up to 2,000 penalty units for any other person.[36] ***[Part 17, clause 252(5) and (6)]***

The Regulator's monitoring powers

7.20 The Regulator has powers to enter facilities operated by liable entities to monitor their activities under the mechanism and to investigate potential contraventions. The Regulator may appoint inspectors who may enter premises for these purposes. ***[Part 1, clause 5, definition of 'inspector'], [Part 1, clause 5, definition of 'monitoring powers']***

7.21 Generally, an inspector would examine records kept by liable entities and operators of facilities covered by the mechanism, but may undertake other monitoring functions. Inspectors are subject to specific rules concerning whether and how they may enter premises and conduct themselves. The occupier of the premises also has specific rights and responsibilities concerning the exercise of monitoring powers. ***[Part 15, clause 229]***

Appointment of inspectors

7.22 An inspector is appointed by the Regulator and may be a member of the Regulator's staff or an Australian Federal Police officer. ***[Part 1, clause 5, definition of 'official of the Regulator']***

7.23 If a member of the Regulator's staff, the inspector must be either an Senior Executive Service employee or acting Senior Executive Service employee; an employee who holds Australian Public Servant Executive Level 1 or 2 positions or an equivalent position (or is performing those functions). This means that junior Australian Public Servant officers cannot be appointed as inspectors. In appointing an inspector, the Regulator must also be satisfied that he or she has suitable qualifications and experience to properly exercise the functions of an inspector. ***[Part 15, clause 230]***

[36] An explanation of the level of civil penalties in the bill is set out below, under the heading 'Reasons for the level of civil penalties'.

7.24 An inspector must comply with any direction given by the Regulator in exercising his or her powers. ***[Part 15, clause 230(3) and (4)]*** A written direction is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the LI Act. The provision is included to indicate that an exemption from the LI Act is not sought or required.

7.25 Inspectors require detailed knowledge of the mechanism and the ability to identify and interpret technical data, such as data used in the measurement of emissions at the facility or organisational level, which are used to calculate a liable entity's emissions number. For this reason, inspectors should be Senior Executive Service or Australian Public Servant Executive Level 1 and 2 staff.

7.26 The Regulator must issue inspectors with an identity card which the inspector must carry. The card must contain a photograph of the inspector and its form is to be prescribed in regulations. Failure to return the card is an offence with a penalty of one penalty unit, unless it was lost or destroyed.[37] ***[Part 15, clause 231]***

Powers of inspectors

7.27 With the consent of the occupier or a warrant issued by a court, an inspector can enter premises and exercise monitoring powers to determine whether the Act or the associated provisions have been complied with or for the purpose of substantiating information provided under the Act or associated provisions. ***[Part 1, clause 5, definition of 'associated provisions']*** The inspector can only enter premises with the consent of the occupier or under a monitoring warrant. ***[Part 15, clause 232], [Part 1, clause 5, definition of 'monitoring warrant']***

7.28 Having entered the premises, an inspector may search the premises and anything on them, to examine any activity; to inspect, examine, measure or test anything; to photograph or record the premises and anything on them; to inspect and copy documents; and to take such equipment onto the premises to exercise these powers. An inspector may also operate electronic equipment to see whether it contains relevant information and transfer this to a storage device. ***[Part 15, clause 233]***

Example 7.1 Inspectors' powers

An inspector could examine emissions monitoring equipment at a facility or search computer files concerning greenhouse gas emissions

[37] An explanation of the level of criminal penalties in the bill are discussed below, under the heading 'Offences'.

either at the facility or an office of the liable entity or the controlling corporation.

7.29 The inspector may also secure things for up to 24 hours if entry to the premises was under a monitoring warrant in specific circumstances. This period can be extended by a magistrate, provided the inspector has given notice to the occupier of the premises or their representative. An extension may not be granted more than three times. ***[Part 15, clause 233(5), (6), (7), (8) and (9)]***

7.30 In exercising their powers, inspectors may be assisted by other persons if this is necessary and reasonable. A person assisting an inspector may enter the premises and exercise monitoring powers, but only in accordance with a direction given to him or her by the inspector. Inspectors may only give directions that are consistent with the exercise of their functions under the bill. This will ensure that monitoring activities are at all times carried out by or under the direction of a properly qualified person, and that the person assisting cannot exercise any monitoring powers on his or her own initiative. ***[Part 15, clause 234]***

7.31 The inspector may require assistance to operate specific equipment or access premises. It is envisaged that persons assisting an inspector will be people with specific technical skills required to enable the inspector to undertake his or her functions in obtaining documents or information. The actions of the person assisting an inspector will be taken, at all times, to be the actions of the inspector. This means that the inspector is accountable for any actions taken by the person assisting the inspector. ***[Part 15, clause 234]***

7.32 A written direction given by an inspector is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the LI Act. The provision is included to indicate that an exemption from the LI Act is not sought or required.

7.33 If the inspector has entered the premises with the consent of the occupier, then he or she may ask the occupier to answer questions relevant to the Act or associated provisions or to produce relevant documents. If the inspector has entered the premises under a monitoring warrant, then the inspector may require the occupier to answer relevant questions or produce relevant documents. ***[Part 15, clause 235], [Part 1, clause 5, definition of 'associated provisions']***

7.34 It is an offence for the person not to comply with such a requirement.[38] A court may impose a maximum penalty of 6 months' imprisonment or 30 penalty units, or both.[39] ***[Part 15, clause 235]***

Limits on the powers of inspectors

7.35 In the exercise of their functions, inspectors are subject to a range of obligations aimed at protecting the rights and interests of the occupiers of premises, including:

- the inspector must obtain the voluntary consent of the occupier before entering premises, including informing the occupier that consent may be refused, subject to limitations or withdrawn. If consent is withdrawn, the inspector and any person assisting him or her must leave the premises. ***[Part 15, clause 237]***

- where a monitoring warrant has been obtained, the inspector must, before entering the premises, announce that he or she is authorised to enter the premises, show his or her identity card and give the occupier of the premises the opportunity to permit entry into the premises. ***[Part 15, clause 238]***

- when executing a monitoring warrant, the inspector must be in possession of the warrant. ***[Part 15, clause 239]***

- the inspector must provide a copy of the monitoring warrant to the occupier who is present and inform him or her of the rights and responsibilities of the occupier. ***[Part 15, clause 240]***

- specific requirements for securing electronic equipment (for example, computers containing relevant data) until an expert assistant is able to attend and operate the equipment. ***[Part 15, clause 241]***

- the Commonwealth must provide compensation for damage to electronic equipment due to a failure to exercise sufficient care. ***[Part 15, clause 242]***

7.36 The occupier can be present when a monitoring warrant is executed, but cannot impede its execution. ***[Part 15, clause 243]***

[38] An explanation of the approach taken to the privilege against self-incrimination in the bill are set out below, under the heading 'Self-incrimination'.

[39] An explanation of the level of criminal penalties in the bill are discussed below, under the heading 'Offences'.

7.37 The occupier must provide the inspector, and persons assisting the inspector, with all reasonable facilities and assistance where a monitoring warrant applies to the premises. Failure to do so is an offence, with a maximum penalty of 30 penalty units.[40] ***[Part 15, clause 244]***

Monitoring warrants

7.38 An inspector must apply to a magistrate for a monitoring warrant, which must contain specified information. ***[Part 15, clause 245(4)]*** The magistrate may issue a warrant if he or she is satisfied, based on information given under oath or affirmation (including further information sought by the magistrate), that access to the premises is needed to determine whether the Act or the associated provisions are being complied with or to substantiate information provided under the Act or the associated provisions. ***[Part 15, clause 245], [Part 1, clause 5, definition of 'associated provisions']***

7.39 The power to issue a monitoring warrant is conferred on a magistrate in his or her personal capacity. The power need not be accepted, but when it is exercised the magistrate has the same protection and immunity as if he or she were exercising the power as a member of the court of which the magistrate is a member. ***[Part 15, clause 246]***

7.40 A magistrate for these purposes is a magistrate of a state or territory court, and not a Federal Magistrate (see section 16C of the *Acts Interpretation Act 1901*).

Self-incrimination

Requirement to provide information, subject to use/derivative use immunity

7.41 As indicated above, a person may be required to give information or produce a document to the Regulator under clause 221 or to answer an inspector's questions or produce a document to an inspector under clause 235. The person cannot refuse to produce the information or documents or answer questions because it might incriminate them or expose them to a penalty.

7.42 However, any information and documents produced and answers given, and anything obtained as a direct or indirect consequence, are not admissible in evidence against an individual in:

[40] An explanation of the level of criminal penalties in the bill are discussed below, under the heading 'Offences'.

- civil proceedings for the recovery of a penalty (other than the penalty for failing to relinquish units and late payment penalty); and

- criminal proceedings, unless the proceedings are for an offence that relates to information-gathering by the Regulator, involving the provision of false or misleading information or documents. ***[Part 13, clause 225(1)], [Part 15, clause 236(1)]***

7.43 Thus the provisions in the bill regulating the privilege against self-incrimination are in the usual form for overriding the privilege subject to a 'use and derivative use' immunity. They ensure self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the person (known as 'derivative use' immunity). However, the information could be used against a third party, such as an accomplice.

Reasons for the approach taken in the bill

7.44 The treatment of self-incrimination in the bill is consistent with enforcement powers in other equivalent Commonwealth legislation is consistent with the views of the Senate Standing Committee for the Scrutiny of Bills, as well as the Australian Government's legal policy regarding the privilege against self-incrimination as set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

7.45 The removal of the privilege, subject to a use/derivative use immunity, will enhance the ability of the Regulator to monitor and ensure compliance with the mechanism and therefore assist in the effective administration of the mechanism. The effective administration of the mechanism is an issue of major public importance with a significant impact on the Australian community and the conduct of business. Non-compliance could undermine the capacity of the mechanism to drive reductions in greenhouse gas emissions so as to meet Australia's international climate change obligations, result in unfair competition between compliant and non-compliant businesses, and reduce the revenues collected from the issue of carbon units, which are to be used to assist households and businesses in adjusting to the mechanism.

Enforceable undertakings

7.46 The Regulator may accept enforceable undertakings from liable persons about their compliance with the Act or associated provisions. ***[Part 20, clause 278], [Part 1, clause 5, definition of 'associated provisions']*** A person may, for example, undertake to do a particular thing directed to

compliance with their obligations under the Act, or to not do specific things which are not in compliance with the Act.

7.47 These undertakings may only be accepted from persons who are covered by the mechanism, such as liable entities, recipients of free carbon units under Part 7 or assistance under Part 8, and OTN holders. They cannot be imposed on members of the public or persons who do not have compliance obligations under the mechanism.

7.48 The Regulator must publish such undertakings on its website. ***[Part 20, clause 278(5)]***

7.49 Where a Regulator considers that the person has breached any of the terms of the undertaking, it may apply to the court for an order:

- directing the person to comply with the term of the undertaking;
- directing the person to pay the Commonwealth an amount up to the amount of any financial benefit reasonably attributable to the breach of the term of the undertaking;
- directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and
- any other orders. ***[Part 20, clause 279]***

7.50 Enforceable undertakings are a useful tool for the Regulator to promote compliance, without the need to take court action. They are used extensively by other national economic Regulators.

Example 7.2 Enforceable undertakings

An undertaking might be accepted when a liable entity has lodged inadequate reports and its data collection and quality assurance systems are found to have deficiencies that make it difficult to comply with reporting obligations. The entity may be willing to enter into an enforceable undertaking setting out the steps it will take to improve its systems and procedures, so that it can produce compliant reports in the future.

Late payment and administrative penalties

7.51 The bill provides that where a person under an obligation to pay a unit shortfall charge or to relinquish units under Part 11does not do so, then they are liable to pay an administrative penalty or a late payment penalty (see Table 7.1 for a list of administrative penalty provisions).

7.52 These administrative penalties may only be imposed on persons who are covered by the mechanism and are liable to pay a unit shortfall charge or to relinquish units under Part 11.

Table 7.1 Administrative and late payment penalties and amounts

Clause	Description	Administrative penalty
135(1)	Late payment penalty – unit shortfall charge	An amount calculated at the rate of 20 per cent per annum or such rate as is specified in regulations
212(2)	Administrative penalty - Failure to relinquish units at all	Determined according to the formula in sub-clause 212(2)
212(3)	Administrative penalty - Failure to relinquish sufficient units	Determined according to the formula in sub-clause 212(3)
213(1)	Late payment penalty - relinquishment	An amount calculated at the rate of 20 per cent per annum or such rate as is specified in regulations

7.53 Liability for administrative and late payment penalties is an automatic consequence of non-compliance and the Regulator has no discretion about whether the person is liable.

Remission of late payment penalties

7.54 The Regulator may remit:

- a late payment penalty for failing to pay a unit shortfall charge (but not the charge itself except in the limited circumstances set out in clauses 130 and 134A); or

- a late payment penalty for failing to pay a penalty for failing to surrender units under Part 11 (but not the penalty itself),

to the person liable to pay that penalty. ***[Part 6, clause 135], [Part 11, clause 213]*** This may occur on the application of the person liable to pay the penalty or on the Regulator's own initiative. The Regulator cannot remit an administrative penalty for failing to relinquish units under Part 11.

7.55 The Regulator does not have a general power to remit late payment penalties but must apply specified criteria in determining whether to remit a late payment penalty, namely:

- the person did not contribute to the delay in payment and has taken reasonable steps to mitigate the causes of the delay; or

- the person contributed to the delay in payment and has taken reasonable steps to mitigate the causes of the delay and, having

regard to the reasons for the delay, it would be fair and reasonable to remit some or all of the amount; or

- the Regulator is satisfied that there are special circumstances that make it reasonable to remit some or all of the amount. ***[Part 6, clause 135(2)], [Part 11, clause 213(2)]***

7.56 Late payment penalties are debts due and payable to the Commonwealth and may be recovered by the Regulator, on the Commonwealth's behalf, in a court of competent jurisdiction ***[Part 6, clause 136], [Part 11, clause 214]***

7.57 The Regulator may set off such penalties against other amounts owing to the Commonwealth, if the amount owing is of a kind specified in the regulations. ***[Part 6, clause 137], [Part 11, clause 215]*** The Commonwealth must refund an overpayment of a late payment penalty made by a person. ***[Part 6, clause 140], [Part 11, clause 216]***

Infringement notices

7.58 The bill provides that infringement notices may be issued for contraventions of certain provisions. These infringement notices may only be issued to persons who are covered by the mechanism. They cannot be issued to members of the public more generally.

The role of infringement notices

7.59 The Regulator may issue an infringement notice for any civil penalty provision. ***[Part 18, clause 264]*** Infringement notices allow the Regulator to take action against minor contraventions more efficiently and effectively than through court action alone, and provide the potential for a speedier resolution of matters than is possible through the courts (although this would depend on the complexity of each matter).

7.60 A person who receives an infringement notice is under no legal obligation to pay the penalty set out in that notice. However, should the person choose not to do so, then he or she is exposed to the possibility that the Regulator will commence proceedings to recover a civil penalty for the contravention.

