Chapter 1

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Legal Framework

Introduction

[30,001]

This chapter provides an overview of the legal frameworks supporting the four dimensions of Australia's clean energy future:

(1) the carbon pricing mechanism;
(2) energy efficiency;
(3) renewable energy; and
(4) action on the land to encourage land use change.

The chapter also places the Australian action into the international context.

Australia accounts for approximately 1.5 per cent of global greenhouse gas (GHG) emissions. The latest information published for Australia's emissions for the year to 31 March 2012 reveals estimated national emissions of 546.8 Mt CO_2-e.[1] The national ambition is to reduce emissions by at least five per cent below 2000 levels by 2020,[2] to 523.9 Mt CO_2-e per annum,[3] and 80 per cent below 2000 levels by 2050.[4]

The carbon pricing mechanism is the central policy in Australia's multi-dimensional approach to establish a clean energy future. Its aims reflect Australia's international obligations and domestic aspiration in GHG emissions reduction targets.

The Australian Government formally announced the carbon pricing mechanism in "Securing Australia's Clean Energy Future: The Australian Government's Climate Change Plan" released on "carbon Sunday", 10 July 2011.[5] That plan also detailed extensions to complementary measures in renewable energy, energy efficiency and action in the land sector and new funds, grants and assistance programs to support new investment and technology.

The carbon pricing mechanism is established by the Clean Energy Act 2011 (Cth) and a further 18 associated acts passed by the 43rd Australian Parliament on 8 November 2011, together with their regulations.

The Clean Energy Act 2011 (Cth) commenced 2 April 2012, with the commencement of the Clean Energy Regulator.

The carbon pricing mechanism operates from 1 July 2012, and comprises:

- from 1 July 2012, a three year fixed charge period to 30 June 2015; and
- from 1 July 2015, a cap-and-trade emissions trading scheme (ETS) (the flexible charge period).

Amendments to existing federal laws by the Clean Energy (Consequential Amendments) Act 2011 (Cth) fit the carbon pricing mechanism into the Australian federal legal landscape. The Clean Energy Act 2011 (Cth) must be read with the following acts:

- National Greenhouse and Energy Reporting Act 2007 (Cth), an existing act providing (*inter alia*) for registration with the regulator and the measurement and reporting of GHG to the regulator;
- Australian National Registry of Emissions Units Act 2011 (Cth);
- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth);
- Corporations Act 2001 (Cth) and Australian Securities and Investment Commission Act 2001 (Cth);

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- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth);
- Fuel Tax Act 2006 (Cth);
- Excise Act 1901 (Cth) and Excise Tariff Act 1921 (Cth);
- Customs Act 1901 (Cth) and Customs Tariff Act 1995 (Cth);
- Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth); and
- Renewable Energy (Electricity) Act 2000 (Cth).

The clean energy laws package also interfaces with and relevantly modifies the existing complementary measures.

Diagram 30,001-1 is a conceptual overview of the legal framework:

Diagram 30,001-1 — Conceptual overview of legal framework

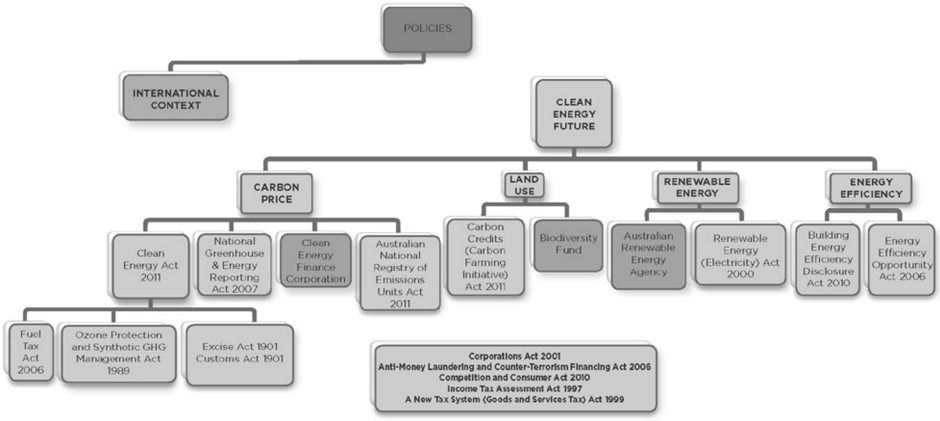
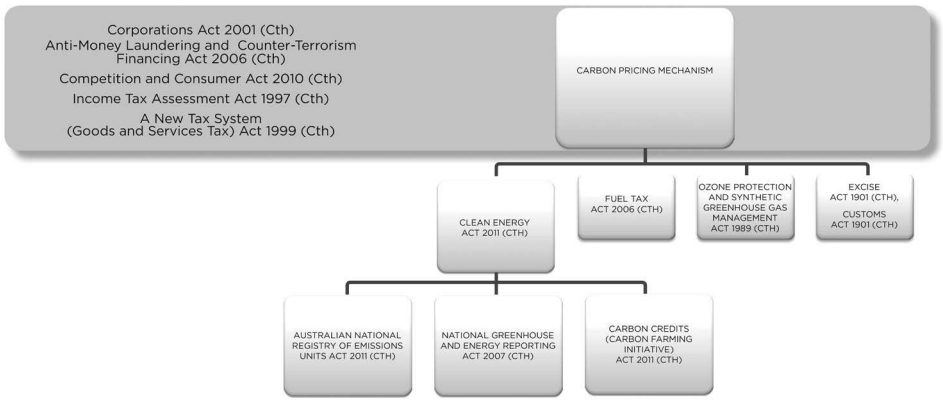


Diagram 30,002-2 is a conceptual overview of the carbon pricing mechanism.

Diagram 30,002-2 — Conceptual overview of carbon pricing mechanism



Notes

1 Australian National Greenhouse Accounts, Quarterly Update of Australia's National Greenhouse Gas Inventory, March Quarter 2012 (Australian Government, Department of Climate Change and Energy Efficiency, 2 August 2012) 3. These figures include land use, land use change and forestry (LULUCF).

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Per capita emissions equate to emissions of 25.5 t CO_2-e per person and have declined 21 per cent from 1990. Australia's per capita emissions top a list of 185 countries: UNEP Urban Environment Unit, "Representative GHG Baselines for Cities and their Respective Countries" (2010) United Nations Environment Program: www.unep.org/urban_environment.

2 The five per cent reduction is an unconditional commitment, reflected in the *Copenhagen Accord*, Decision 2/CP.15, UN document FCCC/CP/2009/11/Add.1. The amount of the reduction may increase up to 25 per cent below 2000 national emissions if other nations also commit to emissions reductions (Former Prime Minister the Hon Kevin Rudd MP, Deputy Prime Minister and Treasurer the Hon Wayne Swan MP and Senator the Hon Penny Wong, former Minister for Climate Change, Energy Efficiency and Water, "A new target for reducing Australia's carbon pollution" (Press Release, 4 May 2009).

3 Australian Government, Department of Environment and Water Resources, "National Greenhouse Gas Inventory: Analysis of Recent Trends and Greenhouse Indicators 1990 to 2005" (Report, Department of Environment and Water Resources, 2006).

4 Senator the Hon Penny Wong, former Minister for Climate Change, Energy Efficiency and Water, "Climate Change: A Responsibility Agenda", (Speech delivered at the Australian Industry Group Luncheon, Melbourne, 6 February 2008). An 80 per cent reduction would reduce Australian GHG emissions to approximately 110 Mt CO_2-e per annum.

5 Australian Government, "Securing a Clean Energy Future: The Australian Government's Climate Change Plan" (Policy Paper, Australian Government, 10 July 2011).

Sources of law

[30,025]

Australia is a party to an international framework comprising:

- United Nations Framework Convention on Climate Change (UNFCCC);
- Kyoto Protocol to the UNFCCC;
- Marrakesh Accords (being action taken by the parties to the UNFCCC); and
- decisions and agreements reached at subsequent conferences of the parties (COP) and meetings of the parties (MSP), most notably:
  - — the Copenhagen Accord;
  - — the Cancun Agreements; and
  - — the Durban Platform.

The clean energy laws package (at 1 July 2012) comprises the following Acts and Regulations:

- Clean Energy Act 2011 (Cth), as amended up to Clean Energy Legislation Amendment Act 2012 (Cth); and:
  - — Clean Energy Regulations 2011 (Cth), as amended up to:
    - Clean Energy Amendment Regulation 2012 (No 1) (Cth);
    - Clean Energy Amendment Regulation 2012 (No 2) (Cth);
    - Clean Energy Amendment Regulation 2012 (No 3) (Cth);
    - Clean Energy Amendment Regulation 2012 (No 4) (Cth);
- Clean Energy (Consequential Amendments) Act 2011 (Cth);
- Climate Change Authority Act 2011 (Cth);
- Clean Energy Regulator Act 2011 (Cth);
- Clean Energy (Charges-Customs) Act 2011 (Cth);
- Clean Energy (Charges-Excise) Act 2011 (Cth);
- Clean Energy (Unit Issue Charge-Auctions) Act 2011 (Cth);
- Clean Energy (Unit Issue Charge-Fixed Charge) Act 2011 (Cth);
- Clean Energy (International Unit Surrender Charge) Act 2011 (Cth);
- Clean Energy (Unit Shortfall Charge-General) Act 2011 (Cth);
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Act 2011 (Cth);

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- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Act 2011 (Cth);
  - — Clean Energy (Customs Tariff Amendment) Act 2011 (Cth), as amended up to Clean Energy (Customs Tariff Amendment) Act 2012 (Cth);
  - — Clean Energy (Excise Tariff Legislation Amendment) Act 2011 (Cth) as amended up to Clean Energy (Excise Tariff Legislation Amendment) Act 2012 (Cth);
  - — Clean Energy (Fuel Tax Legislation Amendment) Act 2011 (Cth);
  - — Clean Energy (Household Assistance Amendments) Act 2011 (Cth);
  - — Clean Energy (Income Tax Rates Amendments) Act 2011 (Cth);
  - — Clean Energy (Tax Laws Amendments) Act 2011 (Cth);
- Steel Transformation Plan Act 2011 (Cth).

Interfacing legislation and Regulations (including as relevantly amended by the clean energy laws package) (at 1 July 2012) include:

- A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and:
  - — Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007;
- Australian National Registry of Emissions Units Act 2011 (Cth) and:
  - — Australian National Registry of Emissions Units Regulations 2011 (Cth), as amended up to:
    - Australian National Registry of Emissions Units Amendment Regulation 2012 (No 1) (Cth);
    - Australian National Registry of Emissions Units Amendment Regulation 2012 (No 2) (Cth);
- Australian Securities and Investment Commission Act 2001 (Cth) and:
  - — Australian Securities and Investment Commission Regulations 2001;
- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) and:
  - — Carbon Credits (Carbon Farming Initiative) Regulations 2011 (Cth), as amended up to:
    - Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 1) (Cth);
    - Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 2) (Cth);
  - — Carbon Credits (Carbon Farming Initiative) Kyoto Australian Carbon Credit Unit Specification 2011;
  - — Carbon Credits (Carbon Farming Initiative) Landfill Legacy Emissions Avoidance Project Specification 2011;
  - — Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012;
- Competition and Consumer Act 2010 (Cth);
- Corporations Act 2001 (Cth) and:
  - — Corporations Regulations 2001 (Cth), as amended up to:
    - Corporations Amendment Regulation 2012 (No 1);
- Criminal Code Act 1995 (Cth);
- Fuel Tax Act 2006 (Cth);
- Ozone Protection and Synthetic Greenhouse Gas Management Act 1999 (Cth);
- Income Tax Assessment Act 1936 (Cth) (ITAA36);
- Income Tax Assessment Act 1997 (Cth) (ITAA97);
- National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act) and:

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- — National Greenhouse and Energy Reporting Regulations 2008 (as amended), up to:
  - National Greenhouse and Energy Reporting Amendment Regulation 2012 (No 1);
- — National Greenhouse and Energy Reporting (Measurement) Determination 2008 (as amended) up to:
  - National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2012 (No 1) — consultative draft at 30 April 2012;
- — National Greenhouse and Energy (Audit) Determination 2009.

The energy efficiency laws package comprises the following Acts and Regulations:

- Building Energy Efficiency Disclosure Act 2010 (Cth) (BEED Act) and:
  - — Building Energy Efficiency Disclosure Regulations 2010;
  - — Building Energy Efficiency Disclosure Determination 2011;
  - — Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011;
- Energy Efficiency Opportunities Act 2006 (Cth) (EEO Act) and:
  - — Energy Efficiency Opportunities Regulations 2006.

The renewable energy laws package comprises the following Acts and Regulations:

- Renewable Energy (Electricity) Act 2000 (Cth) (RET Act) and:
  - — Renewable Energy (Electricity) Regulations 2001 (Cth).

The land sector action laws package comprises the following Acts and Regulations:

- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (CFI Act) and:
  - — Carbon Credits (Carbon Farming Initiative) Regulations 2011, as amended up to:
    - Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 1);
    - Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 2);
  - — Carbon Credits (Carbon Farming Initiative) Kyoto Australian Carbon Credit Unit Specification 2011; and
  - — Carbon Credits (Carbon Farming Initiative) Landfill Legacy Emissions Avoidance Project Specification 2011; and
  - — Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012.

Snapshot

[30,050]

The linchpin of the clean energy laws package is the Clean Energy Act 2011 (Cth), underpinned by (and to be read with) the National Greenhouse and Energy Reporting Act 2007 (Cth) (the NGER Act) and its associated regulations.

Obligations for liable entities arise under both the NGER Act and the Clean Energy Act 2011 (Cth) broadly as follows:

Activity	Source of Law
Registration	NGER Act

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Activity	Source of Law
Measurement of emissions	NGER Act
Reporting of emissions	NGER Act
Liability	Clean Energy Act 2011 (Cth)
Acquiring carbon units	Clean Energy Act 2011 (Cth)
Surrender of eligible emissions units	Clean Energy Act 2011 (Cth)

The NGER Act and Regulations provide for:

- registration by controlling corporations and liable entities with the regulator;
- measurement of GHG, energy consumption and energy production; and
- reporting of GHG, energy consumption and energy production by registered entities.

The Clean Energy Act 2011 (Cth) and associated regulations provide for the issue and acquisition of carbon units and the acquittal of emissions of greenhouse gases by surrender of eligible emissions units by:

- liable entities — persons with operational control of facilities with covered scope 1 emissions of 25,000 tonnes carbon dioxide equivalent or more;
- natural gas and gaseous fuels suppliers;
- persons who quote obligation transfer numbers;
- certain joint venturers; and
- holders of liability transfer certificates.

Follow this four step guide to marrying the NGER Act and the Clean Energy Act 2011 (Cth):

Step 1:

Determine liability to register with the regulator: NGER Act, ss 12, 15A, 15AA.

A failure to register if required is a civil liability penalty.

If registered, go to step 2.

Step 2:

Is a report to the regulator required? NGER Act, ss 19, 20, 21, 21A, 22A, 22AA, 22E, 22G, 22X.

A failure to submit a report if required (and in the approved form as per the National Greenhouse and Energy Reporting Regulations 2008 (Cth) and National Greenhouse and Energy Reporting (Measurement) Determination 2008 (Cth)) is a civil liability penalty.

Step 3:

Determine if a liable entity: Clean Energy Act 2011 (Cth) Pt 3.

If a liable entity, go to step 4.

Step 4

In order to avoid a unit shortfall, surrender eligible emissions units: Clean Energy Act 2011 (Cth), Pt 6.

The core rules for unit shortfall penalty are set out in ss 125, 128, 129 and 133 of the Clean Energy Act 2011 (Cth).

By the relevant surrender deadline, a liable entity with an emissions number more than zero must surrender eligible emissions units equal to the emissions number of the liable entity, thereby so ensuring that the person does not have a unit shortfall.

The surrender deadline in the fixed charge period, 1 July 2012 to 30 June 2015 is:

- 15 June in the eligible financial year;
- 1 February in the following compliance period: the balance of the emissions number for the preceding eligible financial year.

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The surrender deadline in the flexible charge period after 1 July 2015 is:

- 1 February in the following compliance period: 100 per cent of the emissions number for the preceding eligible financial year.

The unit shortfall penalty is:

- in the fixed charge period, 1 July 2012 to 30 June 2015: 130 per cent of the fixed charge for carbon units;
- in the flexible charge period after 1 July 2015: 200 per cent of the benchmark average auction charge for carbon units in the preceding eligible financial year.

A "carbon price equivalent" is applied to certain liquid and gaseous fuels and synthetic GHG through existing laws:

- the Fuel Tax Act 2006 (Cth)[6] re-prices fuel and gas consumption;
- the Ozone Protection and Synthetic Greenhouse Gas Management Act 1999 (Cth)[7] impacts the importation and manufacture of ozone depleting substances (ODS).

Notes

6 As amended by the Clean Energy (Fuel Tax Legislation Amendment) Act 2011 (Cth).

7 As amended by the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Act 2011 (Cth) and the Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Act 2011 (Cth).

National legal framework — Carbon pricing mechanism

[30,075]

The carbon pricing mechanism comprises these laws:

- the Clean Energy Act 2011 (Cth);
- the NGER Act; and
- the Australian National Registry of Emissions Units Act 2011 (Cth)

and intersects with:

- the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth); and
- the international framework.

CLEAN ENERGY ACT 2011 (CTH)

Commencement, historical background, amendments and regulations

[30,100]

The Clean Energy Act 2011 (Cth), Act No 131 of 2011[8] was passed 8 November 2011 and received Royal Assent 18 November 2011.

Clean Energy Act 2011 (Cth) commenced 2 April 2012.

- Amending Acts:
  - — Clean Energy Legislation Amendment Act 2012 (Cth);
- Regulations:
  - — Clean Energy Regulations 2011 (Cth);[9]

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- Amending Regulations:
  - — Clean Energy Amendment Regulation 2012 (No 1) (Cth);[10]
  - — Clean Energy Amendment Regulation 2012 (No 2) (Cth);[11] and
  - — Clean Energy Amendment Regulation 2012 (No 3) (Cth).[12]
  - — Clean Energy Amendment Regulation 2012 (No 4) (Cth).[13]

Notes

8 Introduced into the House of Representatives by the Hon Greg Combet, AM MP, Minister for Climate Change and Energy Efficiency and read 1st time, 13 September 2011. Passed House of Representatives, 12 October 2011. Introduced into the Senate, 12 October 2011. Passed the Senate, 8 November 2011.

9 SLI 221 of 2011, made 23 November 2011, F2011L02473.

10 SLI 12 of 2012, made 22 February 2012, F2012L00417.

11 SLI 51 of 2012, made 21 March 2012, F2012L00904.

12 SLI 100 of 2012, made 14 June 2012, F2012L01230.

13 SLI 126 of 2012, made 28 June 2012, F2012LO1403.

Objects

[30,125]

The main act in the clean energy future laws package, the Clean Energy Act 2011 (Cth) establishes the governing rules for a carbon pricing mechanism operating in Australia from 1 July 2012.

The objects of the Clean Energy Act 2011 (Cth) are:[14]

(a) to give effect to Australia's international obligations.

Australia is a signatory to the UNFCCC and has assumed binding obligations to reduce national GHG emissions pursuant to the Kyoto Protocol.

(b) to support the development of an effective global response to climate change, consistent with Australia's national interest.

Australia's national interest is ensuring that average global temperatures do not increase by more than two degrees Celsius above pre-industrial levels.

(c) to take flexible and cost-effective action that helps Australia meet a long-term target of reducing net greenhouse gas emissions to 80 per cent below 2000 levels by 2050. The 2050 target is national emissions of approximately 110 Mt CO_2-e per annum.

(d) to create the framework that allows the market-place to price greenhouse gas emissions in a way that:

"(i) encourages investment in clean energy; and

(ii) supports jobs and competitiveness in the economy; and

(iii) supports Australia's economic growth while reducing pollution."

Notes

14 Clean Energy Act 2011 (Cth) s 3.

Summary of the carbon pricing mechanism

[30,150]

Desired GHG emission reductions are to be achieved by liable entities.

