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# Carbon Package Special Edition

## LIABLE entities and how to calculate carbon units under the Clean Energy Act (Cth)

*John Taberner and Michael Voros FREEHILLS*

### **Editorial Note:**

*The passing of the Clean Energy Legislation package in November 2011 is expected to have a significant effect on Australian industries.*

*One of the biggest questions being asked about the package is what kind of liabilities companies will be facing under this new legislative regime.*

*To aid subscribers, the decision was made to produce a comprehensive reference document about how to calculate carbon units under the main piece of legislation, the Clean Energy Act. Written by John Taberner, Consultant at Freehills and Environmental Law specialist, and his colleague Michael Voros, this document is intended as a useful guide, diverting from the usual newsletter article format.*

*As always, your feedback is appreciated. Your comments can be emailed to [newsletters@lexisnexis.com.au](mailto:newsletters@lexisnexis.com.au)*

### **1 What's Happened?**

On 8 November 2011, the Senate passed the Clean Energy Act 2011 (Cth) (Clean Energy Act) and a suite of 18 related Acts (2011 Carbon Legislation).<sup>1</sup>

This marks a significant stage in a debate on national climate change legislative policy which has been under way in Australia for well over two decades.

This overview gives a short background to the 2011 Carbon Legislation and then outlines the principal features of the Clean Energy Act, the central piece of the 2011 Carbon Legislation.

### **2 Background**

#### **2.1 Introduction**

At the August 2010 election, climate change policy was a central issue. The composition of the Parliament which was returned at the election meant that issues of climate change policy would be central to that Parliament.

At the election, the Australian Labor Party (ALP) led by Prime Minister Gillard became a "minority government". In the Lower House of Federal Parliament it has a "notional majority" of 76 (supported by 3 Independents and a Green).

In the Upper House, since 1 July 2011 the Greens Party holds the balance of power and the ALP needs the support of the Greens Party to pass any legislation which is opposed by the Liberal/National Party Coalition.

These circumstances have made crucial the agreement which the ALP reached with the Greens on 1 September 2010.<sup>2</sup> Under it, the Greens agree to ensure supply to the ALP in government, and to oppose any motion of no confidence in the ALP in government, in return for the ALP's agreement to pursue (among other things) "policies which address climate change". In the agreement, the two parties acknowledge that "Australia must tackle climate change and that reducing carbon pollution by 2020 will require a price on carbon".

#### **2.2 Implementation of 1 September 2010 Agreement**

##### **(a) Multi-Party Committee**

On 27 September 2010, Prime Minister Gillard announced the membership and terms of reference of the multi-party climate change committee (Multi-Party Committee) contemplated by the 1 September 2010 Agreement.<sup>3</sup>

The Committee held its meetings between October 2010 and February 2011. On 24 February 2011, the

Committee released a framework for a carbon price mechanism (Carbon Price Framework)<sup>4</sup> the core elements of which were: an initial fixed price on emissions (now commonly referred to as a “carbon tax”) as early as 1 July 2012; and, within three to five years, transition to a market-based emissions trading scheme (ETS). The scheme would cover stationary energy, transport, industrial processes, fugitive emissions (other than from decommissioned coal mines) and non-legacy waste: other sectors could be phased in. Emissions covered by the voluntary regime known as the Carbon Farming Initiative,<sup>5</sup> including agriculture, would be excluded. International credits could not be used during the fixed price phase, but there could be limited use of domestic offsets. Accepted international credits could be used in the ETS phase. The 2020 emissions reduction target would be set prior to the ETS commencement. The Carbon Price Framework did not contain details of the starting price for the initial carbon tax, nor did it contain details of: industry, community and household assistance; or of support for low emissions technology and innovation.

The Committee held further meetings between March and June 2011 but, after its seventh communiqué on 17 May 2011, there were no further communiqués from the Committee.

#### (b) Garnaut Review

Under the 1 September 2010 Agreement, the Garnaut Review<sup>6</sup> continued its work in updating the 2008 Garnaut Report. The release of update papers was completed in March 2011.<sup>7</sup>

The update paper released on 17 March 2011 stated that an ETS, “initially with a fixed (and rising) price, is the best instrument for long-term emissions reductions ... This model provides the benefits of credibility and steadiness in its early years, as industry and institutions build confidence and capability, with later trade in abatement allowing emissions reductions to take place where they are cheapest. It also provides substantial revenue”. The paper advocated a “starting” carbon price of \$20 to \$30 a tonne escalating by CPI plus 4% a year to 2015. With some variations, the paper also advocated acceptance of the levels of industry assistance which were negotiated in late 2009 in relation to the CPRS. The paper proposed the establishment of an independent agency to determine the levels and duration of assistance in particular cases.

On 31 May 2011, the final report of the Garnaut Review (2011 Garnaut Report) was released.<sup>8</sup> The 2011 Garnaut Report proposed a “starting” carbon price of “around” \$26 a tonne in 2012 escalating by 4% a year to 2015, converting to a floating price (under a trading regime) in the middle of 2015, unless an independent

regulator, on expert advice, judges that the opportunities for international trade in entitlements are not sufficient to support a liquid and stable permit market. The report indicates that a “starting” carbon price of “\$26 will raise approximately \$11.5 billion in the first year” and will rise over time. The report proposed that 55% of this revenue should be allocated towards household assistance, that 35% of carbon revenues should be allocated towards business assistance, and that the remainder of the revenue should be applied towards innovation in low-emissions technologies.

The 2011 Garnaut Report also recommended that three independent bodies should be established: an independent scheme regulator; an independent committee to advise on targets; and an independent agency to advise on trade-exposed industries. Details of these governance arrangements were contained in a “supplementary note” to the 2011 Garnaut Report (Supplementary Note).<sup>9</sup>

The 2011 Garnaut Report stated that a “starting” carbon price of \$26 would put Australia on track to achieve a 5% reduction below 2000 levels by 2020. The report also stated that a “fair share” for Australia (if there is global agreement to stabilise greenhouse gases at 550ppm) would be a 10% reduction below 2000 levels by 2020 and (if there is global agreement to stabilise greenhouse gases at 450ppm) a 25% reduction. The Supplementary Note proposed that Parliament should pass legislation which states the initial aim of achieving the 5% reduction but provides that this target would be tightened after two years if the independent carbon agency recommended doing so in its first review — which would take place two years after commencement of the legislation — unless Parliament disagreed. The target could be further tightened after subsequent review by the independent committee. These would occur at least every five years, but any subsequent tightening could only occur with five years notice.

#### (c) Legislative Policy

On 12 October 2010, the newly appointed Minister for Climate Change and Energy Efficiency, The Hon Greg Combet AM MP made his first public speech.<sup>10</sup> He announced that the “introduction of a carbon price” was a key element of the Gillard Government’s domestic climate change mitigation policy. He stated that the Australian economy “[had] evolved without regard to the costs of carbon pollution”, that Australian industry must become less carbon-intensive “if [it is] to remain internationally competitive over the long term”, and that “[the] best and most responsible way of doing this is by establishing a carbon price in the economy”.

Minister Combet reiterated and expanded on these themes in several subsequent speeches, particularly a

speech on 17 December 2010<sup>11</sup> in which he compared the challenge for Australia of “decoupling” carbon pollution from economic growth as similar to the economic challenges of the 1980s.

On 16 February 2011<sup>12</sup> and 17 February 2011,<sup>13</sup> he continued to emphasise “the scale of [the] challenge to decouple production from pollution” in Australia, and the government’s determination “to deliver on a carbon price as a key economic reform supporting a long-term climate change”. On 8 March 2011,<sup>14</sup> he indicated the government’s view that “[a] carbon price will enhance Australia’s long-term economic competitiveness” and “will decouple the historically close relationship between carbon pollution and economic growth”.

(d) Legislative Program: (1)

On 11 October 2010, it was confirmed that the Gillard government would introduce legislation to implement its pre-election promise for a voluntary scheme, known as the Carbon Farming Initiative (CFI) to create “credits” from land-based actions that reduce or store carbon pollution.

On 24 March 2011, the government introduced the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) (CFI Bill) and the Australian National Registry of Emissions Units Bill 2011 (Cth) (ANREU Bill) into Federal Parliament.<sup>15</sup> On 22 August 2011, these bills were passed by the Senate and, on 23 August 2011, the bills (as passed by the Senate) were passed by the House of Representatives. On 15 September 2011, the bills received assent.