7.61 The capacity to issue an infringement notice is not intended to amount to the imposition of a financial penalty by the Regulator. It is a mechanism through which a person, in circumstances where the Regulator has reasonable grounds to believe has contravened a civil penalty provision, may forestall an application to the court by the Regulator for the imposition of a civil penalty. ***[Part 18, clause 265(1)]***

Formal requirements

7.62 The Regulator must give the person an infringement notice within 12 months after the day on which the alleged conduct took place. ***[Part 18, clause 265(2)]***

7.63 The notice must include specified information, namely:

- the name of the person to whom it is given and the name of the person giving the notice;
- brief details of the alleged contravention and the date on which it is alleged to have occurred;
- a statement to the effect that proceedings will not be brought concerning the alleged contravention if the penalty specified in the notice is paid to the Regulator, on behalf of the Commonwealth, within 28 days of the notice being given or, if allowed by the Regulator, a longer period;
- an explanation of how to pay the penalty;
- information about what occurs if the Regulator withdraws the notice; and
- any other matters required by regulations to be included. ***[Part 18, clause 266]***

7.64 The Regulator may withdraw an infringement notice by giving the person a withdrawal notice. This must be given within 28 days of the infringement notice being given to the person. If the person has already paid the penalty prior to receiving the withdrawal notice, then the Commonwealth is liable to refund the penalty. ***[Part 18, clause 268]***

7.65 Other matters concerning infringement notices may be set out in regulations. ***[Part 18, clause 271]***

Infringement notice penalties

7.66 An infringement notice penalty must equal one-fifth of the maximum civil penalty amount (see Table 7.2 for infringement notice provisions and the penalties that may be obtained). ***[Part 18, clause 267]***

7.67 The amounts of infringement notice penalties are set in accordance with the guidance in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. They are substantially

less than the maximum amounts that apply to a contravention of a civil penalty[41], but are still significant, reflecting the seriousness of any potential contravention and the potential impact of such conduct on the operations and integrity of the mechanism.

Table 7.2 Infringement notice penalties

Clause	Description	Infringement Notice penalty
47(1)	Notification of change of name or address of OTN holder	100 penalty units (currently $11,000) for a corporation 20 penalty units (currently $2,200) for any other person
63 (1)-(2)	Misuse of OTN	2,000 penalty units (currently $220,000) for a corporation 400 penalty units (currently $44,000) for any other person
66 (1), (2), (3), (4)	Notification of mandatory designated JVs	
71A	Notification of mandatory designated JVs	
151 (1)-(3)	Compliance with JCP reporting and record-keeping requirements	
218 (2), (4)	Notification of significant holding — controlling corporation of a group	
219 (2), (4)	Notification of significant holding — non-group entity	
221 (4), (5)	Regulator may obtain information and documents	
227 (2), (3)	Record-keeping requirements — general	
228 (2), (3)	Record-keeping requirements — quotation of OTN	
64 (1)-(4)	Quotation of bogus OTN	Section 64 (1) or (2) – three times the total benefit received by a corporation Section 64 (3) or (4) - 100 penalty units (currently $11,000) for a corporation Section 64(3) or (4) – 20 penalty units (currently $2,200) for any

[41] An explanation of the level of civil penalties in the bill is set out below, under the heading 'Reasons for the level of civil penalties'.

Clause	Description	Infringement Notice penalty
		other person
248(1)	Civil penalties for executive officers of bodies corporate	400 penalty units (currently $44,000)

7.68 A 'penalty unit' is defined by reference to the *Acts Interpretation Act 1901*.[42] At present, a penalty unit is $110.

Effect on civil penalty proceedings

7.69 Where the person pays the penalty, then any liability that person has for the contravention of the relevant civil penalty provision is discharged and the Regulator may not bring proceedings against that person for the alleged contravention. ***[Part 18, clause 269]***

7.70 The Regulator is not required to issue an infringement notice where there is an allegation of a contravention of a civil penalty provision, and the Regulator is free to take such enforcement action as is appropriate in the circumstances. ***[Part 18, clause 270(a)]***

7.71 An infringement notice does not give rise to an enforceable requirement to pay the financial penalty. If a person does not comply with the infringement notice within the period of time specified, the Regulator cannot enforce the infringement notice. Instead, the Regulator may bring civil proceedings against the person for the same alleged contravention, but not for failure to pay the penalty in the infringement notice, and the fact that a notice has been issued does not affect the liability of the person for any contravention of a civil penalty provision. ***[Part 18, clause 270(b)]***

7.72 An infringement notice does not limit the court's discretion when determining the amount of a penalty where it finds that there has been a contravention of a civil penalty provision. ***[Part 18, clause 270(c)]***

Civil penalties

7.73 The bill provides that civil penalties may be imposed for contraventions of certain provisions. These civil penalties may only be imposed on persons who have obligations under the mechanism. They cannot otherwise be imposed on members of the public more generally.

[42] The *Acts Interpretation Act 1901* was amended by the *Acts Interpretation Amendment Act 2011* to define 'penalty unit' in section 2B by reference to section 4AA of the *Crimes Act 1914*. This bill is expected commence after the *Acts Interpretation Amendment Act 2011*.

Civil penalty provisions and amounts

7.74 The Regulator may apply to the court for a civil penalty order against a person who has contravened a civil penalty provision. ***[Part 17, clause 253], [Part 1, clause 5, definition of 'civil penalty order']*** Apart from the Commonwealth Director of Public Prosecutions, no other person may apply for a civil penalty order. The Regulator must seek the order no later than six years after the contravention. ***[Part 17, clause 255]*** The court may order a civil penalty if it is satisfied a person has contravened a civil penalty provision. ***[Part 17, clause 252]***

7.75 The bill applies to the Australian, state and territory governments (that is, the Crown in right of each Australian jurisdiction). However, no government is liable to a pecuniary penalty. This protection does not apply to authorities of the Crown or to administrative penalties or late payment penalties. ***[Part 1, clause 9]***

7.76 The majority of penalty provisions in the bill are civil penalty provisions (see Table 7.3 for a list of civil penalty provisions). Ancillary contraventions, such as aiding a contravention, are also civil penalty provisions.

7.77 Each civil penalty provision has a specified maximum pecuniary penalty (see Table 7.3 for each maximum penalty amount).

7.78 These are civil penalty provisions because contravening them does not involve conduct of such serious moral culpability that criminal prosecution and sanctions are warranted. Further, as most liable entities are expected to be bodies corporate, the financial disincentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool, reflecting the practice of other areas of business regulation.

Reasons for the level of civil pecuniary penalties

7.79 The levels of civil penalties in the bill reflect the seriousness of the contraventions and represent clear and strong disincentives for non-compliance. The integrity of the mechanism could be compromised by liable entities failing to maintain records adequately or at all, failing to report accurately or at all or misusing OTNs.

7.80 For example, liable entities must adhere to requirements for reporting emissions and the use of OTNs (which determine whether an entity has a liability under the mechanism for natural gas it receives). This is essential to maintaining the integrity of the mechanism, ensuring that there is no unfair competition and ensuring that Australia meets

current and future emissions reduction targets in accordance with its international obligations.

7.81 Indeed, a person who does not comply could obtain substantial financial gains through holding and selling units under the mechanism, while not meeting his or her emissions obligations. For this reason, penalties are significant.

Table 7.3 Civil penalties and amounts

Clause	Description	Maximum Amount
47(1)	Notification of change of name or address of OTN holder	500 penalty units (currently $55,000) for a corporation 100 penalty units (currently $11,000) for any other person
63 (1)-(2)	Misuse of OTN	10,000 penalty units (currently $1.1 million) for a corporation 2,000 penalty units (currently $220,000) for any other person
66 (1), (2), (3), (4)	Notification of mandatory designated JVs	
71A	Notification of mandatory designated JVs	
151 (1)-(3)	Compliance with JCP reporting and record-keeping requirements	
218 (2), (4)	Notification of significant holding — controlling corporation of a group	
219 (2), (4)	Notification of significant holding — non-group entity	
221 (4), (5)	Regulator may obtain information and documents	
227 (2), (3)	Record-keeping requirements — general	
228 (2), (3)	Record-keeping requirements — quotation of OTN	
64 (1)-(4)	Quotation of bogus OTN	Section 64(1) or (2) – three times the total benefit received by a corporation Section 64(3) or (4) – 500 penalty units (currently $55,000) for a corporation Section 64(3) or (4) – 100 penalty units (currently $11,000)
248(1)	Civil penalties for executive	2,000 penalty units (currently

Clause	Description	Maximum Amount
	officers of bodies corporate	$220,000) for an individual

Example 7.3 The scale of penalties under the bill

The maximum penalty of 10,000 penalty units (currently $1,100,000) is equivalent to 47,826 carbon units at $23 per unit. At present, more than half of liable entities are expected to emit more than this annually.

7.82 The penalty for a body corporate for quoting a bogus OTN may be up to three times the total benefits that are reasonably attributable to the contravention. ***[Part 17, clause 252(5)]*** This is included because there are circumstances in which a civil penalty would otherwise be equivalent to a small proportion of the benefit gained from quoting a bogus OTN.

7.83 This is designed to penalise the liable entity in a way which directly reflects the considerable profit that could be made from quoting a bogus OTN, acquiring natural gas without a carbon price, selling it on the basis that the carbon price has been paid and not surrendering units to the Regulator as a holder of an OTN would usually be required to do. The financial advantage to the entity quoting the bogus OTN would be borne by the Commonwealth and, accordingly, the Australian people.

7.84 The profit that could be made out of this conduct could amount to several lifetimes' worth of imprisonment on the standard penalty/imprisonment ratio. It is for this reason that the standard ratio is varied. This is consistent with *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers* that the penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

7.85 Lower penalties apply to a natural gas supplier who fails to identify a bogus OTN by checking the OTN register (as there is a greater onus on the user of the OTN, that is, the recipient of natural gas supplies) and for failure by an OTN holder or natural gas supplier to notify the Regulator of changes of the name or address entered in the OTN register. ***[Part 17, clause 252(4)(b) and (6)(a)]***

7.86 Amendments to the civil penalties included in the NGER Act are included in the Consequential Amendments bill. They reflect the significance of the reporting and auditing regime for the mechanism as a whole.

The role of the court

7.87 The Federal Court of Australia and State and Territory courts with sufficient jurisdiction may make civil penalty orders. ***[Part 17, clause 251], [Part 1, clause 5, definition of 'Federal Court']*** For these purposes a State and Territory court is a court with jurisdiction to decide matters covered by the bill. This is generally determined by any limits on the amount of pecuniary orders that may be made by a court.

7.88 If a court is satisfied that a person has contravened a civil penalty provision, then it may order the person to pay a civil penalty. ***[Part 17, clause 252]***

7.89 The court may have regard to all relevant matters in determining the amount of the penalty. To assist the court, the bill identifies specific matters to which it may have regard, including the nature and extent of the contravention and the loss or damage it resulted in, the circumstances in which the contravention took place, whether the person has engaged in similar conduct and whether they have cooperated with the authorities, and, if the person is a body corporate, the seniority of the involved officers and employees, whether any due diligence was undertaken and whether the corporation has a corporate culture conducive to compliance. ***[Part 17, clause 252(3)]***

7.90 These factors reflect the approach indicated in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and follow the recommendations of the Australian Law Reform Commission's *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*.

Evidential burden

7.91 Civil pecuniary penalties are imposed by the courts according to civil standard of proof. ***[Part 17, clause 256], [Part 1, clause 5, definition of 'evidential burden']*** As such, a matter brought to the court seeking a civil pecuniary penalty is not subject to criminal standard of proof, but the lower standard of proof of 'on the balance of probabilities', though the court will construe the standard more strictly the higher the penalty sought.[43]

7.92 A person is not liable to have a civil penalty order made against him for a contravention of a civil penalty provision if the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts and had those facts existed, the conduct

[43] See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 12 ALJ 100.

would not have constituted a contravention of the civil penalty provision. ***[Part 17, clause 261]***

7.93 This is framed in such a way as to alter the usual evidential burden, to place it on the defendant in certain circumstances. This approach is consistent with the guidance in *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers*, concerning situations where matters are peculiarly within the defendant's knowledge and not available to the prosecution.

7.94 In seeking a civil penalty order, the Regulator does not need to prove the person's intention, knowledge, recklessness, negligence or any other state of mind with regard to specified civil penalty provisions in the bill. ***[Part 17, clause 262]*** This provision makes it clear, for the avoidance of any doubt, that it is not necessary to prove a matter concerning a person's state of mind at the time the conduct occurred. It is simply a matter of proving whether the relevant provision has been contravened. Where a person's state of mind is relevant to the issue at hand, then this is specifically dealt with in the relevant provision.

Continuing contraventions

7.95 A person who contravenes specified civil penalty provisions which involve, for example, a requirement to do something within a particular period, commits a separate contravention on each of the days on which he or she fails to comply. ***[Part 17, clause 263]***

7.96 Generally, the daily amount of the penalty is limited to 5 per cent of the maximum penalty for the initial contravention. However, in the case of a contravention of a requirement by the Regulator to provide information or documents ***[Part 13, clause 221(4)]*** the daily amount of the penalty is up to 10 per cent of the maximum civil penalty applicable to the initial contravention. ***[Part 17, clause 263(3)]***

7.97 This approach is consistent with the guidance in *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers*, which suggests that the daily amounts for continuing penalties should be significantly less than where the penalty is a global maximum, while still providing sufficient disincentive for ongoing non-compliance.

7.98 The applicable daily penalties are set out in Table 7.4.

Table 7.4 Continuing civil penalties and amounts

Clause	Description	Maximum Daily Amount
47(1) and (2)	Notification of change of name or address of OTN holder	25 penalty units (currently $2,750) for a corporation

		5 penalty units (currently $550) for any other person
66(1), (2),(3), (4)	Notification of a mandatory designated JV	500 penalty units (currently $55,000) for a corporation 100 penalty units (currently $11,000) for any other person
71A(1)	Notification of a declared designated JV	
151(1)	Compliance with JCP reporting and record-keeping requirements	
218(2)	Notification of significant holding — controlling corporation of a group – notice requirement	
219(2)	Notification of significant holding — non-group entity – notice requirement	
221(4)	Regulator may obtain information and documents – compliance with notice	1,000 penalty units (currently $110,000) for a corporation 200 penalty units (currently $22,000) for any other person

Other provisions about civil penalties

7.99 A court may direct that two or more proceedings for a civil penalty may be heard together. ***[Part 17, clause 254]*** For example, the court may do this for proceedings concerning multiple contraventions by a single entity or members of a corporate group.

7.100 If a person has been convicted of a criminal offence concerning conduct which is substantially the same as that to which the alleged contravention relates, then the court must not make a civil pecuniary penalty order against the person. ***[Part 17, clause 257]*** However, criminal proceedings may be commenced even if a civil penalty has been imposed for substantially similar conduct. ***[Part 17, clause 259]***

7.101 Civil proceedings for a contravention of the Act must be stayed if criminal proceedings are commenced concerning conduct which is substantially the same as that to which the alleged contravention relates, ***[Part 17, clause 258]*** but evidence given in civil proceedings is not admissible in subsequent criminal proceedings, unless that evidence concerns the question of whether the evidence in the civil proceedings was false. ***[Part 17, clause 260]***

Court-ordered relinquishment of units

7.102 On an application by the Commonwealth Director of Public Prosecutions or the Regulator a court may order the relinquishment of units, and specify the time within which those units must be relinquished, where a person has obtained those units as a result of fraudulent conduct and has been convicted of an offence under the Criminal Code concerning that conduct. ***[Part 10, clause 208(1) and (2)]*** The relevant provisions of the Criminal Code are specified in the bill.

7.103 An application may be made to:

- the court that convicted the person of the offence;
- the Federal Court of Australia; or
- the Supreme Court of a State or a Territory. ***[Part 10, clause 208(8)]***

7.104 Before making such an order, the court must be satisfied that the issue of any or all of the units was attributable to the offence. ***[Part 10, clause 208(1)(c)]***

7.105 A person must comply with such an order. This includes where he or she is not the registered holder of any carbon units or the holder of the units to be relinquished. ***[Part 10, clause 208(5)]***

7.106 The court must provide a copy of the order to the Regulator. ***[Part 10, clause 208(7)]***

Example 7.4 Relinquishment of units

JillCo Ltd is a liable entity under the mechanism which receives assistance through the Jobs and Competitiveness Program.

In November 2012, JillCo Ltd applies for assistance under the Program. Tom Dodge, the Chief Financial Officer of JillCo Ltd, knowingly includes false information in the report, which increases JillCo Ltd's reported production output beyond their actual level so as to increase the allocation of carbon units to JillCo Ltd.

As a result, JillCo Ltd receives 100,000 more units than it is entitled to receive.