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Liable entities must register, measure and report emissions or potential emissions under the NGER Act.

The Clean Energy Act 2011 (Cth) creates the system for assessing if a liable entity, calculating emissions numbers and meeting obligations in respect of emissions through payment and surrender processes for eligible emissions units.

Liability is imposed by way of a unit shortfall charge if eligible emissions units surrendered by a liable entity are not equal to reported GHG emissions (or potential GHG emissions in the case of natural gas and gaseous fuels suppliers).

Liable entities

[30,175]

The Clean Energy Act 2011 (Cth) imposes liability on a liable entity[15] for their GHG emissions in the compliance period, or if a natural gas or gaseous fuels supplier, for the potential GHG emissions embodied in the natural gas and/or gaseous fuel they supply in that period.

Liable entities under the Clean Energy Act 2011 (Cth) are limited to:

- the person[16] with operational control[17] of a facility[18] emitting covered emissions[19] in a covered sector in the compliance period, the financial year from 1 July to 30 June; or
- a member of a corporate group or person with financial control that is the holder of a liability transfer certificate (LTC); or
- a participant in a mandatory designated joint venture or a declared designated joint venture; or
- a person who has quoted an obligation transfer number (OTN); or
- a supplier of natural gas or gaseous fuel;
- a person who opts in under the Opt-in scheme.

Notes

15 Liability is discussed in chapter three. A "liable entity" is defined in the Clean Energy Act 2011 (Cth) as a "person" who is liable under the Clean Energy Act 2011 (Cth).

16 Section 5 of the Clean Energy Act 2011 (Cth) defines "person" exclusively to be any of the following:

(a) an individual;	(b) a body corporate;	(c) a trust;
(d) a corporation sole;	(e) a body politic;	(f) a local governing body.

17 "Operational control" is defined in the NGER Act s 11.

18 "Facility" is defined in NGER Act s 9.

19 Excluded emissions include emissions from agriculture, emissions from entities with facilities in non-covered sectors, emissions captured under the related Clean Energy law package, emissions from de-commissioned underground mines, and legacy emissions from landfill and closed landfill.

Covered sectors

[30,200]

Covered sectors within the coverage of the Clean Energy Act 2011 (Cth) and defined in regulations made under the NGER Act are:

- stationary energy;
- industrial processes;
- fugitive emissions (except decommissioned coal mines); and

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- non-legacy waste.

Covered emissions

[30,225]

GHGs within the coverage of the Clean Energy Act 2011 (Cth)[20] are scope 1 emissions[21] of any of the following greenhouse gases released in Australia:

- carbon dioxide (CO_2);
- methane (CH_4); and
- nitrous oxide (N_2O);[22]

The covered GHGs must meet definitions in regulations.

Different greenhouse gases are made equivalent (called carbon dioxide equivalence (CO_2-e)) through their global warming potential (GWP). GWPs are specified in the National Greenhouse and Energy Reporting Regulations 2008.

Notes

20 Other GHG include:
nitrogen trifluoride (NF_3);
sulphur hexafluoride (SF_6);
hydrofluorocarbons (HHCs); and
perfluorocarbons (PFCs).

21 Scope 1, 2 or 3 emissions means one of the following types of emissions as specified in the GHG Protocol 2004:
Scope 1 emissions: direct GHG emissions (excluding emissions not covered by the Kyoto Protocol) occurring from sources that are owned or controlled by the entity, and emissions from chemical production in owned or controlled process equipment. Excludes direct CO_2 emissions from the combustion of biomass
Scope 2 emissions: electricity indirect GHG emissions from the generation of purchased electricity consumed by the entity and physically occurring at the facility where electricity is generated. Purchased electricity is defined as electricity that is purchased or otherwise brought into the organisational boundary of the entity
Scope 3 emissions: other indirect GHG emissions (an optional reporting category allowing for the treatment of all other indirect emissions that are a consequence of the activities of the entity) that occur from sources not owned or controlled by the entity. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services.
GHG Protocol 2004, published under that name by the World Business Council for Sustainable Development (WBCSD) and the World Resources Institute (WRI).

22 Per fluorocarbons from aluminium smelting are also included in the Clean Energy Act 2011 (Cth).

Liability threshold

[30,250]

Before liability as a direct emitter under the Clean Energy Act 2011 (Cth) is attracted, scope 1 emissions at facility level must exceed a (prorated) threshold of equal to or more than 25,000 tonnes (t) (25 K) CO_2-e per annum.

The tests for liability apply both in respect of the whole of the eligible financial year, and for a part of the year (called control days). The threshold is prorated across the number of control days, if control does not exist for the whole of the eligible financial year.

Generally, provision is made to avoid double-counting of GHG emissions where emissions from a facility are attributable to the combustion of natural gas or gaseous fuel obtained from an (upstream) supplier.[23]

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Notes

23 If an obligation transfer number (OTN) is not quoted, the emissions are not counted in a facility's provisional emissions number. If an OTN is quoted, the emissions do not count towards the natural gas supplier's liability.

Fixed charge and flexible charge periods

[30,275]

The carbon pricing mechanism comprises a three year fixed charge period from 1 July 2012 until to 30 June 2015, followed from 1 July 2015 by a cap-and-trade emissions trading scheme (ETS) (the flexible charge period).

The liability mechanism in the Clean Energy Act 2011 (Cth) is similar in the fixed charge and the flexible charge periods, the major exception being the restriction of trading of emissions units acquired for a fixed charge.

The price of carbon units from 1 July 2012 to 30 June 2015 is fixed, starting at $23, rising from 1 July 2013 to $24.15 and from 1 July 2014 to $25.40.

From 1 July 2015, the price of carbon units will be determined by the carbon markets, subject to a price collar and cap for three years. The floor (lowest) price for carbon units will be $15 (rising by four per cent in real terms) and the ceiling price will be $20 higher than the expected international price in 2015–2016 (rising by five per cent in real terms).

From 1 July 2018, the price of carbon units will be determined by the carbon markets.

Eligible emissions units

[30,300]

Eligible emissions units in the carbon pricing mechanism are:

- the carbon unit;
- Kyoto compliant Australian carbon credit units (ACCUs) arising under the Carbon Farming Initiative (CFI), subject to a cap on use in the fixed charge period by direct (non-landfill) emitters, set at five per cent of liability; and
- in the flexible charge period, eligible international emissions units (EIEUs), including Certified Emission Reduction units (CERs) issued under the Clean Development Mechanism (CDM) and Emission Reduction Units (ERUs) issued under the Joint Implementation (JI) programs established by the Kyoto Protocol (also subject to a cap on use, set at 50 per cent of liability up to 2020).

Each eligible emissions unit covers emissions of 1 t CO_2-e defined GHG (for a nominated compliance period).

Carbon units

[30,325]

Carbon units will be originally issued by the regulator (on behalf of the Australian government).

A carbon unit of a particular vintage may not be issued later than 1 February in the following compliance period.

The carbon unit will be personal property.

The carbon unit will be represented by an electronic entry in the Australian National Registry of Emissions Units (Registry). Each carbon unit will have an identification number, including four digits representing vintage (the year of issue).

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The carbon unit may be cancelled, surrendered or transferred (if issued free or if issued for a vintage year starting on or after 1 July 2015).

Only carbon units held on the Registry may be surrendered. Legal title in carbon units will only be transferred by entry into an account in the Registry.

In the flexible charge period:

- carbon units will have an indefinite life, until cancelled or surrendered;
- carbon units may be banked into future periods; and
- carbon units of the next vintage after the compliance period may be borrowed, subject to a cap on use, set at five per cent of liability.

The creation of equitable interests and security interests in carbon units will be permitted.

Surrender timetable

[30,350]

There are two surrender dates in the fixed charge period. 75 per cent of the previous year's provisional emissions number, or a self-assessed estimate of emissions (that is greater than 75 per cent of the emissions for the current compliance year) must be surrendered by 15 June in the compliance year (the provisional surrender deadline), and the balance by 1 February in the next compliance year (the "true-up" surrender deadline).

The true-up surrender deadline in the flexible charge period is 1 February in the year after the compliance period.

The ETS cap

[30,375]

The short term target is for Australia to reduce national GHG emissions five per cent below 2000 levels by 2020, and the long term target is to reduce national GHG emissions 80 per cent below 2000 levels by 2050.

The "cap" in the cap-and-trade carbon pricing mechanism from 1 July 2015 is an emissions target separately established in accordance with the Clean Energy Act 2011 (Cth).

The carbon pricing mechanism will operate only for a defined subset of Australia's GHG emissions. The government estimates that the Clean Energy Act 2011 (Cth) will apply up to approximately 500 emitters, responsible for approximately half of Australia's total GHG emissions.[24]

Notes

24 Australian Government, "Securing a Clean Energy Future: the Australian government's climate change plan" (Policy, Australian Government, 10 July 2012) p 27.

Trading markets

[30,400]

The carbon pricing mechanism will establish the Australian carbon market, which will comprise primary, secondary and derivatives carbon markets.

Primary market

[30,425]

The primary market is created by the issue of carbon units by the regulator.

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In the period to 30 June 2015, carbon units will be issued to liable entities for a fixed price[25] upon application in writing to the regulator, or free under assistance programs.

For vintages from 1 July 2015, carbon units will be issued to successful bidders in auctions conducted by the regulator.

Notes

25 The fixed price is called a safety valve.

Secondary markets

[30,450]

The secondary market encapsulates exchanges of carbon units via:

- private treaty;
- transactions in regulated financial markets; and
- over-the-counter (OTC) exchanges.

Carbon units (other than fixed price carbon units) which may be transferred may be acquired by anyone with a Registry account and hence the secondary markets for carbon units will be open to all.

Derivatives markets

[30,475]

The forward or derivatives market includes futures, derivatives and other structured or synthetic products.[26] The Interagency Working Group for the Study on Oversight of Carbon Markets described a derivative, or a derivative contract as:

> a financial instrument whose value is based on, or derived from, the value of an underlying asset (eg a stock), commodity (eg wheat and oil) or measurable event (eg weather or a bankruptcy). In carbon markets, derivative contracts could be based on the price of carbon emission allowances or offset credits.[27]

Collins and Palmer (2008) describe the forward market in the following terms:

> The forward market involves agreements to buy or sell, or the option to buy or sell, or swap an asset (which can be of any kind) at a set price on an agreed future date. Forward trading can occur on an exchange through standardised futures contracts or on the OTC market by transactions negotiated through brokers or directly between counterparties.[28]

Notes

26 The forwards or derivatives markets are primarily risk management and price discovery markets where the price is tied to the price of the underlying carbon unit. Actual transfer of a carbon unit cannot occur in this market, because of ss 104 and 110 of the Clean Energy Act 2011 (Cth).

27 Interagency Working Group for the Study on Oversight of Carbon Markets, "Report on the Oversight of Existing and Prospective Carbon Markets" (Report, US Commodity Futures Trading Commission, 18 January 2011) p 15.

28 Anthony Collins and Sally Palmer, "The Role of Financial Markets in Emissions Trading" (2008) 27 *Australian Resources and Energy Law Journal* at 41, 45.

Unit shortfall charge

[30,500]

In the fixed charge period, the unit shortfall charge is 130 per cent of the relevant fixed price for the compliance year.

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In the flexible charge period, the unit shortfall charge will be 200 per cent of the benchmark average auction charge (BAAC) for the compliance year.

The unit shortfall charge is not deductible for income tax purposes.

Structure of the Clean Energy Act 2011 (Cth)

[30,525]

The Clean Energy Act 2011 (Cth) is arranged into parts, conveniently grouped as follows:

General provisions	Pt 1 — objects and definitions, Territorial coverage
	Pt 2 — carbon pollution cap
	Pt 21 — review of decisions
	Pt 22 — review by Climate Change Authority
	Pt 23 — miscellaneous machinery
Liability	Pt 3 — liable entities
	Div 2 — direct emitters of greenhouse gases
	Div 3 — suppliers of natural gas
	Div 3A — suppliers of gaseous fuels
	Div 4 — obligation transfer numbers
	Div 5 — designated joint ventures
	Div 6 — liability transfer certificates
	Div 7 — Opt-in scheme
	Pt 4 — carbon units
	Pt 5 — emissions number
	Pt 6 — surrender of eligible emission units
	Pt 11 — relinquishment of carbon units
Special items	Pt 7 — Jobs and Competitiveness Program
	Pt 8 — Coal-fired electricity generation
Transparency	Pt 9 — publication of information by the regulator
	Pt 10 — fraudulent conduct
	Pt 12 — notification of holdings
	Pt 13 — information gathering
	Pt 14 — record keeping
	Pt 15 — monitoring powers
	Pt 21 — review of decisions
Enforcement	Pt 13 — information gathering
	Pt 15 — monitoring powers
	Pt 16 — liability of chief executive officer
	Pt 17 — civil penalty orders
	Pt 18 — administrative penalties
	Pt 19 — offences relating to unit shortfall charge
	Pt 20 — enforceable undertakings
	Pt 23 — legal professional privilege

NATIONAL GREENHOUSE AND ENERGY REPORTING ACT 2007 (CTH)

Commencement, historical background, amendments and regulations

[30,550]

The National Greenhouse and Energy Reporting Act 2007 (Cth), Act No 175 of 2007 was passed 16 August 2007 and received Royal Assent, 15 September 2007.

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The National Greenhouse and Energy Reporting Act commenced 1 July 2008.

- Amending Acts:
  - — National Greenhouse and Energy Reporting Amendment Act 2008 (Cth);
  - — Clean Energy (Consequential Amendments) Act 2011 (Cth);
  - — Clean Energy Legislation Amendment Act 2012 (Cth).
- Regulations:
  - — National Greenhouse and Energy Reporting Regulations 2008 (Cth);
- Amending Regulations:
  - — National Greenhouse and Energy Reporting Amendment Regulation 2009 (No 1) (Cth);
  - — National Greenhouse and Energy Reporting Amendment Regulation 2009 (No 2) (Cth);
  - — National Greenhouse and Energy Reporting Amendment Regulation 2011 (No 1) (Cth);
  - — National Greenhouse and Energy Reporting Amendment Regulation 2011 (No 2) (Cth);
- Determinations:
  - — National Greenhouse and Energy (Measurement) Determination 2008 (Cth);
  - — National Greenhouse and Energy (Audit) Determination 2009 (Cth);
  - — Auditor Registration Instrument 2010 (Cth).

Objects

[30,575]

The objects of the NGER Act include:

- informing the public and government policy formulation;
- assisting Australia meet its international greenhouse gas reporting obligations; and
- underpinning an emissions trading scheme in Australia: s 3.

The NGER Act mandates a national approach and avoids duplication in the states and territories by annihilating any existing or future state or territory laws that require reporting or disclosure of similar information.[29]

Notes

29 National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act) s 5.

Summary of registration, measurement and reporting under the NGER Act

[30,600]

The NGER Act establishes Australia's national framework for registration, measurement, reporting and dissemination of information about GHG emissions, energy consumption and energy production, and GHG projects.

The NGER Act is the measurement and reporting platform for the Clean Energy Act 2011 (Cth).

Registration with regulator

[30,625]

An obligation to apply for registration with the regulator[30] is imposed on:

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- controlling corporations;
- liable entities; and
- potentially liable entities.

A controlling corporation is a "constitutional corporation" that does not have a "holding company" incorporated in Australia: s 7 of the NGER Act.

A constitutional corporation (defined by reference to paragraph 51(xx) of the Constitution) is a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth of Australia.

A definition of holding company (and "subsidiary", as defined in the Corporations Act 2001 (Cth)) is supported by the definition of a controlling corporation's "group" — the controlling corporation is defined to be the corporation at the top of the corporate hierarchy of companies incorporated in Australia: s 8 of the NGER Act.

A foreign company operating in Australia without an Australian holding company may register.

If there is a group of companies with an ultimate Australian holding company, the Australian parent company may register.

If there is a group of companies with an ultimate foreign holding company, then only the Australian holding company that is owned by the foreign parent company may register.

Notes

30 Up to 2 April 2012, the regulator was the Greenhouse and Energy Data Officer.

Registration thresholds

[30,650]

Registration is mandatory:

- if a person is or was a liable entity under the Clean Energy Act 2011 (Cth): s 15A;
- if a person is or is likely to be a liable entity with an interim emissions number in a fixed charge year under the Clean Energy Act 2011 (Cth): s 15AA;
- if a controlling corporation's group meets one or more of the thresholds for a trigger financial year: s 12.

The threshold tests (s 13 of the NGER Act) for a controlling corporation group for mandatory registration by the controlling corporation from 1 July 2010 are set out in Table 30,650-1:

Table 30,650-1 — NGER Act Corporate Group Thresholds

Greenhouse gases emitted from operation of facilities within the group under operational control	Carbon dioxide equivalence: 50,000 tonnes
Energy produced from the operation of facilities within the group under operational control	200 terajoules
Energy consumed from the operation of facilities within the group under operational control	200 terajoules
Registration is also mandatory if any liable entity or entity within a controlling corporation's group has operational control of a facility which during the year causes:	

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- emission of greenhouse gases that have a carbon dioxide equivalence of 25,000 tonnes or more;
- production of energy of 100 terajoules or more; or
- consumption of energy of 100 terajoules or more.

If not required to register, a corporation may still apply for registration if the corporation or one of its group members undertakes or propose to undertake a "greenhouse gas project"; s 14 of the NGER Act.

Registration timetable

[30,675]

Registration is required by 31 August in the year following the compliance year.

However in the fixed charge period, registration is required by 1 May if, as at 1 April in the compliance year, the person is or is reasonably likely to be a liable entity with an interim emissions number at 15 June in the compliance year.

Penalty for failure to register

[30,700]

The penalty for failing to register is up to:

- 2000 penalty units[31] (currently, $220,000) for a person;
- 10,000 penalty units (currently, $1,100,000) for any other entity.

A potential further penalty of up to 100 penalty units per day (currently, $11,000 per day) accrues for each day not registered.

The chief executive officer of a corporation may also be liable for the corporation's failure to register, and face a civil penalty up to $220,000.

Notes

31 See s 4AA of the Crimes Act 1914 (Cth). 1 penalty unit = A$110.

Greenhouse gases

[30,725]

"Greenhouse gas" is defined in s 5 of the NGER Act to mean:

- carbon dioxide (CO_2); or
- methane (CH_4); or
- nitrous oxide (N_2O); or
- sulphur hexafluoride (SF_6); or
- hydro fluorocarbon — of a kind specified in the regulations; or
- per fluorocarbon — of a kind specified in the regulations.

Water vapour, oxides of nitrogen (NOx), nitric oxide (NO), sulphur dioxide (SO_2), chlorofluorocarbons (CFCs) (bromofluorocarbons and other man-made organohalogen compounds which are ozone depleting substances (ODSs)) are not GHG.

Nitrogen trifluoride (NF_3) is recognised as a GHG in the international context and in the California Emissions Trading Scheme (California ETS), but not yet in Australia.

A number of key definitions in the NGER Act are left undefined in the NGER Act and are specified in regulations. These include the definition of:

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- emissions of greenhouse gas;
- reduction of greenhouse gas emissions;
- removal of greenhouse gas;
- offsets of greenhouse gas emissions.

Energy

[30,750]

"Energy" includes fuel and other energy commodities specified in the regulations. The regulations also define:

- production of energy;
- consumption of energy.

"Greenhouse gas project" means an activity (or series of activities) designed to remove or reduce the emission of greenhouse gases and that meet requirements stipulated in regulations. Further, if the activity is located in Australia's exclusive economic zone, it will only qualify to the extent that it is an oil or gas extraction activity (or series of activities).

Facility

[30,775]

A "facility" is an activity or series of activities that involve greenhouse gas emissions, or the production or consumption of energy, and that are a single undertaking or enterprise meeting requirements stipulated in regulations, or alternatively are declared by the regulator to be a facility: s 9.

Operational control

[30,800]

"Operational control" is defined in ss 11, 11A, 11B and 11C of the NGER Act — only one person can have operational control over a facility at any one time.