(e) Legislative Program: (2)

On 24 February 2011, Prime Minister Gillard adopted the Multi-Party Committee’s Carbon Price Framework as legislative policy. Draft legislation implementing the policy was released for public comment on 28 July 2011. Bills were introduced into the House of Representatives on 13 September 2011. With some amendments, these Bills were passed in the House of Representatives on 12 October 2011. The Bills, as so amended, were passed without further amendment by the Senate on 8 November 2011 (2011 Carbon Legislation).

### 3 Overview of 2011 Carbon Legislation

#### 3.1 Introduction

With some departures, the 2011 Carbon Legislation reflects the Carbon Price Framework of 24 February 2011<sup>16</sup> and the matters contained in the update paper released by the Garnaut Review on 17 March 2011.<sup>17</sup> The principal features of the Clean Energy Act, the central piece of the 2011 Carbon Legislation, are summarised in this s 3.

#### 3.2 Principal Features of 2011 Carbon Legislation: (1)

- (a) The Clean Energy Act is administered by a Clean Energy Regulator established under the Clean Energy Regulator Act 2011 (Regulator).
- (b) The Clean Energy Act will operate in two distinct phases: a **fixed price phase** for FY2012–13, FY2013–14 and FY2014–15; and a **flexible price phase** from FY2015–16 and onwards.
- (c) If, in either the fixed price phase or the flexible price phase, a **liable entity** has a **unit shortfall**, a charge is imposed on the unit shortfall.
- (d) Unit shortfall is calculated by reference to the number of **eligible emissions units** (EEUs) surrendered by the liable entity for the relevant FY. Eligible emissions units are:
  - (1) **carbon units** issued by the Regulator under the Clean Energy Act;
  - (2) international credits — **eligible international emissions units** (as defined in Australian National Registry of Emissions Units Act 2011); and
  - (3) domestic credits — **eligible Australian carbon credit units** (as defined in Carbon Credits (Carbon Farming Initiative) Act 2011)).
- (e) In the fixed price phase, international credits cannot be surrendered, but up to 5% of liability can be offset using domestic credits. In the flexible price phase, there is no limit on the number of domestic credits which may be surrendered, and up to 50% of liability can be offset using international credits during the first 5 years of the flexible phase after which time there is no limit on the number of international credits that may be used. Regulations may prohibit the surrender of specified eligible international emissions units.
- (f) From 1 July 2012, the price of carbon units issued under the Clean Energy Act will be fixed for three financial years. The fixed price in FY2012–13 will be \$23 per tonne of carbon dioxide equivalent (CO<sub>2</sub>e), and will rise by approximately 5% in each of the two subsequent years. From 1 July 2015, the price will be set by a market under an ETS.
- (g) In the first three years of the flexible price phase, there will be a **price floor** for carbon units issued under the Clean Energy Act — \$15 in FY2015–16, \$16 in FY2016–17, and \$17.05 in FY2017–18.<sup>18</sup> There will also be a **price ceiling** for FY2015–16: this is to be set by 31 May 2014 (probably at \$20 above the expected 1 July 2015 international permit price) and will increase 7.625%pa in the second and third years.

(h) In the flexible price phase, the total number of carbon units issued under the Clean Energy Act for any particular year will align with the **carbon pollution cap number** for that year. The carbon pollution cap number is set for each year as follows:

- (1) A cap number is set by regulation, as follows:
  - (A) in proposing regulations, the Minister must have regard to (among other things) the most recent report of the new Climate Change Authority established under the Climate Change Authority Act 2011 (CCA);
  - (B) the CCA will make recommendations to the government on a range of matters, including recommendations for the caps;
  - (C) the regulations will be disallowed if either House of Parliament passes a resolution within 15 days of regulations being tabled;
  - (D) the Minister must take all reasonable steps to ensure that regulations specifying the pollution cap numbers for the first five flexible charge years (FY2015–16 to FY2019–20) are tabled no later than 31 May 2014; and
  - (E) the five years of pollution caps will be extended by a year every year so that five years of pollution caps are always known.

The following table illustrates the timeline:

Deadline	Pollution cap announced for FY(s)
31 May 2014	FY2015–16, FY2016–17, FY2017–18, FY2018–19 and FY2019–20
30 June 2016	FY2020–21
30 June 2017	FY2021–22
	Pollution caps will continue to be set annually

(2) If no cap number is set by regulation, a default cap number is set at

(A) in FY2015–16: the total covered emissions for FY2012–13 less 38,000,000; and

(B) in subsequent financial years, the cap number of the previous year less 12,000,000.

The default caps follow a trajectory consistent with Australia's unconditional target of reducing national emissions to 5% below 2000 levels by 2020.

### 3.3 Principal Features of 2011 Carbon Legislation: (2)

This overview gives further details below of the principal features of the Clean Energy Act:

(a) Sections 4 and 5 describe in more detail the 3 species of liability under the Clean Energy Act and the quantum of liability imposed.

(b) Section 6 describes the manner of issue of carbon units, one of the three species of eligible emissions units by which liability under the Clean Energy Act is managed.

(c) Finally, section 7 describes the calculation and imposition of units shortfall charges, the central enforcement mechanism of the Clean Energy Act.

### 3.4 Other Features of 2011 Carbon Legislation

This overview does not discuss in any detail the extensive provisions in the Clean Energy Act for the publication of information. Part 9 of the Clean Energy Act establishes an information database on which a wide variety of information is to be recorded and made publicly available. Nor does this overview discuss in any detail the provisions in the Clean Energy Act for: the voluntary and compulsory relinquishment of carbon units; the compulsory notification of “significant holdings” of carbon units; information-gathering by the Regulator; compulsory record-keeping by liable entities and others; monitoring by inspectors; civil and criminal penalties, and enforceable undertakings; or review of decisions under the Act.

## 4 Liable Entity

### 4.1 3 Species of Liable Entity

(a) There are now only three species of liable entity under the 2011 Carbon Legislation. This is a significant departure from the coverage of the proposed CPRS and also from the coverage set out in the Carbon Price Framework of 24 February 2011.

(b) The coverage of the 2011 Carbon Legislation is summarised in the table in Schedule 1 to this overview. In short, the following entities will need to surrender permits:

(1) entities with **operational control** (as defined in the National Greenhouse and Energy Reporting Act 2011 (Cth) (NGER Act) of certain types of **facilities** (as defined in the NGER Act), subject to special provisions for **liability transfer certificates** and **designated joint ventures**;

(2) entities which **supply natural gas**; and

(3) entities which:

(A) acquire, manufacture or import certain fuels regulated under the Fuel Tax Act 2006; and

(B) are **designated opt-in persons** under an opt-in scheme to be set up in regulations under the Clean Energy Act.

### 4.2 Facility Liability

(a) Only certain types of facility attract liability under the Clean Energy Act. The facility must either:

- (1) emit, in FY2012–13 or a subsequent FY:
- (A) (in the case of a non-landfill facility): **covered emissions** in excess of 25,000 tonnes a year;<sup>19</sup> or
  - (B) (in the case of landfill facilities): covered emissions, legacy emissions and exempt landfill emissions in excess of a threshold number of 25,000 tonnes a year or (in the case of certain landfills) 10,000 tonnes a year;<sup>20</sup> or
- (2) be a **large gas consuming facility**.
- (b) A large gas consuming facility means a facility which emits, in FY2010–11 or a subsequent FY, covered emissions from the combustion of natural gas in the facility in excess of 25,000 tonnes (or another amount in regulations).<sup>21</sup> A facility is a large gas consuming facility from the second 1 July after end of the financial year in which the threshold is first met:<sup>22</sup> for example, if a facility first meets the threshold in FY2010–11, the facility is a large gas consuming facility in FY2012–13; if a facility first meets the threshold in FY2011–12, the facility is a large gas consuming facility in FY2013–14.
- (c) Covered emissions means<sup>23</sup> scope 1 emissions of greenhouse gases for which methodologies have been determined under NGER Act, and greenhouse gas is also as defined in NGER Act.<sup>24</sup> There are important exclusions from covered emissions:
- (1) emissions from combustion of certain taxable fuels (as defined in Fuel Tax Act);<sup>25</sup>
  - (2) emissions from combustion of bio-fuels;
  - (3) certain emissions from agriculture or soil (unless attributable to the operation of a landfill);
  - (4) land use, land use change or forestry emissions (unless attributable to the operation of a landfill);
  - (5) fugitive emissions from decommissioned underground mines;
  - (6) legacy emissions from landfills — namely: emissions from waste accepted before 1 July 2012;
  - (7) exempt landfill emissions;
  - (8) emissions from closed landfills — namely: landfills which have not accepted waste since 1 July 2012; and
  - (9) emissions of synthetic greenhouse gases.<sup>26</sup>
- (d) Subject to the matters in (e) and (f) below, the person with “operational control” of the facility (operational controller) is a liable entity.<sup>27</sup>
- (e) The operational controller is taken for the purposes of the Clean Energy Act not to have operational control of the facility while a liability transfer certificate is in force in relation to the facility:<sup>28</sup>
- (1) a member of the corporate group of the operational controller can apply for a liability transfer certificate to transfer liability to it;<sup>29</sup>
  - (2) a person outside the corporate group of the operational controller that has financial control over the facility can apply for a liability transfer certificate to transfer liability to it;<sup>30</sup>
  - (3) the holder of such a certificate pursuant to any such application is the liable entity in lieu of the operational controller.<sup>31</sup>
- (f) The operational controller is taken for the purposes of the Clean Energy Act not to have operational control of the facility while a designated joint venture has the facility:<sup>32</sup> in this case the participants in the designated joint venture are each liable entities<sup>33</sup> in their respective **participating percentages** in lieu of the operational controller.<sup>34</sup>
- (g) Liability transfer certificates are not transferable.<sup>35</sup>
- (h) There are two types of designated joint ventures (DJVs):
- (1) A **mandatory DJV** — a JV in which no person meets the test for operational control in NGER Act.<sup>36</sup> Participants in a mandatory DJV have an obligation to notify of their participation in the DJV<sup>37</sup> and to apply for a **participating percentage determination** (PPD).<sup>38</sup> Failure to do so attracts a maximum civil penalty of \$1.1 million<sup>39</sup> and additional daily penalties for ongoing contravention.<sup>40</sup> Executive officers of corporations also face personal liability.<sup>41</sup>
  - (2) A **declared DJV** — a JV which has a JV-participant or a third party who meets the test for operational control in NGER Act.<sup>42</sup> Participants in such a DJV have an entitlement, with the consent of the operator, to apply for a PPD.<sup>43</sup> They also have an obligation to inform the Regulator if and when the DJV “ceases to pass the joint venture declaration test” in relation to the facility, and to do so within 30 days of the cessation.<sup>44</sup> Failure to do so attracts a maximum civil penalty of \$1.1 million<sup>45</sup> and additional daily penalties for ongoing contravention.<sup>46</sup> Executive officers of corporations also face personal liability.<sup>47</sup> A DJV “ceases to pass the joint venture declaration test” in relation to a facility if:<sup>48</sup>
    - (A) the DJV no longer has the facility; or
    - (B) the participants are no longer parties to an agreement that deals with the facility; or
    - (C) the facility is no longer operated exclusively for the DJV by the JV-participant operator or third party operator.

### 4.3 Natural Gas Liability

(a) Certain types of supply of natural gas attract the operation of the Clean Energy Act 2011.<sup>49</sup> There must be:

- (1) a **supply of natural gas** to another person;
- (2) a **withdrawal** of the supplied natural gas from a **natural gas pipeline**; and
- (3) a withdrawal in Australia.

Natural gas, withdrawal and natural gas supply pipeline are all defined by regulations,<sup>50</sup> but regulations are not yet in place. Supply means “supply (including re-supply) by way of sale, exchange or gift” and (subject to regulations) occurs when the gas is physically delivered.<sup>51</sup>

(b) If the conditions in (a) are met, then the supplier is a liable entity in relation to the supply:<sup>52</sup>

- (1) if:
  - (A) it may reasonably be expected that the natural gas supplied is wholly or partly for use by the recipient of the supply; and
  - (B) the withdrawal is for the purposes of the use;

(2) unless the recipient quotes an **obligation transfer number** (OTN) in relation to the supply,<sup>53</sup> in which case the recipient is the liable entity.<sup>54</sup>

(c) OTNs must be quoted in some circumstances and may be quoted in others:

(1) An OTN **must** be quoted by the recipient where it may reasonably be expected that the gas is for use in a large gas consuming facility (see s 4.2(a)(2) above) and withdrawal is from natural gas pipeline for the purposes of the use.<sup>55</sup> Failure to do so attracts a maximum civil penalty of \$1.1 million<sup>56</sup> and additional daily penalties for ongoing contravention.<sup>57</sup> Executive officers of corporations also face personal liability.<sup>58</sup>

(2) An OTN **may** be quoted by “large users of natural gas”<sup>59</sup>, being:

- (A) a person who is a recipient of gas as described in (1) and who also receives other gas in addition for that person’s use; or
- (B) a person approved by the Regulator.

The Regulator will only give such approval if satisfied that it is likely that in the financial year of the application a facility of the applicant will exceed 25kt CO<sub>2</sub>e<sup>60</sup> (and therefore can be seen to be likely to be a large gas consuming facility in the future).

(3) An OTN **may** be quoted by a recipient where recipient intends to use the whole or a part of the gas as feedstock.<sup>61</sup> Feedstock means a substance

that is converted by a chemical process into a substance that is not a greenhouse gas.<sup>62</sup>

(4) An OTN **may** be quoted by a recipient where recipient carried on business of converting gas to CNG, LNG or LPG.<sup>63</sup>

(d) The natural gas supplier must accept OTN quotations, except for the situations in 4.3(c)(2) above, for which the natural gas supplier may accept the quotations at their discretion.<sup>64</sup>

(e) OTNs are not transferable.<sup>65</sup>

### 4.4 “Opt-in” Liability

(a) A **designated opt-in person** is a liable entity.<sup>66</sup>

(b) Who is a “designated opt-in person”? A person who acquires, manufactures or imports certain types of fuel<sup>67</sup> in the following circumstances;

(1) the acquisition, manufacture or import occurs in FY2013–14 or subsequent FY;<sup>68</sup>

(2) the person is<sup>69</sup> either:

- (A) an “entity” as defined in Fuel Tax Act 2006 (Cth) and is entitled to a fuel tax credit in respect of the acquisition, manufacture or import; or
- (B) a member of the corporate group of such an entity; or
- (C) a participant in a GST JV with such an entity;

(3) the person applies to “opt-in”<sup>70</sup> in respect of an **opt-in amount** of fuel;<sup>71</sup> and

(4) the “**potential greenhouse gas emissions embodied in the opt-in amount**” exceed a specified threshold.<sup>72</sup>

(c) The mechanism for “opt-in” will be created under regulations to be in place by 15 December 2012.<sup>73</sup>

## 5 Quantum of Liability

### 5.1 Introduction

The quantum of liability of a liable entity in a particular financial year (FY<sub>n</sub>) is determined by the liable entity’s **emissions number** (EN).

### 5.2 Emissions Number

A liable entity’s emissions number for a particular financial year is equal to total of the liable entity’s **provisional emissions numbers** (PEN) for that year:

$$EN (FY_n) = total\ PEN (FY_n).$$

### 5.3 Emissions Number Publication Time

(a) A report setting out liable entity’s PEN (FY<sub>n</sub>) and EN (FY<sub>n</sub>) must be submitted to the Regulator by 31 October in the next financial year (FY<sub>n+1</sub>).

- (b) Once that report is received, the Regulator must enter the liable entity's EN (FY<sub>n</sub>) in the **information database** established under the Clean Energy Act.
- (c) The date on which that entry is made is the liable entity's **emissions number publication time**.

#### 5.4 Calculation of Provisional Emissions Numbers

- (a) The calculation of provisional emissions numbers differs depending on whether the liability is facility liability, natural gas supply liability or liability under the "opt-in scheme".
- (b) A facility PEN (FY<sub>n</sub>) is calculated by reference to covered emissions<sup>74</sup> from the facility during (FY<sub>n</sub>).<sup>75</sup>
- (c) A natural gas supply PEN (FY<sub>n</sub>) is calculated in two steps:

- (1) determine the **potential greenhouse gas emissions** embodied in the amounts of gas supplied by the liable entity during (FY<sub>n</sub>) (PGGE);<sup>76</sup> and
- (2) determine the aggregate of the liable entity's PGGEs (FY<sub>n</sub>) equals its PEN (FY<sub>n</sub>).  
**PEN (FY<sub>n</sub>) = total PGGE (FY<sub>n</sub>).**

Special provisions apply for the calculation of PGGEs of persons who quote OTNs in relation to a large gas consuming facility: where an amount of gas supplied to that person is actually combusted in the facility, that amount is not relevant for calculation of PGGE.<sup>77</sup>