The fraudulent conduct is discovered and JillCo Ltd and Tom Dodge are found guilty of offences under the Criminal Code, including providing false and misleading statements in applications (section 136.1). The court orders JillCo Ltd to relinquish 100,000 carbon units.

JillCo Ltd then fails to relinquish the units by the specified time, and is further exposed to an administrative penalty under clause 212(2), which is worked out according the the formula in clause 212(2), that is 100,000 x $46 (the prescribed amount before 31 July 2013) = $4.6 million.

Offences

7.107 The bill provides for criminal offences in certain circumstances (see Table 7.5). These offences apply to persons who are covered by the mechanism, either as liable entities, officers or employees of those entities or officers of the Regulator. They do not apply to members of the public more generally.

7.108 These are offences which generally relate to behaviour which involves dishonest or fraudulent conduct, or could involve considerable harm to society or the environment and involve such culpability that criminal penalties are justified.

7.109 The maximum penalties for each offence are justified by the potential financial incentives for liable entities to avoid their liabilities under the mechanism. In general, the penalties are designed to ensure there is an adequate penalty for the worst possible case.

Table 7.5 Offences and criminal sanctions

Clause	Description	Maximum Sanction
62	False or misleading declarations under clause 61(4)	Imprisonment for 12 months
231	Identity cards for inspector – failure to return	1 penalty unit (currently $110)
235	Inspector may ask questions and seek production of documents – failure to comply	Imprisonment for 6 months or 30 penalty units (currently $3,300), or both
244	Occupier to provide inspector with facilities and assistance	30 penalty units (currently $3,300)
273(5), 274(5), 275(5) and 276(5)	Scheme to avoid liability to pay unit shortfall charge or administrative penalty – objective purpose	Imprisonment for 3 years or 850 penalty units (currently $93,500) or both
273(1)-(3), 274(1)-(3), 275(1)-(3),	Scheme to avoid liability to pay unit shortfall charge or administrative penalty– intention, knowledge or belief	Imprisonment for 10 years or 10,000 penalty units (currently $1.1 million) or both

Clause	Description	Maximum Sanction
276(1)-(3)		

Reasons for the level of criminal sanctions and related matters

Failing to comply with requests for information or failing to provide facilities or assistance

7.110 Liable entities are likely to have far more information about their emissions than the Regulator, particularly if they have failed to report. It is therefore essential that the Regulator's information gathering and monitoring powers are adequate and that the requirements of inspectors are complied with. For this reason, the maximum sanction for a failure to answer questions or produce documents to an inspector is 6 months imprisonment or 30 penalty units or both. ***[Part 15, clause 235]*** The maximum sanction for a failure to provide assistance to an inspector under a monitoring warrant is 30 penalty units. ***[Part 15, clause 244]***

Scheme or avoid existing or future unit shortfall charge or administrative penalty

7.111 Entering into 'schemes' aimed at ensuring that a body corporate or trust, for example, becomes unable to pay an existing or future liability to pay:

- a unit shortfall charge; and ***[Part 19, clause 273], [Part 19, clause 274]***
- an administrative penalty, ***[Part 19, clause 275], [Part 19, clause 276]***

is a criminal offence. ***[Part 1, clause 5, definition of 'scheme']***

7.112 These provisions are comparable to those which apply to various taxes. They are aimed at artificial schemes involving, for instance, 'asset-stripping' whereby a corporation's assets are moved leaving only liabilities, and creating a situation where the corporation is forced into liquidation. For this reason, the maximum sanction is 10 years imprisonment or 10,000 penalty units, or both. These are significant and are justified by the potentially very large financial gains that dishonest liable entities can obtain by avoiding their liabilities under the mechanism.

Failing to return an identity card

7.113 The offence of a failure by an inspector to return his or her identity card promptly after ceasing to be an inspector is an offence of strict liability. ***[Part 15, clause 231]*** This is justified because the criminal sanction is small (a fine of 1 penalty unit) and is intended to place those

appointed as inspectors on notice to guard against the possibility of any contravention.

7.114 This is consistent with the guidance *in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, which sets out three criteria, all of which are relevant in this case, concerning strict liability offences, namely:

- the penalty imposed is no more than 60 penalty units for an individual and 300 penalty units for a body corporate;
- the punishment of offences not involving fault is likely to significantly enhance enforcement; and
- there are legitimate grounds for penalising persons lacking 'fault'.

7.115 If an identity card is lost or destroyed, the onus rests with the person to prove that this occurred, consistent with sub-section 13.3(3) of the *Criminal Code*. Knowledge of the fact that an identity card is lost or destroyed is solely within the knowledge of the person responsible for the identity card. Therefore it is appropriate that the onus should rest with the defendant to prove that this is the case. ***[Part 15, clause 231(5)]*** This approach is consistent with the guidance in *A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers*, concerning situations where matters are peculiarly within the defendant's knowledge and not available to the prosecution.

7.116 It should also be noted that the only persons who may commit this offence are persons who are appointed inspectors and whose appointment ceases.

Other matters

7.117 Ancillary contraventions, such as aiding a contravention, are addressed by the Criminal Code.

7.118 The bill applies to the Australian, state and territory governments (that is, the Crown in right of each Australian jurisdiction). However, consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, the Crown is not liable to a criminal sanction. This protection does not apply to servants or authorities of the Crown. ***[Part 1, clause 9]***

7.119 In addition to the offences listed in **Table 7.5** above, conduct concerning the mechanism may constitute contravention of provisions of the Criminal Code. Conviction for an offence against specified provisions

of the Criminal Code is one of the preconditions for a court order to relinquish units. ***[Part 10, clause 208]*** The offences specified include making a statement in information provided to the Regulator or in an application for a benefit, knowing that it is false. An example is a false statement in an application for an OTN or for free carbon units.

7.120 The specified provisions in the Criminal Code are also defined as being 'associated provisions' of the Act. ***[Part 1, clause 5, definition of 'associated provisions']***

Liability of executive officers of bodies corporate

7.121 The bill provides that executive officers of bodies corporate are liable for a contravention of a civil penalty provision by that body corporate in certain circumstances.

7.122 It is appropriate that extended accessorial liability applies to such officers, given the importance of ensuring compliance with the mechanism is taken seriously at all levels within liable entities, and particularly at high levels. Liability is not being imposed simply because the person is an office holder at the relevant time, but requires a degree of responsibility on the part of the officer concerned before a civil penalty may be imposed.

Example 7.5 Liability of an executive officer

A chief financial officer is aware that her company is quoting a bogus OTN and receiving natural gas supplies without a carbon price, and is in a position to influence this conduct, but fails to take all reasonable steps to prevent this.

The Chief Financial Officer could be found liable for the company's contravention and subject to a civil penalty order.

7.123 An 'executive officer' is a director, chief executive officer, chief financial officer or secretary of the body corporate. ***[Part 1, clause 5, definition of 'director'], [Part 1, clause 5, definition of 'executive officer']***

7.124 Where a body corporate contravenes a civil penalty provision, and one of its executive officers knew that (or was reckless or negligent as to whether) the contravention would occur, then the officer is subject to a civil penalty if he or she was in a position to influence the conduct of the body corporate concerning the contravention, but failed to take all reasonable steps to prevent it. ***[Part 16, clause 248]***

7.125 An executive officer is 'reckless' if he or she is aware of a substantial risk that the contravention would occur and, having regard to

the circumstances known to him or her, it is unjustifiable to take that risk. ***[Part 16, clause 248(2)]***

7.126 An executive officer is 'negligent' if his or her conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and his or her conduct involves such a high risk that the contravention would occur, that a pecuniary penalty should be imposed. ***[Part 16, clause 248(3)]***

7.127 The terms 'reckless' and 'negligent' are explained because the provisions are civil penalty provisions and the required standard of conduct should be made clear to enable corporate officers to comply with the law.

7.128 Executive officers have a defence that they took reasonable steps to prevent the contravention. In considering whether an officer failed to take reasonable steps, the court may have regard to all relevant matters. These matters may include what action (if any) the officer took towards ensuring (to the extent that the action is relevant to the contravention) that the body corporate arranges regular professional assessments of its compliance with civil penalty provisions. The word 'professional' refers to the qualifications and experience of the person undertaking the assessment and does not require, on every occasion that the assessment be undertaken by a person outside the organisation. ***[Part 16, clause 249]***

Justification of the approach taken to liability for executive officers

7.129 The bill takes the same approach as the liability imposed on executive officers in other Commonwealth laws, including under section 154N of the *Renewable Energy (Electricity Act) 2000*, section 40B of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and section 494 of the *Environmental Protection and Biodiversity Conservation Act 1999*. It also reflects the approach taken in clause 217 of the Carbon Credits (Carbon Farming Initiative) Bill 2011.

7.130 It ensures compliance with obligations under the mechanism is taken seriously at a high level within liable entities. By imposing liability on the basis of knowledge, negligence or recklessness, liability only applies if there is a degree of blame that can be attributed to the office holder. This approach ensures fairness and offers some protection to the individuals involved. It is also consistent with the recommendations of the Australian Law Reform Commission in *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[44]

[44] Available at http://www.alrc.gov.au/report-95. See pages 324-325.

Anti-avoidance provisions

7.131 The bill addresses the avoidance of liability under the mechanism by artificial schemes designed to bring facilities or activities below thresholds without reducing emissions from those facilities. A significant threshold which is used in a number of provisions in the bill is 25,000 tonnes of CO_2-e emissions per facility for direct emitters.

7.132 Where a person enters into an artificial scheme with the sole or dominant purpose of obtaining the benefit of being below an applicable threshold, then the Regulator may determine that the relevant provisions apply to the corporation as if it was above the threshold. The bill lists the sections to which a threshold relates. The Regulator must make its determination in writing and publish it on its website. ***[Part 3, clause 29]***

7.133 The Regulator, in making a determination, must have regard to:

- the manner in which the scheme was entered into or carried out;
- the form and substance of the scheme;
- the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
- the result concerning the operation of the mechanism that, but for the enforcement and penalty provisions of the bill, would be achieved by the scheme;
- whether the scheme involves increasing the number of facilities without achieving any significant reductions in the total amount of covered emissions from the operation of the facilities; and
- whether the scheme involves establishing a particular number of facilities (rather than a lesser number) without achieving any significant reductions in the total amount of covered emissions from the operation of the facilities. ***[Part 3, clause 29(1)]***

7.134 A determination is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the LI Act. The provision is included to indicate that an exemption from the LI Act is not sought or required.

7.135 The Regulator may make a determination about a scheme entered into or commenced after 15 December 2008, when the Government first announced the details of the CPRS. ***[Part 3, clause 29(1)]***

Example 7.7 Anti-avoidance prior to the announcement of the mechanism

In 2010, PW Limited decided that it would take steps to ensure that any future emissions trading scheme would not cover it by entering into a scheme designed to give the appearance that its facility, which has annual emissions of 40,000 tonnes, is two separate facilities emitting 20,000 tonnes each.

PW Limited makes the changes gradually and does not register under the NGER Act nor does it surrender any eligible emissions units by 15 June 2013.

The Regulator is empowered to 'look through' the scheme and to apply liability for PW Limited's facilities. The corporation would be liable for a provisional shortfall charge under Part 6.

Chapter 8
The Regulator's decisions and review of decisions

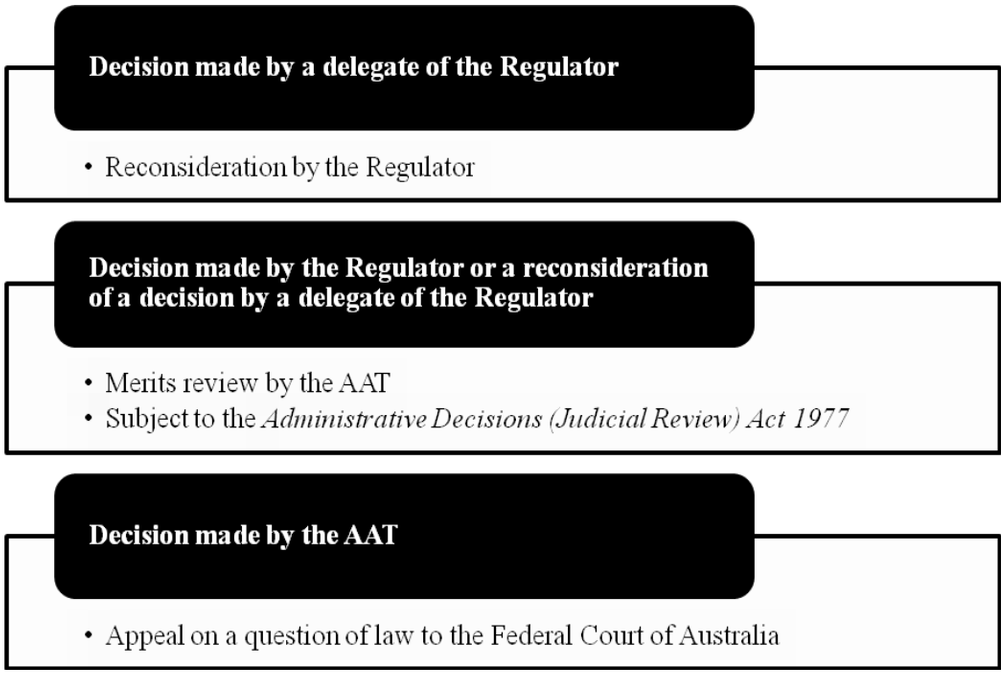
Outline of chapter

8.1 Chapter 8 explains the provisions in the bill on internal and external merits review of administrative decisions made by the Regulator. It covers Parts 21 and 23.

Summary

8.2 The mechanism allows the Regulator to make a wide range of administrative decisions and allows for a robust review process for these decisions, including judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and merits review by the Administrative Appeals Tribunal (AAT).

Diagram 8.1 Reconsideration, review and appeal under the carbon pricing mechanism



Detailed explanation of new law

Reviewable decisions

8.3 The bill sets out those decisions by the Regulator that are 'reviewable decisions'. A 'reviewable decision' is a decision identified by the bill as being such a decision (see Table 8.1). ***[Part 1, clause 5, definition of 'reviewable decision'], [Part 21, clause 280], [Part 21, clause 281]***

Table 8.1 Reviewable decisions

Clause	Decision
5	A decision to make a determination under paragraph (b) in the definition of 'nameplate rating'
29(3)	A determination concerning the application of the Act to an entity which has engaged in a scheme to avoid its liabilities
40	A decision to refuse to issue an OTN
42	A decision to refuse to give consent to the surrender of an OTN
43	A decision to cancel an OTN
56(2)	A decision to refuse to declare that a person is an approved person
70	A decision to refuse to make a declaration about a declared designated JV
72(3)	A decision to revoke a declaration about a declared designated JV
76(2)	A decision about a participating percentage declaration
77(1)	A decision about a participating percentage declaration made on the Regulator's initiative
83, 87	A decision to refuse to issue a liability transfer certificate
89	A decision to refuse to give consent to the surrender of a liability transfer certificate
90	A decision to cancel a liability transfer certificate
Part 3, Division 7	A prescribed decision under the Opt-in Scheme
106(6)	A decision to refuse to extend a period
109	A decision to refuse to make an entry in a Registry account
113(1)	A prescribed decision under a determination concerning policies, procedures and rules for auctioning carbon units
119	A decision concerning the assessment of an emissions number
119(4)	A decision concerning amending an assessment of an emissions

Clause	Decision
	number
119(4)	A decision concerning a refusal to amend an assessment of an emissions number
120	A decision concerning the assessment of an emissions number where no report is given by a liable entity
120(4)	A decision concerning amending an assessment of an emissions number where no report is given by a liable entity
120(4)	A decision concerning a refusal to amend an assessment of an emissions number where no report is given by a liable entity
130(2)	A decision to refuse to remit the whole or part of an unit shortfall charge imposed on an estimation error unit shortfall
134A(2)	A decision to refuse to remit a late payment penalty
135(2)	A decision to refuse to remit the whole or part of a late payment penalty
Part 7	A prescribed decision under the Jobs and Competitiveness Program
141	An assessment of a unit shortfall charge
141(3)	An decision to amend or refuse to amend an assessment of a unit shortfall charge
165	A decision to refuse to issue a certificate of eligibility for coal-fired electricity assistance
165(3)	A decision to state that a specified number is the annual assistance factor in respect of a generation complex
171(7)(b)	A decision to make a determination about replacement capacity
184	A decision to refuse to remove an entry for a person in the Information Database
213(2)	A decision to refuse to remit the whole or part of a late payment penalty

8.4 A decision made by the Regulator includes decisions made by officers of the Regulator or other departments under a delegation made under clause 35 of the Regulator bill.