The general rule in the NGER Act is that a person has operational control over a facility if the person has the authority to introduce and implement any or all of the following (meeting requirements stipulated in regulations):

- operating policies;
- health and safety policies;
- environmental policies

unless the regulator declares the corporation to have operational control of the facility: ss 55–55A of the NGER Act.

If two or more persons could satisfy the general test in relation to a facility for an eligible financial year, but one of the persons has the greatest authority to introduce and implement operating policies and environmental policies, then the person with that greatest authority will have operational control.

If two or more persons could satisfy the general test in relation to a facility for an eligible financial year, but no particular person has the greatest authority to introduce and implement operating policies and environmental policies, then those persons must jointly nominate (by 30 April in a fixed charge year) one of them to be the nominated person in relation to the facility (save that a foreign person cannot be nominated).

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The nominated person shall be taken to have operational control over the facility (including if the facility is a facility of a joint venture).

If no nomination is made, then each person is taken to have operational control.

A similar tie-breaker rule applies to a trust with multiple trustees.

Groups

[30,825]

The concept of the controlling corporation's group is important, as it relates to registration and reporting obligations.

The group includes the controlling corporation and its subsidiaries (unless the controlling corporation is not incorporated in Australia): s 8 of the NGER Act.

Registration mechanics

[30,850]

The application to register must be made before 31 August in the year following the eligible financial year.

In the fixed charge period, liable entities and potentially liable entities must register by 1 May in the eligible financial year.

Applications are made to the regulator in writing or on-line. They are required to identify the liable entity or controlling corporation and be in the form and contain such other information as specified in the regulations.

The regulator will keep a register of registered corporations. Registration is mandatory if the regulator is satisfied that ss 12, 15A or 15AA requires the person to apply for registration. Also, the regulator may register a corporation if satisfied that s 14 permits the corporation to apply for registration.

Reporting obligations

[30,875]

As a general rule, the registered entity must in respect of each year it is registered provide a report to the regulator relating to:

- greenhouse gas emissions; and
- energy production; and
- energy consumption

from the operation of facilities under operational control (including for controlling corporations within its group).

A civil penalty of up to 2000 penalty units applies for breach of this obligation.

The report is due by 31 October after each compliance year (note however that a s 22AA report is due by 15 June in the compliance year).

The report must be made on-line in a manner and form approved by the regulator (using the Online System for Comprehensive Activity Reporting (OSCAR)).

The report must be based upon the National Greenhouse and Energy Reporting Regulations 2008 (Cth) (NGER Reporting Regulations) and the National Greenhouse and Energy Reporting (Measurement) Determination 2008 (Cth) (NGER Measurement Determination) and contain the information stipulated in the regulations.

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A registered entity will be required to keep appropriate records of activities so that it may accurately report, and will be required to retain those records for 5 years.

If a registered corporation is carrying out a greenhouse gas project, it may also report relating to:

- reduction of greenhouse gas emissions;
- removals of greenhouse gases; and
- offsets of greenhouse gas emissions.

Reporting obligations by regulator

[30,900]

The information provided by a registered entity to the regulator must be published by the regulator on a website and by 28 February, unless a request for non-publication is made.

Non-disclosure of information may be sought on the basis that it reveals or is capable of revealing trade secrets, or any other matter of commercial value that would be destroyed or diminished if disclosed, about a specific facility, technology or corporate initiative.

The regulator may also disclose its information to the states and territories, to other government departments for statistical purposes and for facilitating review of Australia's compliance with international obligations relating to reporting of greenhouse gas emissions and the production and consumption of energy.

Monitoring compliance by regulator

[30,925]

The regulator and its authorised officers are given a wide range of entry, search and execution powers to examine any activity conducted by a registered entity (or entity that should be registered) that may relate to compliance with or for the purposes of the NGER Act or to gather information relating to the NGER Act.

The regulator may require an external auditor to be appointed to examine compliance.

Regulations

[30,950]

The NGER Reporting Regulations provide definitions of concepts used in the NGER Act and further detail to support registering and reporting under the NGER Act. The NGER Measurement Determination specifies the methodologies for monitoring and measuring:

- greenhouse gas emissions;
- the production of energy; and
- the consumption of energy

arising from the operation of facilities.

The NGER Act and its Regulations must be read together.

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FUEL TAX ACT 2006 (CTH)

Commencement, historical background, amendments and regulations

[30,975]

The Fuel Tax Act 2006 (Cth), Act No 72 of 2006 was passed 22 June 2006 and received Royal Assent 26 June 2006.

The Fuel Tax Act 2006 (Cth) commenced 1 July 2006.

- Amending Acts:
  - — Clean Energy (Fuel Tax Legislation Amendment) Act 2011 (Cth);
  - — Clean Energy Legislation Amendment Act 2012 (Cth).
- Regulations:
  - — Fuel Tax Regulations 2006 (Cth).

Objects

[31,000]

The Fuel Tax Act 2006 (Cth) introduced a single system of fuel tax credits to remove/reduce the incidence of fuel tax levied on taxable fuels from 1 July 2006, and a framework for the taxation of gaseous fuels from 1 July 2011, when fuel tax was levied on liquefied petroleum gas (LPG), liquefied natural gas (LNG) and compressed natural gas (CNG) for the first time.

Summary of the carbon price under the Fuel Tax Act 2006 (Cth)

[31,025]

Households and on-road commercial vehicles 4.5 tonnes and under currently pay the full rate of fuel excise. From 1 July 2012, they will continue to pay excise under current arrangements but they will not also pay a carbon price.

All other fuel uses (except fuel used in the fishing, forestry and agriculture industries, and non-combustion use of fuel) will be subject to a carbon price. The carbon price is proposed not to apply to fuel used in heavy transport until 1 July 2014.

Liability for fuel tax currently arises under the Excise Act 1901 (Cth), the Excise Tariff Act 1921 (Cth), the Customs Act 1901 (Cth) and the Customs Tariff Act 1995 (Cth).

The design of the Fuel Tax Act 2006 (Cth) ensures that fuel tax is effectively only applied to fuel used in private vehicles (and for certain other private purposes), to fuel used on-road in light commercial vehicles for business purposes (see Table 30,025-1) and to aviation fuels.

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Table 30,025-1 — Summary of fuel tax credits			
Business Use			**Private Use**
Use on roads	**gross vehicle mass ≤4.5 tonnes**	Full fuel tax payable	Full fuel tax payable
	gross vehicle mass 4.5 tonnes or more	Fuel tax payable up to the amount of the road-user charge, balance offset by a fuel tax credit (subject to carbon price from 1 July 2014)	

Emissions from non-transport liquid petroleum gas and liquefied natural gas (LPG and LNG) are brought into the mandatory carbon pricing mechanism from 1 July 2013.

Emissions from non-transport compressed natural gas (CNG) is brought into the mandatory carbon pricing mechanism from 1 July 2012.

Fuel tax credit entitlements under the Fuel Tax Act 2006 (Cth) will not be reduced for business use of gaseous fuels (CNG, LPG and LNG) when those fuels are covered under the carbon pricing mechanism.

When the gaseous fuels are covered under the Fuel Tax Act 2006 (Cth), the agriculture, fishing and forestry industries will still be entitled to a fuel tax credit equivalent to the amount of the carbon charge that is embedded in the price of the fuel.

The liable entity for non-transport LPG and LNG under the Clean Energy Act 2011 (Cth) will be the person for whom customs duty or excise duty is or was payable on an amount of fuel that is entered for home consumption after import or manufacture. Liability will apply to LPG and LNG for which excise is remitted on the basis that the LPG or LNG is not intended to be used in an internal combustion engine in a motor vehicle or vessel.

The fuel tax credit entitlement (with some exceptions noted below) will be reduced by an amount equivalent to what the carbon price on the fuel emissions would be (if those emissions were subject to a carbon price).

The carbon price reduction is achieved by amending the formula for the amount of fuel tax credit for taxable fuel (Fuel Tax Act 2006 (Cth) s 43-5) as follows:

Amount of effective fuel tax − Amount of carbon reduction

The formula for the amount of carbon reduction is worked out, to 3 decimal places, as follows:

Quantity of fuel × *Carbon price* × *Carbon emission rate*

LNG and CNG are measured in kilograms, and all other fuels are measured in litres.

The carbon price tracks the carbon unit charge set in the Clean Energy Act 2011 (Cth) for the fixed charge period: starting from 1 July 2012 at 2300 cents, rising from 1 July 2013 to 2415 cents and from 1 July 2014 to 2540 cents.

From 1 July 2015, the carbon price is calculated at six monthly intervals (in the same manner the six monthly average charge is calculated under the Clean Energy Act 2011 (Cth) s 196).

For the first half of the calendar year (1 January to 30 June), the carbon price is the average charge achieved for auctions of carbon units in the six months period ending the last November before the start of that half year. For the last half of the calendar year

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(1 July to 31 December), the price is the average charge achieved for auctions of carbon units in the six months period ending the last May before the start of that half year.

The carbon emission rate is set as:

- gasoline — 0.0024;
- LPG — 0.0016;
- LNG — 0.0029;
- CNG — 0.0029;
- denatured ethanol for use in an internal combustion engine — nil;
- biodiesel or renewable diesel — nil or
- any other taxable fuel (other than a blend of taxable fuels) — 0.0027.

If the fuel is a blend, then the amount of carbon reduction that applies to the blend is worked out as the sum of the amount that applies to each constituent fuel.

No carbon reduction applies to fuel:

- covered by the opt-in scheme;
- acquired, manufactured or imported for use in agriculture, fishing operations or forestry;
- acquired, manufactured or imported for use in a vehicle with a gross vehicle mass of more than 4.5 tonnes travelling on a public road or
- acquired, manufactured or imported for use otherwise than by combustion of the fuel.

The opt-in scheme will allow businesses that are large fuel users and would pay an effective carbon price through the fuel tax system to voluntarily opt-in to the carbon pricing mechanism for the emissions associated with their use of fuel. To opt-in to the carbon pricing mechanism, businesses will apply to the regulator. Once a business has opted into the carbon pricing mechanism, they will no longer pay an effective carbon price through the fuel excise and fuel tax credit systems, and they will have the same obligations as other liable entities under the carbon pricing mechanism.

OZONE PROTECTION AND SYNTHETIC GREENHOUSE GAS MANAGEMENT ACT 1989 (CTH)

Commencement, historical background, amendments and regulations

[31,050]

The Ozone Protection Act (1989),[32] Act No 7 of 1989 received Royal Assent 16 March 1989 and commenced 16 March 1989.

- Related acts:
  - — Ozone Protection (License Fees — Import) Act 1989 (Cth);
  - — Ozone Protection (License Fees — Manufacture) Act 1989 (Cth);
- Amending acts:
  - — Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Act 2011 (Cth);
  - — Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Act 2011 (Cth);
  - — Clean Energy (Consequential Amendments) Act 2012 (Cth).
- Regulations:
  - — Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995;

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— Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Regulations 2004;
— Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Regulations 2004.

- Amending Regulations:
  — Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation 2012 (No 1);
  — Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Regulation 2012 (No 1);
  — Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Regulation 2012 (No 1).

Notes

32 Subsequently renamed the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth).

Objects

[31,075]

The primary objective of the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth) was to institute the Australian system of controls for the manufacture, import and export of substances that deplete ozone in the atmosphere (ozone depleting substances (ODS)) thereby giving effect to Australia's obligations under the *Vienna Convention for the Protection of the Ozone Layer*[33] and *Montreal Protocol on Substances that Deplete the Ozone Layer.*[34]

Notes

33 Opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988).

34 Opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989).

Summary of the carbon price for synthetic GHG

[31,100]

The Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Act 2011 and the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Act 2011 relevantly amend their underlying acts to apply an equivalent carbon charge to the import and manufacture of synthetic greenhouse gases (SGGs) and equipment which contains SGG (SGG equipment).

SGGs comprise hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6).

The carbon charge component applies in addition to the existing levies which currently apply to the import and manufacture of SGGs and "pre-charged equipment" (which includes equipment containing ODS (ODS equipment) as well as SGG equipment).

The amount of levy is:

[Number of tonnes CO_2-e of SGG × *Applicable charge]* + *[Number of tonnes of SGG* × *Prescribed rate]*

The carbon dioxide equivalence of an amount of SGG is the amount of the SGG multiplied by the value specified in the regulations for that kind of SGG. The carbon dioxide equivalence of SGG that is not a greenhouse gas is zero.

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The applicable charge tracks the carbon unit charge set in the Clean Energy Act 2011 (Cth) for the fixed charge period: starting from 1 July 2012 at $23.00, rising from 1 July 2013 to $24.15 and from 1 July 2014 to $25.40. From 1 July 2015, the applicable charge will be the benchmark average auction charge for the previous financial year.

The prescribed rate is currently $165 per tonne.[35]

The levy will be payable if a person has a controlled substances licence to import or manufacture SGGs. A "controlled substances licence" allows the import, manufacture or export of hydrochlorofluorocarbons (HCFCs), methyl bromide or SGGs.

Because Australia has the only approved destruction facilities in this region and has destroyed ODS and SGGs from New Zealand and some Pacific Island countries, the levy applicable to SGGs does not apply if the SGG is imported for the purpose of destruction of that SGG and the conditions specified in the regulations are satisfied.

Notes

35 Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Regulations 2004 reg 5; Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Regulations 2004 reg 5.

National legal framework — Energy efficiency

[31,125]

Energy efficiency reduces energy consumption and energy costs and helps conserve energy resources for the future. The Australian government promotes energy efficiency through a range of programs, for example:

- energy rating labelling for appliances and equipment;
- a nationwide house energy rating scheme and energy star ratings for buildings;
- building codes, subsidies and rebates for insulation, lighting, solar panels and hot water systems for homes and offices; and
- mandatory schemes for identifying energy efficiency opportunities and disclosing building energy efficiency.

ENERGY EFFICIENCIES OPPORTUNITIES ACT 2006 (CTH)

Commencement, historical background, amendments and regulations

[31,150]

The Energy Efficiencies Opportunities Act 2006 (Cth), Act No 31 of 2006 received Royal Assent 6 April 2006 and commenced 1 July 2006.

- Amending Acts:
  - — Energy Efficiency Opportunities Amendment Act 2007(Cth);
- Regulations:
  - — Energy Efficiency Opportunities Regulations 2006 (Cth);
- Amending Regulations:

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— Energy Efficiency Opportunities Amendment Regulation 2012 (No 1) (Cth).

Objects

[31,175]

The Energy Efficiency Opportunities (EEO) program encourages large energy-using businesses (those consuming more than 0.5 petajoules of energy) to improve their energy efficiency by requiring them to identify, evaluate and report publicly on cost effective energy savings opportunities.

Summary of the EEO Act under a carbon price

[31,200]

Of the corporations obligated to report by the end of 2010, 207 indicated that they had assessed 85 per cent of their energy use and identified opportunities to save 141.9 PJ of energy per year (9.8 per cent of their assessed energy use) or 2.5 per cent of Australia's total energy use. These identified energy savings are equivalent to:

- emissions reductions of 11.2 million tonnes per annum, or two per cent of Australia's total GHG emissions; and
- financial benefit for EEO program corporations worth an estimated $1.2 billion per annum.

From 1 July 2011, the EEO program extended to electricity generation corporations and this will increase the coverage of the EEO program to approximately 57 per cent of Australia's total energy use.

Under the Clean Energy future plans, the EEO program is to be further expanded. The Government has adopted many of the recommendations of the 2010 Prime Minister's Task Group on Energy Efficiency and announced:

- extending base funding for the EEO program out to 30 June 2017;
- expanding the EEO program to include energy transmission and distribution networks, and major greenfield and expansion projects; and
- establishing a voluntary scheme for medium sized energy users.

BUILDING ENERGY EFFICIENCY DISCLOSURE ACT 2010 (CTH)

Commencement, historical background, amendments and regulations

[31,225]

The Building Energy Efficiency Disclosure Act 2010 (Cth), Act No 67 of 2010 received Royal Assent 28 June 2010, and commenced 1 July 2010.

- Regulations:
  - — Building Energy Efficiency Disclosure Regulations 2010;
  - — Building Energy Efficiency Disclosure Determination 2011;
  - — Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011.

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Objects

[31,250]

The object of the Building Energy Efficiency Disclosure Act 2010 (Cth) (BEED Act) is to mandate disclosure of the energy efficiency rating of certain buildings and the energy efficiency of lighting for those buildings.

Summary of the Building Energy Efficiency Disclosure Act

[31,275]

The BEED Act redresses the information asymmetries between building owners and prospective tenants or buyers by requiring disclosure of the energy efficiency rating of certain buildings and the energy efficiency of lighting for those buildings. Tenants or buyers may thus understand the energy efficiency performance of premises before making purchase or lease decisions.

Disclosure affected buildings and areas of a building

[31,300]

Disclosure affected buildings includes buildings or areas of the building used or capable of being used as an office with a net lettable area (NLA) of 2,000m^2 or more.

Disclosing and non-disclosing entities

[31,325]

Unless exempted, disclosing entities are:

- Australian trading and financial companies and foreign companies ("constitutional corporations") who own, lease or sublease a disclosure affected building or disclosure affected area of a building;
- any person that a constitutional corporation who is a prospective purchaser or lessee requests in writing to give an energy efficiency certificate.

Prohibition on sale, lease or sublease

[31,350]

Unless there is a current and valid building energy efficiency certificate (BEEC) registered for a disclosure affected building, the owner or lessee of the building (as appropriate) may not:

- sell; or
- offer to sell; or
- offer to enter into a contract under which a contingent obligation or right to sell is created;
- invite offers to purchase; or
- offer to lease the building or a disclosure affected area of the building; or
- invite offers to lease the building or a disclosure affected area of the building; or
- advertise the building for sale or lease unless the current valid energy efficiency rating for the building or area of the building is included in the advertisement in the manner approved by the Secretary.

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A civil penalty of a fine up to $110,000 applies for a breach, and continues daily up to the day after the making of any civil penalty order.

Current and valid Building Energy Efficiency Certificate

[31,375]

A BEEC sets out the energy efficiency rating of the building and the energy efficiency of the lighting for the building (limited to the lighting that might reasonably be expected to remain if the building is sold, let or sublet). The BEEC also includes guidance on improving energy efficiency.

A BEEC remains current for a period of no more than 12 months, from when the certificate is issued.

In order for a BEEC to be valid, the issuing authority must be satisfied that the energy efficiency rating specified in the certificate for the building (or area of the building) is appropriate for the building, and the assessment of the energy efficiency of the lighting for the building is also appropriate for the building (or the area of the building).

Application for and issue of Building Energy Efficiency Certificate

[31,400]

The issue of a BEEC is based on an application made by an accredited assessor or alternatively, information provided by an auditing authority, based on the NABERS (National Australian Built Environment Rating System) rating system.

BEECs are maintained in a Building Energy Efficiency Register. There is also an Energy Efficiency Non-disclosure Register disclosing instances of non-disclosure by repeat offenders.

An owner, lessor, lessee and/or sublessee may seek damages from a court if an accredited assessor fails to comply with the duty to determine energy efficiency rating (of either the building or lighting in the building) according to the promulgated methods and standards.

Enforcement

[31,425]

It is a civil penalty to:

- attempt to contravene any civil penalty provision in the BEED Act; or
- aid, abet, counsel or procure a contravention of a civil penalty provision; or
- induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
- be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
- conspire with others to effect a contravention of a civil penalty provision.

Mistake of fact is a complete defence to a civil penalty order, provided if at or before the time of the conduct constituting the contravention, 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 would not have constituted a contravention of the civil penalty provision.

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As an alternative to prosecution, an infringement notice may issue if there are reasonable grounds for belief that a civil penalty provision has been contravened. An infringement notice must be issued within 12 months of the alleged contravention. The penalty in an infringement notice cannot exceed 10 per cent of the maximum penalty. Payment of the infringement notice is not an admission of liability, and payment within 28 days (or such longer time as may be granted) will extinguish civil proceedings.

National legal framework — Renewable energy

[31,450]

Renewable energy systems use non-fossil fuel sources such as solar, wind and hydro (water) to generate power. Energy produced from renewable sources contributes to the reduction of Australia's greenhouse gas emissions. The Australian government was the first in the world to introduce a mandatory target for the uptake of renewable energy in power supplies.