Special provisions also apply for the adjustment of PENs of persons who quote OTNs. Where an amount of gas supplied is used as "feedstock", PGGE of that amount is a **netted out number** and PEN is reduced by that number.<sup>78</sup> Similarly, where an amount of gas supplied is used "in such a way as not to emit any greenhouse gases", PGGE of that amount is a netted out number and PEN is reduced by that number.<sup>79</sup> Similarly, where the covered emissions from the operation of a facility (other than a large gas consuming facility) are attributable to combustion of an amount of gas supplied, PGGE of that amount is a netted out number and PEN is reduced by that amount.<sup>80</sup> Similarly, where an amount of gas supplied is used to manufacture CNG, LNG or LPG, PGGE of that amount is a netted out number and PEN is reduced by that amount.<sup>81</sup> Finally, where an amount of gas supplied is resupplied to another person, PGGE of that amount is a netted out number and PEN is reduced by that amount.<sup>82</sup>

- (d) An "opt-in" PEN (FY<sub>n</sub>) is calculated in two steps:

- (1) determine the **potential greenhouse gas emissions** embodied in the "opt-in amount" of fuel (PGGE);<sup>83</sup>
- (2) the aggregate of the liable entity's PGGEs (FY<sub>n</sub>) equals its PEN (FY<sub>n</sub>).<sup>84</sup>  
**PEN (FY<sub>n</sub>) = total PGGE (FY<sub>n</sub>).**

## 6 Issue of Carbon Units

### 6.1 Introduction

This section 6 describes the manner of issue of carbon units, one of the three species of eligible emissions units by which liability under the Clean Energy Act is managed. The two other species are eligible international emissions units and eligible Australian carbon credit units.

### 6.2 Types of Carbon Units

- (a) There are two types of carbon unit:
  - (1) carbon units which are issued free of charge; and
  - (2) carbon units which are not issued free of charge.
- (b) Carbon units which are "free" are of two types:
  - (1) units issued in accordance with the **Jobs and Competitiveness Program** (JCP) under s 145 of the of the Clean Energy Act; and
  - (2) units issued in accordance with **Pt 8** of the Clean Energy Act (relating to coal-fired power generation); and
- (c) Carbon units which are not issued free are also of two types:
  - (1) units which are issued for a "fixed" price; and
  - (2) units which are issued at auction.

### 6.3 Regulator's Powers to Issue Carbon Units

- (a) The Regulator may issue carbon units,<sup>85</sup> each with a unique **identification number**<sup>86</sup> and **vintage year**.<sup>87</sup>
- (b) The Regulator can issue a carbon unit for vintage year FY<sub>n</sub> at any time before 1 February in FY<sub>n+1</sub>.<sup>88</sup>
- (c) Carbon units cannot be issued except:
  - (1) to a person who has a **Registry account** under the Australian National Registry of Emissions Units Act;<sup>89</sup> and
  - (2) to that account.<sup>90</sup>
- (d) Carbon units may only be issued by the Regulator as follows;<sup>91</sup>

- (1) for **fixed charges** under s 100 of the Clean Energy Act;
  - (2) as a result of an **auction** under ss 111 to 114 of the Clean Energy Act;
  - (3) in accordance with the **JCP** under s 145 of the Clean Energy Act; or
  - (4) in accordance with **Pt 8** of the Clean Energy Act (relating to coal-fired power generation).
- (e) The total carbon units issued for a particular vintage year by way of auction and in accordance with the JCP and in accordance with Pt 8 must equal the **carbon pollution cap number**<sup>92</sup> for the vintage year.<sup>93</sup>

#### 6.4 Fixed Charge Units

- (a) For fixed charge years (FY2012–13, FY2013–14 and FY2014–15):
  - (1) fixed prices for carbon units are **specified** in Clean Energy Act<sup>94</sup> (\$23/tonne in FY2012–13 rising by 5% pa);
  - (2) units at these fixed prices are available during the **issue periods** in items 1–6 of s 100 of Clean Energy Act;
  - (3) these issue periods are of two types:
    - (A) (items 1, 3, 5): the period between 1 April FY<sub>n</sub> and 15 June FY<sub>n</sub>;
    - (B) (items 2, 4 and 6) the period between the liable entity's **emissions number publication time** FY<sub>n</sub> (namely: before 31 October FY<sub>n+1</sub>)<sup>95</sup> and 1 February in FY<sub>n+1</sub>;
  - (4) an application for fixed price carbon units cannot seek more than a maximum number of units.<sup>96</sup>
- (b) For the first three flexible charge years (FY2015–16, FY2016–17 and FY2017–18):
  - (1) fixed prices are **not specified** in Clean Energy Act;
    - (A) a fixed price for FY2015–16 is to be specified by regulations;
    - (B) the aim is to publish such regulations before 31 May 2014;<sup>97</sup>
    - (C) the Government has indicated that the regulations will probably specify a fixed price for FY2015–16 at \$20 above the expected international price in FY2015–16;
    - (D) such regulations can be amended before 1 June 2015 to allow for variations to the specified fixed price for FY2015–16 to reflect movements in the expected international price in FY2015–16;<sup>98</sup>
    - (E) units at fixed prices will only be available in FY2015–16, FY2016–17 and FY2017–18 if a fixed price for FY2015–16 has been specified by regulations;<sup>99</sup>

- (F) if fixed price for FY2015–16 has been specified, the fixed price in FY2016–17 and FY2017–18 rises by 7.625%pa.
- (2) units at these fixed prices are available during **issue periods** in items 7–9 of s 100 of Clean Energy Act;
- (3) there is only one type of issue period: the period between the liable entity's **emissions number publication time** FY<sub>n</sub> (namely: before 31 October FY<sub>n+1</sub>)<sup>100</sup> and 1 February in FY<sub>n+1</sub>;
- (4) an application for fixed price carbon units cannot seek more than a maximum number of units.<sup>101</sup>
  - (c) The Regulator cannot issue fixed charge units to a person unless the person actually pays the fixed price.<sup>102</sup>
  - (d) Fixed price units are taken to be surrendered immediately on issue.<sup>103</sup>

#### 6.5 Auctions Units

- (a) Policies, procedures and rules for auctions are to be set by legislative instrument,<sup>104</sup> but auctions can be conducted without legislative instrument.<sup>105</sup>
- (b) Limits apply to the Regulator's ability to **advance auction** a carbon unit for a particular vintage year where no regulations are in force declaring a carbon **pollution cap number**<sup>106</sup> for the vintage year:
  - (1) no more than 15 million carbon units for that vintage year can be issued in any auction which takes in any financial year which starts more than 12 months before the beginning of the vintage year;<sup>107</sup> and
  - (2) no more than 15 million carbon units for that vintage year can be issued in any auction which takes place within 6 months before the beginning of the vintage year.<sup>108</sup>
- (c) A carbon unit issued at auction attracts a charge equal to the amount bid, subject to reserve charges (**floor prices**) in FY2015–16 (\$15), FY2016–17 (\$16) and FY2017–18 (\$17.05). This floor price will also apply to eligible international emission units.

#### 6.6 JCP Units

- (a) Part 7 of the Clean Energy Act contemplates the issue of **free carbon units** under regulations for the JCP. These regulations are to be in place by 1 March 2012.<sup>109</sup> The JCP may include the issue of free carbon units in respect of activities that, under the JCP, are taken to be emissions-intensive trade-exposed (EITEs).<sup>110</sup> The extraction of coal cannot be an EITE.<sup>111</sup>

(b) Draft regulations have been released for public comment.<sup>112</sup> The draft regulations divide activities into two types:

- (1) highly emissions-intensive activities; and
- (2) moderately emissions-intensive activities.

(c) Highly emissions-intensive activities attract an assistance rate of 94.5% in the 2012–13 financial year. Moderately emissions-intensive activities attract an assistance rate of 66% in the 2012–13 financial year.

(d) A “carbon productivity contribution” will apply, reducing these rates by 1.3%pa.

(e) The indicative rates of assistance for each category for each year are as follows:

FY	for a moderately emissions-intensive activity	for a highly emissions-intensive activity
2012–13	66.0%	94.5%
2013–14	65.1%	93.3%
2014–15	64.3%	92.1%
2015–16	63.5%	90.9%
2016–17	62.6%	89.7%

(f) At least 3 years’ notice must be given of any changes to the JCP, and no changes that would have a negative effect on recipients of assistance will be made before FY2017–18.<sup>113</sup>

(g) Any changes to the JCP regulations, after they are in place, must take into account the most recent report by the Productivity Commission.<sup>114</sup>

(h) The Clean Energy Act contemplates that the Productivity Commission will conduct a series of annual and 5-yearly reviews and produce a series of related reports<sup>115</sup> on the operation of the JCP<sup>116</sup> for various periods. The first such period is FY2014–15.<sup>117</sup>

## 6.7 Part 8 Units

(a) Part 8 of the Clean Energy Act contemplates the issue of **free carbon units** for certain **coal-fired generation complexes**.