Reconsideration of decisions by a delegate of the Regulator

8.5 A person affected by a decision made by a delegate of the Regulator may apply to the Regulator within 28 days of being informed of the decision (or a longer period, if it is extended by the Regulator) for a reconsideration of that decision if that person is dissatisfied with the decision. ***[Part 21, clause 282(4)]***

8.6 An application must be in writing, set out the person's reasons for seeking a reconsideration and include any applicable fee. The application must be in a form approved by the Regulator and the fee must be in a form specified in a legislative instrument made by the Regulator. ***[Part 21, clause 282(3)]***

8.7 On receiving an application, the Regulator must reconsider the decision and either, affirm, vary or revoke the decision within 90 days of receiving the application. ***[Part 21, clause 283], [Part 21, clause 284(1)]*** The Regulator's reconsideration has the same legal basis and effect as the original decision.

8.8 The Regulator must give written reasons for its decision on the reconsideration within 28 days of making this decision. ***[Part 21, clause 283(4)]***

8.9 If the Regulator does not make a decision on the reconsideration within 90 days, its original decision is deemed to be affirmed. ***[Part 21, clause 284(2)]***

Review by the Administrative Appeals Tribunal

8.10 A person affected by a decision may apply to the AAT for a review of a reviewable decision if the Regulator has affirmed or varied that decision under clause 283 or it is a decision that was not made by a delegate of the Regulator. ***[Part 21, clause 285]***

Stay of proceedings

8.11 If a person is the subject of an action in a court to recover a shortfall charge, or a late payment penalty for a failure to pay a unit shortfall charge, then the court may stay those proceedings pending the completion of a review or reconsideration under Part 21 of a decision of the Regulator in relation to making an assessment of the relevant shortfall. ***[Part 21, clause 286]***

Computerised decision-making by the Regulator

8.12 The Regulator has the capacity to make use of a computer program for the purposes of decision making provided that it makes arrangements to do so by means of a legislative instrument. ***[Part 23, clause 296]***

Chapter 9
Public information

Outline of chapter

9.1 Chapter 9 explains how information about the mechanism is made public. It covers Part 9 of the bill.

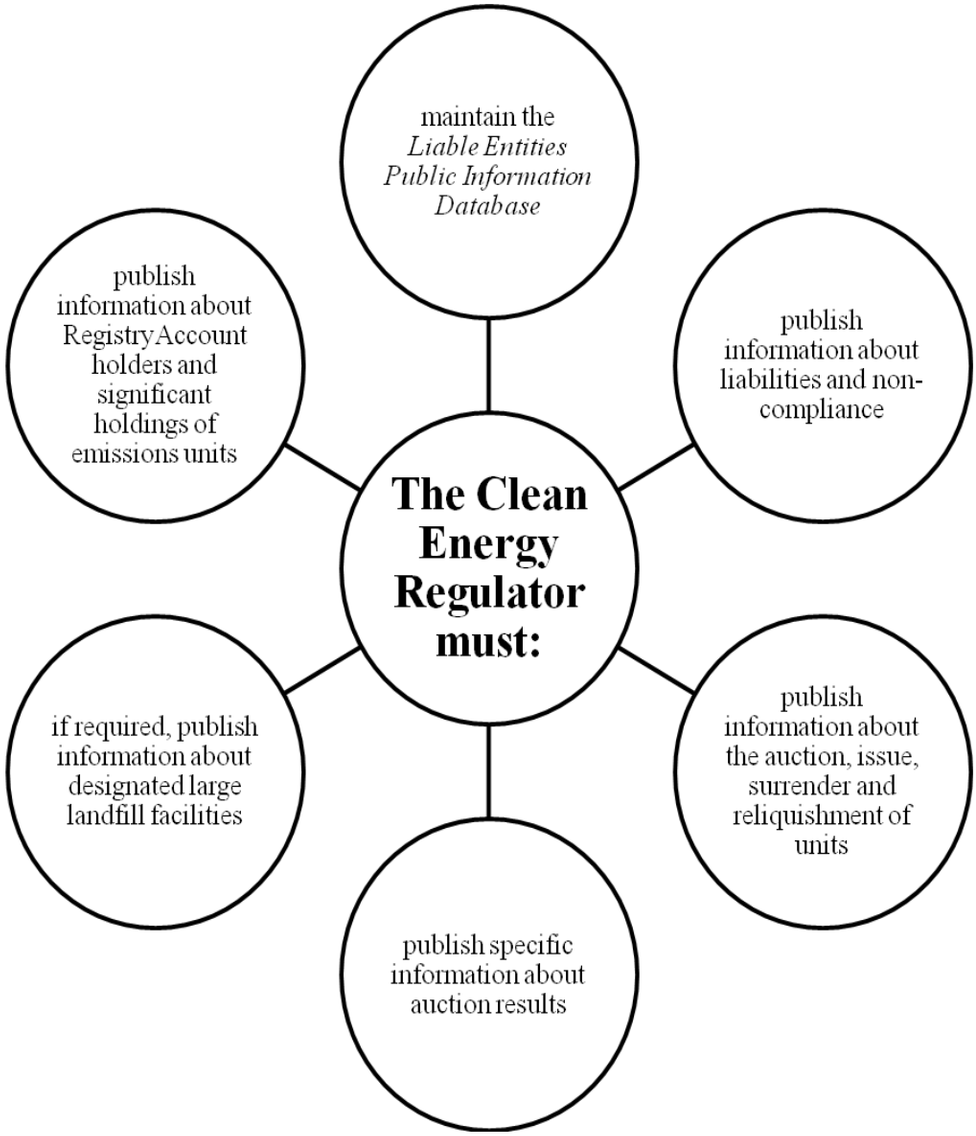
Context

9.2 The transparency of the mechanism is key to ensuring its effectiveness and efficiency. To this end, aggregated information about transactions is to be made public. The regular publication of market information by the Regulator will assist participants and financial market and other analysts to identify and understand the supply and demand conditions for carbon units, enabling efficient price discovery and facilitating trade and efficient business decision making.

Summary

9.3 The Regulator must publish information about the operation of the mechanism, emissions, participants and compliance. ***[Part 9, clause 182]***

Diagram 9.1 The Regulator's obligations to publish information under the carbon pricing mechanism



Detailed explanation of new law

Liable Entities Public Information Database

9.4 The Regulator must keep a database known as the Liable Entities Public Information Database (the Information Database), which records the persons who are liable entities under the mechanism. ***[Part 9, clause 183], [Part 1, clause 5, definition of 'Information Database']***

9.5 Since liability in some situations is determined at the end of the financial year, persons may be included in the Information Database if the Regulator has reasonable grounds to believe that a person is or is likely to be a liable entity for a particular financial year. ***[Part 9, clause 184]*** This allows the Information Database to be maintained continuously on the basis of information available to the Regulator, such as emissions from previous years.

9.6 When the Regulator makes, removes or refuses to remove an entry, it must give written notice of it to the person. ***[Part 9, clause 184(2), (5) and (6)]*** There is provision for removal of entries ***[Part 9, clause 184]*** and for correction of the Information Database. ***[Part 9, clause 193]***

9.7 The Regulator must enter the following information onto the Information Database:

- as soon as possible after the report or assessment is made, each liable entity's emissions number, which will be drawn from a report under the NGER Act or an assessment or amended assessment of the Regulator; ***[Part 9, clause 185]***

- before the end of 28 February of the next eligible financial year, the Regulator's estimate of the total of emissions numbers; ***[Part 9, clause 186]***

- at the time the Regulator makes its assessment or estimate, any unit shortfall and any unit shortfall charge payable:

  – based on an assessment made by the Regulator ***[Part 6, clause 141]*** (including, where appropriate, the details of the Regulator's assessment and annotations if the assessment is being reconsidered by the Regulator or reviewed by the AAT); ***[Part 9, clause 187(3)]***

  – based on an estimate by the Regulator (which may be based on a report under the NGER Act); ***[Part 9, clause 187(4)]***

- at the time the reconsideration or review commences, annotations indicating that particular administrative decisions concerning the mechanism are being reconsidered by the Regulator or are under review by the AAT; ***[Part 9, clause 187(5)]***

- after the time for payment of the charge has passed, any unpaid unit shortfall charge; ***[Part 9, clause 188]***

- as soon as practicable after receiving a notice under clause 122 surrendering units, details of the number and types of eligible emissions units surrendered by each liable entity; ***[Part 9, clause 189]***

- at the time the Regulator makes its assessment or estimate, the details of any relinquishment requirement under the bill or the Jobs and Competitiveness Program, including annotations if the relinquishment decision is being reconsidered by the Regulator or subject to review by the AAT; ***[Part 9, clause 190]***

- after the time for payment of the charge has passed, any unpaid administrative penalties for a failure to relinquish units as required under the bill or the Jobs and Competitiveness Program; and ***[Part 9, clause 191]***

- as soon as practicable after receiving the notice of relinquishment, the number of units relinquished by a person as required under the mechanism. ***[Part 9, clause 192]***

Information about holders of Registry accounts

9.8 The Regulator must publish on its website the name of each person with a Registry account and the person's address last known to the Regulator and must keep that information up to date. ***[Part 9, clause 194]***

Information about units

9.9 The Regulator must publish on its website the following information about units:

- as soon as practicable, the date of each auction of carbon units, the vintage year of carbon units, and for each vintage year auctioned, the per unit charge payable and the total of units issued for that per unit charge; ***[Part 9, clause 195]***

- within 7 days of the end of May 2015 and May of every year after that and November 2015 and November of every year after

that, the average auction price of current eligible financial year units for the six month period prior to that, worked out in accordance with the formula:

$$\frac{\text{Total auction proceeds}}{\text{Number of units issued as the result of auctions}}$$

  - This is relevant to the adjustments to fuel taxes which will take place every 6 months; ***[Part 9, clause 196(1) and (2)]***

- as soon as practicable after 1 February of 2014, the total number of carbon units issued for a fixed charge from 2012-13; ***[Part 9, clause 197(1)]***

- as soon as practicable after 15 February of the eligible financial year after the end of that financial year, the total number of carbon units issued for a fixed charge for each subsequent year following 2012-13 until 2017-2018; ***[Part 9, clause 197(2)-(6)]***

- as soon as practicable after the issue of units, the identity of recipients, the number of units provided free of charge under Parts 7 and 8, and details of the activities to which they relate; ***[Part 9, clause 198]***

- as soon as practicable after the end of each quarter, a quarterly report of the following information:

  - the total number of free carbon units with a particular vintage year issued under Part 7;

  - for each activity under Part 7, the total number of free carbon units with a particular vintage year that relate to that activity;

  - the total number of free carbon units with a particular vintage year which relate to pending applications under Part 7; and

  - the total number of free carbon units with a particular vintage year issued under Part 8. ***[Part 1, clause 5, definition of 'quarter'], [Part 9, clause 199]***

- as soon as practicable after 15 February of the next eligible financial year, the total number of borrowed carbon units for the relevant year and the total number of banked carbon units for the relevant year; ***[Part 9, clause 200]***

- as soon as practicable after 1 March following an eligible financial year, a calculation of total emissions numbers and total unit shortfalls for the relevant year; and ***[Part 9, clause 201]***

- as soon as practicable after the establishment of the Regulator; a statement setting out a concise description of carbon units, which must be kept up to date. ***[Part 9, clause 202]***

Information about relinquishment by persons other than liable entities

9.10 The Regulator must publish on its website the following information about relinquishment requirements by persons other than liable entities:

- when the requirement arises, the name of a person and details of the relinquishment requirement to which that person is subject, where that person is under a liability to relinquish under the bill or the Program and there is no entry included on the Information Database for that person (see above); ***[Part 9, clause 203(1) and (2)]***

- when the reconsideration or review commences, annotations indicating that particular decisions concerning relinquishment requirements are being reconsidered by the Regulator or are under review by the Administrative Appeals Tribunal; ***[Part 9, clause 203(3)]***

- after the time for the payment of the penalty has expired, details of any unpaid administrative penalties for a failure to relinquish units as required; and ***[Part 9, clause 204]***

- as soon as practicable after receiving the notice of relinquishment, the name of a person and the details of the carbon units relinquished under the bill or the Program where there is no entry included on the Information Database for that person. ***[Part 9, clause 205]***

Information about designated landfill facilities

9.11 The Regulator must, if required by regulations, publish on its website, at a time specified in the regulations, a list of the landfill facilities that, in the Regulator's opinion, were designated landfill facilities for the previous eligible financial year (including, for these purposes, the year commencing on 1 July 2011). This should include the location of each listed landfill facility. ***[Part 9, clause 206]*** It is appropriate for this to be contained in regulations as it allows flexibility in determining whether a list is necessary at any particular time, and allows any such list to be

published at the most appropriate time and in the most appropriate manner.

9.12 This list will help landfill operators determine whether they are a liable entity operating a facility within the prescribed distance of a designated large landfill facility. ***[Part 1, clause 5, definition of 'designated large landfill facility']***

Information about significant holdings

9.13 Significant holdings of carbon units must be disclosed to the Regulator and this information is published. ***[Part 12, clause 217]*** This disclosure provides additional information to the market about major holdings which may be relevant to price and the operation of the market.

9.14 A controlling corporation must, where the members of that controlling corporation's group hold a total of 5 per cent or more of the national pollution cap number for the particular vintage year, give written notice of this to the Regulator, in a form which includes the required information. ***[Part 12, clause 218]*** In other cases, the obligation rests on the entity holding the units. ***[Part 12, clause 219]*** The controlling corporation or the entity holding the units must also give written notice to the Regulator if it no longer holds a significant number of units or the percentage total of their significant holding changes, when rounded down to the nearest whole number. ***[Part 12, clause 218], [Part 12, clause 219]***

9.15 Civil penalties and infringement notices apply to a contravention of these provisions (see also Chapter 7). ***[Part 12, clause 218(2) and (4)], [Part 12, clause 219(5)]***

9.16 In the case that the Regulator receives a notice about a significant holding of units, the Regulator must publish on its website:

- the name and address of the controlling corporation or entity holding the units;
- the level of the holding expressed as a percentage, rounded down to the nearest whole number (that is, for a holding of 10.8 per cent, the number published should be 10 per cent; and
- where the controlling corporation or entity holding the units no longer has a significant holding, a statement to that effect. ***[Part 12, clause 218(6)], [Part 12, clause 219(6)]***

Other information

9.17 The Regulator must maintain other published information concerning the mechanism and its participants, including:

- the OTN Register; ***[Part 3, clause 45]***
- the 'benchmark average auction charge' by the Regulator (which relates to setting the administrative penalties for failure to pay unit shortfalls and the failure to relinquish units); and ***[Part 4, clause 114(4)(b)]***
- certificates of eligibility for coal-fired generation assistance. ***[Part 8, clause 165(6)]***

9.18 Related legislation also permits public disclosure of relevant information. This includes:

- clause 52 of the Regulator bill, for example, permits the disclosure of summaries and statistics of protected information, where they are not likely to enable the identification of a person; and
- the NGER Act, which is to be amended by the Consequential Amendments bill (see for example items 370-377, 378, 380, 382-386 and 415).