RENEWABLE ENERGY (ELECTRICITY) ACT 2000 (CTH)

Commencement, historical background, amendments and regulations

[31,475]

The Renewable Energy (Electricity) Act 2000 (Cth), Act No 174 of 2000 received Royal Assent 21 December 2000 and commenced 1 July 2001.

- Amending Acts:
  - — Renewable Energy (Electricity) Amendment Act 2006 (Cth);
  - — Renewable Energy (Electricity) Amendment Act 2009 (Cth);
  - — Renewable Energy (Electricity) Amendment Act 2010 (Cth);
  - — Renewable Energy (Electricity) (Large-scale Generation Shortfall Charge) Act 2000 (Cth);
  - — Renewable Energy (Electricity) (Charge) Amendment Act 2010 (Cth);
  - — Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Act 2010 (Cth);
  - — Clean Energy (Consequential Amendments) Act 2011 (Cth);
- Regulations:
  - — Renewable Energy (Electricity) Regulations 2001 (Cth).
- Amending Regulations:
  - — Renewable Energy (Electricity) Amendment Regulation 2012 (No 1) (Cth);
  - — Renewable Energy (Electricity) Amendment Regulation 2012 (No 2) (Cth);
  - — Renewable Energy (Electricity) Amendment Regulation 2012 (No 3) (Cth);
  - — Renewable Energy (Electricity) Amendment Regulation 2012 (No 4) (Cth);

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— Renewable Energy (Electricity) Amendment Regulation 2012 (No 5) (Cth).

Objects

[31,500]

The Renewable Energy Target (RET) aims for 20 per cent of Australia's electricity supply to be sourced from renewable sources by 2020.

The objects of the Renewable Energy (Electricity) Act 2000 (Cth) are to:

- encourage the additional generation of electricity from renewable sources;
- reduce emissions of GHG in the electricity sector; and
- ensure that renewable energy sources are ecologically sustainable: s 3.

The RET is designed to speed up the adoption of renewable energy technologies. The government plans to complement the RET with a new range of programs also designed to help smooth the transition to a clean energy future. The government predicts that by the early 2020s, the amount of electricity coming from sources like solar, wind, water and geothermal will be almost as large as all of Australia's current household electricity use.

Summary of the RET and its interface with the carbon price

[31,525]

The RET is a national ambition focused primarily on electricity retailers and wholesale buyers in liable grids exceeding 100 megawatt per annum. The RET scheme combines all state and territory renewable energy targets into a single national scheme.

The RET became mandatory in 2001 (called the Mandatory Renewable Energy Target (MRET)) with a compliance level of electricity to be sourced from renewable sources annually set for 2002 at 1100 GWh and increasing in subsequent years until 2010 to an initial maximum target set at 9500 GWh.

In 2009, the mandatory renewable target was raised to 45,000 GWh by 2020, representing 20 per cent of Australia's energy supply (see Table 32,175-2). In 2009, the MRET was replaced with the Renewable Energy Target (RET) scheme by the Renewable Energy (Electricity) Amendment Act 2010 (Cth). This amendment was also responsible for introducing the Solar Credits scheme. In June 2010, The Renewable Energy (Electricity) Amendment Act 2010 (Cth), the Renewable Energy (Electricity) (Charge) Amendment Act 2010 (Cth), and the Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Act 2010 (Cth) separated the RET scheme into two parts, effective from 1 January 2011:

- Large-scale Renewable Energy Target (LRET) and
- Small-scale Renewable Energy Scheme (SRES).

The LRET has a target of 41,000 GWh by 2020 and only large-scale renewable energy projects are eligible. The LRET is designed to encourage renewable energy from wind farms, ocean waves and tide, hydroelectricity, bagasse, geothermal aquifers and black liquor. Waste coal mine gas is eligible until 31 December 2020 only if the gas is used in the generation of electricity by a power station.

The SRES targets a theoretical 4000 GWh annually and is eligible only to small-scale or household installations.

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Methodology for compliance

[31,550]

Each liable entity is required to meet its obligations annually and to prove that it has in fact sourced its appropriate amount of electricity from recognized renewable energy sources.

The Renewable Energy (Electricity) Act 2000 (Cth) creates the system for assessing and meeting liability through creation and surrender processes for Renewable Energy Certificates (RECs) for the generation of electricity using eligible renewable energy sources.

RECs are created both as large-scale generation certificates (LGCs) and small-scale technology certificates (STCs).

The two types of RECs (large-scale and small-scale) create separate obligations for liable entities under the RET scheme:

- LGCs are created in relation to the generation of electricity by accredited power stations;
- STCs are created in relation to the installation of solar water heaters (SWHs) and small generation units (SGUs).

LRET requires liable entities to purchase a set number of LGCs each year. A Renewable Power Percentage (RPP) is set in the regulations by 31 March annually and is applied when calculating the number of LGCs to be purchased. For 2011, the RPP was set at 5.62 per cent. For 2012, the RPP is set at 9.15 per cent. LGCs are purchased directly from renewable energy power stations or from LGC Agents.

Table 31,550-1 — Adjusted renewable energy targets until 2030

Year	Target (GWh)	RPP
2012	16,763	9.15%
2013	19,088	
2014	16,950	
2015	18,850	
2016	21,431	
2017	26,031	
2018	30,631	
2019	35,231	
2020	41,850	
2021–2030	41,000	

Liability is imposed by way of a renewable energy shortfall charge, if RECs surrendered by a liable entity are not equal to their renewable energy target.

Creation of RECs

[31,575]

The RET and the regulations allow for the creation of a REC which certifies that an amount of 1 MWh of energy has been produced and supplied to the national grid from a renewable source.

RECs can be created form two primary sources:

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- LGCs — accredited renewable energy power stations can produce LGCs from generations in excess of the power station's 1997 generation level (the year the MRET was announced — referred to as the baseline year).

  During the accreditation process the regulator determines the baseline amount. LGCs for eligible parties are created in an electronic form through the REC Registry and are not valid or available for purchase or surrender until they are registered by the regulator.
- STCs — deemed outputs from eligible SWHs and SGUs (such as small-scale solar panels and photovoltaic units, wind turbines or micro-hydro systems, solar water heaters and pumps).

The REC once created, can be banked, traded and/or surrendered to meet the liability of a generator or other liable party under the Renewable Energy (Electricity) Act 2000 (Cth).

RECs operate like a traded stock and vary in price dependant on demand in the financial cycle at any given time. Banked RECs may be surrendered at any time up to the cessation of the scheme in 2020.

Owners of the SWH generally receive accredited RECs on a once-off basis, the number being determined by the regulator after tests have been conducted to establish the efficiencies of the SWH unit when mapped against a baseline model. RECs may be claimed by the owner but most often are assigned to a broker, usually the SWH supplier, who retains the RECs for sale at a time they deem appropriate.

SGUs have a perpetual REC cycle and create RECs annually.

Register

[31,600]

A REC Register records the creation, trading and surrender of RECs.

A full history of the life of a REC is recorded and is available for scrutiny in the public domain.

Regulator

[31,625]

The Office of Renewable Energy Regulator (ORER) was created to administer the creation, assignment, trading and surrendering of RECs. The ORER was subsumed by the Clean Energy Regulator from 2 April 2012.

The regulator's responsibilities include:

- accrediting renewable energy power stations under the RET;
- overseeing the creation, validation and surrender of RECs;
- assessing annual Energy Acquisitions Statements and Electricity Generation returns;
- ensuring the integrity of the scheme by undertaking audits under the Renewable Energy Act.

Reports by regulator

[31,650]

The regulator produces two annual reports. One report provides financial information about the regulator in the way most other government bodies operate and a second provides full disclosure and accountability for the RECs created, traded and surrendered for the year the report covers.

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Renewable Energy Shortfall Charge

[31,675]

A liable entity is required to "cover" the assigned number of MWhs annually by surrendering the appropriate number of RECs by the surrender date. However, the Renewable Energy (Electricity) Act 2000 (Cth) provides for a leeway of 10 per cent.

Where the REC surrender shortfall is outside 10 per cent the whole shortfall creates a liability for Renewable Energy Shortfall Charge penalty under the provisions of Pt 4 of the Renewable Energy (Electricity) Act 2000 (Cth).

The penalty is capped at $40 per REC not surrendered.

The Renewable Energy (Electricity) Act 2000 (Cth) allows a three year opportunity to recoup losses incurred by the penalties associated with a maximum 10 per cent shortfall. Penalties may be redeemed if the relevant number of RECs is surrendered within the following three years of the penalty being paid and there are sufficient RECs offered for surrender against the compliance year being assessed.

National legal framework — Land sector

[31,700]

Agriculture and forestry emissions are excluded (among others) from the carbon pricing mechanism. However, agricultural and forestry activities currently make up 23 per cent of Australia's emissions. In order to unlock the GHG abatement opportunities available in the land sector and as the incentive to take action to increase carbon storage in the landscape, farmers, forest growers and landholders have been offered access to carbon markets.

The Australian carbon credit unit (ACCU), an offset credit representing 1 t CO_2-e reduction in emissions achieved through programs approved and implemented under the carbon farming initiative (CFI), will substitute for a carbon unit in the carbon pricing mechanism and will be saleable in voluntary carbon markets.

In the fixed charge period, no more than five per cent of liability under the Clean Energy Act 2011 (Cth) may be satisfied with "Kyoto compliant" ACCUs. After 1 July 2015, there is no limit.

CARBON CREDITS (CARBON FARMING INITIATIVE) ACT 2011 (CTH)

Commencement, historical background, amendments and regulations

[31,725]

The Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) (CFI Act), No 101 of 2011 (Cth) was passed 23 August 2011 and received Royal Assent, 15 September 2011.

The CFI Act commenced 1 December 2011.

- Amending Acts:
  - — Clean Energy (Consequential Amendments) Act 2011 (Cth);
  - — Clean Energy Legislation Amendment Act 2012 (Cth);

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- Regulations:
  - — Carbon Credits (Carbon Farming Initiative) Regulations 2011 (Cth);
  - — Carbon Credits (Carbon Farming Initiative) Kyoto Australian Carbon Credit Unit Specification 2011 (Cth);
  - — Carbon Credits (Carbon Farming Initiative) Landfill Legacy Emissions Avoidance Project Specification 2011 (Cth);
  - — Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 1) (Cth);
  - — Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No 2) (Cth);
  - — Carbon Farming (Quantifying Carbon Sequestration by Permanent Environmental Plantings of Native Tree Species using the CFI Reforestation Modelling Tool) Methodology Determination 2012.

Objects

[31,750]

The objects of the CFI Act are to:

- give effect to Australia's international obligations (under the UNFCCC and the Kyoto Protocol);
- create incentives for people to carry on land based offsets projects; and
- increase carbon abatement in a manner that is consistent with the protection of Australia's natural environment and improves resilience to the effects of climate change: s 3.

Summary of the Carbon Farming Initiative (CFI)

[31,775]

The CFI aims to provide financial incentives for farmers, forest growers, landholders and landfill operators to develop projects that will reduce greenhouse gas emissions. The CFI is targeted at the generation of carbon credits from sectors not covered by mandatory liability under the carbon pricing mechanism. It enables projects developed and implemented within the rules of the CFI to be issued with ACCUs which can be sold into carbon markets.

Kyoto compliant ACCUs will be issued when a CFI project relates to activities/emissions that are within Australia's Kyoto Protocol emissions reporting inventory. Permitted activities include:

- reforestation;
- the capture and combustion of landfill gas;
- reduction of nitrous oxide emissions from fertiliser use; and
- managing methane emissions from piggeries and dairies.

Voluntary ACCUs will be issued when a CFI project relates to activities/emissions that are outside of Australia's Kyoto Protocol emissions reporting inventory. Relevant activities include:

- increasing the carbon in soils;
- sequestering carbon in shrubbery or lands that fall short of the definition of a carbon forest sink; and
- use of biochar to enrich soils.

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CFI projects comprise emissions avoidance projects and carbon sequestration projects. In order to create a CFI project, a project proponent (which may be an individual or a company) must first make an application to the regulator to become a recognised offsets entity.

The CFI Act provides a mechanism for approval of methodologies for reducing GHG emissions. Each methodology must be approved by the minister. However, before it is approved it must be assessed and endorsed by an independent body of experts called the Domestic Offsets Integrity Committee (DOIC). Approved methods will include carbon capture and storage (sequestering carbon emissions underground), capture and disposal of methane (from livestock farming), savannah burning (management of savannas by controlled burning), reforestation, forest protection and forest establishment.

Integrity standards built into the CFI Act provide key concepts that underpin the CFI and its methodologies that must be met by project proponents.

Additionality

[31,800]

Emissions abatement or sequestration must be additional to business as usual emissions on the site or sites — the reduction in emissions must not have occurred without the CFI project.

Permanence

[31,825]

When emissions are taken out of the atmosphere and stored by sequestration projects, they must not be re-released back into the atmosphere (otherwise the reduction in emissions will no longer be additional). Under the CFI an emissions reduction is considered permanent if it is guaranteed for at least 100 years. This will impose ongoing obligations running with lands that have hosted sequestration projects.

Leakage

[31,850]

Leakage occurs where an emissions reduction activity causes emissions to rise outside of the boundaries of the project, thus neutralising the benefit of reducing emissions by the particular project. An example would be a reforestation or reduced native forest deforestation project that resulted in increased deforestation outside of the boundaries of the CFI project.

Measurable and verifiable

[31,875]

Measurement and monitoring systems must be consistent over time, must enable abatement estimates to be audited and must be complied with in carrying out a CFI project. Methodologies set out in detail the technical requirements for measurement of emissions reductions for particular kinds of projects and the ability to quantify and verify emissions reductions through technical measurement processes (which are different for each different project type).

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Conservative

[31,900]

As far as is possible, conservative assumptions, numerical values and procedures consistent with the peer reviewed science in relation to carbon offsetting should be used to ensure that abatement and other claims are not over-estimated and should be built into the technical mechanisms and formulae used in methodologies.

Internationally consistent

[31,925]

Estimation and accounting methods must be consistent with (not necessarily the same as) the National Greenhouse Accounts.

When a project proponent has all regulatory approvals, and is carrying out the CFI project, the proponent applies to the regulator to obtain a certificate of entitlement and ACCUs from the registry issued by the regulator.

The Australian government is supporting the CFI with a range of complementary measures designed to boost participation in the CFI. These measures include a Carbon Farming Futures Fund to support the development of new opportunities through research and the development of methodologies, an Indigenous Carbon Farming Fund to assist the participation of indigenous Australians in the CFI, and a Non-Kyoto Carbon Fund to help initiate the development of projects to produce ACCUs for voluntary markets.

Regulatory oversight

[31,950]

The Australian government remains responsible for climate change policy. The government will rely on the following new and existing statutory bodies to contribute to, and help reinforce the core aims of the government's policies:

- Clean Energy Regulator;
- Climate Change Authority Land Sector and Carbon Biodiversity Board;
- Productivity Commission;
- Australian Competition and Consumer Commission (ACCC); and
- Australian Securities and Investment Commission (ASIC).

CLEAN ENERGY REGULATOR

Commencement, historical background, amendments and regulations

[31,975]

The Clean Energy Regulator Act 2011 (Cth), Act No 163 of 2011 was passed 8 November 2011 and received Royal Assent 4 December 2011.

The Clean Energy Regulator Act 2011 (Cth) established the Clean Energy Regulator (the regulator) as a new statutory authority. The regulator commenced operation 2 April 2012.

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History of legislation:[36]

[31,975.05]

House of Representatives		
Introduced and read a first time	13/09/2011	
Second reading moved	13/09/2011	
Second reading debate	14/09/2011	
Second reading debate	15/09/2011	
Second reading debate	19/09/2011	
Second reading debate	20/09/2011	
Second reading debate	21/09/2011	
Second reading debate	11/10/2011	
Second reading agreed to	11/10/2011	
Consideration in detail debate	11/10/2011	
Consideration in detail debate	12/10/2011	Amendment details: 1 Government agreed to
Third reading agreed to	12/10/2011	
Third reading agreed to	12/10/2011	

Senate		
Introduced and read a first time	12/10/2011	
Second reading moved	12/10/2011	
Second reading debate	31/10/2011	
Second reading debate	01/11/2011	
Second reading debate	02/11/2011	
Second reading debate	03/11/2011	
Second reading agreed to	03/11/2011	
Committee of the Whole debate	03/11/2011	
Committee of the Whole debate	07/11/2011	
Committee of the Whole debate	08/11/2011	
Third reading agreed to	08/11/2011	

Text of bill as passed both Houses	08/11/2011

The second reading speech was made in the House of Representatives on 13 September 2011 by Mr Greg Combet AM MP, Minister for Climate Change and Energy Efficiency.[37]

Sections 1 and 2 of the Clean Energy Regulator Act 2011 (Cth) came into effect on the date of Royal Assent, 4 December 2012. Sections 3–57 came into effect at the same time as s 3 of the Clean Energy Act 2011 (Cth) commenced, 2 April 2012.

Notes

36 Source: Parliament of Australia, Bills of the 43rd Parliament: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4657%22.

37 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4657%22.

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Objects

[32,000]

The role of the regulator is to:

- educate about the carbon price mechanism;
- assess emissions data;
- allocate emissions units;
- operate the Australian National Registry of Emissions Units (registry);
- monitor, facilitate and enforce carbon liability compliance;
- administer the NGER Act, the RET and the CFI; and
- accredit auditors for the CFI and NGER Act.

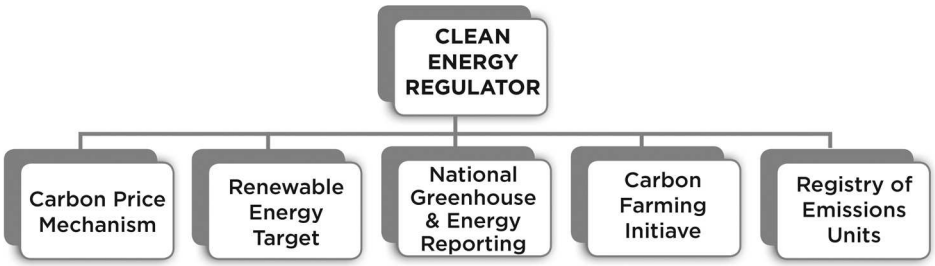
Introduction to the Clean Energy Regulator

[32,025]

The regulator was established because there was no single existing regulator in a position to provide the breadth of regulatory oversight required by the Clean Energy legislative package. Indeed, the establishment of the regulator sets the Australian emissions trading scheme apart from the EU ETS. This is because there is no separate regulator in the European Union that has similar functions to the Australian regulator.

The functions of the regulator are illustrated in Diagram 32,025-1.

DIAGRAM 32,025-1 — FUNCTIONS OF THE REGULATOR[38]



Although the Clean Energy Regulator Act 2011 (Cth) established the regulator, the regulator has functions conferred on it by or under climate change law,[39] including:

- Clean Energy Act 2011 (Cth);
- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth);
- National Greenhouse and Energy Reporting Act 2007 (Cth);
- Renewable Energy (Electricity) Act 2000 (Cth); and
- Australian National Registry of Emissions Units Act 2011 (Cth).

The Clean Energy Act 2011 (Cth) makes provision for certain functions and powers of the regulator.