(b) A coal-fired generation complex means a generation unit or a set of 2 or more generation units, a generation unit being “a generator of electricity”<sup>118</sup> including “the boiler (if any)...and any other related equipment essential to the generator’s functioning as a generator”.<sup>119</sup>

(c) For Pt 8 to apply to a coal-fired generation complex, a **certificate of eligibility** must be in force in respect of the complex.<sup>120</sup> The Clean Energy Act contains provisions concerning appli-

cation for, and issue of, such a certificate.<sup>121</sup> Under these provisions, the complex must “[pass] **the generation complex assistance eligibility test**”;<sup>122</sup> in short:

(1) the complex must have been:

(A) in operation; and

(B) connected to a grid with a capacity<sup>123</sup> of at least 100Mw;

at some time during FY2008–09 and FY2009–10;<sup>124</sup> and

(2) during FY2008–09 and FY2009–10, at least 95% of the electricity generated by the complex must have been attributable to the combustion of coal;<sup>125</sup> and

(3) the complex must have an **emissions intensity**<sup>126</sup> greater than 1kt CO<sub>2</sub>e per GWh of electricity generated.<sup>127</sup>

(d) An application for a certificate of eligibility must be made within 30 days of the commencement of the provisions of the Clean Energy Act which enable application.<sup>128</sup> The Regulator must use best endeavours to assess the application within 90 days of the date of the application.<sup>129</sup> But the Regulator may make its assessment up to 150 days after the commencement of the substantive provisions of the Act.<sup>130</sup>

(e) A person must own, operate or control a generation complex to make an application.<sup>131</sup>

(f) Each application must cover a separate generation unit: multiple applications for the same generation unit cannot be made.<sup>132</sup>

(g) An application for carbon units does not entitle the applicant to the carbon units. Rather, units are issued in respect of the generation complex rather than to any particular person. A person’s entitlement to receive units is determined by reference to the person’s relationship to the generation complex.<sup>133</sup>

(h) In the certificate of eligibility, the Regulator must<sup>134</sup> specify the **annual assistance factor**<sup>135</sup> for the complex.

(i) 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.<sup>136</sup>

(j) The number of units to be issued for FY2013–14, FY2015–16 and FY2016–17 is set at 41,705,000. The total number of units allocated in FY2014–15 may differ from this amount and is calculated according to a different formula which ensures that no more than 83,410,000 free carbon units can be issued over the first two years of allocations.<sup>137</sup>

(k) A generation complex must comply with the **power system reliability test** before it can receive free carbon units.<sup>138</sup>

(l) No free carbon units will be issued to a generator unless it gives a **clean energy investment (CEI) plan** to the Minister for Resources and Energy for a particular generation complex.<sup>139</sup>

(m) If a closure contract is in force for the generation complex with the Commonwealth, there will be restrictions on the free units that may be issued in respect of the generation complex<sup>140</sup> and the generation complex does not have to pass the power system reliability test and is not subject to the requirement for a CEI plan.<sup>141</sup>

## 6.8 Comments

Carbon units that are issued free of charge under the provisions described in 6.6 or 6.7 above for vintage years FY2012–13, FY2013–14 or FY2014–15:

- (a) can be transferred, but can only be surrendered for the FY corresponding to their vintage year<sup>142</sup> and, if not surrendered, will be cancelled at the end of 1 February of the next financial year;<sup>143</sup> or
- (b) 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.<sup>144</sup>

## 7 Unit Shortfall Charge

### 7.1 Introduction

- (a) A central feature of the 2011 Carbon Legislation is the imposition of unit shortfall charges. If a liable entity has a **unit shortfall**, a **unit shortfall charge** is imposed on the liable entity.
- (b) “Unit shortfall” for  $FY_n$  is calculated by reference to the number of eligible emissions units which a liable entity has **surrendered** for  $FY_n$ .
- (c) In fixed charge years (FY2012–13, FY2013–14 and FY2014–15), the Clean Energy Act 2011 contemplates “progressive” surrender of units — 75% by 15 June in  $FY_n$  and the remaining 25% by 1 February in  $FY_{n+1}$ . In flexible charge years (FY2015–16 onwards), the Clean Energy Act 2011 contemplates only one surrender deadline — 100% by 1 February in  $FY_{n+1}$ .
- (d) Surrender of eligible international emissions units is not permitted in fixed charge years (FY2012–13, FY2013–14 and FY2014–15).
- (e) Regulations may prohibit the surrender of specified eligible international emissions units during the flexible charge years (FY2015–16 onwards).

- (f) Surrender of eligible Australian carbon credit units in fixed charge years cannot exceed 5% of the liable entity’s PEN in the year, except for persons with at least 50% of their emissions coming from landfill facilities who are not restricted in the number of Australian carbon credit units they can surrender.<sup>145</sup>
- (g) Eligible international emissions units surrendered in FY2015–16 to FY2019–20 cannot exceed 50% of PEN in the year.<sup>146</sup>

### 7.2 General Scheme

- (a) Calculation of unit shortfall differs depending on whether the shortfall arises in relation to a fixed charge year (FY2012–13, FY2013–14 and FY2014–15) or a flexible charge year (FY2015–16 onwards). Schedule 2 to this overview sets out in detail the mechanism for calculating unit shortfall.
- (b) The unit shortfall charge is imposed under a group of 3 Acts — the Clean Energy (Charges — Customs) Act 2011 (so far as the charge is a duty of customs), the Clean Energy (Charges — Excise) Act 2011 (so far as the charge is a duty of excise) and the Clean Energy (Unit Shortfall Charge — General) Act 2011 (so far as the charge is not a duty of customs or excise).
- (c) In fixed charge years (FY2012–13, FY2013–14 and FY2014–15), the amount of the unit shortfall charge is 130% of the per unit charge applicable under s 100(1) Clean Energy Act 2011 for the issue of a carbon unit with a vintage year of that fixed charge year.
- (d) In flexible charge years (FY2015–16 onwards), the amount charged for each unit in the shortfall is 200% of the **benchmark average auction charge**<sup>147</sup> for the previous financial year. The charge can also be set in regulations, but cannot be lower than 130%, or exceed 200%, of the benchmark average auction charge for the previous financial year.
- (e) After the time when the unit shortfall charge becomes payable, a late payment penalty accrues at a rate of 20% per annum (or a lower rate if prescribed in regulations).<sup>148</sup>
- (f) A liability transfer certificate amounts to a statutory guarantee by the transferor of payment of any unit shortfall charge.<sup>149</sup>

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## Schedule 1

### Species of Liability

<b>Facility (Clean Energy Act 2011, Part 3 Division 2)</b>			
<b>Non-landfill</b>			
	<b>Circumstances of Liability</b>	<b>Provisional Emissions Number</b>	<b>Liable Entity</b>
	Section 20(1) — operational control of facility	Section 20(2)	Section 20(3) — operator of facility
	Section 21(1) — “designated joint venture” facility	Section 21(2)+(9)	Section 21(3) — participant in joint venture
	Section 22(1) — liability transfer certificate for facility	Section 22(2)	Section 22(2) — holder of certificate
<b>Landfill</b>			
	<b>Circumstances of Liability</b>	<b>Provisional Emissions Number</b>	<b>Liable Entity</b>
	Section 23(1) — operational control of facility	Section 23(2)	Section 23(3) — operator of facility
	Section 24(1) — “designated joint venture” facility	Section 24(2)+(9)	Section 24(3) — participant in designated joint venture
	Section 25(1) — liability transfer certificate for facility	Section 25(2)	Section 25(3) — holder of liability transfer certificate
<b>Non-facility (Clean Energy Act 2011, Part 3 Division 3)</b>			
	<b>Circumstances of Liability</b>	<b>Provisional Emissions Number</b>	<b>Liable Entity</b>
	Section 33(1) — supply of natural gas by supplier (no OTN quoted)	Section 33(2)(a)	Section 33(2)(b) — supplier
	Section 35(1) — supply of natural gas by supplier (OTN quoted)	Section 35(3)(a)	Section 35(3)(b) — OTN holder
	Section 36(1) — supply of natural gas by supplier (OTN misused)	Section 36(2)(a)	Section 36(2)(b) — OTN holder
<b>“Opt-in” (Clean Energy Act 2011, Part 3 Division 7)</b>			
	<b>Circumstances of Liability</b>	<b>Provisional Emissions Number</b>	<b>Liable Entity</b>
	Section 92A — acquisition, manufacture or import of fuel	Section 92A(1)(b)	Section 92A(1)(b) — designated “opt-in” person