Chapter 10
Independent reviews

Outline of chapter

10.1 Chapter 10 explains how the Authority conducts reviews of the *Clean Energy Act 2011* (once enacted) and aspects of the mechanism. It covers Part 22 of the bill.

Context

10.2 The carbon pricing mechanism (the mechanism) is a significant, long-term reform. It is essential that regular, expert, independent and public reviews are carried out to ensure its ongoing relevance, robustness and integrity.

10.3 In particular, reviews are required to provide a considered basis for decisions on the level of pollution caps and changes to the design of the mechanism.

Summary

Periodic reviews of the *Clean Energy Act 2011*

10.4 Part 22, Division 2 provides for periodic reviews by the Authority of specified matters, namely:

- reviews of the mechanism;
- reviews of the level of the pollution caps, the indicative national trajectory and carbon budget;
- reviews of progress towards meeting emissions reduction targets and carbon budgets; and
- reviews requested by the Minister or by both Houses of Parliament.

Other reviews

10.5 Part 22, Division 3 provides that the Authority may undertake such other reviews as requested by the Minister or the Parliament.

Detailed explanation of new law

10.6 The Authority must undertake reviews of the mechanism every 5 years. The Authority will also carry out reviews of the level of pollution caps and progress towards meeting emissions reduction targets and carbon budgets. In addition, the Authority must conduct special reviews concerning the mechanism as requested. ***[Part 22, clause 287]***

10.7 The Authority bill constitutes the Authority as a statutory agency and provides for its membership and administration (see the Explanatory Memorandum for that bill for further detail).

Periodic reviews of the carbon pricing mechanism

10.8 The Authority must undertake periodic reviews of the mechanism as follows:

- the first periodic review must be completed before 31 December 2016; ***[Part 22, clause 288(2)]***
- the second review must be completed before 31 December 2018; ***[Part 22, clause 288(3)]***
- subsequent periodic reviews must be completed within five years, measured from the deadline for the completion of the previous review. ***[Part 22, clause 288(4)]***

10.9 The Authority, in conducting a periodic review, will cover certain matters:

- the effectiveness and efficiency of the mechanism;
- whether national targets and any carbon budget concerning emissions of greenhouse gases should be changed or extended;
- the process for setting pollution caps;
- the arrangements for the auctioning of units;
- the operation of the price ceiling and price floor;

- whether other units besides carbon units should be able to be surrendered and the way in which the payment and surrender process operates;

- the governance and administration of the mechanism;

- the relationship of the mechanism to other legislation, including the CFI Act; and

- such other matters concerning the mechanism, if any, that the Minister specifies.[45] ***[Part 22, clause 288(1)]***

Reviews recommending the level of pollution caps, and the indicative national emissions trajectory and national carbon budget

10.10 The Authority must conduct reviews:

- recommending the level of pollution caps; and

- any indicative national emissions trajectory and national carbon budget,

under the mechanism as follows:

- the first review must be completed by 28 February 2014. ***[Part 22, clause 289(3)]*** This review must include recommendations on the pollution caps for the first five years of the flexible price period (namely 2015-16, 2016-17, 2017-18, 2018-19, and 2019-20) and must also provide advice on an indicative national trajectory or carbon budget. ***[Part 22, clause 289(4), (8) and (10)]***

- subsequent reviews must be completed annually by 28 February. ***[Part 22, clause 289(5) and (9)]***

10.11 Any report dealing with an indicative national emissions trajectory and national carbon budget, must address how these are expected to be met by emissions covered and not covered by the mechanism and the purchase of eligible international emissions units by the Australian Government or by other persons. ***[Part 22, clause 289(11)]***

10.12 The Authority, in conducting a review, must consider:

- Australia's international obligations under international climate change agreements;

[45] See 'Written instruments' below

- Australia's medium-term and long-term targets and any carbon budget for reducing net greenhouse gas emissions;
- progress towards the reduction of greenhouse gas emissions;
- global action to reduce greenhouse gas emissions;
- estimates of the global greenhouse gas emissions budget;
- the economic and social implications associated with various levels of carbon pollution caps;
- voluntary action to reduce Australia's greenhouse gas emissions;
- estimates of greenhouse gas emissions not covered by the bill;
- estimates of the number of ACCUs that are likely to be issued;
- the extent (if any) of non-compliance with the bill and the associated provisions;
- the extent (if any) to which liable entities have failed to surrender sufficient units to avoid liability for unit shortfall charge;
- any acquisitions, or proposed acquisitions, by the Commonwealth of eligible international emissions units;
- such other matters (if any) as the Authority considers relevant. ***[Part 22, clause 289(2)], [Part 1, clause 5, definition of 'associated provisions'], [Part 1, clause 5, definition of 'carbon pollution cap']***

10.13 These considerations are intended to have the same meaning as the Minister's considerations in formulating the pollution cap regulations (see Chapter 2).

10.14 If, on 1 November 2014, there are no regulations that declare a carbon pollution cap and the carbon pollution cap number for the flexible charge year commencing on 1 July 2015, then the Authority must conduct an additional review of the carbon pollution cap for the flexible charge year commencing on 1 July 2020. ***[Part 22, clause 290(1)and (2)], [Part 1, clause 5, definition of 'carbon pollution cap'], [Part 1, clause 5, definition of 'carbon pollution cap number']***

10.15 This review must be completed before the end of February 2015. ***[Part 22, clause 290(4)]***

Reviews of progress in achieving emissions reduction targets and carbon budgets

10.16 The Authority must review the progress in achieving emissions reductions targets and any carbon budgets ***[Part 22, clause 291(1)]*** as follows:

- the first review must be completed by 28 February 2014; ***[Part 22, clause 291(3)]***
- subsequent reviews must be completed annually by 28 February. ***[Part 22, clause 291(4)]***

10.17 The Authority, in conducting a review, must consider:

- the level of domestic emissions;
- the level of purchases of international units;
- the level of emissions in the uncovered sectors; and
- the level of voluntary action. ***[Part 22, clause 291(2)]***

Other reviews of the mechanism

10.18 In addition to the mandatory periodic reviews:

- the Minister (by a written instrument to the Chair of the Authority);[46] or
- both Houses of Parliament (by a resolution),

may request that the Authority conduct a review of the matters specified in the written instrument or the resolution ***[Part 22, clause 293(1)]***

10.19 A review under this section may cover:

- the effectiveness and efficiency of the mechanism;
- whether national targets concerning emissions of greenhouse gases and any carbon budget should be changed or extended;
- the process for setting pollution caps;
- the arrangements for the auctioning of units;

[46] See 'Written instruments' below

- the operation of the price ceiling and price floor;
- whether other units besides carbon units should be able to be surrendered and the way in which the payment and surrender process operates;
- the governance and administration of the mechanism;
- the relationship of the mechanism to other legislation, including the CFI Act; and
- such other matters concerning the mechanism, if any, that the Minister specifies. ***[Part 22, clause 293(4)]***

10.20 The Government has announced[47] that the Minister will request the Authority to examine the role of the price floor and the price cap beyond the first three years of the flexible price period. The Minister will also request the Authority to review methodologies for recognising additional voluntary action. It is intended that this provision will be used to give effect to this policy.

Procedures for conducting reviews

Procedures

10.21 In conducting a review the Authority must make provision for public consultation. ***[Part 22, clause 288(6)], [Part 22, clause 289(7)], [Part 22, clause 290(6)], [Part 22, clause 291(6)], [Part 22, clause 293(3)]***

10.22 For these purposes, a review is 'completed' when the report of the review is given to the Minister. ***[Part 22, clause 288(5)], [Part 22, clause 289(6)], [Part 22, clause 290(5)], [Part 22, clause 291(5)]***

10.23 The Authority must give a report to the responsible Minister. ***[Part 22, clause 292(1)], [Part 22, clause 294(1)]*** The Authority must publish reports on its website as soon as practicable after delivering them to the Minister. ***[Part 22, clause 292(1)], [Part 22, clause 294(1)]***

10.24 The Minister must, within 15 sitting days of receiving the report, cause the report to be tabled in both Houses of Parliament. ***[Part 22, clause 292(2)], [Part 22, clause 294(2)]***

[47] Australian Government (2011) *Securing a clean energy future: The Australian Government's climate change plan* p.110 table 11

Recommendations

10.25 If a report includes recommendations to the Australian Government, then the report must set out reasons for the recommendations. ***[Part 22, clause 292(6)], [Part 22, clause 294(6)]*** In formulating a recommendation that the Government take a particular action, the Authority must analyse the costs and benefits of that action, although that does not prevent the Authority from taking other matters into account. ***[Part 22, clause 292(4) and (5)], [Part 22, clause 294(4) and (5)]***

10.26 If a report makes recommendations to the Australian Government, the Government must respond to each of those recommendations as soon as practicable. The Minister must table this response in each House of Parliament within 6 months from receipt of the report. It is expected that the response will outline the Government's reasons for each response. ***[Part 22, clause 292(7)-(8)], [Part 22, clause 294(7)-(8)]***

Written instruments

10.27 An instrument provided by the Minister to the Chair of the Authority about a review is not a legislative instrument. ***[Part 22, clause 288(7)], [Part 22, clause 293(5)]*** It is not of a legislative character and is therefore not within the meaning of section 5 of the LI Act. This provision is included to indicate that an exemption from the LI Act is not sought or required.

Chapter 11
Administrative and miscellaneous provisions

Outline of chapter

11.1 Chapter 11 covers the provisions in the bill which relate to:

- its commencement and objects;
- administrative arrangements, both within the Australian Government and with the States and Territories;
- its constitutional basis; and
- regulations and specific legal issues.

It covers Parts 1 and 23.

Summary

Commencement, objects and definitions

11.2 Part 1 covers the commencement of the bill and its objects, as well as definitions and key concepts.

Miscellaneous provisions

11.3 Part 23 provides for:

- miscellaneous functions of the Regulator under the bill;
- concurrent operation of state and territory laws, arrangements with state and territory governments and delegations by state and territory ministers;
- administrative matters within the Australian Government;
- the alternative constitutional bases of the mechanism;

- regulations;
- liability for damages; and
- legal professional privilege.

Detailed explanation of new law

Short title, objects and simplified outline

11.4 The short title of the bill is the *Clean Energy Act 2011*. ***[Part 1, clause 1]***

11.5 The objects of the bill are:

- to give effect to Australia's international obligations on addressing climate change under the Climate Change Convention and the Kyoto Protocol; ***[Part 1, clause 5, definition of 'Climate Change Convention'], [Part 1, clause 5, definition of 'Kyoto Protocol']***
- to support the development of an effective global response to climate change, consistent with Australia's national interest in ensuring that average global temperatures increase by not more than 2 degrees Celsius above pre-industrial levels;
- to take action directed towards meeting Australia's long-term target of reducing net greenhouse gas emissions to 80 per cent below 2000 levels by 2050 and take that action in a flexible and cost effective way; and
- to put a price on greenhouse gas emissions in a way that encourages investment in clean energy, supports jobs and competitiveness in the economy and supports Australia's economic growth while reducing pollution. ***[Part 1, clause 3]***

11.6 The essential features of the mechanism are set out in a simplified outline. ***[Part 1, clause 4]*** More information on the policy context and outline of the mechanism is set out in the chapters headed 'Policy context' and 'General outline of the Clean Energy Bill 2011' above. The mechanism puts a price (in the economic sense) on carbon emissions with a view to meeting Australia's international obligations and targets.

Commencement

11.7 The provisions on the bill's short title and commencement commence on the day on which the bill receives the Royal Assent. ***[Part 1, clause 2]***

11.8 The provisions concerning:

- contracts and arrangements to protect energy security;
- loans to the owners and others concerned with emissions-intensive coal-fired generation complexes; and
- the general power to make regulations,

commence on the day after the day on which the bill receives the Royal Assent. ***[Part 1, clause 2], [Part 23, clause 303A], [Part 23, clause 303B], [Part 23, clause 312]*** The energy security provisions commence on the day after Royal Assent because the special appropriations need to be operating to potentially provide assistance in advance of the commencement of the carbon price on 1 July 2012.

11.9 The substantive provisions of the bill (clauses 3 to 303, 304 to 311) commence on a date to be fixed by Proclamation. ***[Part 1, clause 2]***

11.10 The commencement date set by the Proclamation should not be earlier than the date on which the last bill in the Clean Energy Legislative Package receives the Royal Assent. ***[Part 1, clause 2]*** This means that the mechanism cannot commence until all aspects of it to be implemented through the bills in the Clean Energy Legislative Package are passed by the Parliament and receive the Royal Assent. This reflects the linkages between the bill and the other bills in the Clean Energy Legislative Package, and the need for all of the bills to take effect for the mechanism to be operative.

11.11 If the substantive provisions do not commence on a date within the period of 6 months of the date on which the last bill in the Clean Energy Legislative Package receives the Royal Assent, then the provisions commence on the day after the end of that 6 month period. ***[Part 1, clause 2]***

Territorial application of the mechanism

11.12 The mechanism will cover Australia and extend to every external territory of Australia. ***[Part 1, clause 9], [Part 1, clause 5, definition of 'Australia']*** It will also extend to the coastal sea in accordance with section 15B of the *Acts Interpretation Act 1901*.

11.13 It will extend to a matter concerning the exercise of Australia's sovereign rights in the exclusive economic zone or the continental shelf. ***[Part 1, clause 10], [Part 1, clause 5, definition of 'Australia']*** This means that those responsible for oil and gas facilities and for carbon capture and storage facilities in the exclusive economic zone or the continental shelf will be responsible under the general provisions of the bill for any emissions from these facilities. The 'continental shelf', 'exclusive economic zone' and 'territorial sea' are defined in the *Acts Interpretation Act 1901*.[48]

11.14 However, the mechanism will not apply to the extent that its application would be inconsistent with the exercise of rights of foreign ships in the territorial sea, exclusive economic zone or waters of the continental shelf in accordance with the *United Nations Convention on the Law of the Sea*. ***[Part 1, clause 12], [Part 1, clause 5, definition of 'continental shelf'], Part 1, clause 5, definition of 'territorial sea'], [Part 1, clause 5, definition of 'United Nations Convention on the Law of the Sea']***

11.15 The operation of the bill extends to the Joint Petroleum Development Area because Australia is responsible for a proportion of the emissions from this region under the *United Nations Framework Convention on Climate Change* and the Kyoto Protocol. ***[Part 1, clause 11]*** The regulations will specify the percentage of the emissions from facilities in the Joint Petroleum Development Area and the Greater Sunrise Unit Area which are subject to the mechanism. These regulations will specify percentages consistent with Australia's responsibilities under international law. ***[Part 3, clause 26], [Part 3, clause 27], [Part 3, clause 28], [Part 1, clause 5, definition of 'Australia'], [Part 1, clause 5, definition of 'Greater Sunrise unit area]***

11.16 The express application of the Act to the Joint Petroleum Development Area — an agreed joint development area under the *Timor Sea Treaty* [2003] ATS 13 — is consistent with the obligations of Australia under article 4(1) of the *Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea* [2007] ATS 12.

11.17 Apart from these provisions, reliance is placed on the general presumption that legislation does not have extraterritorial effect and section 21 of the *Acts Interpretation Act 1901* to limit the scope of the legislation.

[48] The *Acts Interpretation Act 1901* was amended by the *Acts Interpretation Amendment Act 2011* to define the terms 'continental shelf', 'exclusive economic zone' and 'territorial sea' in section 2B by reference to the *Seas and Submerged Lands Act 1973*. The bill is expected to commence after the *Acts Interpretation Amendment Act 2011* commences.

Miscellaneous functions of the Regulator under the bill

11.18 As well as the specific functions of the Regulator provided through the bill, the Regulator will monitor and promote compliance, conduct and co-ordinate education programs and advise and assist persons (and their representatives) concerning their obligations. ***[Part 23, clause 295(a), (b), (c), (d), (h) and (f)]*** This is expected to be a significant part of the Regulator's work in the period leading to the commencement of the mechanism and the initial period of the mechanism's operation.