Table 32,025–1 — Functions and powers of the regulator as set out in the Clean Energy Act 2011 (Cth)
The regulator's functions — Clean Energy Act 2011 (Cth), Pt 23, s 295
The functions of the regulator are to:
(a) monitor compliance with the Clean Energy Act 2011 (Cth) and associated provisions;

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(b) monitor the extent to which persons have taken steps, by way of the surrender of carbon units, to avoid being liable to pay unit shortfall charge;
(c) promote compliance with Clean Energy Act 2011 (Cth) and associated provisions;
(d) conduct and/or co-ordinate education programs about the Clean Energy Act 2011 (Cth) and associated provisions, as well as about emissions trading schemes;
(e) advise the Minister on the Clean Energy Act 2011 (Cth) and its associated provisions, as well as emissions trading schemes;
(f) advise and assist persons in relation to their obligations under the Clean Energy Regulator Act 2011 (Cth) and associated provisions;
(g) advise and assist persons in relation to the steps that can be taken, by way of the surrender of eligible emissions units, to avoid being liable to pay unit shortfall charge;
(h) advise and assist the representatives of persons to comply with the Clean Energy Act 2011 (Cth) and associated provisions;
(i) liaise with regulatory and other relevant bodies, in Australia and abroad, about co-operative arrangements for matters relating to the Clean Energy Act 2011 (Cth) and other emissions trading schemes;
(j) collect, analyse, interpret and disseminate statistical information relating to the operation of the Clean Energy Act 2011 (Cth).

Computerised decision-making — Clean Energy Act 2011 (Cth), Pt 23, s 296

The regulator may (in writing) arrange for the use of computer programs for any purposes for which the regulator may make a decision, exercise any power, comply with any obligation, or do any related thing.

Where such an arrangement is in place, then for the purposes of the Clean Energy Act 2011 (Cth) and the regulations, the regulator is taken to have made a decision, exercised a power or complied with an obligation, or done the related thing if it was made, exercised, complied with or done by the operation of a computer program.

Power to require further information — Clean Energy Act 2011 (Cth), Pt 23, s 297

If a person makes an application or a request to the regulator under the Clean Energy Act 2011 (Cth) and the regulator exercises a power to require the person to give the regulator further information, the regulator must ensure that the requested information is relevant to the matter to which the application or request relates and that the power is exercised in a reasonable way.

The regulator incorporates the existing regulatory functions of the Office of the Renewable Energy Regulator (ORER) and the Greenhouse and Energy Data Officer (GEDO), as well as some responsibilities of the Department of Climate Change and Energy Efficiency (DCCEE). Previously, the ORER administered the RET, the GEDO administered the NGER Act, and the DCCEE administered the Registry.

The establishment of the regulator represents significant regulatory consolidation. Inter alia, this consolidation is intended to:

- reduce the risk of conflicts or gaps emerging between multiple regulatory bodies;
- streamline procedures for reporting and surrender of emissions units; and
- reduce the administrative burden for businesses that would otherwise be required to deal with multiple regulators.

Notes

38 Source: Revised Explanatory Memorandum, Clean Energy Bill 2011 (Cth) p 7.

39 Section 4 of the Clean Energy Regulator Act 2011 (Cth) defines "climate change law" as:
(a) this Act or legislative instruments under this Act;
(b) the Clean Energy Act 2011 (Cth) or legislative instruments under that Act;
(c) the Clean Energy (Charges-Excise) Act 2011 (Cth) or legislative instruments under that Act;

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(d) the Clean Energy (Charges-Customs) Act 2011 (Cth) or legislative instruments under that Act;
(e) the Clean Energy (Unit Issue Charge-Auctions) Act 2011 (Cth) or legislative instruments under that Act;
(f) the Clean Energy (Unit Issue Charge-Fixed Charge) Act 2011 (Cth) or legislative instruments under that Act;
(g) the Clean Energy (Unit Shortfall Charge-General) Act 2011 (Cth) or legislative instruments under that Act;
(h) the Clean Energy (International Unit Surrender Charge) Act 2011 (Cth) or legislative instruments under that Act;
(i) the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) or legislative instruments under that Act;
(j) the National Greenhouse and Energy Reporting Act 2007 (Cth) or legislative instruments under that Act;
(k) the Renewable Energy (Electricity) Act 2000 (Cth) or legislative instruments under that Act;
(l) the Renewable Energy (Electricity) (Large-scale Generation Shortfall Charge) Act 2000 (Cth);
(m) the Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Act 2010 (Cth);
(n) the Australian National Registry of Emissions Units Act 2011 (Cth) or legislative instruments under that Act.

Administrative arrangement of the regulator

Constitution

[32,050]

The regulator is a body corporate with perpetual succession.[40] It may acquire, hold and dispose of real and personal property, and it may sue and be sued in its corporate name.[41]

The regulator has power to do all things necessary to carry out its functions.[42] This includes the power to enter into contracts.[43] Any contract entered into, any real or personal property held, and any money received by the regulator is done so on behalf of the Commonwealth. The regulator's financial liabilities are taken to be liabilities of the Commonwealth.

The regulator is required to have a seal, which must not be used except as authorised by the regulator. All courts, judges and persons acting judicially must take judicial notice of the imprint of the seal, and presume that a document under seal was duly sealed.

Notes

40 Clean Energy Regulator Act 2011 (Cth) s 16. In this regard, the authority is similar to the Climate Change Authority (authority) and the Reserve Bank of Australia (RBA). These are independent bodies established to advise the government on key (and potentially contentious) issues.

41 Clean Energy Regulator Act 2011 (Cth) ss 17–20.

42 Clean Energy Regulator Act 2011 (Cth) Divs 1–8.

43 Clean Energy Regulator Act 2011 (Cth) ss 12, 13 and 214.

Membership and appointment

[32,051]

The regulator consists of a Chair and at least two (but no more than four) other members. Each member is to be appointed by the Minister by written instrument. Members of the regulator are eligible for reappointment.

Ms Chloe Munro is the current Chair and Chief Executive Officer.

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Other members are Ms Jennie Granger, Dr Michael Sargent, Ms Anne T Brown and Ms Virginia Malley.

A person is not eligible for appointment unless the Minister is satisfied that the person has substantial experience and significant standing in at least one of the following fields:[44]

- economics;
- industry;
- energy production and supply;
- energy measurement and reporting;
- greenhouse gas emissions measurement and reporting;
- greenhouse gas abatement measures;
- financial markets;
- trading of environmental instruments;
- land resource management; and
- public administration.

The Chair holds office on a full-time basis. Other members may hold office on either a full-time or a part-time basis. A member of the regulator holds office for the period specified in the instrument of appointment, which must not exceed five years.

The Minister may appoint a person to act as the Chair during a vacancy in the office, or during any period when the Chair is absent from duty or from Australia, or is for any reason unable to perform the duties of the office. Likewise, the Minister may appoint a person to act as a member during a member vacancy (other than the Chair).

A person is not eligible for appointment to act as the Chair or to act as a member unless they are eligible for appointment as a member of the regulator.

Notes

44 This list differs from the relevant fields of knowledge required of members of the authority. This is because the regulator focuses on administration and enforcement, not policy development.

Membership remuneration and disclosure of interests

[32,052]

A member is to be paid remuneration as determined by the Remuneration Tribunal. If no determination is in operation, a member is to be paid the remuneration prescribed in the regulations.[45]

A member must give written notice to the Minister of all interests, pecuniary or otherwise, that the member has or acquires and that conflict or could conflict with the proper performance of the role.[46]

A member must also disclose to a meeting of the regulator any interest, pecuniary or otherwise, in a matter being considered or about to be considered by the regulator. The disclosure must be made as soon as possible, and the disclosure must be recorded in the minutes of the meeting. Unless the regulator otherwise determines, the member must not be present during or take part in any deliberation on the matter.[47]

Notes

45 Clean Energy Regulator Act 2011 (Cth) s 21.

46 Clean Energy Regulator Act 2011 (Cth) s 22.

47 Clean Energy Regulator Act 2011 (Cth) s 23.

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Employment and leave of absence

[32,053]

A full-time member must not engage in paid employment outside the role without the Minister's approval. A part-time member must not engage in paid employment that conflict or may conflict with the proper performance of the role.[48]

A full-time member has recreation leave entitlements as determined by the Remuneration Tribunal. The Minister may grant leave of absence, other than recreation leave, to a full-time member on terms and conditions that the Minister determines. Likewise, the Chair may grant leave of absence to a part-time member on terms and conditions that the Chair determines.[49]

Notes

48 Clean Energy Regulator Act 2011 (Cth) s 24.

49 Clean Energy Regulator Act 2011 (Cth) s 25.

Resignation and termination

[32,054]

A member of the regulator may resign (in writing) to the Minister. The resignation takes effect on the day it is received, or if a later day is specified in the resignation, on that later day.[50]

The Minister may terminate the appointment of a member for misbehaviour or physical or mental incapacity.[51] The Minister may do this if:

- the member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors;
- a full-time member engages (except with the Minister's approval) in paid employment outside the duties of the office;
- a part-time member engages in paid employment that conflicts or may conflict with the proper performance of the role;
- the member fails, without reasonable excuse, to comply with disclosure of interests;
- the member is absent (except on leave of absence) from three consecutive meetings.

Notes

50 Clean Energy Regulator Act 2011 (Cth) s 26.

51 Clean Energy Regulator Act 2011 (Cth) ss 27–28.

Decision-making by the regulator

[32,055]

The regulator is to hold such meetings as are necessary for the performance of its functions.[52] The Chair may convene a meeting at any time. The Chair presides at all meetings at which they are present.[53] If the Chair is not present, the members who are present must appoint one of themselves to preside.

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Two members of the regulator constitute a quorum.[54] A question is decided by a majority of the votes of members present and voting.[55] The person presiding has a deliberative vote and, in the event of an equality of votes, also has the casting vote.

The regulator must keep minutes of its meetings.[56]

Notes

52 Clean Energy Regulator Act 2011 (Cth) s 29.

53 Clean Energy Regulator Act 2011 (Cth) s 30.

54 Clean Energy Regulator Act 2011 (Cth) s 31.

55 Clean Energy Regulator Act 2011 (Cth) s 32.

56 Clean Energy Regulator Act 2011 (Cth) s 34.

Delegation

[32,056]

The regulator may delegate in writing any or all of its functions and powers to:[57]

- a member of the regulator;
- a person who is a member of the regulator's staff and is an SES employee or acting SES employee;
- a person who is a member of the regulator's staff and is an APS employee who performs the duties of an Executive Level 2 position;
- a person who is assisting the regulator and is an SES employee or acting SES employee in the Department;
- a person who is assisting the regulator and is an APS employee who performs the duties of an Executive Level 2 position in the Department.

A delegate must comply with written directions from the regulator.

Notes

57 Clean Energy Regulator Act 2011 (Cth) s 35.

Staff of the regulator

[32,057]

The Chair and the staff of the regulator together constitute a statutory agency.

The staff of the regulator are engaged under the Public Service Act 1999.[58] The regulator may also be assisted:[59]

- by employees of government agencies;
- by employees of authorities of the Commonwealth;
- by employees of a state or territory; and
- by employees of authorities of a state or territory.

In addition, the regulator may engage consultants on terms and conditions that the regulator determines in writing.[60]

Notes

58 Clean Energy Regulator Act 2011 (Cth) s 36.

59 Clean Energy Regulator Act 2011 (Cth) s 37.

60 Clean Energy Regulator Act 2011 (Cth) s 38.

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Corporate plan and annual report

[32,058]

The regulator must prepare and submit to the Minister a corporate plan at least once every three years.[61] The regulator must ensure that the first corporate plan is prepared within 12 months after beginning operations.

The plan must cover a three-year period and include:

- the objectives of the regulator;
- the strategies and policies to be followed in order to achieve those objectives; and
- other matters required by the Minister.

The Chair must keep the Minister informed about changes to the plan and matters that might affect the achievement of the objectives. The Minister may give the Chair written guidelines, however such guidelines are not a legislative instrument.

The regulator must, as soon as practicable after the end of each financial year, submit to the Minister an annual report on its operations for presentation to the Parliament.[62] The report must describe the objectives of the regulator and assess the extent to which the regulator has achieved those objectives.

This annual report is in addition to the report under s 105 of the Renewable Energy (Electricity) Act 2000 (Cth). If the report under the Renewable Energy (Electricity) Act is for the calendar year, then the annual report for the financial year ending on 30 June after the end of the calendar year need not deal comprehensively with the working of the Renewable Energy (Electricity) Act during any calendar overlap; however, it must include a summary of the renewable energy report, to the extent to which it deals with the working of the Renewable Energy (Electricity) Act during the calendar overlap.

Notes

61 Clean Energy Regulator Act 2011 (Cth) s 39.

62 Clean Energy Regulator Act 2011 (Cth) s 40.

Independence

[32,059]

The independence of the regulator is demonstrated by the limited scope for Ministerial directions.

As with other regulators, such as the Australian Securities and Investments Commission (ASIC), the regulator is subject to ministerial direction on general matters only. This approach ensures that the regulator is accountable to the Minister while preventing the Minister from intervening in specific instances.

The Minister may, by legislative instrument, give directions to the regulator in relation to the performance of its functions and the exercise of its powers. A Ministerial direction to the regulator has the status of a legislative instrument. This means directions must be tabled in parliament and incorporated into the Federal Register of Legislative Instruments. It should be noted that s 42 (disallowance) and Pt 6 (sunsetting) of the Legislative Instruments Act 2003 (Cth) do not apply to the direction.[63]

A direction must be of a general nature only, and must not be inconsistent with the objects of the:

- Clean Energy Act 2011 (Cth);
- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth);

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- National Greenhouse and Energy Reporting Act 2007 (Cth); or
- Renewable Energy (Electricity) Act 2000 (Cth).

To avoid doubt, the Chair is not subject to direction by the regulator in relation to the Chair's performance of functions, or exercise of powers, under the Financial Management and Accountability Act 1997 (Cth) or the Public Service Act 1999 (Cth).

Notes

63 Legislative Instruments Act 2003 (Cth) ss 44 and 54.

Secrecy

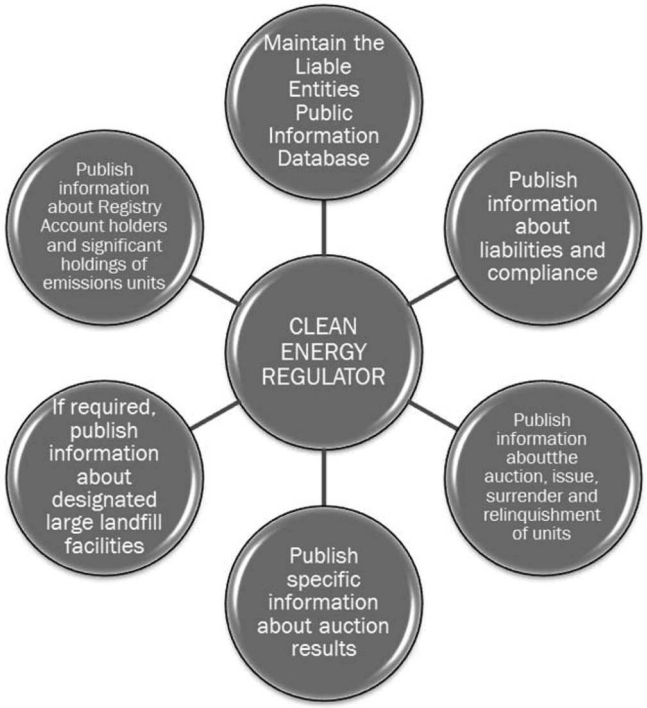
[32,075]

The regulator has extensive information gathering powers (discussed in chapter six).

The regulator also has responsibilities for publishing information about its operations, emissions units and liable entities. The disclosure responsibilities (including for the Liable Entities Public Information Database (LEPID) under s 186 of the Clean Energy Act 2011 (Cth)) are outlined in Diagram 32,075-1.

The regulator is subject to the secrecy requirements (Pt C of the Clean Energy Regulator Act 2011 (Cth)) that apply to government departments and agencies.

DIAGRAM 32,075-1 — THE REGULATOR'S OBLIGATION TO PUBLISH INFORMATION[64]



The Clean Energy Act 2011 seeks to ensure that information is not disclosed unnecessarily or put to unauthorised use. Personal information collected under Pt 3 is subject to the Privacy Act 1988.

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A person commits an offence if they are or have been, an official of the regulator and they obtain protected information in their capacity as an official of the regulator and then either disclose the information to another person or use the information.[65]

The penalty is imprisonment for two years or 120 penalty units, or both.

There are two exceptions to the prohibition, which are when:

- the disclosure or use is authorised by a provision of Pt 3 of the Clean Energy Regulator Act 2011; or
- the disclosure or use is in compliance with a requirement under a Commonwealth or a state or territory law.

Except where it is necessary to do so for the purposes of giving effect to a climate change law, an official of the regulator is not to be required to produce to a court or tribunal a document containing protected information, or to disclose protected information.

Notes

64 Source: Clean Energy Bill 2011 (Cth), Explanatory Memorandum at 248.

65 Clean Energy Regulator Act 2011 (Cth) s 43.

Disclosure to Ministers and Secretaries

[32,076]

An official of the regulator may disclose or use protected information if it is for the purposes of:

- a climate change law;
- the performance of the regulator's functions under a climate change law;
- the official's employment or service as an official of the regulator[66]

An official of the regulator may disclose protected information to the Minister.[67]

An official may also disclose protected information to another minister if the Minister is responsible for administering a program, or collecting statistics, relating to greenhouse gas emissions, energy consumption and energy production (as defined within the meaning of the NGER Act).

An official of the regulator may disclose protected information to a person employed under ss 13 or 20 of the Members of Parliament (Staff) Act 1984 (Cth).

An official of the regulator may disclose protected information in writing to the Secretary or an officer of the Department who is authorised by the Secretary if the disclosure is for the purposes of:

- advising the Minister;
- facilitating the monitoring of Australia's compliance with its international obligations under an international climate change agreement; or
- facilitating the development of an international agreement that relates to climate change.[68]

If a minister is responsible for administering a program or collecting statistics relating to greenhouse gas emissions, energy consumption and energy production (within the meaning of the NGER Act), an official of the regulator may disclose protected information to:

- the Secretary of the Department administered by that Minister; and
- an officer of that Department who is authorised in writing by that Secretary

if the disclosure is for the purposes of advising that Minister, administering that program, or collecting those statistics.

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Notes

66 Clean Energy Regulator Act 2011 (Cth) s 44.

67 Clean Energy Regulator Act 2011 (Cth) s 45.

68 Clean Energy Regulator Act 2011 (Cth) s 46.

Disclosure for methodology development

[32,077]

To assist CFI methodology development protected information may be disclosed or used seven years after the information was provided to the regulator. This applies to information provided as a part of a project declaration or a methodology determination.

The regulator may disclose or use protected information that relates to a particular offsets project if:

- under s 27 of the CFI Act, the regulator has declared the offsets project to be an eligible offsets project;
- more than seven years have passed since the application was made for the declaration under the CFI Act;
- the information was contained in the application, given in connection with the application, or contained in an offsets report about the project; and
- the disclosure is for the purposes of facilitating the development of one or more methodology determinations[69] and/or one or more proposals for methodology determinations.[70]

The regulator may disclose or use protected information if:

- the information was contained in an application under s 108 of the CFI Act for endorsement of a specified proposal for a methodology determination, or contained in an application under s 116 for endorsement of a specified proposal for the variation of a methodology determination;
- more than seven years have passed since the application was made; and
- the disclosure is for the purposes of facilitating the development of one or more methodology determinations and/or one or more proposals for methodology determinations.

Notes

69 Section 4 of the Clean Energy Regulator Act 2011 (Cth) defines "methodology determination" to have the same meaning as in the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth).

70 Clean Energy Regulator Act 2011 (Cth) s 47.

Disclosure to a Royal Commission

[32,078]

An official of the regulator may disclose protected information to a Royal Commission.[71] The Chair may impose conditions in writing in relation to this disclosure. These conditions are not to be considered a legislative instrument.