## Schedule 2

### Calculation of Unit Shortfall

Calculation of Unit Shortfall	
<b>Key Terms</b>	
	<p>There is a range of “key terms” used in the provisions dealing with unit shortfall charges.</p> <p>Several of these terms have already been mentioned:  <b>emissions number</b> (EN);<sup>150</sup>  <b>provisional emissions number</b> (PEN);<sup>151</sup> and  <b>eligible emissions units</b> (EEUs).<sup>152</sup></p> <p>Several new terms are now involved:  <b>interim emissions number</b> (IEN);  <b>total interim emissions number</b> (total IEN);  <b>number of units submitted by 15 June</b> in any particular year (FY<sub>n</sub>) (<b>15 June Surrender Number</b>);  <b>number of units submitted after 15 June and before 1 February</b> in any particular year (FY<sub>n</sub>) (<b>1 February Surrender Number</b>);  <b>provisional unit shortfall</b> (PUS);  <b>provisional surplus surrender number</b> (PSSN);  <b>estimation error number</b> (EEN);  <b>total estimation error number</b> (total EEN);  <b>total estimation error number unit shortfall</b> (total EENUS);  <b>surplus and estimation error adjustment number</b> (SEEAN);  <b>final unit shortfall</b> (FUS).</p>
<b>1 Calculation of Unit Shortfall: Fixed Charge Years (FY2012–13, FY2013–14 and FY2014–15)</b>	
Before 15 June (FY <sub>n</sub> )	
<b>Step 1</b>	<b>Determine interim emissions numbers (IENs)</b>
	<p>Determination of IENs for a liable entity differs depending on source of liability:</p> <p>(1) where liability arises in respect of a <b>facility</b>, there are two alternative (mutually exclusive) means of calculation:</p> <p>(A) section 126(2)-(3)+(5): <math>IEN (FY_n) = 0.75 \times PEN (FY_{n-1})</math></p> <p>(B) section 126(4): before 15 June in FY<sub>n</sub>, the liable entity may give the Regulator a “reasonable estimate” of <math>0.75 \times PEN (FY_n)</math>.</p> <p>(2) where liability arises in respect of a <b>natural gas supply</b>:  <math>IEN (FY_n) = PEN (FY_n)</math> (on assumption that FY<sub>n</sub> ends 31 March) — section 126(7).</p> <p>(3) where liability arises in respect of “<b>opt-in</b>” <b>fuel</b>:  <math>IEN (FY_n) = PEN (FY_n)</math> (on assumption that FY<sub>n</sub> ends 31 March) — section 126(8).</p>
<b>Step 1A</b>	<b>Special Provisions</b>
	<p>Special provisions apply for determining IEN in relation to certain facilities (section 127): calculation of IEN for liable entity does not include a PEN attributable to “covered emissions” from the operation of the facility during FY<sub>n</sub> if:</p> <p>(4) there was no requirement under NGER Act for a report in relation to the facility for FY<sub>n</sub> (section 127(1)(d)(i)); or</p> <p>(5) the facility PEN (FY<sub>n-1</sub>) was, or “is reasonably expected to be” less than 35,000 (section 127(1)(d)(ii)); or.</p> <p>(6) the facility PEN (FY<sub>n</sub>) “is reasonably expected to be” less than 35,000 (section 127(1)(d)(iii)).</p>

<b>Step 2</b>	<b>Determine total interim emissions number (total IEN)</b> <i>Total IEN (FY<sub>n</sub>) for liable entity = total of IENs for liable entity (FY<sub>n</sub>)</i> (section 125(5))
<b>Step 3</b>	<b>Report by 15 June (FY<sub>n</sub>) on total IEN (FY<sub>n</sub>)</b> Section 22AA(2)(c) NGER Act requires such a report.
Before 5 Business Days after 15 June (FY <sub>n</sub> )	
<b>Step 4</b>	<b>Determine number of units submitted by 15 June (FY<sub>n</sub>) (15 June Surrender Number)</b> <i>15 June Surrender Number (FY<sub>n</sub>) for liable entity = number of EEU's submitted by liable entity before 15 June (FY<sub>n</sub>)</i> (section 125(5))
<b>Step 5</b>	<b>Determine provisional unit shortfall (PUS) or provisional surplus surrender number (PSSN)</b> (1) If, for a liable entity: <i>total IEN (FY<sub>n</sub>) – 15 June Surrender Numbers (FY<sub>n</sub>) = X (and X &gt; 0)</i> liable entity has a <i>PUS (FY<sub>n</sub>) = X</i> (section 125(2)). (2) If, for a liable entity: <i>total IEN (FY<sub>n</sub>) – 15 June Surrender Numbers (FY<sub>n</sub>) = X (and X &lt; 0)</i> liable entity has a <i>PSSN (FY<sub>n</sub>) = X</i> (sections 125(4)+(5)).
<b>Step 6</b>	<b>Pay any PUS charge</b> (1) If a liable entity has PUS, charge is imposed on PUS (section 134(1)). (2) PUS charge (FY <sub>n</sub> ) is payable 5 business days after 15 June (FY <sub>n</sub> ) (section 134(1)) (3) The amount of the charge is 130% of the per unit charge applicable under s 100(1) Clean Energy Act 2011 for the issue of a carbon unit with a vintage year of that fixed charge year.
Before 31 October (FY <sub>n+1</sub> )	
<b>Step 7</b>	<b>Determine Provisional Emissions Numbers and Emissions Number<sup>153</sup></b> <i>EN (FY<sub>n</sub>) = total PEN (FY<sub>n</sub>).</i>
<b>Step 8</b>	<b>Report by 31 October (FY<sub>n+1</sub>) on EN (FY<sub>n</sub>)</b> Section 22A(2)(c) NGER Act requires such a report.
Before 5 Business Days after 1 February (FY <sub>n+1</sub> )	
<b>Step 9</b>	<b>Calculate estimation error number (EEN), total estimation error number (total EEN) and total estimation error number unit shortfall (total EENUS)</b> (1) EEN can exist if a liable entity gave “reasonable estimate” under step 1 (section 129(3)(a)). (2) If, for a liable entity: <i>[0.75xPEN (FY<sub>n</sub>)] – reasonable estimate = X (and X &gt; 0)</i> liable entity has a <i>EEN (FY<sub>n</sub>) = X</i> (sections 129(3)(b)). (3) For a liable entity: <i>Total EEN (FY<sub>n</sub>) = total of EENs (FY<sub>n</sub>)</i> (section 131(3)). (4) If, for a liable entity: <i>total EEN (FY<sub>n</sub>) = X</i> liable entity has a <i>total EENUS (FY<sub>n</sub>) = X</i> (section 129(2)(a)).
<b>Step 10</b>	<b>Pay any total EENUS charge</b> (1) If a liable entity has total EENUS (FY <sub>n</sub> ), charge is imposed on total EENUS (FY <sub>n</sub> ) (section 134(2)). (2) Total EENUS charge (FY <sub>n</sub> ) is payable 5 business days after 1 February (FY <sub>n+1</sub> ) (section 134(2)). (3) The amount of the charge is 130% of the per unit charge applicable under s 100(1) Clean Energy Act 2011 for the issue of a carbon unit with a vintage year of that fixed charge year.
<b>Step 10A</b>	<b>Special Provisions</b> Special provision apply for remission of total EENUS charge where the liable entity took “reasonable” steps to avoid having the total EENUS (section 130).
Before 5 Business Days after 1 February (FY <sub>n+1</sub> )	