11.19 The Regulator will also be empowered to collect, analyse, interpret and disseminate statistical information concerning the operation of the mechanism. ***[Part 23, clause 295(j)]*** This is expected to add to the body of information available to participants in the carbon market and other people who are interested in how the mechanism is operating. Other sources of information are the public information released under Part 9 and the Regulator's annual report.

11.20 The Regulator will also liaise with regulatory and other relevant bodies about co-operative arrangements for matters concerning the mechanism or emissions trading schemes more generally. ***[Part 23, clause 295(i)]*** This liaison may be with domestic or overseas bodies, and will be important in handling the international transfers of units and will enable the Regulator to learn from experience with other trading schemes.

11.21 The Regulator will also advise the Minister on matters concerning the mechanism and other emissions trading schemes. ***[Part 23, clause 295(e)]***

Agency

11.22 A person may use an agent for the purposes of undertaking tasks to comply with the mechanism. These tasks include:

- making or withdrawing an application;
- making a request;
- giving a notice (including an electronic notice);
- giving an instruction;
- giving information;
- giving a report;
- giving a plan;

- making a payment. ***[Part 23, clause 297A]***

States and Territories

Concurrent operation of State and Territory law

11.23 The bill is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it. ***[Part 23, clause 301]***

Arrangements with the States and Territories

11.24 The Minister may make arrangements with a Minister of a State, the ACT, Northern Territory or Norfolk Island about the administration of the bill, including arrangements for the performance of the functions by magistrates. A copy of each instrument by which such an arrangement is made is to be published in the Commonwealth Gazette, but it is not a legislative instrument. ***[Part 23, clause 303]*** These instruments are not of a legislative character and are therefore not within the meaning of section 5 of the LI Act. The provision is included to indicate that an exemption from the LI Act is not sought or required

11.25 This provision may be used, for example, to establish arrangements for magistrates to exercise power concerning the granting of monitoring warrants (see above). ***[Part 15, clause 245]***

Delegation by a State Minister or a Territory Minister

11.26 The Minister of a State or Territory may delegate any functions or powers under the bill to a person who is an officer or employee of the State or Territory and who holds or performs duties that are equivalent to a position occupied by a Senior Executive Service (SES) employee in the Australian Public Service (APS). ***[Part 23, clause 299]***

Administrative matters within the Australian Government

Delegation by the Minister

11.27 The Minister may delegate any or all of his or her functions or powers under the Act or regulations to the Secretary, SES, or acting SES, employee of the Department. This power does not extend to making, varying or revoking legislative instruments. The delegate must comply with any direction of the Minister. ***[Part 23, clause 298], [Part 1, clause 5, definition of 'Secretary']***

Executive power

11.28 The Act does not, by implication, limit the executive power of the Commonwealth. ***[Part 23, clause 305]*** This makes it clear that the bill does not, for example, limit the Commonwealth's executive power to take various actions to meet Australia's obligations under international climate change agreements.

Notional payments by the Commonwealth

11.29 The Crown, in each of its capacities, will be bound by the bill, except in respect of a pecuniary penalty or an offence. ***[Part 1, clause 8]***

11.30 Provision is made for the Minister administering the *Financial Management and Accountability Act 1997* to give written directions relating to, among other things, transfers of amounts within or between accounts operated by the Commonwealth to allow for payment of notional amounts by the Commonwealth. ***[Part 23, clause 306]*** This provision accommodates the fact that the Commonwealth may be a liable entity under the mechanism but cannot tax itself. The provision will be used to ensure that the Commonwealth can be made notionally liable for any liabilities it incurs under the mechanism. The Commonwealth pays other taxes notionally (see, for example, section 177.1 of *A New Tax System (Goods and Services Tax) Act 1999*).

Compensation for acquisition of property

11.31 If the operation of the Act or regulations would result in an acquisition of property from a person other than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. The bill provides for the institution of proceedings to recover such compensation if agreement has not been reached. The terms 'acquisition of property' and 'just terms' have the same meaning as in section 51(xxxi) of the Constitution. ***[Part 23, clause 308]***

11.32 The Commonwealth does not consider that the bill would result in an acquisition of property on other than just terms. However, clause 308 ensures that the Act cannot be invalid on the basis that it does.

Constitutional basis

11.33 The bill and the Charges bills are supported by the Commonwealth's power to make laws with respect to external affairs in section 51(xxxi) of the Constitution. The object of the bill is to implement Australia's obligations under the Climate Change Convention and the Kyoto Protocol. ***[Part 1, clause 3(a)]***

11.34 The bill and the Charges bills are also supported, wholly or partly, by several other Commonwealth legislative powers. ***[Part 23, clause 307]***

11.35 For instance, subclause 307(3) gives the provisions of the bills the effect they would have if they applied only to the extent that they related to taxation. The unit shortfall charge is a tax and the provisions imposing and otherwise dealing with the charge are laws with respect to taxation and relate to taxation. The provisions of the bills which do not deal directly with the unit shortfall charge nevertheless deal with the charge because they establish the liability for the charge or are incidental to establishing that liability. The provisions are supported by the taxation power in the alternative to the external affairs power. ***[Part 23, clause 307(3)]***

11.36 Another example is subparagraph 307(4)(b)(i) which gives the provisions of the bills the effect they would have if they applied only to a liable entity which was a constitutional corporation. A constitutional corporation is a corporation to which the corporations power in section 51(xx) of the Constitution applies (foreign, trading and financial corporations). ***[Part 1, clause 5, definition of 'constitutional corporation']*** The corporations power gives the Commonwealth power to impose legal obligations on constitutional corporations, including the obligations imposed by the bills on liable entities. To the extent that they apply to liable entities which are constitutional corporations, the provisions are supported by the corporations power in the alternative to the external affairs power. ***[Part 23, clause 307(4)]***

11.37 Two sets of provisions are confined in their application to constitutional corporations and rely on the corporations power:

- the power of the Minister to obtain certain information relevant to the Jobs and Competitiveness Program; ***[Part 7, Division 4]***

- the power of the Treasurer to enter into contracts and arrangements and to make loans to certain constitutional corporations. ***[Schedule 1,Part 23, clause 303A], [Part 23, clause 303B]***

Regulations

11.38 The bill includes a general regulation-making power. ***[Part 23, clause 312]***

11.39 The regulations may apply, adopt, or incorporate with or without modification, a matter contained in another instrument as it exists from time to time, despite subsection 14(2) of the LI Act. The instrument referred to must be published on the Regulator's website, unless this would infringe copyright. ***[Part 23, clause 309]***

11.40 The function of this provision is to allow for the adoption of current regulatory approaches, without the need for a duplicative process of amendment to both the original instrument and regulations made under the bill.

11.41 The adoption of such instruments through regulations would be subject to the disallowance procedure. While a legislative instrument is subject to disallowance, a House of the Parliament may require any document incorporated by reference into the instrument to be made available for inspection by that House at a particular place and time.

Example 11.1 An instrument adopted by reference

Regulations may specify the adoption of a matter contained in a standard published by the International Organization for Standardisation, as in force from time to time. This is designed to facilitate consistent compliance by liable entities under the mechanism by reference to commonly used and understood requirements.

11.42 This is in accordance with the *Legislative Instruments Handbook*[49], which states that:

2.22 A legislative instrument may make provision for matters by applying, adopting or incorporating the provisions of any other written instrument as in force or existing at the time when the legislative instrument takes effect. Unless the enabling legislation allows instruments in this category to be applied, adopted or incorporated as in force from time to time, they may only be applied, adopted or incorporated in the form in which the instrument exists at the date when the legislative instrument takes effect.

and

*11.21 ... the [*LI Act*] provides that legislative instruments may incorporate documents by reference in accordance with section 14. The benefit of incorporation by reference is that the incorporated document, which could be lengthy, is taken to be a part of the legislative instrument even though it is not required to be registered or tabled. However, an agency will be asked to provide information about any document incorporated by reference in the instrument when lodging the instrument for registration and OLDP will arrange for this information to be available on the FRLI. The explanatory statement tabled in Parliament will also describe any documents incorporated by*

[49] Attorney-General's Department (2004) *Legislative Instruments Handbook* Australian Government, Canberra, pages 6 and 55.

reference, so this will draw the attention of Parliament to use of this mechanism.

11.43 Incorporating complex technical documents directly into the primary legislation or regulations would significantly increase the volume of the legislation giving effect to the mechanism and, more generally, the Commonwealth statute book, and would be inconsistent with the Government's Clearer Commonwealth Laws initiative which aims to reduce the complexity of legislation. By incorporating such documents by reference and requiring their publication on an easily accessible webpage, the bill provides guidance to the Regulator and liable entities while avoiding unnecessary length and complexity.

11.44 In addition, the regulations may confer a power to make a decision of an administrative character on the Regulator. ***[Part 23, clause 310]***

11.45 An instance where this provision is expected to be used is in connection with the Jobs and Competitiveness Program, which will be implemented through regulations. In particular, the Regulator will need to make administrative decisions about a person's eligibility for, and quantum of, assistance in accordance with the requirements in the regulations. It may also need to make administrative decisions to require the relinquishment of carbon units, such as on the closure of a facility. ***[Part 7, clause 146]***

11.46 Regulations may be made after the bill receives the Royal Assent and prior to the commencement of the substantive provisions of the bill (clauses 3 to 312), in accordance with section 4 of the *Acts Interpretation Act 1901*.

Transitional – definitions

11.47 Where a concept in the bill is defined by reference to the NGER Act, then those references apply to the NGER Act as it is amended by the Consequential Amendments bill. ***[Part 23, clause 311]***

Legal professional privilege

11.48 The doctrine of legal professional privilege has been described by the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 as follows:

'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the

giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.'

11.49 The Act will not affect the law concerning legal professional privilege. ***[Part 23, clause 302]***

Liability for damages

11.50 Certain specified persons are not liable to an action for damages for acts (or omissions) done in good faith in the performance of their functions or powers under the bill or the associated provisions. The provision includes where such acts or omissions are done in the purported performance of functions or powers. ***[Part 23, clause 304]*** Immunity provisions of this sort are often included in Commonwealth laws to ensure that administrators are not unduly hindered in undertaking their duties in good faith by threats of legal action.

11.51 The persons include the Minister, the Regulator, the Regulator's staff and delegates of either the Minister or the Regulator. Furthermore, the appropriate energy market operators in relation to a generation complex are also not liable concerning the performance of functions under Part 8 and, specifically, functions associated with determining power system reliability. ***[Part 23, clause 304], [Part 1, clause 5, 'appropriate energy market operator']***

Index

Part 1: Preliminary

Bill reference	***Paragraph number***
Part 1, clause 5, definition of ‘compressed natural gas’	1.26, 1.29
Part 1, clause 5, definition of ‘constitutional corporation’	5.82, 11.36
Part 1, clause 5, definition of ‘continental shelf’	11.14
Part 1, clause 5, definition of ‘controlling corporation’	6.86
Part 1, clause 5, definition of ‘corporate group transfer test’	1.91
Part 1, clause 5, definition of ‘covered emission’	1.14
Part 1, clause 5, definition of ‘covered emissions’	1.20, 1.41
Part 1, clause 5, definition of ‘declared designated joint venture’	1.69
Part 1, clause 5, definition of ‘decommissioned underground mine’	1.34
Part 1, clause 5, definition of ‘designated joint venture’	1.60, 6.87
Part 1, clause 5, definition of ‘designated large landfill facility’	9.12
Part 1, clause 5, definition of ‘director’	7.123
Part 1, clause 5, definition of ‘distribution pipeline’	1.126
Part 1, clause 5, definition of ‘electronic notice transmitted to the Regulator’	4.70
Part 1, clause 5, definition of ‘eligible Australian carbon credit unit’	3.17, 3.18
Part 1, clause 5, definition of ‘eligible emissions unit’	3.17, 4.58
Part 1, clause 5, definition of ‘eligible financial year’	3.22, 3.27, 3.90, 3.95
Part 1, clause 5, definition of ‘eligible international emissions unit’	3.99, 3.100, 3.102, 3.107, 4.58, 4.67, 4.76
Part 1, clause 5, definition of ‘emissions intensity’	6.46, 6.52, 6.53, 6.60, 6.61
Part 1, clause 5, definition of ‘emissions number publication time’	3.58
Part 1, clause 5, definition of ‘emissions number’	4.16
Part 1, clause 5, definition of ‘evidential burden’	7.91
Part 1, clause 5, definition of ‘executive officer’	7.123
Part 1, clause 5, definition of ‘facility’	1.14
Part 1, clause 5, definition of ‘Federal Court’	7.87
Part 1, clause 5, definition of ‘feedstock’	1.142, 1.148
Part 1, clause 5, definition of ‘financial control transfer test’	1.93
Part 1, clause 5, definition of ‘financial control’	1.93, 6.86
Part 1, clause 5, definition of ‘fixed charge year’	3.26
Part 1, clause 5, definition of ‘flexible charge year’	3.49
Part 1, clause 5, definition of ‘foreign account’	3.40
Part 1, clause 5, definition of ‘foreign country’	4.76, 5.46
Part 1, clause 5, definition of ‘foreign person’	1.94

Bill reference	***Paragraph number***
Part 1, clause 5, definition of 'non-group entity'	6.86
Part 1, clause 5, definition of 'official of the Regulator'	7.22
Part 1, clause 5, definition of 'operational control'	1.16
Part 1, clause 5, definition of 'participating percentage'	6.87
Part 1, clause 5, definition of 'person'	1.115
Part 1, clause 5, definition of 'potential greenhouse gas emissions'	1.206
Part 1, clause 5, definition of 'prescribed international unit'	4.76
Part 1, clause 5, definition of 'Productivity Minister'	5.95
Part 1, clause 5, definition of 'provisional emissions number'	1.57
Part 1, clause 5, definition of 'quarter'	5.88, 9.9
Part 1, clause 5, definition of 'registered holder'	3.20
Part 1, clause 5, definition of 'Registry account'	3.20
Part 1, clause 5, definition of 'Registry'	3.20
Part 1, clause 5, definition of 'relinquish'	4.79
Part 1, clause 5, definition of 'Resources and Energy Minister'	6.88
Part 1, clause 5, definition of 'reviewable decision'	8.3
Part 1, clause 5, definition of 'scheme'	7.111
Part 1, clause 5, definition of 'scope 1 emission'	1.20, 1.41
Part 1, clause 5, definition of 'supply'	1.128, 1.200
Part 1, clause 5, definition of 'surrender'	3.16
Part 1, clause 5, definition of 'transfer'	3.39
Part 1, clause 5, definition of 'trust estate'	1.115
Part 1, clause 5, definition of 'trust'	1.115
Part 1, clause 5, definition of 'trustee'	1.115
Part 1, clause 5, definition of 'unit shortfall charge'	4.45
Part 1, clause 5, definition of 'unit shortfall'	4.24
Part 1, clause 5, definition of 'United Nations Convention on the Law of the Sea'	11.14
Part 1, clause 5, definition of 'vintage year'	3.22
Part 1, clause 6	1.128, 1.131, 1.200
Part 1, clause 7	4.70
Part 1, clause 8	1.116, 4.70, 11.29
Part 1, clause 9	7.75, 7.118
Part 1, clause 10	11.13
Part 1, clause 11	11.15
Part 1, clause 12	11.14