Notes

71 Clean Energy Regulator Act 2011 (Cth) s 48.

Disclosure to certain agencies, bodies and persons

[32,079]

If an official of the regulator is authorised in writing by the Chair, the official may

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disclose that protected information to any of the following agencies, bodies or persons where the Chair is satisfied that particular protected information will assist that agency, body or persons:[72]

(a) the Australian Bureau of Statistics;
(b) the Australian Communications and Media Authority;
(c) the Australian Competition and Consumer Commission;
(d) the Australian Prudential Regulation Authority;
(e) the Australian Securities and Investments Commission;
(f) the National Competition Council;
(g) the Productivity Commission;
(h) the Australian Energy Regulator;
(i) the Australian Statistician;
(j) the Commissioner of Taxation;
(k) the Australian Competition Tribunal;
(l) the Director of Public Prosecutions;
(m) the Australian Transaction Reports and Analysis Centre;
(n) the Reserve Bank of Australia;
(o) Australian Energy Market Operator Limited;
(p) the Australian Energy Market Commission established under the Australian Energy Market Commission Establishment Act 2004 (SA);
(q) the Independent Market Operator established under the Electricity Industry (Independent Market Operator) Regulations 2004 (WA);
(r) Low Carbon Australia Limited;
(s) the Climate Change Authority;
(t) the Land Sector Carbon and Biodiversity Board and the Energy Security Council;
(u) the Chief Executive Officer of Customs;
(v) a state/territory government body whose functions include a function that corresponds to a function of the regulator;
(w) a prescribed State/Territory government body;
(x) a prescribed international climate change body;
(y) a prescribed professional disciplinary body;
(z) a person or body responsible for the administration of a scheme that involves the issue or registration of prescribed eligible carbon units or prescribed international units.

The Chair may impose conditions to be complied with in relation to the information disclosed.

A person commits an offence if the person is subject to such conditions and the person's conduct breaches the condition.

The penalty is imprisonment for two years or 120 penalty units, or both.

Notes

72 Clean Energy Regulator Act 2011 (Cth) s 49.

Disclosure to certain financial bodies

[32,080]

If an official of the regulator is authorised in writing by the Chair, the official may disclose protected information to a body corporate, if the Chair is satisfied that particular protected information will enable or assist that body corporate and it:

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- conducts, or is involved in the supervision of, a financial market or is a body corporate that holds an Australian CS facility licence;[73] or
- is specified in the regulations to monitor compliance with, enforce, or perform functions or exercise powers under the Corporations Act 2001 (Cth), the business law of a state or territory, the business law of a foreign country or the operating rules (if any) of the body corporate.[74]

The Chair may impose conditions to be complied with by the body corporate and its officers, employees and agents in relation to the disclosure.

A person commits an offence if they are subject to such a condition and their conduct breaches the condition.

The penalty is imprisonment for two years or 120 penalty units, or both.

There are also penalties for secondary disclosure and use. A person commits an offence if the person is a body corporate or an officer, employee or agent of a body corporate that has received disclosure of protected information and the person discloses the information to another person or uses the information without the consent of the Chair of the regulator or other than for the purpose of monitoring compliance with, enforcing, or performing functions or exercising powers under the Corporations Act 2001 (Cth), the business law of a State or Territory, the business law of a foreign country, or the operating rules (if any) of the body corporate.

The penalty is imprisonment for two years or 120 penalty units, or both.

Notes

73 "Australian CS facility licence", "financial market", "officer" and "operating rules" have the same meaning as defined in the Corporations Act 2001 (Cth).

74 Clean Energy Regulator Act 2011 (Cth) s 50.

Disclosure for other reasons

[32,081]

An official of the regulator may disclose protected information that relates to the affairs of a person if the person has consented to the disclosure and the disclosure is in accordance with that consent.[75]

An official may disclose protected information if the official believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of an individual, and the disclosure is for the purposes of preventing or lessening that threat.[76]

An official may also disclose protected information if it has already been lawfully made available to the public.[77]

An official of the regulator may disclose summaries of protected information and statistics derived from protected information (if the information is not likely identify a person).[78]

Notes

75 Clean Energy Regulator Act 2011 (Cth) s 51.

76 Clean Energy Regulator Act 2011 (Cth) s 52.

77 Clean Energy Regulator Act 2011 (Cth) s 53.

78 Clean Energy Regulator Act 2011 (Cth) s 54.

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Disclosure for purposes of law enforcement

[32,082]

If the Chair is satisfied that disclosure of particular protected information is reasonably necessary for the enforcement of the criminal law, the enforcement of a law imposing a pecuniary penalty, or protection of the public revenue, the Chair may disclose that protected information to a department, agency or authority of the Commonwealth, state and territory, or an Australian police force (whose functions include enforcement or protection, for the purposes of that enforcement or protection). Likewise, if an official of the regulator is authorised in writing by the Chair, the official may disclose protected information to the same authorities.[79]

A person commits an offence if:

- the person is, or has been, an employee or officer of a department, agency or authority of the Commonwealth, a state or a territory, or an Australian police force;
- protected information has been disclosed to the department, agency, authority or police force;
- the person has obtained the information in the person's capacity as an employee; and
- the person discloses the information to another person or uses the information without the consent of the Chair, or other than for the purpose of enforcing the criminal law, enforcing a law imposing a pecuniary penalty, or protecting public revenue.

The penalty is imprisonment for two years or 120 penalty units, or both.

Notes

79 Clean Energy Regulator Act 2011 (Cth) s 55.

Delegation

[32,083]

The Chair may delegate any or all of the functions of their role to another member of the regulator.[80]

A delegate must comply with any written directions of the Chair.

Notes

80 Clean Energy Regulator Act 2011 (Cth) s 56.

Regulation

[32,084]

The Governor-General may make regulations prescribing matters required or permitted by the Clean Energy Regulator Act 2011 (Cth), or as necessary for carrying out the Act.[81]

Notes

81 Clean Energy Regulator Act 2011 (Cth) s 57.

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AUSTRALIAN CLIMATE CHANGE AUTHORITY

Commencement, historical background, amendments and regulations

[32,100]

The Climate Change Authority Act No 143 of 2011 (Cth) was passed 8 November 2011 and received Royal Assent, 29 November 2011.

The Climate Change Authority Act 2011 (Cth) established the Climate Change Authority (authority) and the Land Sector Carbon and Biodiversity Board (LSCB Board).

The second reading speech was made in the House of Representatives on 13 September 2011 by Mr Greg Combet AM MP, Minister for Climate Change and Energy Efficiency.[82]

Notes

82 The second reading speech may be found at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4663%22.

Objects

[32,125]

The authority is an independent body established:

- to advise on aspects of the Clean Energy laws — in particular the carbon price and the CFI;
- to review Australia's national emissions targets and annual pollution caps;
- to advise the government, although it should be remembered that final decisions remain the prerogative of the government.

The authority commences operation 1 July 2012.

Introduction to the Climate Change Authority

[32,150]

The creation of the independent authority is one of the important pieces of the Clean Energy legislative package that was not a part of the previous Carbon Pollution Reduction Scheme (CPRS). The government's intentions are to ensure best practice governance of the most critical decisions in relation to Australia's clean energy future.

The authority has three key functions. These are to:

- recommend future pollution caps;
- recommend the indicative national trajectory and emissions budget; and
- advise on meeting national emissions reduction targets.

Additionally, the authority is mandated to review the following Acts:

- Clean Energy Act 2011 (Cth);
- Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth);
- National Greenhouse and Energy Reporting Act 2011 (Cth);
- Renewable Energy (Electricity) Act 2000 (Cth); and
- Climate Change Authority Act 2011 (Cth).

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The authority is directed in performing its functions to have regard to the principle that any measures to respond to climate change should:[83]

(a) be economically efficient;[84]
(b) be environmentally effective;[85]
(c) be equitable;
(d) be in the public interest;
(e) take account of the impact on households, business, workers and communities;
(f) support the development of an effective global response to climate change; and
(g) be consistent with Australia's foreign policy and trade objectives.

Notes

83 Climate Change Authority Act 2011 (Cth) s 12. The authority may also have regard to any other principles the authority considers relevant.

84 The Explanatory Memorandum, Climate Change Authority Bill 2011 (Cth) at [1.30] suggests that "economically efficient" refers to "measures which are cost-effective and support informed and efficient investment decisions".

85 The Explanatory Memorandum, Climate Change Authority Bill 2011 (Cth) at [1.31] states that "environmentally effective" means measures are to be informed by science and able to achieve Australia's environmental objectives. The measurement of emissions, sequestration and abatement should have scientific integrity to deliver an environmentally effective outcome.

Administrative arrangement of the Climate Change Authority

[32,160]

The authority enjoys the privileges and immunities of the Crown in right of the Commonwealth.[86]

Notes

86 Climate Change Authority Act 2011 (Cth) s 15.

Powers and liabilities

[32,160.5]

The authority is granted the power to do all things necessary or convenient to be done for the performance of its functions.[87]

The powers of the authority include the power to enter into contracts.[88] Any contract entered into, personal property held by, or money received by the authority, is done so on behalf of the Commonwealth.

Financial liabilities of the authority are liabilities of the Commonwealth.[89]

Notes

87 Climate Change Authority Act 2011 (Cth) s 13(1).

88 Climate Change Authority Act 2011 (Cth) s 13(2). The Chief Executive Officer of the authority may also enter into contracts on behalf of the Commonwealth: Financial Management and Accountability Act 1997 (Cth) s 44.

89 Climate Change Authority Act 2011 (Cth) s 14(1).

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Constitution

[32,160.10]

The authority is a body corporate with perpetual succession.[90] It may acquire, hold and dispose of real and personal property, and it may sue and be sued in its corporate name.

The authority is required to have a seal, which must not be used except as authorised by the authority. All courts, judges and persons acting judicially must take judicial notice of the imprint of the seal, and presume that a document under seal was duly sealed.

Notes

90 Climate Change Authority Act 2011 (Cth) s 16(1).

Membership of authority

[32,160.15]

Membership of the authority consists of the Chair, the Chief Scientist and seven other members.[91]

The Chair is Mr Bernie Fraser. The Chief Scientist is Professor Ian Chubb AC. Authority members are Dr Lynn Williams, Mr John Marley, Professor David Karoly, Ms Heather Ridout, Professor Clive Hamilton, Ms Elana Rubin and Professor John Quiggan.

Each member is (with the exception of the Chief Scientist) appointed by the Climate Change Minister. To be eligible for appointment (other than to the role of Chief Scientist) the Climate Change Minister must be satisfied that the person has substantial experience or knowledge and significant standing in at least one of the following fields:[92]

- climate science;
- economics (including environmental economics);
- industry;
- social policy;
- technology development and adoption;
- employment policy;
- energy production and supply;
- greenhouse gas emissions measurement and reporting;
- greenhouse gas abatement measures;
- financial markets and investment;
- trading of environmental instruments;
- land resource management;
- environmental management; and
- public administration.

An authority member (other than the Chief Scientist) holds office on either a full-time or a part-time basis. The Chief Scientist holds office on a part-time basis. It is possible for the Chief Executive Officer (CEO) of the authority to also be the Chair. All members of the authority (with the exception of the Chief Scientist) hold office for the period specified in the instrument of appointment, which must not exceed five years.

Notes

91 Climate Change Authority Act 2011 (Cth) s 17.

92 Climate Change Authority Act 2011 (Cth) s 18(2).

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Acting authority members

[32,160.20]

The Climate Change Minister may appoint a person (other than the Chief Scientist) to act as the Chair of the authority:

- during a vacancy in the office of the Chair; or
- during any period when the Chair is absent from duty or Australia, or is, for any reason, unable to perform the duties of the office.

Likewise, the Climate Change Minister may appoint a person (other than the Chief Scientist) to act as a member of the authority:

- during a vacancy in the office of a member of the authority (other than the Chair), whether or not an appointment has previously been made to the office; and
- during any period when a member of the authority (other than the Chair) is absent from duty or Australia, or is, for any reason, unable to perform the duties of the office.

It should be noted that a person is not eligible for appointment to act as the Chair or act as an authority member if they do not qualify for appointment as an authority member.

Associate authority members

[32,160.25]

The Climate Change Minister by written instrument may appoint an unlimited number of authority associate members for a specified review, provided that the Climate Change Minister must ensure that only one associate member of the authority is appointed for any particular review.[93]

To be eligible for appointment, the Climate Change Minister must be satisfied that the person has substantial experience or knowledge in the same fields as outlined in membership criteria for members of the authority.

An associate member may be appointed on a full-time of a part-time basis. The associate member holds office until either the end of the day of the completion of the report of the specified review, or for the period stated in the instrument of appointment.

Notes

93 Climate Change Authority Act 2011 (Cth) s 23.

Deputy of the Chief Scientist

[32,160.30]

The Chief Scientist may appoint (and terminate) a Senior Executive Service (SES) employee to be his or her deputy at meetings of the authority. A deputy of the Chief Scientist may resign his or her appointment with a written notice to the Chief Scientist.

If a person is the deputy of the Chief Scientist for the purposes of attendance at a particular meeting when the Chief Scientist is absent, the person is to be taken to be a member of the authority. However, a deputy of the Chief Scientist is not entitled to any remuneration or allowances for attending a meeting of the authority (other than in his or her capacity as an SES employee).

Remuneration of members and associate members

[32,160.35]

Subject to the Remuneration Tribunal Act 1973 (Cth), authority members (other than

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the Chief Scientist) and associate authority members are to be paid the remuneration determined by the Remuneration Tribunal, or if there is no determination by the Tribunal, the remuneration prescribed in the regulations.[94]

Notes

94 Climate Change Authority Act 2011 (Cth) s 25.

Disclosure of interests

[32,160.40]

A member or associate member must give written notice to the Climate Change Minister in relation to all interests, pecuniary or otherwise, that they have or acquire and that conflict or could conflict with their proper performance as an authority representative.[95]

An authority member or associate authority member who has an interest, pecuniary or otherwise, in a matter being considered or about to be considered by the authority must also disclose the nature of the interest to a meeting of the authority. This disclosure must occur as soon as possible, and must be recorded in the minutes of the relevant meeting. The member or associate member must not be present during or participate in any deliberation by the authority when making a determination about the disclosure of interests.[96]

Notes

95 Climate Change Authority Act 2011 (Cth) s 26.

96 Climate Change Authority Act 2011 (Cth) s 27.

Other employment and leave of absence

[32,160.45]

Full-time members and associate members must not engage in paid employment outside the duties of their office without the Climate Change Minister's approval.[97] Part-time members and associate members must not engage in any paid employment that conflict or may conflict with the proper performance of their role.[98]

Full-time members and associate members have recreation leave entitlements determined by the Remuneration Tribunal. The Climate Change Minister may grant leave of absence to a full-time member or associate member on remuneration and terms and conditions determined by the Climate Change Minister. Likewise, the Chair may grant leave of absence to a part-time members (other than the Chief Scientist) and associate members on the terms and conditions determined by the Chair.[99]

Notes

97 Climate Change Authority Act 2011 (Cth) s 28(1).

98 Climate Change Authority Act 2011 (Cth) s 28(2).

99 Climate Change Authority Act 2011 (Cth) s 29.

Resignation and termination of appointment

[32,160.50]

A member (other than the Chief Scientist) or associate member may resign in writing to the Climate Change Minister.[100] The resignation takes effect on the day it is received or, if a later day is specified in the resignation, on that later day.

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However, a member of the authority may be removed from office only in limited circumstances. The Climate Change Minister may terminate the appointment of a member (other than the Chief Scientist) or associate member for misbehaviour or physical or mental incapacity. This may occur if:[101]

- the member or associate member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or compounds with creditors, or makes an assignment of remuneration for the benefit of creditors;
- the full-time member or associate member engages, except with the Climate Change Minister's approval, in paid employment outside the duties of the role;
- the part-time member or associate member engages in paid employment that conflicts or may conflict with the proper performance of the duties of the role;
- the member or associate member fails, without reasonable excuse, to disclose interests; or
- the member or associate member is absent (excluding leave of absence) from three consecutive authority meetings.

Notes

100 Climate Change Authority Act 2011 (Cth) s 30.

101 Climate Change Authority Act 2011 (Cth) s 31.

Meetings

[32,160.55]

The Chair may convene a meeting at any time.[102] The Chair presides at all meetings at which he or she is present.[103] If the Chair is not present, the members present must appoint one of themselves to preside.

Five authority members constitute a quorum at meetings of the authority.[104]

Notes

102 Climate Change Authority Act 2011 (Cth) s 33.

103 Climate Change Authority Act 2011 (Cth) s 34.

104 Climate Change Authority Act 2011 (Cth) s 35.

Participation by Associate members

[32,160.60]

An associate member is entitled to attend and participate in a meeting when the meeting is considering a matter connected with a review relevant to their appointment, or when assisting the Climate Change Minister prepare a response to recommendations set out in a relevant review.[105]

Notes

105 Climate Change Authority Act 2011 (Cth) s 36.

Voting

[32,160.65]

At an authority meeting, a question is decided by a majority of the votes of the members and the associate members (if the question relates to a matter connected with a

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review specified in their instruments of appointment, or the associate members are assisting the Climate Change Minister prepare a response to recommendations set out in relevant review).[106]

The person presiding at a meeting has a deliberative vote and, in the event of equal votes, the casting vote.

Minutes of all meetings must be kept.[107]

Notes

106 Climate Change Authority Act 2011 (Cth) s 37.

107 Climate Change Authority Act 2011 (Cth) s 39.

Delegation

[32,160.70]

The authority may (in writing) delegate any or all of its functions and powers to:[108]

- the CEO;
- a member or associate member;
- an authority staff member who is also an SES employee;
- an authority staff member who is also an Australian Public Service (APS) employee who performs the duties of an Executive Level 2 position;
- an SES employee or an acting SES employee in the Climate Change Department; or
- an APS employee in the Climate Change Department who performs the duties of an Executive Level 2 position.

A delegate must comply with any written directions of the authority.[109]

The authority must not delegate a function or power to an associate member unless it relates to the review specified in their instrument of appointment, or they are assisting the Climate Change Minister prepare a response to recommendations in a relevant review.[110]

Notes

108 Climate Change Authority Act 2011 (Cth) s 40.

109 Climate Change Authority Act 2011 (Cth) s 40(2).

110 Climate Change Authority Act 2011 (Cth) s 40(3).

Role and appointment of CEO

[32,160.75]

The Chief Executive Officer (CEO) of the authority is Ms Anthea Harris.

The CEO is responsible for the day-to-day administration of the authority, but must act in accordance with the policies determined, and any directions given, by the authority.[111] The CEO has power to do all things necessary or convenient to be done for or in connection with the performance of her duties.

The CEO is appointed by written instrument by the Climate Change Minister (after consultation with the authority).[112] The position of CEO is a full-time position to be held for a maximum of five years.

The Climate Change Minister may appoint (through written instrument) a person to act as the CEO during a vacancy in the office of the CEO when the CEO is absent from duty or from Australia, or is for any reason unable to perform the duties of the office.[113]

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Notes

111 Climate Change Authority Act 2011 (Cth) s 42.

112 Climate Change Authority Act 2011 (Cth) s 43.

113 Climate Change Authority Act 2011 (Cth) s 44.

Employment of CEO, staff and consultants

[32,160.80]

The Climate Change Authority Act 2011 (Cth) makes provision for the terms and conditions of employment of the CEO, for staff of the authority and other persons and consultants who may assist the authority.

CEO

The CEO must not engage in paid employment outside the duties of the role without the approval of the Climate Change Minister.[114] The Climate Change Minister may grant the CEO leave of absence on the terms and conditions determined by the Climate Change Minister determines.[115]

The CEO is to be paid the remuneration and recreational leave entitlements determined by the Remuneration Tribunal or if there is no such determination, the CEO is to be paid the remuneration prescribed in the regulations.[116]

The CEO must give written notice to the Climate Change Minister and the authority of all interests, pecuniary or otherwise, that the CEO has or acquires and that conflict or could conflict with the proper performance of the role.[117]

The CEO may resign through a written resignation to the Climate Change Minister. The resignation takes effect on the day it is received, or on the day specified in the resignation.[118] The authority must notify the Climate Change Minister if the CEO resigns.

The Climate Change Minister, after consulting the authority, may terminate the appointment of the CEO for misbehaviour or physical or mental incapacity, and also if the CEO:

- becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors, or makes an assignment of remuneration for the benefit of his or her creditors;
- is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;
- fails, without reasonable excuse, to disclose interests; or
- engages, except with the approval of the Climate Change Minister, in paid employment outside the duties of the role office.