<b>Step 11</b>	<b>Calculate surplus and estimation error adjustment number (SEEAN)</b> (1) If a liable entity has EEN (FY <sub>n</sub> ) but no PSSN (FY <sub>n</sub> ): <b>SEEAN (FY<sub>n</sub>) = total EENUS (FY<sub>n</sub>)</b> (section 131(4)) (2) If liable entity has PSSN (FY <sub>n</sub> ) but no EEN (FY <sub>n</sub> ): <b>SEEAN (FY<sub>n</sub>) = PSSN (FY<sub>n</sub>)</b> (section 131(5)) (3) If liable entity has both PSSN (FY <sub>n</sub> ) and EEN (FY <sub>n</sub> ): <b>SEEAN (FY<sub>n</sub>) = total EENUS (FY<sub>n</sub>) – PSSN (FY<sub>n</sub>)</b> (section 131(2)+(3))
<b>Step 12</b>	<b>Determine number of units submitted after 15 June and before 1 February (FY<sub>n+1</sub>) (1 February Surrender Number)</b> <b>1 February Surrender Number for liable entity (FY<sub>n</sub>) = number of EEU's submitted by liable entity after 5 June (FY<sub>n</sub>) and before 1 February (FY<sub>n+1</sub>)</b> (section 128(5))
<b>Step 13</b>	<b>Calculate final unit shortfall (FUS)</b> If, for a liable entity: <b>EN (FY<sub>n</sub>) – [1 February Surrender Number (FY<sub>n</sub>) + total IEN (FY<sub>n</sub>) + SEEAN (FY<sub>n</sub>)] = X (and X &gt; 0)</b> liable entity has a FUS for FY <sub>n</sub> = X (section 128(2)).
<b>Step 14</b>	<b>Pay any FUS charge</b> (1) If liable entity has FUS, charge is imposed on FUS (section 134(2)). (2) FUS charge (FY <sub>n</sub> ) is payable 5 business days after 1 February (FY <sub>n+1</sub> ) (section 134(2)). (3) The amount of the charge is 130% of the per unit charge applicable under s 100(1) Clean Energy Act 2011 for the issue of a carbon unit with a vintage year of that fixed charge year.
<b>2 Calculation of Unit Shortfall: Flexible Charge Years (FY2015–16 onwards)</b>	
Before 31 October (FY <sub>n+1</sub> )	
<b>Step 1</b>	<b>Determine Provisional Emissions Numbers and Emissions Number</b> <sup>154</sup> EN (FY <sub>n</sub> ) = total PEN (FY <sub>n</sub> ).
<b>Step 2</b>	<b>Report by 31 October (FY<sub>n+1</sub>) on EN (FY<sub>n</sub>)</b> Section 22A(2)(c) NGER Act requires such a report.
Before 5 Business Days after 1 February (FY <sub>n+1</sub> )	
<b>Step 3</b>	<b>Determine number of units submitted by 1 February (FY<sub>n+1</sub>) (1 February Surrender Number)</b> <b>1 February Surrender Number (FY<sub>n</sub>) for liable entity = number of EEU's submitted by liable entity before 1 February (FY<sub>n+1</sub>)</b> (section 125(5))
<b>Step 4</b>	<b>Determine unit shortfall (US) or surplus surrender number (SSN)</b> (1) If, for a liable entity: <b>EN (FY<sub>n</sub>) – 1 February Surrender Numbers (FY<sub>n</sub>) = X (and X &gt; 0)</b> liable entity has a <b>US (FY<sub>n</sub>) = X</b> (section 133(2)). (2) If, for a liable entity <b>EN (FY<sub>n</sub>) – 1 February Surrender Numbers (FY<sub>n</sub>) = X (and X &lt; 0)</b> liable entity has a <b>SSN (FY<sub>n</sub>) = X</b> (section 133(4)).
<b>Step 5</b>	<b>Pay any US charge</b> (1) If a liable entity has US, charge is imposed on US (section 134(3)). (2) US charge (FY <sub>n</sub> ) is payable 5 business days after 1 February (FY <sub>n+1</sub> ) (section 134(3)). (3) The amount charged for each unit in the shortfall is 200% 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%, or exceed 200%, of the benchmark average auction charge for the previous financial year.

## Footnotes

1. The 18 related Acts are: Clean Energy (Charges-Customs) Act 2011; Clean Energy (Charges-Excise) Act 2011; Clean Energy (Consequential Amendments) Act 2011; Clean Energy (Cus-

oms Tariff Amendment) Act 2011; Clean Energy (Excise Tariff Legislation Amendment) Act 2011; Clean Energy (Fuel Tax Legislation Amendment) Act 2011; Clean Energy (Household Assistance Amendments) Act 2011; Clean Energy (Income Tax Rates Amendments) Act 2011; Clean Energy (International

- Unit Surrender Charge) Act 2011; Clean Energy Regulator Act 2011; Clean Energy (Tax Laws Amendments) Act 2011; Clean Energy (Unit Issue Charge — Auctions) Act 2011; Clean Energy (Unit Issue Charge — Fixed Charge) Act 2011; Clean Energy (Unit Shortfall Charge — General) Act 2011; Climate Change Authority Act 2011; Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Act 2011; Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Act 2011; Steel Transformation Plan Act 2011.
2. [http://greens.org.au/sites/greens.org.au/files/Final%20Agreement%20\\_ALP\\_GRNS.pdf](http://greens.org.au/sites/greens.org.au/files/Final%20Agreement%20_ALP_GRNS.pdf) accessed January 2012.
  3. <http://www.climatechange.gov.au/minister/greg-combet/2010/media-releases/September/mr20100927.aspx> accessed January 2012.
  4. <http://www.climatechange.gov.au/government/initiatives/multi-party-committee/carbon-price-framework.aspx> accessed January 2012.
  5. See paragraph 2.2(d).
  6. See: <http://www.garnautreview.org.au/>.
  7. The papers released were as follows: 3 February 2011: Weighing the costs and benefits of climate change action; 7 February 2011: Progress towards effective global action on climate change; 11 February 2011: Global emissions trends; 1 March 2011: Transforming rural land use; 10 March 2011: The science of climate change; 17 March 2011: Carbon pricing and reducing Australia's emissions; 23 March 2011: Low emissions technology and the innovation challenge; 29 March 2011: Transforming the electricity sector.
  8. See: <http://www.garnautreview.org.au/update-2011/garnaut-review-2011/garnaut-review-2011.pdf> Accessed January 2012.
  9. See: <http://www.garnautreview.org.au/update-2011/garnaut-review-2011/summary-garnaut-review-2011.html> Accessed January 2012.
  10. <http://www.climatechange.gov.au/minister/greg-combet/2010/major-speeches/October/sp20101012.aspx> Accessed January 2012.
  11. <http://www.climatechange.gov.au/en/minister/greg-combet/2010/major-speeches/December/sp20101217.aspx> Accessed January 2012.
  12. <http://www.climatechange.gov.au/minister/greg-combet/2011/major-speeches/February/sp20110216.aspx> Accessed January 2012.
  13. <http://www.climatechange.gov.au/minister/greg-combet/2011/major-speeches/February/sp20110217.aspx> Accessed January 2012.
  14. <http://www.climatechange.gov.au/minister/greg-combet/2011/major-speeches/March/sp20110308.aspx> Accessed January 2012.
  15. See <http://www.climatechange.gov.au/en/minister/greg-combet/2011/media-releases/March/mr20110324.aspx>. The Bills consist of: the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth); the Carbon Credits (Consequential Amendments) Bill 2011 (Cth); and the Australian National Registry of Emissions Units Bill 2011 (Cth).
  16. See 2.2(a) above.
  17. See 2.2(b) above.
  18. See: paper prepared by Dr Frank Jotzo entitled "A Price Floor for Australia's Emissions Trading Scheme?" mentioned in the seventh communiqué of the Multi-Party Committee on 17 May 2011. See: <http://www.climatechange.gov.au/en/government/initiatives/multi-party-committee/meetings/seventh-meeting/communique.aspx>.
  19. Clean Energy Act, sections 20(1)(b)(i) and 20(4), 21(1)(d)(i) and 21(4)–(5), 22(1)(b)(i) and 22(4)(5).
  20. Clean Energy Act, sections 23(1)(b) and 23(4)–(5), 24(1)(d) and 24(4)–(5), 25(1)(b) and 25(4)–(5) and 25(8)–(10))
  21. Clean Energy Act, section 55A.
  22. Clean Energy Act, section 55A.
  23. Clean Energy Act, sections 30 and 31.
  24. CO<sub>2</sub>, methane, nitrous oxide, sulfur hexfluoride, prescribed hydrofluorocarbons, prescribed perfluorocarbons and "prescribed gas".
  25. Transport fuels will not be subject to the carbon price mechanism in the Clean Energy Act 2011. However, amendments will be made to the fuel tax/excise/credits regime so that an equivalent carbon price will be applied under that regime to: (a) off-road business use — other than agriculture, forestry and fishing — including transport-related and non-transport-related uses (for example, in diesel power generation); (b) heavy on-road vehicles (>4.5t) from 2014–15; (c) rail, domestic aviation and domestic shipping; and (d) non-transport gaseous fuels (LPG, LNG and CNG).
  26. Synthetic greenhouse gases will not be subject to the carbon price mechanism in the Clean Energy Act 2011. However, amendments will be made to impose levies on the import and manufacture of these gases so that an equivalent carbon price will be applied under that regime.
  27. Clean Energy Act, sections 20(3) and 23(3).
  28. Clean Energy Act, sections 20(7) and 23(7).
  29. Clean Energy Act, section 83.
  30. Clean Energy Act, section 87.
  31. Clean Energy Act, sections 22(3) and 25(3).
  32. Clean Energy Act, sections 20(6) and 23(6).
  33. Clean Energy Act, sections 21(3) and 24(3).
  34. Clean Energy Act, sections 21(2) and (3), 24(2) and (3).
  35. Clean Energy Act, section 91.
  36. Clean Energy Act, section 65.
  37. Clean Energy Act, sections 66(1)–(3).
  38. Clean Energy Act, section 66(5).
  39. Clean Energy Act, section 252(4)(c).
  40. Clean Energy Act, sections 263(2)(c)–(f).
  41. Clean Energy Act, section 248.
  42. Clean Energy Act, section 70(2).
  43. Clean Energy Act, section 68(1).
  44. Clean Energy Act, section 71A(1).
  45. Clean Energy Act, section 252(4)(c).
  46. Clean Energy Act, section 263(2)(g).
  47. Clean Energy Act, section 248.
  48. Clean Energy Act, sections 70A(2) and 252(4)(c).