Part 2: Pollution Caps

Bill reference	*Paragraph number*
Part 2, clause 13	2.10
Part 2, clause 14	2.11
Part 2, clause 14(2)	2.12
Part 2, clause 14(2)(a)	2.23
Part 2, clause 14(2)(b)	2.23
Part 2, clause 14(2)(c)(i)	2.26
Part 2, clause 14(2)(c)(ii)	2.27
Part 2, clause 14(2)(c)(iii)	2.28
Part 2, clause 14(2)(c)(iv)	2.29
Part 2, clause 14(2)(c)(ix)	2.34
Part 2, clause 14(2)(c)(v)	2.30
Part 2, clause 14(2)(c)(vi)	2.31
Part 2, clause 14(2)(c)(vii)	2.32
Part 2, clause 14(2)(c)(viii)	2.33
Part 2, clause 14(2)(c)(x)	2.35
Part 2, clause 14(2)(c)(xi)	2.36
Part 2, clause 14(2)(c)(xii)	2.37
Part 2, clause 14(2)(c)(xiii)	2.38
Part 2, clause 15	2.12
Part 2, clause 16(1)	2.14
Part 2, clause 16(2)	2.15
Part 2, clause 16(3) and (4)	2.16
Part 2, clause 16(5)	2.17
Part 2, clause 17	2.21
Part 2, clause 18	2.22

Part 3: Liable entities

Bill reference	*Paragraph number*
Part 3, clause 19	1.14, 1.114
Part 3, clause 20	1.198
Part 3, clause 20(1)	1.44, 1.52, 1.55, 1.57, 1.138

Bill reference	***Paragraph number***
Part 3, clause 20(1)-(3)	1.15
Part 3, clause 20(4)	1.43
Part 3, clause 20(5)	1.54
Part 3, clause 20(8)-(9)	1.138
Part 3, clause 21	1.198
Part 3, clause 21(1)	1.44, 1.52, 1.55, 1.57, 1.138
Part 3, clause 21(1)-(3)	1.15
Part 3, clause 21(4)	1.43
Part 3, clause 21(5)	1.54
Part 3, clause 21(7)-(8)	1.138
Part 3, clause 22	1.198
Part 3, clause 22(1)	1.44, 1.52, 1.56, 1.57, 1.138
Part 3, clause 22(1)-(3)	1.15
Part 3, clause 22(4)	1.43
Part 3, clause 22(5)	1.54
Part 3, clause 22(6)-(7)	1.138
Part 3, clause 23(1)	1.52, 1.55, 1.57, 1.138
Part 3, clause 23(1)-(3)	1.15
Part 3, clause 23(4) and (10)	1.47
Part 3, clause 23(5)	1.54
Part 3, clause 23(8)-(9)	1.138
Part 3, clause 24(1)	1.52, 1.55, 1.57, 1.138
Part 3, clause 24(1)-(3)	1.15
Part 3, clause 24(4) and (10)	1.47
Part 3, clause 24(5)	1.54
Part 3, clause 24(7)-(8)	1.138
Part 3, clause 25(1)	1.52, 1.56, 1.57, 1.138
Part 3, clause 25(1)-(3)	1.15
Part 3, clause 25(4) and (8)	1.47
Part 3, clause 25(5)	1.54
Part 3, clause 25(6)-(7)	1.138
Part 3, clause 26	11.15

Bill reference	***Paragraph number***
Part 3, clause 27	11.15
Part 3, clause 28	11.15
Part 3, clause 29	1.224, 7.6, 7.132
Part 3, clause 29(1)	7.133, 7.135
Part 3, clause 30(1) and (2)	1.20
Part 3, clause 30(10)	1.38
Part 3, clause 30(11) and (9)	1.40
Part 3, clause 30(2)	1.26, 1.29
Part 3, clause 30(2)-(12)	1.25
Part 3, clause 30(3)	1.30
Part 3, clause 30(4)	1.31
Part 3, clause 30(5)	1.32
Part 3, clause 30(6) and (7)	1.33
Part 3, clause 30(8)	1.34
Part 3, clause 30(9)	1.35
Part 3, clause 32	1.37
Part 3, clause 33	1.128, 1.133
Part 3, clause 33(1)(e)	1.205
Part 3, clause 33(3)	1.134
Part 3, clause 35(1)(d)	1.205
Part 3, clause 35(2)	1.138
Part 3, clause 35(3)	1.157
Part 3, clause 35(4)-(8)	1.158
Part 3, clause 35(4)-(9)	1.158
Part 3, clause 35(5)	1.159
Part 3, clause 35(6)	1.159
Part 3, clause 35(7)	1.159
Part 3, clause 35(8)	1.159
Part 3, clause 35(9)	1.159
Part 3, clause 36	1.196
Part 3, clause 36(1)(e)	1.205
Part 3, clause 37	1.161
Part 3, clause 39	1.164
Part 3, clause 40	1.162
Part 3, clause 41	1.162
Part 3, clause 42	1.169

Bill reference	***Paragraph number***
Part 3, clause 42(4)	1.165
Part 3, clause 43	1.166
Part 3, clause 43(2)(a)	1.167
Part 3, clause 43(2)(b)	1.167
Part 3, clause 43(3)	1.168
Part 3, clause 44	1.162
Part 3, clause 45	1.171, 1.172, 1.175, 9.17
Part 3, clause 47	1.176
Part 3, clause 48	1.177
Part 3, clause 48(1)	1.178
Part 3, clause 49	1.192
Part 3, clause 50	1.192
Part 3, clause 51	1.191
Part 3, clause 52	1.191
Part 3, clause 53	1.186
Part 3, clause 54	1.193
Part 3, clause 55	1.193
Part 3, clause 55A	1.15, 1.44
Part 3, clause 55B	1.143
Part 3, clause 55B(2)	1.137, 1.180
Part 3, clause 55B(3)	1.136
Part 3, clause 56	1.140, 1.144
Part 3, clause 56(1)	1.142
Part 3, clause 56(1)(e)(i)	1.142
Part 3, clause 56(1)(e)(ii)	1.142
Part 3, clause 56(3)	1.146
Part 3, clause 56(4), (5) and (6)	1.146
Part 3, clause 56(8)	1.146
Part 3, clause 57	1.140, 1.142, 1.148
Part 3, clause 57(2)	1.180
Part 3, clause 58	1.140, 1.142, 1.152
Part 3, clause 58(2)	1.180
Part 3, clause 59	1.140, 1.188, 1.190
Part 3, clause 59(3)	1.155
Part 3, clause 59(4)	1.137, 1.154

Bill reference	***Paragraph number***
Part 3, clause 59(5)	1.189
Part 3, clause 60	1.140, 1.188, 1.190
Part 3, clause 60(3)	1.155
Part 3, clause 60(4)	1.137, 1.154
Part 3, clause 60(5)	1.189
Part 3, clause 62	1.155
Part 3, clause 63	1.195
Part 3, clause 63(1)	1.197
Part 3, clause 63(4)	1.196
Part 3, clause 64	1.185
Part 3, clause 64(1)	1.182
Part 3, clause 64(3)	1.183
Part 3, clause 65	1.61
Part 3, clause 65(1)(a)	1.64
Part 3, clause 66(1), (2) and (3)	1.65
Part 3, clause 66(4)	1.66
Part 3, clause 66(5)	1.67
Part 3, clause 66(6)	1.68
Part 3, clause 67	1.69, 1.78
Part 3, clause 67A	1.71
Part 3, clause 68	1.72
Part 3, clause 69	1.72
Part 3, clause 70	1.73
Part 3, clause 71	1.75, 1.78
Part 3, clause 71A	1.79
Part 3, clause 72	1.76, 1.78
Part 3, clause 73	1.80
Part 3, clause 74	1.80
Part 3, clause 75	1.80
Part 3, clause 76	1.81, 1.84
Part 3, clause 77	1.85
Part 3, clause 78	1.82, 1.86
Part 3, clause 78A	1.89
Part 3, clause 79	1.83, 1.86
Part 3, clause 80	1.91, 1.112
Part 3, clause 81	1.91, 1.112

Bill reference	***Paragraph number***
Part 3, clause 81(c)	1.102
Part 3, clause 82	1.103
Part 3, clause 83	1.104
Part 3, clause 84	1.93, 1.94
Part 3, clause 85(3)	1.102
Part 3, clause 86	1.103
Part 3, clause 87	1.98, 1.99, 1.104
Part 3, clause 88	1.105
Part 3, clause 88(4)	1.106
Part 3, clause 89	1.107, 1.109, 1.111
Part 3, clause 89(5)	1.108
Part 3, clause 90	1.110, 1.111
Part 3, clause 91	1.113
Part 3, clause 92	1.96, 1.97
Part 3, clause 92A	1.210
Part 3, clause 92A(1)(a) and (b)	1.214
Part 3, clause 92A(1)(a)(i),(ii), (iii) and (5)	1.214
Part 3, clause 92A(1)(a)(v)	1.214, 1.218
Part 3, clause 92A(2)	1.222
Part 3, clause 92A(4)(a)	1.215
Part 3, clause 92A(4)(b)	1.215
Part 3, clause 92A(4)(c)	1.215
Part 3, clause 92A(5)	1.213
Part 3, clause 92B	1.217
Part 3, clause 92C and 92D	1.221
Part 3, clause 92E	1.220
Part 3, clause 92G	1.219

Part 4: Carbon units

Bill reference	***Paragraph number***
Part 4, clause 93	3.16
Part 4, clause 94	3.19
Part 4, clause 95	3.21
Part 4, clause 96	3.22

Bill reference	***Paragraph number***
Part 4, clause 97	3.23
Part 4, clause 98(1)	3.20
Part 4, clause 98(2)	3.20, 3.21
Part 4, clause 98(3)	3.20
Part 4, clause 99	3.30, 3.59
Part 4, clause 100	3.46, 3.47
Part 4, clause 100(1)	3.48, 3.49, 3.51, 3.53, 3.54, 3.55
Part 4, clause 100(11)	3.79
Part 4, clause 100(14) and (15)	3.49
Part 4, clause 100(3)	3.58
Part 4, clause 100(4)	3.58
Part 4, clause 100(7)	3.29, 3.57
Part 4, clause 100(9)	3.52
Part 4, clause 100A	3.56
Part 4, clause 101	3.68
Part 4, clause 102	3.31
Part 4, clause 103	3.32
Part 4, clause 103A	3.34
Part 4, clause 104	3.39
Part 4, clause 105	3.40
Part 4, clause 106	3.40, 3.42
Part 4, clause 106(12)	3.45
Part 4, clause 106(2) and (8)	3.43
Part 4, clause 106(5)	3.44
Part 4, clause 106(7)	3.43
Part 4, clause 106(9), (10) and (11)	3.45
Part 4, clause 107	3.40
Part 4, clause 108	3.40
Part 4, clause 108(3)	3.98
Part 4, clause 109A	3.37
Part 4, clause 110	3.36
Part 4, clause 111	3.60
Part 4, clause 111(2)	3.66
Part 4, clause 111(4)	3.79
Part 4, clause 111(5)	3.76, 3.83, 3.85, 3.88

Bill reference	***Paragraph number***
Part 4, clause 111(6)	3.67
Part 4, clause 111(7)	3.81
Part 4, clause 112	3.60, 3.72, 4.81
Part 4, clause 113	3.62, 3.71
Part 4, clause 113(2), (3) and (4)	3.63
Part 4, clause 113(6)	3.64
Part 4, clause 113(9)	3.62
Part 4, clause 114	3.74, 3.75
Part 4, clause 114(4)(b)	9.17
Part 4, clause 115	3.27, 3.90
Part 4, clause 116	3.90, 6.183
Part 4, clause 116(2)	3.92, 3.93
Part 4, clause 116(3) and (4)	3.96
Part 4, clause 116(5)	3.97
Part 4, clause 116A	3.94
Part 4, clause 117	4.16
Part 4, clause 118	4.16

Part 5: Emissions number

Bill reference	***Paragraph number***
Part 5, clause 119	4.18
Part 5, clause 119(3)	4.20
Part 5, clause 119(4) and (6)	4.21
Part 5, clause 119(5) and (7)	4.19
Part 5, clause 119(9)	4.22
Part 5, clause 120	4.18
Part 5, clause 120(3)	4.20
Part 5, clause 120(4) and (6)	4.21
Part 5, clause 120(5) and (7)	4.19
Part 5, clause 120(9)	4.22

Part 6: Surrender of eligible emissions units

Bill reference	***Paragraph number***
Part 6 clause 134A	4.53
Part 6 clause 134A(4)	4.54
Part 6, clause 121	4.23
Part 6, clause 122(1)	4.58, 4.69
Part 6, clause 122(10)	3.38, 4.73
Part 6, clause 122(11)	4.76
Part 6, clause 122(12)	4.74, 4.75
Part 6, clause 122(2)	4.71
Part 6, clause 122(3)	4.59
Part 6, clause 122(4)	3.24, 4.60
Part 6, clause 122(5)	4.64
Part 6, clause 122(6)	3.28, 4.61, 6.182
Part 6, clause 122(7)	3.27, 3.90, 4.62
Part 6, clause 122(8)	3.98, 4.68
Part 6, clause 122(9)	3.104
Part 6, clause 123	3.98, 3.104
Part 6, clause 123(2)	3.105
Part 6, clause 123(3)	3.107
Part 6, clause 124	3.86, 3.109, 4.77
Part 6, clause 125	4.25, 4.36
Part 6, clause 125(7)	4.65
Part 6, clause 126	4.29, 4.30, 4.40
Part 6, clause 127	4.27
Part 6, clause 128	4.28, 4.37, 4.38, 4.42
Part 6, clause 128(7)-(9)	4.65
Part 6, clause 129	4.40
Part 6, clause 130	4.43
Part 6, clause 131	4.42
Part 6, clause 132	4.39
Part 6, clause 133	4.44
Part 6, clause 133(6)	4.63
Part 6, clause 133(7)	3.98, 3.99, 4.67
Part 6, clause 134	4.25, 4.40, 4.45

Bill reference	*Paragraph number*
Part 6, clause 135	4.48, 7.6, 7.54
Part 6, clause 135(2)	7.55
Part 6, clause 136	4.49, 7.56
Part 6, clause 137	4.50, 7.57
Part 6, clause 138	1.92, 4.52
Part 6, clause 140	4.51, 7.57
Part 6, clause 141	9.7
Part 6, clause 141(2) and (5)	4.55
Part 6, clause 141(3) and (4)	4.56
Part 6, clause 141(9)	4.57
Part 6, clause 142	4.72

Part 7: Jobs and Competitiveness Program

Bill reference	*Paragraph number*
Part 7, clause 143(1)	5.43
Part 7, clause 143(2)(a)	5.45
Part 7, clause 143(2)(b)	5.46
Part 7, clause 143(2)(c)	5.46
Part 7, clause 143(2)(d)	5.47
Part 7, clause 143(2)(e)	5.48
Part 7, clause 143(2)(f)	5.48
Part 7, clause 143(2)(g)	5.51
Part 7, clause 144	5.45
Part 7, clause 145	5.52
Part 7, clause 145(1)(a)	5.55
Part 7, clause 145(1)(b)	5.56
Part 7, clause 145(2)(a)	5.57
Part 7, clause 145(2)(b)	5.58
Part 7, clause 145(3)	5.59
Part 7, clause 145(4)	5.60
Part 7, clause 145(5)	5.61
Part 7, clause 146	4.78, 5.63, 11.45
Part 7, clause 146(1)(a)	5.65
Part 7, clause 146(1)(b)	5.64

Bill reference	*Paragraph number*
Part 7, clause 146(2)	5.65
Part 7, clause 147	5.67
Part 7, clause 148	5.68
Part 7, clause 149	5.70
Part 7, clause 149(1)-(3)	5.71
Part 7, clause 149(4)	5.74
Part 7, clause 150	5.70, 5.75
Part 7, clause 151	5.77
Part 7, clause 151(4)	5.77
Part 7, clause 152	5.82
Part 7, clause 152(3)	5.83
Part 7, clause 152(5)	5.83
Part 7, clause 153	5.84
Part 7, clause 154	5.85
Part 7, clause 155 (3)	5.96
Part 7, clause 155(1)(a)	5.94
Part 7, clause 155(1)(b) – (e)	5.94
Part 7, clause 155(2)(a) to (c)	5.95
Part 7, clause 155(4)	5.97
Part 7, clause 156	5.98
Part 7, clause 156(5)	5.99
Part 7, clause 157(6)	5.100
Part 7, clause 158	5.95