Authority staff

Staff of the authority are defined as persons engaged under the Public Service Act 1999 (Cth). The CEO and the authority staff together constitute a Statutory Agency.[119]

The authority may be assisted:

- by officers and employees of other agencies;
- by officers and employees of authorities of the Commonwealth;
- by officers and employees of a state or territory; and
- by officers and employees of authorities of a state or territory whose services are made available to the authority.[120]

The authority may also engage consultants on terms and conditions that the authority determines in writing.[121]

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Notes

114 Climate Change Authority Act 2011 (Cth) s 45.

115 Climate Change Authority Act 2011 (Cth) s 47(2).

116 Climate Change Authority Act 2011 (Cth) ss 46, 47(1).

117 Climate Change Authority Act 2011 (Cth) s 48.

118 Climate Change Authority Act 2011 (Cth) s 49.

119 Climate Change Authority Act 2011 (Cth) s 52.

120 Climate Change Authority Act 2011 (Cth) s 53.

121 Climate Change Authority Act 2011 (Cth) s 54.

Corporate plan

[32,165]

The authority is required to prepare a corporate plan at least once every three years, outlining its objectives, strategies and policies. The authority has a similar role to the Committee on Climate Change in the United Kingdom: see Box 32,150-1.

Box 32,150-1 — The United Kingdom's Climate Change Committee

The United Kingdom's Climate Change Committee is an independent body established under Pt 2 of the Climate Change Act 2008 (UK).

The functions of the Climate Change Committee are to:

- advise on the level of the 2050 target;
- advise on the carbon budget;
- report on progress;
- advise on emissions from international aviation and shipping; and
- advise on other areas upon request.[122]

The Climate Change Act 2008 (UK) requires the United Kingdom to reduce emissions by at least 80 per cent by 2050 compared to 1990 levels, and has helped to shape the United Kingdom's approach to climate change. For example, in 2008, the UK Parliament raised the national emissions reduction target from 60 per cent to 80 per cent in response to recommendations from the Climate Change Committee. Furthermore, in December 2008 the Climate Change Committee outlined the United Kingdom's first three carbon budgets, as well as the 2050 emissions reduction target, and this advice was accepted and legislated by the UK Parliament. The latest (2010) report outlines the United Kingdom's fourth carbon budget.

The Climate Change Committee is required to report on its activities, objectives and priorities. To date it has published three corporate plans, the latest of which is Corporate Plan 2011–2014.

The Climate Change Act 2008 (UK) also established the Adaptation Sub-Committee as a sub-committee of the Climate Change Committee. The purpose of the Adaptation Sub-Committee is to help the United Kingdom prepare for and adapt to the impacts of climate change. There are similarities between the Adaptation Sub-Committee and Australia's Land Sector Carbon and Biodiversity Board.

The authority must ensure that the first corporate plan is prepared within 12 months after beginning operations.

The Chair must keep the Climate Change Minister informed about changes to the plan and matters that might significantly affect the achievement of the authority's objectives.

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Notes

122 Climate Change Act 2008 (UK) ss 33–38.

Annual report

[32,170]

The authority must, as soon as practicable after the end of each financial year, report to the Climate Change Minister on its operations during that year.[123] This must include an assessment of the extent to which the authority achieved its objectives.

Notes

123 Climate Change Authority Act 2011 (Cth) s 56.

Reviews by the authority

[32,175]

The authority is to carry out reviews as specified in the Climate Change Authority Act 2011 (Cth): see Table 32,175-1.

Table 32,175-1 — Reviews to be conducted by the Climate Change Authority

Clean Energy Act 2011 (Cth)	The authority will periodically review the carbon pricing mechanism. The first review must be completed before 31 December 2016 and the second before 31 December 2018. Subsequent reviews must be conducted within five years of the previous deadline. The authority will review the pollution caps, the indicative national emissions trajectory and the carbon budget. The first review is to be completed by 28 February 2014 and the second by 28 February 2016. Subsequent reviews will be undertaken annually and will be completed by 28 February each year. The authority will also review Australia's progress towards meeting emissions reduction targets and the national carbon budget. The first review is to be completed by 28 February 2014, and subsequent reviews are to be completed annually.
National Greenhouse and Energy Reporting Act 2007 (Cth)	The authority will conduct periodic reviews of the National Greenhouse and Energy Reporting Act 2007 (Cth). The first review will be completed before 31 December 2018 (but not before 30 June 2016) and the second by 31 December 2023. Subsequent reviews will be completed within five years of the last review.

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Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)	The authority will conduct periodic reviews of the operation of the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth). The first review will be completed by 31 December 2014. Subsequent reviews will be conducted every three years.
Renewable Energy (Electricity) Act 2000 (Cth)	The authority will conduct periodic reviews of matters relating to the operation of the Renewable Energy (Electricity) Act 2000 (Cth). The first review will be conducted as soon as practicable after 30 June 2012. Subsequent reviews will be conducted every two years.
Climate Change Authority Act 2011 (Cth)	The authority will conduct special reviews of matters specified by the minister, or by both Houses of Parliament by resolution, which relate to climate change and are covered by any of the legislative powers of the Parliament or the executive power of the Commonwealth.

The authority is to carry out reviews as specified in the Clean Energy Act 2011 (Cth): see Table 32,175-2.

Table 32,175-2 — Reviews to be conducted as outlined in the Clean Energy Act 2011 (Cth)

Reviews of the Clean Energy Act 2011 (Cth)	The authority is to undertake periodic reviews of the Clean Energy Act 2011 (Cth). This includes review of: (a) the effectiveness and efficiency of the Clean Energy Act 2011 (Cth) and associated provisions; (b) whether there should be any changes to Australia's emissions reduction targets and carbon budget; (c) the process that should apply to the setting of carbon pollution caps; (d) policies and procedures that should apply to the auctioning of carbon units; (e) the provisions that should apply in relation to the issue of carbon units for a fixed charge; (f) the provisions that should apply in relation to minimum reserve charges for the issue of carbon units as a result of an auction; (g) the provisions that should apply in relation to charges for the surrender of eligible international emissions units; (h) the extent to which units other than carbon units should be able to be surrendered; (i) the extent to which a liable entity should be able to avoid liability for unit shortfall charge in relation to an eligible financial year by surrendering a carbon unit with a vintage year that is later than the eligible financial year;

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	(j) the arrangements for the governance and administration, including the functions and powers of the regulator, the minister's power to give directions to the regulator, and the other powers of the minister; (k) the relationship between the Clean Energy Act 2011 (Cth) and the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth).
Reviews of the pollution cap	The authority is to undertake periodic reviews of the carbon pollution caps, including the level of carbon pollution caps, and any indicative national emissions trajectory and national carbon budget. When conducting this review the authority must have regard to: (a) Australia's international obligations; (b) undertakings relating to the reduction of emissions that Australia has given under international climate change agreements; (c) Australia's medium-term and long-term emissions reduction targets; (d) progress towards the reduction of emissions; (e) global action to reduce emissions; (f) estimates of the global emissions budget; (g) the economic and social implications associated with pollution caps; (h) voluntary action; (i) estimates of greenhouse gas emissions that are not covered by the Clean Energy Act 2011 (Cth); (j) estimates of the number of ACCUs that are likely to be issued; (k) the extent of non-compliance with the Clean Energy Act 2011 (Cth) and associated provisions; (l) the extent to which liable entities have failed to surrender sufficient units to avoid the unit shortfall charge; (m) any acquisitions or proposed acquisitions by the Commonwealth of eligible international emissions units; (n) other matters the authority considers relevant. In addition, a report on a review must: • set out recommendations for an indicative national emissions trajectory and a national carbon budget; • deal with the extent to which any indicative national emissions trajectory and national carbon budget are expected to be met by; • emissions that are reflected in the provisional emissions numbers of liable entities;

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	• emissions that are attributable to activities in the Australian economy and are not reflected in the provisional emissions numbers of liable entities; • the purchase of eligible international emission units (whether by the Commonwealth or other persons).
Reviews of the level of the pollution cap for 2020–2021	On 1 November 2014, if there are no regulations in effect setting the carbon pollution cap and the carbon pollution cap number for the year beginning on 1 July 2015, the authority must review the level of the carbon pollution cap for the year beginning on 1 July 2020. The review must be completed before the end of 28 February 2015.
Periodic reviews of progress towards the emission reduction targets and carbon budget	The authority is to conduct reviews of progress towards the medium-term and long-term targets, and progress in achieving any national carbon budget. When conducting this review the authority must have regard to: (a) the level of emissions in Australia; (b) the level of purchases of eligible international emissions units; (c) the level of emissions that are attributable to activities in the Australian economy and are not reflected in the provisional emissions numbers of liable entities; (d) voluntary action to reduce greenhouse gas emissions; (e) other matters the authority considers relevant. The first review must be completed before the end of 28 February 2014, and each subsequent review must be completed within 12 months of the previous deadline.

Independence

[32,180]

The intention to establish the authority as an independent body is reflected in the limited scope for Ministerial directions to the authority.

The Climate Change Minister may, by legislative instrument, give directions to the authority in relation to the performance of its functions and the exercise of its powers, although this direction may be only general in nature.[124] The authority must comply with a direction.

A Ministerial direction must not relate to the conduct of a particular review or the content of a particular report. A direction from the Climate Change Minister must not be inconsistent with the objects of the Clean Energy Act 2011 (Cth), the CFI Act, the NGER Act or the Renewable Energy (Electricity) Act 2000 (Cth).

The CEO is not subject to direction by the authority in relation to the CEO's performance of functions, or exercise of powers, under the Financial Management and Accountability Act 1997 (Cth) or the Public Service Act 1999 (Cth).[125]

The authority is required to be environmentally effective.[126]

The first major "test" for the authority will occur in 2014, when the government is to decide on the pollution caps in the flexible-charge period but it is authority's role to independently advise on those emissions reduction targets and pollution caps.

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The Chief Scientist is a member of the authority (Pt 2 Div 2 Subdiv B s 17) and the authority recognises climate science as a skill (Pt 2 Div 2 Subdiv B s 18), it is likely that (based on scientific consensus) the authority may recommend the current unconditional 5 per cent by 2020 on 2000 levels be increased, possibly by a substantial measure.

Notes

124 Climate Change Authority Act 2011 (Cth) s 57.

125 Climate Change Authority Act 2011 (Cth) s 58.

126 Climate Change Authority Act 2011 (Cth) s 12.

LAND SECTOR AND CARBON BIODIVERSITY BOARD

[32,200]

The objective of the Land Sector and Carbon Biodiversity Board (LSCB Board) is to advise the Environment Minister, the Climate Change Minister and the Agriculture Minister about land sector climate change measures. These include a $1.7 billion land sector package providing funding over six years for the Biodiversity Fund, the Indigenous Carbon Farming Fund and the Regional Natural Resource Management Planning for Climate Change Fund.

The LSCB Board is also to advise the Environment Minister about performance indicators, implementation and guidelines for the funding of Australia's Biodiversity Fund that:

- protect, manage or restore biodiverse ecosystems; and
- establish, protect, manage, improve or restore levels of carbon sequestered in living biomass or in dead organic matter.

The LSCB Board consists of the Chair and four other members. The LSCB Board members are the Hon Bob Debus AM (Chair), Professor Lesley Hughes, Mr David Crombie, Mr Joe Ross and Ms Anna Skarbek.

Each member of the Board must have experience and standing in one of the following fields — agricultural science, economics (including environmental economics), conservation ecology, greenhouse gas emissions measurement and reporting, greenhouse gas abatement measures, public administration, business management, the management or care of indigenous-held land (within the meaning of the Aboriginal and Torres Strait Islander Act 2005).

Functions

[32,202]

The LSCB Board advises the Environment Minister, the Agriculture Minister and the Climate Change Minister about performance indicators, implementation, and the priorities for research in relation to:

- increasing the land sector's resilience to climate change;
- improving long-term farm productivity;
- assisting landholders and regional communities to benefit from the reduction of greenhouse gas emissions from the land sector; and
- assisting landholders and regional communities to benefit from the sequestration of carbon in soil, in living biomass, or in dead organic matter

and about other matters that may assist the land sector address climate change.[127]

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The LSCB Board also advises the Environment Minister about performance indicators, implementation and guidelines for the funding of the Biodiversity Fund that protect, manage or restore biodiverse ecosystems and establish, protect, manage, improve or restore levels of carbon sequestered in living biomass, or in dead organic matter, in biodiverse ecosystems.

Notes

127 Climate Change Authority Act 2011 (Cth) s 62.

Constitutional limitations

[32,204]

The LSCB Board may perform its functions:[128]

- for purposes related to external affairs, including an international agreement to which Australia is a party, and for purposes related to addressing matters of international concern;
- for purposes related to the executive power of the Commonwealth;
- for purposes related to statistics;
- for purposes related to a territory;
- with respect to a Commonwealth place (within the meaning of the Commonwealth Places (Application of Laws) Act 1970 (Cth));
- for purposes related to trade and commerce between Australia and places outside Australia, among the States, or within a Territory, between a state and a territory or between two territories;
- for purposes related to a corporation to which paragraph 51(xx) of the Constitution applies (any trading or financial corporation incorporated in Australia or any foreign corporation);
- by way of the provision of a service to the Commonwealth, an authority of the Commonwealth, or a purpose of the Commonwealth;
- for purposes related to matters that are peculiarly adapted to the government of a nation and that cannot otherwise be carried on for the benefit of the nation;
- for purposes related to matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

Notes

128 Climate Change Authority Act 2011 (Cth) s 63.

LCSB Board membership

[32,206]

Part 4 Division 2 s 64, s 65 and s 66

The LSCB Board consists of the Chair and four other members.

The Chair of the LSCB Board is the Hon Bob Debus AM. The members of the LSCB Board are Anna Skarbek, David Crombie, Joe Ross and Professor Lesley Hughes.

Each Board member is appointed by the Environment Minister and the Agriculture Minister by written instrument. The Environment Minister and the Agriculture Minister must consult the Climate Change Minister before making an appointment to the LSCB Board.[129]

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A person is eligible for appointment to the Board when the Environment Minister and the Agriculture Minister are satisfied that they have substantial experience and significant standing in at least one of the following fields:[130]

- agricultural science;
- economics (including environmental economics);
- conservation ecology;
- greenhouse gas emissions measurement and reporting;
- greenhouse gas abatement measures;
- public administration;
- business management;
- the management or care of indigenous-held land (within the meaning of the Aboriginal and Torres Strait Islander Act 2005 (Cth)).

An LSCB Board member holds office on a part-time basis, and holds office for the period specified in the instrument of appointment (which must not exceed five years).

Notes

129 Climate Change Authority Act 2011 (Cth) s 64.

130 Climate Change Authority Act 2011 (Cth) s 65.

Acting LSCB Board members

[32,208]

The Environment Minister and the Agriculture Minister may appoint an LSCB Board member to act as the Chair during a vacancy in the office of the Chair, or when the Chair is absent from duty or from Australia or is unable to perform the duties of the office.[131]

Likewise, the Environment Minister and the Agriculture Minister may appoint a person (other than the Chair) to act as a Board member during a vacancy or during any period when a Board member is absent from duty or Australia, or is unable to perform the duties of the office.

A person is not eligible for appointment to act as the LSCB Chair or as a Board member unless the person is eligible for appointment as a Board member.

Notes

131 Climate Change Authority Act 2011 (Cth) s 67.

Procedures

[32,210]

Regulations may prescribe the procedures to be followed at Board meetings, including the convening of meetings, the number of members who constitute a quorum, the selection of a Board member to preside in the absence of the Chair, and the manner in which questions arising at a meeting of the Board are to be decided.[132]

Notes

132 Climate Change Authority Act 2011 (Cth) s 68. If the LSCB Board determines, a Board resolution will be taken to have been passed if a majority of Board members indicate agreement with the resolution (without meeting), or all Board members have been informed of the proposed resolution (or reasonable efforts had been made to inform all Board members).

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Disclosure of interests

[32,212]

An LSCB Board member must give written notice to the Environment Minister and the Agriculture Minister of all interests that conflict or could conflict with the proper performance of the Board member's functions.[133]

An LSCB Board member must also disclose the nature of the interest to a meeting of the LSCB Board as soon as possible after the relevant facts have been identified.[134] The disclosure must be recorded in the minutes. Unless the Board otherwise determines, the LSCB Board member must not be present during or participate in any deliberation on the matter.

Notes

133 Climate Change Authority Act 2011 (Cth) s 69.

134 Climate Change Authority Act 2011 (Cth) s 70.

Other employment and remuneration

[32,214]

LSCB Board members must not engage in any paid employment that conflicts or may conflict with the proper performance of their role.[135]

An LSCB Board member is to be paid the remuneration determined by the Remuneration Tribunal, or if no determination is in operation, the LSCB Board member is to be paid and receive allowances according to the regulations.[136]

Notes

135 Climate Change Authority Act 2011 (Cth) s 71.

136 Climate Change Authority Act 2011 (Cth) s 72.

Leave of absence, resignation and termination

[32,216]

The Environment Minister may grant leave of absence to the Chair of the LSCB Board on terms and conditions that the Minister determines. Likewise, the Chair may grant leave of absence to an LSCB Board member on the terms and conditions that the Chair determines.[137]

A LSCB Board member may resign through written resignation to the Environment Minister or the Agriculture Minister.[138] The resignation takes effect on the day it is received, or on the date specified in the resignation.

The Environment Minister and the Agriculture Minister may terminate the appointment of a LSCB Board member for misbehaviour or physical or mental incapacity. This may occur if the LSCB Board member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors, or makes an assignment of remuneration for the benefit of creditors. It may also occur if the LSCB Board member is absent (except on leave of absence) for three consecutive meetings of the LSCB Board, or if the LSCB Board member engages in paid employment that conflict with the proper performance of the role. Additionally, the Environment Minister and the Agriculture Minister may terminate the appointment of a LSCB Board member if they

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consider the performance of the LSCB Board member unsatisfactory. Before termination, the Ministers must consult the Climate Change Minister.[139]

Notes

137 Climate Change Authority Act 2011 (Cth) s 73.

138 Climate Change Authority Act 2011 (Cth) s 74.

139 Climate Change Authority Act 2011 (Cth) s 75.

Assistance to LSCB Board

[32,218]

The Environment Department, as well as any other Department, agency or authority of the Commonwealth, may assist the LSCB Board.[140] This may include the provision of information and advice, as well as making resources available, including secretariat services and clerical assistance.

Notes

140 Climate Change Authority Act 2011 (Cth) s 77.

Committees

[32,220]

The Environment Minister may, with the agreement of the Agriculture Minister, establish committees to assist the LSCB Board.[141] A committee may be constituted wholly by LSCB Board members, wholly by persons who are not LSCB Board members, or by a combination of both.

Each committee member is to be appointed by the Environment Minister and the Agriculture Minister by written instrument. The Environment Minister may, with the agreement of the Agriculture Minister, determine in writing the committee's terms of reference, the terms and conditions of appointment, and the committee procedures to be followed.

A committee member is to be paid the remuneration determined by the Remuneration Tribunal, or if no determination is in operation, the member is to be paid and receive allowances according to the regulations.

Notes

141 Climate Change Authority Act 2011 (Cth) s 78.

Annual report

[32,222]

Part 4 Division 5 s 81, s 82 and s 83

The LSCB Board must, as soon as practicable after the end of each financial year, submit to the Environment Minister for presentation to the Parliament a report on its operations during that year.[142]

If the LSCB Board makes an assessment about:

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- the performance of a measure prescribed for the purposes of s 62(1)(a) of the Climate Change Authority Act 2011 (Cth) against performance indicators;
- the implementation of a measure for the purposes of s 62(1)(a);
- the performance of a specified Biodiversity Fund program measure against performance indicators; or
- the implementation of such a Biodiversity Fund program measure

then the LSCB Board's report for the financial year must include a summary of that assessment and a statement describing the contribution of the measure in advancing the protection, management or restoration of land biodiversity, as well as the reduction of greenhouse gas emissions.[143]

Notes

142 Climate Change Authority Act 2011 (Cth) s 81.

143 Climate Change Authority Act 2011 (Cth) s 81(2).

Liability for damages

[32,223]

No representative of the authority is liable to an action or other proceeding for damages for, or in relation to, an act or matter in good faith done or omitted to be done in the performance of:

- the Climate Change Authority Act 2011 (Cth);
- Pt 22 of the Clean Energy Act 2011 (Cth);
- s 306 of the CFI Act;
- ss 76A or 76B of the NGER Act; and
- s 162 of the Renewable Energy (Electricity) Act 2000 (Cth).