49. Clean Energy Act, sections 33(1)(a) and 35(1)(a).
50. Clean Energy Act, section 5.
51. Clean Energy Act, sections 5 and 6.
52. Clean Energy Act, section 33(2)(b).
53. Clean Energy Act, section 33(1)(e).
54. Clean Energy Act, section 35(3)(b).
55. Clean Energy Act, section 55B(1).
56. Clean Energy Act, sections 55B(1) and 252(4)(c).
57. Clean Energy Act, sections 55B(1) and 263(2)(c).
58. Clean Energy Act, section 248.
59. Clean Energy Act, section 56(1).
60. Clean Energy Act, section 56(6).
61. Clean Energy Act, section 57(1).
62. Clean Energy Act, section 5.
63. Clean Energy Act, section 58(1).
64. Clean Energy Act, section 59(2)–(4).
65. Clean Energy Act, section 44.
66. Clean Energy Act, section 92A(1).
67. Clean Energy Act, section 92A(1)(a)(i).
68. Clean Energy Act, sections 92A(1)(a) and 92A(7).
69. Clean Energy Act, sections 92A(1)(a)(iv) and 92A(4).
70. Clean Energy Act, section 92A(1)(a)(vi).
71. Clean Energy Act, section 92A(1)(a)(iii).
72. Clean Energy Act, section 92A(1)(a)(iii).
73. Clean Energy Act, section 92D.
74. See 4.2(c) above.
75. Clean Energy Act, sections 20(2) and 21(2) and 22(2), 23(2) and 24(2) and 25(2)).
76. Clean Energy Act, sections 33(1)(f) and 35(1)(d) and 36(1)(e).
77. Clean Energy Act, section 35(2).
78. Clean Energy Act, section 35(5)(b)(i).
79. Clean Energy Act, section 35(5)(b)(ii).
80. Clean Energy Act, section 35(2) and 35(6)(b).
81. Clean Energy Act, section 35(7)(b)–(e).
82. Clean Energy Act, section 35(8)(b).
83. Clean Energy Act, section 92A(1)(vi).
84. Clean Energy Act, section 92A(2).
85. Clean Energy Act, section 94.
86. Clean Energy Act, section 95.
87. Clean Energy Act, section 96.
88. Clean Energy Act, section 97.
89. Clean Energy Act, section 98(3).
90. Clean Energy Act, section 98(1).
91. Clean Energy Act, section 102(1).
92. See 3.2(h) above.
93. Clean Energy Act, section 98(3).
94. Clean Energy Act, section 100.
95. See 5.3(b) and (c) above.
96. Clean Energy Act, sections 100(3) and (4).
97. Clean Energy Act, section 100(14).
98. Clean Energy Act, section 100(15).
99. Clean Energy Act, section 100(2).
100. See 5.3(b) and (c) above.
101. Clean Energy Act, section 100(4).
102. Clean Energy Act, sections 100(6)(b) and (10).
103. Clean Energy Act, section 100(7).
104. Clean Energy Act, section 113.
105. Clean Energy Act, section 113(9).
106. See 3.2(h) above.
107. Clean Energy Act, section 101(1).
108. Clean Energy Act, section 101(2).
109. Clean Energy Act, section 145(4).
110. Clean Energy Act, section 145(1).
111. Clean Energy Act, section 145(3).
112. See: <http://www.climatechange.gov.au/government/submissions/regulations.aspx>. Accessed January 2012.
113. Clean Energy Act, section 145(5).
114. [cxiv] Clean Energy Act, section 145(5)(b).
115. Clean Energy Act, sections 155–158.
116. Clean Energy Act, section 155(2).
117. Clean Energy Act, section 155(1).
118. Clean Energy Act, section 5.
119. Clean Energy Act, section 5. A “generation complex” is not the same as a “facility” in the NGER Act. The concept of a “generation complex” is confined to the coal-fired electricity generation equipment. A “facility”, on the other hand, could include, for example, the activities of a co-located coal-fired generator and coal mine.
120. Clean Energy Act, section 161(1).
121. Clean Energy Act, sections 162–168.
122. Clean Energy Act, section 166(1).
123. “Capacity” is determined by tests in regulations under the Renewable Energy (Electricity) Act 2000.
124. Clean Energy Act, section 166(2)(a).
125. Clean Energy Act, section 166(2)(b).
126. “Emissions intensity” is determined according to the tests in s 168 of the Clean Energy Act as the ratio between (on the one hand) the carbon dioxide equivalence of CO<sub>2</sub>e emissions from the combustion of fuel in the complex for the purposes of generating electricity and (on the other hand) gigawatt hours of electricity generated by the complex.
127. Clean Energy Act, section 166(2)(c).
128. Clean Energy Act, section 162(1).
129. Clean Energy Act, section 165(4)(b)(i).
130. Clean Energy Act, section 165(4)(b)(ii).
131. Clean Energy Act, section 162(2). 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 Pt 8 of the Clean Energy Act are: (for the National Electricity Market (NEM), the National Electricity Rules as made and amended under Pt 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 (WAWEM)) the Wholesale Electricity Market Rules provided for under s 123 of the Electricity

- Industry Act 2004 (WA) and the Electricity Industry (Wholesale Electricity Market) Regulations 2004 (WA).
132. Clean Energy Act, section 162(3).
133. Clean Energy Act, sections 161(6) and (7).
134. Clean Energy Act, section 167(1).
135. Annual assistance factor is determined according to the tests in s 167(2) of the Clean Energy Act as a factor of the emissions intensity of the complex and the “historical energy” of the complex.
136. Clean Energy Act, sections 162(2) and (3).
137. Clean Energy Act, sections 162(2) and (3).
138. Clean Energy Act, section 169.
139. Clean Energy Act, sections 177–180.
140. Clean Energy Act, sections 181.
141. Clean Energy Act, sections 181A.
142. Clean Energy Act, section 122(7).
143. Clean Energy Act, section 115.
144. Clean Energy Act, section 116.
145. Clean Energy Act, section 125(7).
146. Clean Energy Act, section 133(7).
147. The benchmark average auction charge is calculated and published by the Regulator as soon as practicable after the end of each financial year: Clean Energy Act 2011, section 114.
148. Clean Energy Act, sections 135–137.
149. Clean Energy Act, section 138.
150. See 5.1 above.
151. See 5.2 above.
152. See 3.2(d) above.
153. See 5.1 and 5.4 above.
154. See 5.1 and 5.4 above.



## The Mahla Pearlman Oration



When: Thursday 29 March 2012, from 5:00 pm to 7:00 pm

Where: Dixson Room, State Library of NSW, Macquarie Street, Sydney

Contact Name: Michele Kearns

Contact Phone: (02) 8227 9600

EPLA (NSW) Inc is proud to announce it will host on behalf of her family, many friends and colleagues the inaugural **Mahla Pearlman Oration** – an event which honours the career, contribution and memory of one of New South Wales' most distinguished servants.

The Oration will be delivered annually by an eminent person concerned with environment and planning law. We are delighted that the inaugural Oration will be delivered by **Emeritus Professor Ben Boer** of the Faculty of Law, University of Sydney.

Refreshments will be served after the address.

To assist with catering, please let us know if you are coming by 22 March 2012, to the EPLA Secretary, Michele Kearns, [kearns@mpchambers.net.au](mailto:kearns@mpchambers.net.au) or 8227 9600.

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