Part 8: Coal-fired electricity generation

Bill reference	*Paragraph number*
Part 8, clause 159	6.26
Part 8, clause 160	6.26
Part 8, clause 161(10)	6.88, 6.100
Part 8, clause 161(11)	6.88
Part 8, clause 161(12)	6.88
Part 8, clause 161(2)	6.67, 6.69, 6.73, 6.131
Part 8, clause 161(2) and (3)	6.51, 6.100, 6.180

Bill reference	***Paragraph number***
Part 8, clause 161(3)	6.76, 6.78
Part 8, clause 161(4)	6.69
Part 8, clause 161(6)	6.86
Part 8, clause 161(6) and (7)	6.82
Part 8, clause 161(6)and (7)	6.35
Part 8, clause 161(7)	6.87
Part 8, clause 162(1)	6.31, 6.35
Part 8, clause 162(2)	6.32
Part 8, clause 162(2) and 162(3)	6.161
Part 8, clause 162(3)	6.32, 6.37
Part 8, clause 162(7)	6.33
Part 8, clause 163(1)(b) and 163(2)	6.38
Part 8, clause 163(1)(c)-(e)	6.39
Part 8, clause 164	6.40
Part 8, clause 165	6.66
Part 8, clause 165(2)	6.45
Part 8, clause 165(3)	6.51
Part 8, clause 165(4)(a)	6.42
Part 8, clause 165(4)(b)(i)	6.41
Part 8, clause 165(4)(b)(ii)	6.41
Part 8, clause 165(5)	6.50
Part 8, clause 165(6)	6.83, 9.17
Part 8, clause 166(1)	6.45
Part 8, clause 166(2)(a)	6.46, 6.49
Part 8, clause 166(2)(b)	6.47
Part 8, clause 166(2)(c)	6.46
Part 8, clause 166(3)	6.49
Part 8, clause 167	6.64
Part 8, clause 167(a)	6.52, 6.54, 6.55
Part 8, clause 167(b)	6.56
Part 8, clause 168	6.195
Part 8, clause 168(1)	6.61, 6.63
Part 8, clause 168(2)	6.65
Part 8, clause 169	6.90
Part 8, clause 169(2)	6.100
Part 8, clause 170	6.90, 6.111

Bill reference	***Paragraph number***
Part 8, clause 170(2)(a)	6.134
Part 8, clause 170(2)(a)(i)	6.160
Part 8, clause 170(2)(b)(i)	6.160
Part 8, clause 170(2)(c)	6.107
Part 8, clause 170(2)(c)(ii)	6.160
Part 8, clause 170(2)(d)	6.108
Part 8, clause 170(2)(d)(ii)	6.160
Part 8, clause 170(2)(e)	6.120
Part 8, clause 170(2)(f)	6.121
Part 8, clause 170(2)(f) and (g)	6.121
Part 8, clause 170(2)(g)	6.121
Part 8, clause 171	6.120
Part 8, clause 171(2) and (3)	6.122
Part 8, clause 171(4)	6.123, 6.160
Part 8, clause 171(4)(a)	6.123
Part 8, clause 171(4)(b)	6.124
Part 8, clause 171(4)(c)	6.127
Part 8, clause 171(4)(d)	6.127
Part 8, clause 171(4)(e)	6.129
Part 8, clause 171(4)(f)	6.135, 6.144
Part 8, clause 171(5)	6.132, 6.139
Part 8, clause 171(5)(a)	6.124, 6.133
Part 8, clause 171(5)(a)-(c)	6.136
Part 8, clause 171(5)(b)	6.124, 6.134
Part 8, clause 171(5)(c)	6.135
Part 8, clause 171(5)(d)	6.137, 6.138
Part 8, clause 171(5)(d)-(f)	6.136
Part 8, clause 171(5)(e)	6.137, 6.140
Part 8, clause 171(5)(f)	6.137, 6.142
Part 8, clause 171(6)	6.145
Part 8, clause 171(7)	6.146
Part 8, clause 171(9)	6.131
Part 8, clause 172	6.120, 6.123
Part 8, clause 172(1)(a) and (2)	6.147
Part 8, clause 172(1)(a) and (c)	6.148
Part 8, clause 172(1)(b)	6.150

Bill reference	*Paragraph number*
Part 8, clause 172(1)(d)	6.150
Part 8, clause 172(1)(e)	6.151
Part 8, clause 172(1)(f)	6.155
Part 8, clause 172(3) and (4)	6.155
Part 8, clause 173	6.157
Part 8, clause 174	6.112
Part 8, clause 174(4)	6.114, 6.117
Part 8, clause 175	6.112
Part 8, clause 175(4)	6.114, 6.117
Part 8, clause 176	6.160
Part 8, clause 177	6.163
Part 8, clause 177(1)	6.164
Part 8, clause 178	6.163
Part 8, clause 178(a)(i)	6.167
Part 8, clause 178(a)(ii)	6.167
Part 8, clause 178(a)(iii)	6.167
Part 8, clause 178(b)	6.167
Part 8, clause 179	6.165
Part 8, clause 180	6.168
Part 8, clause 181(1)	6.175, 6.179
Part 8, clause 181(1)(a) and (2)(a)	6.176, 6.177
Part 8, clause 181(1)(b) and 181(2)(b)	6.178
Part 8, clause 181(2)	6.179
Part 8, clause 181A	6.88

Part 9: Publication of information

Bill reference	*Paragraph number*
Part 9, clause 182	9.3
Part 9, clause 183	9.4
Part 9, clause 184	9.5, 9.6
Part 9, clause 184(2), (5) and (6)	9.6
Part 9, clause 185	9.7
Part 9, clause 186	9.7
Part 9, clause 187(3)	9.7

Bill reference	*Paragraph number*
Part 9, clause 187(4)	9.7
Part 9, clause 187(5)	9.7
Part 9, clause 188	9.7
Part 9, clause 189	9.7
Part 9, clause 190	9.7
Part 9, clause 191	9.7
Part 9, clause 192	9.7
Part 9, clause 193	9.6
Part 9, clause 194	9.8
Part 9, clause 195	3.77, 9.9
Part 9, clause 196	3.78
Part 9, clause 196(1) and (2)	9.9
Part 9, clause 197(1)	9.9
Part 9, clause 197(2)-(6)	9.9
Part 9, clause 198	5.87, 9.9
Part 9, clause 198(1)	5.88
Part 9, clause 199	5.87, 5.88, 9.9
Part 9, clause 199(c)	5.88
Part 9, clause 200	9.9
Part 9, clause 201	9.9
Part 9, clause 202	9.9
Part 9, clause 203(1) and (2)	9.10
Part 9, clause 203(3)	9.10
Part 9, clause 204	9.10
Part 9, clause 205	9.10
Part 9, clause 206	9.11

Part 10: Fraudulent conduct

Bill reference	*Paragraph number*
Part 10, clause 208(7)	7.106
Part 10, clause 207	7.6
Part 10, clause 208	7.119
Part 10, clause 208(1) and (2)	7.102
Part 10, clause 208(8)	7.103

Bill reference	*Paragraph number*
Part 10, clause 208(1)(c)	7.104
Part 10, clause 208(5)	7.105

Part 11: Relinquishment of carbon units

Bill reference	*Paragraph number*
Part 11, clause 209	7.6
Part 11, clause 210	3.38, 5.66
Part 11, clause 210(1) and (2)	4.79
Part 11, clause 210(3)	3.90, 4.80
Part 11, clause 210(4)	4.81
Part 11, clause 211	4.78
Part 11, clause 212	3.74, 4.82, 5.86
Part 11, clause 213	3.74, 4.82, 7.6, 7.54
Part 11, clause 213(2)	7.55
Part 11, clause 214	4.82, 7.56
Part 11, clause 215	4.82, 7.57
Part 11, clause 216	4.82, 7.57

Part 12: Notification of significant holding of carbon units

Bill reference	*Paragraph number*
Part 12, clause 217	9.13
Part 12, clause 218	9.14
Part 12, clause 218(2) and (4)	9.15
Part 12, clause 218(6)	9.16
Part 12, clause 219	9.14
Part 12, clause 219(5)	9.15
Part 12, clause 219(6)	9.16

Part 13: Information-gathering powers

Bill reference	*Paragraph number*
Part 13, clause 220	7.5, 7.9
Part 13, clause 221	7.9
Part 13, clause 221(4)	7.96
Part 13, clause 222	7.9
Part 13, clause 223	7.11
Part 13, clause 224	7.12
Part 13, clause 225	7.13
Part 13, clause 225(1)	7.42

Part 14: Record-keeping requirements

Bill reference	*Paragraph number*
Part 14, clause 226	7.5, 7.14
Part 14, clause 227	7.16, 7.19
Part 14, clause 228	7.17, 7.19

Part 15: Monitoring powers

Bill reference	*Paragraph number*
Part 15, clause 229	7.5, 7.21
Part 15, clause 230	7.23
Part 15, clause 230(3) and (4)	7.24
Part 15, clause 231	7.26, 7.113
Part 15, clause 231(5)	7.115
Part 15, clause 232	7.27
Part 15, clause 233	7.28
Part 15, clause 233(5), (6), (7), (8) and (9)	7.29
Part 15, clause 234	7.30, 7.31
Part 15, clause 235	7.33, 7.34, 7.110
Part 15, clause 236(1)	7.42
Part 15, clause 237	7.35
Part 15, clause 238	7.35

Bill reference	*Paragraph number*
Part 15, clause 239	7.35
Part 15, clause 240	7.35
Part 15, clause 241	7.35
Part 15, clause 242	7.35
Part 15, clause 243	7.36
Part 15, clause 244	7.37, 7.110
Part 15, clause 245	7.38, 11.25
Part 15, clause 245(4)	7.38
Part 15, clause 246	7.39

Part 16: Liability of executive officers of bodies corporate

Bill reference	*Paragraph number*
Part 16, clause 247	7.6
Part 16, clause 248	7.124
Part 16, clause 248(2)	7.125
Part 16, clause 248(3)	7.126
Part 16, clause 249	7.128

Part 17: Civil penalty orders

Bill reference	*Paragraph number*
Part 17, clause 250	7.6
Part 17, clause 251	7.87
Part 17, clause 252	7.74, 7.88
Part 17, clause 252(3)	7.89
Part 17, clause 252(4)(b) and (6)(a)	7.85
Part 17, clause 252(5)	7.82
Part 17, clause 252(5) and (6)	7.10, 7.19
Part 17, clause 253	7.74
Part 17, clause 254	7.99
Part 17, clause 255	7.74
Part 17, clause 256	7.91
Part 17, clause 257	7.100

Bill reference	*Paragraph number*
Part 17, clause 258	7.101
Part 17, clause 259	7.100
Part 17, clause 260	7.101
Part 17, clause 261	7.92
Part 17, clause 262	7.94
Part 17, clause 263	7.95
Part 17, clause 263(3)	7.96

Part 18: Infringement notices

Bill reference	*Paragraph number*
Part 18, clause 264	7.6, 7.59
Part 18, clause 265(1)	7.61
Part 18, clause 265(2)	7.62
Part 18, clause 266	7.63
Part 18, clause 267	7.66
Part 18, clause 268	7.64
Part 18, clause 269	7.69
Part 18, clause 270(a)	7.70
Part 18, clause 270(b)	7.71
Part 18, clause 270(c)	7.72
Part 18, clause 271	7.65

Part 19: Offences relating to unit shortfall charge and administrative penalties

Bill reference	*Paragraph number*
Part 19, clause 272	7.6
Part 19, clause 273	7.111
Part 19, clause 274	7.111
Part 19, clause 275	7.111
Part 19, clause 276	7.111

Part 20: Enforceable undertakings

Bill reference	*Paragraph number*
Part 20, clause 277	7.6
Part 20, clause 278	7.46
Part 20, clause 278(5)	7.48
Part 20, clause 279	7.49

Part 21: Review of decisions

Bill reference	*Paragraph number*
Part 21, clause 252	1.185, 1.197
Part 21, clause 280	8.3
Part 21, clause 281	8.3
Part 21, clause 282(3)	8.6
Part 21, clause 282(4)	8.5
Part 21, clause 283	8.7
Part 21, clause 283(4)	8.8
Part 21, clause 284(1)	8.7
Part 21, clause 284(2)	8.9
Part 21, clause 285	8.10
Part 21, clause 286	8.11

Part 22: Reviews by the Climate Change Authority

Bill reference	*Paragraph number*
Part 22, clause 287	10.6
Part 22, clause 288(1)	10.9
Part 22, clause 288(2)	10.8
Part 22, clause 288(3)	10.8
Part 22, clause 288(4)	10.8
Part 22, clause 288(5)	10.22
Part 22, clause 288(6)	10.21
Part 22, clause 288(7)	10.27
Part 22, clause 289	2.12, 2.13

Bill reference	***Paragraph number***
Part 22, clause 289(11)	10.11
Part 22, clause 289(2)	10.12
Part 22, clause 289(3)	10.10
Part 22, clause 289(4), (8) and (10)	10.10
Part 22, clause 289(5) and (9)	10.10
Part 22, clause 289(6)	10.22
Part 22, clause 289(7)	10.21
Part 22, clause 290(1)and (2)	10.14
Part 22, clause 290(4)	10.15
Part 22, clause 290(5)	10.22
Part 22, clause 290(6)	10.21
Part 22, clause 291(1)	10.16
Part 22, clause 291(2)	10.17
Part 22, clause 291(3)	10.16
Part 22, clause 291(4)	10.16
Part 22, clause 291(5)	10.22
Part 22, clause 291(6)	10.21
Part 22, clause 292	2.12, 2.23
Part 22, clause 292(1)	10.23
Part 22, clause 292(2)	10.24
Part 22, clause 292(4) and (5)	10.25
Part 22, clause 292(6)	10.25
Part 22, clause 292(7)-(8)	10.26
Part 22, clause 293(1)	10.18
Part 22, clause 293(3)	10.21
Part 22, clause 293(4)	10.19
Part 22, clause 293(5)	10.27
Part 22, clause 294(1)	10.23
Part 22, clause 294(2)	10.24
Part 22, clause 294(4) and (5)	10.25
Part 22, clause 294(6)	10.25
Part 22, clause 294(7)-(8)	10.26

Part 23: Miscellaneous

Bill reference	***Paragraph number***
Part 23, clause 295(a), (b), (c), (d), (h) and (f)	11.18
Part 23, clause 295(e)	11.21
Part 23, clause 295(i)	11.20
Part 23, clause 295(j)	11.19
Part 23, clause 296	8.12
Part 23, clause 297	1.103, 6.40
Part 23, clause 297A	11.22
Part 23, clause 298	11.27
Part 23, clause 299	11.26
Part 23, clause 301	11.23
Part 23, clause 302	11.49
Part 23, clause 303	11.24
Part 23, clause 303A	6.186, 11.8, 11.37
Part 23, clause 303A(1)	6.189
Part 23, clause 303A(2)	6.191
Part 23, clause 303A(3)	6.187
Part 23, clause 303B	6.186, 6.193, 11.8, 11.37
Part 23, clause 303B(1)	6.193
Part 23, clause 303B(2)	6.193
Part 23, clause 303B(3)	6.194
Part 23, clause 303B(4)	6.195
Part 23, clause 303B(5)	6.195
Part 23, clause 303B(6)	6.193
Part 23, clause 303B(7)	6.196
Part 23, clause 303B(8)	6.187
Part 23, clause 304	11.50, 11.51
Part 23, clause 305	11.28
Part 23, clause 306	11.30
Part 23, clause 307	11.34
Part 23, clause 307(3)	11.35
Part 23, clause 307(4)	11.36
Part 23, clause 308	11.31
Part 23, clause 309	5.76, 11.39

Part 23, clause 310	5.76, 11.44
Part 23, clause 311	11.47
Part 23, clause 312	11.8, 11.38