Regulations

[32,224]

The Governor-General may make regulations in relation to matters required or permitted by the Climate Change Authority Act 2011 (Cth), or as necessary or convenient for carrying out of the Act.[144]

Notes

144 Climate Change Authority Act 2011 (Cth) s 83.

PRODUCTIVITY COMMISSION

[32,225]

The Productivity Commission will independently review and report to the government on:

- industry assistance under the Jobs and Competitiveness Program (in the third year of the carbon pricing mechanism, 2014–2015), including:
  - — competitiveness of emissions-intensive and trade-exposed industries; and
  - — the assistance rates or the carbon productivity contribution that applies to any particular activity;
- industry assistance under the Coal Sector Jobs Package; and

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- the carbon emissions reduction activities undertaken by Australia's trading partners internationally.[145]

Notes

145 Climate Change Act 2011 (Cth) ss 64–66.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

[32,250]

Businesses may be liable under the Competition and Consumer Act 2010 (Cth) for penalties up to $1.1 million per contravention for misleading consumers or providing false information.

Claims about the impact of the carbon price on business and prices must be truthful and accurate, based on reasonable and substantiated grounds, and must not mislead consumers.

However, business is not generally required to justify or explain why prices have increased.

The role of the Australian Competition and Consumer Commission (ACCC) does not include setting or restricting price increases related to the impacts of a carbon price. The ACCC promotes competition, encourages fair business dealings and protects consumers from misleading and deceptive conduct.

The ACCC will undertake a compliance and enforcement role in relation to claims made about the impact of a carbon price.

International framework

[32,275]

Australia is a signatory to the United Nations Framework Convention on Climate Change[146] (UNFCCC) and its Kyoto Protocol.[147] The Kyoto Protocol is supplemented by the Marrakesh Accords.[148]

The Kyoto Protocol allocates rights to emit GHG emissions among nominated developed countries, by setting an "assigned amount" for emissions limitation and reduction commitments in a (first) five year commitment period to 31 December 2012.

Australia, as a ratifying party, has bound itself to take action to limit national GHG emissions to 108 per cent of 1990 levels in that first commitment period.[149]

The objects of the Clean Energy Act 2011 (Cth)[150] place the domestic legislation firmly within the international context, and in particular the international response to climate change and Australia's associated international commitments.

Eligible emissions units, the unit of currency in the Clean Energy Act 2011 (Cth) (discussed further in chapter four) are defined in the Clean Energy Act 2011 (Cth) to include eligible international emissions units (EIEUs).[151] EIEUs are in turn defined in the Australian National Registry of Emissions Units Act 2011 (Cth) to include:

- Certified Emissions Reduction credits (CERs) generated by Clean Development Mechanism (CDM) projects (other than temporary CERs and long term CERs) under art 12 of the Kyoto Protocol;

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- Emissions Reduction Units (ERUs) generated by Joint Implementation (JI) projects under art 6 of the Kyoto Protocol;
- Assigned Amount Units (AAUs) and removal units (RMUs) recognised under the Kyoto Protocol and
- non-Kyoto International Emissions Units.

The international mechanisms for these EIEUs are discussed in turn below.

The present assumption is that in the operation of the Clean Energy Act 2011 (Cth) from 1 July 2015, the achievement of Australia's national emissions reduction target and the linkage of the carbon price mechanism to the international market, the international framework will comprise international climate change agreements that continue and support the creation and trade of EIEUs.[152]

Notes

146 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

147 *Kyoto Protocol*, opened for signature 16 March 1998, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997 [being the Report of the Conference of the Parties on its third session, held at Kyoto from 1 to 11 December 1997] (entered into force 16 February 2005).

148 *Marrakesh Accords*, UN Doc FCCC/CP/2001/13/Add.2, 21 January 2002 [being the Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001] (entered into force and formally adopted at the first conference of the parties to the Kyoto Protocol in December 2005).

149 Australia ratified the Kyoto Protocol on 11 March 2008.

150 Clean Energy Act 2011 (Cth) s 3.

151 Eligible emissions units include: carbon units (created under the Clean Energy Act 2011 (Cth)), Australian carbon credit units (ACCUs) (created under the Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)) and eligible international emissions units (EIEUs). Substitution is permitted, as follows:
in the fixed charge period to 30 June 2015, carbon units can be substituted by ACCUs (limited to five per cent of liability); and
in the flexible charge period from 1 July 2015, carbon units can be substituted by:
ACCUs; and
EIEUs (limited to 50 per cent of liability).

152 Clean Energy Act 2011 (Cth) s 5 defines an "international agreement" as "an agreement whose parties are (a) Australia and a foreign country; or (b) Australia and 2 or more foreign countries." Section 5 defines an "international climate change agreement" as "(a) the Climate Change Convention; or (b) any other international agreement, signed on behalf of Australia, that (i) relates to climate change; and (ii) imposes obligations on Australia to take action to reduce greenhouse gas emissions; or (c) an international agreement, signed on behalf of Australia, that (i) relates to climate change; and (ii) is specified in a legislative instrument made by the Minister for the purposes of this definition."

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

[32,300]

The UNFCCC sets the overarching framework for international and intergovernmental climate change action and GHG emissions negotiations.

The UNFCCC was adopted at the Rio Earth Summit on 9 May 1992[153] and entered into force on 21 March 1994. Australia ratified the UNFCCC on 30 December 1992. As of March 2012 the UNFCCC has 195 Parties (194 States and one regional economic integration organisation).[154]

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Notes

153 The UNFCCC was the first binding international legal agreement to address global climate change. The symbolic successor to the Rio Earth Summit was Rio+20, held in Rio de Janiero, Brazil 4–6 June 2012. See 30,550 www.uncsd2012.org.

154 For the most current list of signatories and Parties, see: http://unfccc.int/essential_background /convention/status_of_ratification/items/2631txt.php UNFCCC Art 3(3).

Objects

[32,325]

Article 2 states the UNFCCC objective is "to achieve [. . .] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

The UNFCCC directs parties to "take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."[155] However, it does not specify any target level for GHG concentrations, nor does it specifically define the greenhouse gases to be stabilised.

The UNFCCC also directs parties to "protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[156] Reflective of this ideal, the UNFCCC defines countries according to their economic development. Annex 1 countries, including Australia, are those considered to be developed economies (and in some cases, economies in transition). Non-Annex 1 countries, including China and India, are those considered to be developing economies.[157]

The UNFCCC imposes an obligation on Australia to adopt national policies and take measures to mitigate climate change by limiting anthropogenic emissions and protecting carbon sinks. It is to this obligation that the first object of the Clean Energy Act 2011 (Cth) refers.

Article 4.2(a) of the UNFCCC states:[158]

> . . . Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs [. . .] These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention.

However, it was left to subsequent agreement (the Kyoto Protocol) to define the relevant policies and measures and move the international negotiations towards emission reductions.

Notes

155 UNFCCC Art 3(3).

156 UNFCCC Art 3(1).

157 Twenty years on, the definition of Annex 1 and non-Annex 1 countries remains contentious, particularly in the case of China and India. A complete list of Annex 1 and non-Annex 1 countries is at: www.unfccc.int/parties_and_observers/items/2704.php.

158 UNFCCC Art 4.2(a).

Conference of the Parties

[32,350]

Under the UNFCCC, parties attend the Conference of the Parties (COP) each year. The

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annual COP occurs in November and/or December, and despite ongoing meetings throughout the year is the most public forum in which the international negotiations take place. Several significant additions to the UNFCCC have been negotiated at these COPs, including the Kyoto Protocol, the Copenhagen Accord, the Cancun Agreements, and Durban Platform.

KYOTO PROTOCOL TO THE UNFCCC

[32,375]

The Kyoto Protocol was adopted unanimously at the third Conference of the Parties (COP 3) in Kyoto, Japan on 11 December 1997, and came into force on 16 February 2005. As of March 012 there are 192 Parties (191 states and one regional economic integration organisation) to the Kyoto Protocol.

Although the Kyoto Protocol was adopted unanimously, ratification has proven contentious. Australia ratified the Kyoto Protocol on 3 December 2007, and the ratification entered into force on 11 March 2008. Australia's ratification was the first international action taken by former Prime Minister the Hon Kevin Rudd MP, after being elected Prime Minister on 24 November 2007.

The United States of America is the only developed country signatory to have failed to ratify the Kyoto Protocol. However, in December 2011, Canada became the first developed country to withdraw from the Kyoto Protocol.[159]

Notes

159 Canada's withdrawal will come into effect on 15 December 2012 — two weeks before the conclusion of the first commitment period. For the most current list of Signatories and Parties, see: www.unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

Objects

[32,400]

A key difference between the UNFCCC and the Kyoto Protocol is that while the UNFCCC encouraged developed countries to stabilise emissions, the Kyoto Protocol commits them to do so. The Kyoto Protocol does this by identifying six specific GHG, outlining specific emissions limitation and reduction goals, and establishing market mechanisms through which to achieve these reductions.

Binding commitments

[32,425]

UNFCCC Annex 1 countries that have ratified the Kyoto Protocol accept binding emissions limitation and reduction commitments, specified as targets in Annex B of the Kyoto Protocol for a specified commitment period, and measured against a baseline of 1990 emissions.[160]

The Annex B emissions limitation and reduction commitments are expressed as the "assigned amount" of emissions in each commitment period. These assigned amounts of emissions are unitised and represented by Assigned Amount Units (AAUs).

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The European Union collectively agreed to an emissions reduction of eight per cent, the USA to seven per cent, and Japan to six per cent. However, as noted, the USA has not ratified the Kyoto Protocol and is therefore not bound to comply with its quantitative emissions reduction commitment.

Australia committed to keeping national emissions within 108 per cent of 1990 levels — one of only three developed countries to secure an increase in emissions.[161] Australia is on track to meet this commitment.[162]

Notes

160 In 2006 Parties to the Kyoto Protocol amended Annex B in Decision 10/CMP.2. To date, only 27 Parties have signed the amendment and the amendment has therefore not entered into force.

161 Iceland secured a target of 110 per cent and Norway 101 per cent. See: www.unfccc.int/kyoto_protocol/items/3145.php.

162 Australian Government, "The Australian Government Submission to the United Nations Framework Convention on Climate Change" (Australian Government, Australian National Greenhouse Accounts, National Inventory Report, April 2012) p xi.

GHG

[32,450]

The Kyoto Protocol identified six GHGs that contribute to climate change: see Table 32,450-1.

Table 32,450-1 — Kyoto Protocol greenhouse gases

Carbon dioxide (CO_2)	Sulfur hexafluoride (SF_6)
Nitrous Oxide (N_2O)	Hydrofluorocarbons (HFCs)
Methane (CH_4)	Perfluorocarbons (PFCs)

AAUs

[32,475]

Article 3 of the Kyoto Protocol defines AAUs. Article 3(7) provides:

> In the first quantified emission limitation and reduction commitment period [. . .] the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990 [. . .] multiplied by five.

At the beginning of the first commitment period each Annex-1 country was assigned AAUs equal to the percentage (in Annex B) of its aggregate CO_2-e emissions in the 1990 base year, multiplied by five (being the five year duration of the first commitment period).[163] These AAUs do not expire and can be banked for use in the second commitment period.

Notes

163 UNFCCC (2006) COP/MOP Decision 13 CMP.1.

Removal units

[32,500]

The Kyoto Protocol also established Removal Units (RMUs).

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RMUs are credits that represent an allowance to emit 1t CO_2-e absorbed and/or removed by a carbon sink in an Annex 1 country.

RMUs are defined in Article 3.3 of the Kyoto Protocol:

> The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments under this Article of each Party included in Annex I.

Compliance mechanism

[32,525]

Within 14 months of the end of the first commitment period, all Parties, including Australia, will be required to submit their emissions inventory for the first commitment period to independent expert review. Parties will have 100 days to rectify non-compliance with their emissions reduction targets through the purchase of relevant credits in the carbon market.

If parties fail to comply, the Enforcement Branch of the Executive Board will take steps in relation to the Party's access to the Kyoto carbon market and its emissions reduction targets in the second commitment period.[164]

In late 2011 at the 17th Conference of the Parties (COP17) in Durban, South Africa, the parties agreed to establish a second commitment period under the Kyoto Protocol — known as the Durban Platform.

Notes

164 Kyoto Protocol Arts 5, 7 and 8; UNFCCC (2006) COP/MOP Decision 27/CMP.1

Flexibility mechanisms in the Kyoto Protocol

[32,550]

The Kyoto Protocol established and governs the international carbon market. Articles 6, 12 and 17 introduce three flexibility mechanisms:

- the Clean Development Mechanism (CDM);
- Joint implementation (JI); and
- international emissions trading.

These flexibility mechanisms were specifically created in order to assist developed countries achieve their specified emission reductions more cheaply than they could without an international market and reliant only on domestic means.

As mechanisms under the Kyoto Protocol, the CDM, JI and emissions trading will continue through the second commitment period.

Clean Development Mechanism

[32,575]

Under the Clean Development Mechanism (CDM), emissions reduction projects in non-Annex 1 countries can earn Certified Emission Reduction credits (CERs).

CERs may be sold to Annex 1 countries to meet a part of their emissions limitation and reduction targets under Annex B of the Kyoto Protocol.

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Article 12 of the Kyoto Protocol defines the purpose of the CDM as:

> . . . to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments.

The CDM is a market-based instrument that provides a revenue stream for emissions reduction activities in developing countries and a source of low-cost abatement for developed countries. Australia's carbon market will link under the Clean Energy Act 2011 (Cth) to the international market including the CDM post-1 July 2015. The CDM market and its fate post-2012 are therefore important factors for the achievement of emissions reduction and Australian clean energy laws.

The CDM has helped to shape the global carbon market: see Table 32,575-1. The CDM was the first global carbon credit scheme that provided a standardised emissions offset — a CER. Each CER is equivalent to 1t CO_2-e emissions reduction. This standardisation was the result of rigorous project methodology, development and implementation criteria.

Table 32,575-1 — CDM projects and production of CERs[165]

CDM PROJECTS	AVERAGE ANNUAL CERs	EXPECTED CERs to 2012
3886 registered	571,446,694	2,120,000,000
5,600 in pipeline	N/A	2,700,000,000

Methodology development and governance under the CDM[166] offers significant lessons for methodologies and governance under the Carbon Farming Initiative (CFI) (discussed below).

Notes

165 Up-to-date statistics on the CDM market is at www.cdm.unfccc.int/Statistics/index.html.

166 The most up-to-date information on CDM methodologies is at: www.cdm.unfccc.int/methodologies/index.html.

Joint Implementation

[32,600]

Joint Implementation (JI) allows an Annex B country (a developed country with an emissions limitation and reduction commitment under the Kyoto Protocol) to earn Emissions Reduction Units (ERUs) from an emission reduction or emission removal project in another Annex B Party.[167] Each ERU is equivalent to 1t CO_2-e.

Article 6 of the Kyoto Protocol explains the mechanism:

> . . . any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy.

JI is essentially the mirror of the CDM. While the CDM encourages investment by developed countries in developing countries, JI encourages investment between developed countries.

Furthermore, JI differs from the CDM in that the host country transfers ERUs to the project developer. Unlike CERs, ERUs are not additional credits. The host country is required to cancel an equivalent number of AAUs and/or RMUs.

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Joint implementation has not achieved the same level of emissions reductions as the CDM. This is partly because JI projects are only likely to be approved in countries with AAUs in excess of what they require to surrender to meet their emissions reduction target specified in the Kyoto Protocol. For example, the Australian government previously stated that it will not approve JI projects during the first commitment period.[168] However, the CFI Act defines new rules for registering domestic CFI offsets projects that are Kyoto-compliant as JI projects.

Notes

167 A complete list of eligible countries is found at: www.ji.unfccc.int/JI_Parties/index.html.

168 Australian Government, "Australia's National Guidelines and Procedures for Approving Participation in Joint Implementation Projects" (Policy, Australian Government, Department of Climate Change and Energy Efficiency, 2010) p 8.

International emissions trading

[32,625]

The third Kyoto Protocol flexibility mechanism is international emissions trading. Article 17 of the Kyoto Protocol provides:

> The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article.

International emissions trading allows countries with surplus AAUs (emissions assigned to a country but not emitted by that country) to sell up to 10 per cent of their AAUs to other countries that have failed their emissions reduction target.

The Kyoto Protocol established a market — the carbon market — in which AAUs and RMUs are a commodity and can be sold. In addition to AAUs and RMUs, the international emissions market allows the sale of other Kyoto Protocol units — CERs and ERUs: see Table 32,625-1. Significantly, the Kyoto Protocol also permits private entities to trade, when such entities are authorised by the state (although the country remains responsible for its compliance obligations).[169]

Table 32,625-1 — Summary of international emissions units

UNIT	UNIT	SOURCE
AAU	**Assigned Amount Unit**	Emissions units resulting from countries "assigned amounts" under the Kyoto Protocol
CER	**Certified Emissions Reduction**	Generated by a project under the Clean Development Mechanism
ERU	**Emission Reduction Unit**	Generated by a Joint Implementation project
RMU	**Removal Unit**	Based on land-use, land-use change and forestry (LULUCF) project activities

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Notes

169 UNFCCC (2006) COP/MOP Decision 13 CMP.1 point 33.

ONGOING MODIFICATIONS AND ADDITIONS TO THE UNFCCC

[32,650]

The UNFCCC and the Kyoto Protocol bestow significant discretionary authority on the meetings of the COPs (and meetings of the parties to the Kyoto Protocol (MOPs)).[170] This authority enables the annual COPs (and accompanying MOPs) to oversee the evolution of the international climate change regime by directing and adjusting the implementation of the UNFCCC and Kyoto Protocol. This has resulted in a number of additions to the international climate change framework, including COP 15, COP 16 and COP 18.

Notes

170 UNFCCC (1992) art 7; Kyoto Protocol (1997) Art 13.

COP15: The Copenhagen Accord

[32,675]

The 2009 Copenhagen Accord was reached at the 15th Conference of the Parties (COP 15), held in Copenhagen, Denmark from 7 to 19 December 2009.[171]

The Copenhagen Accord does not have the legal force of the Kyoto Protocol, and did not commit parties to a post-Kyoto international regime. However, it did move the international negotiations a degree, and (*inter alia*):

- recognised that the increase in global temperature should be below 2°C above pre-industrial levels;[172]
- agreed that developed countries (Annex I Parties) would commit to economy-wide emissions targets for 2020 and would strengthen their existing targets, with all reductions to be measured, reported and verified in accordance with COP guidelines;[173] and
- agreed that developing countries (non-Annex I Parties) would implement mitigation actions to slow emissions growth, with Least Developed States and Small Island Developing States to undertake voluntary action with international support.[174]

These three achievements of the Copenhagen Accord are relevant to the Clean Energy Act 2011 (Cth). This is because the second objective of the Clean Energy Act 2011 (Cth) is to support the development of an effective global response to climate change, consistent with Australia's national interest in ensuring that average global temperatures do not increase by more than two degrees Celcius above pre-industrial levels. This is also linked to the third objective, which is to meet Australia's long-term target of reducing net greenhouse gas emissions to 80 per cent below 2000 levels by 2050 in a flexible and cost-effective way.

Australia's quantified economy-wide emissions target for 2020 communicated to the international community is in the following terms:[175]

> Australia will reduce its greenhouse gas emissions by 25% on 2000 levels by 2020 if the world agrees to an ambitious global deal capable of stabilising levels of greenhouse gases in the atmosphere at 450 ppm CO_2-e or lower. Australia will unconditionally reduce our emissions by

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5% below 2000 levels by 2020, and by up to 15% by 2020 if there is a global agreement which falls short of securing atmospheric stabilisation at 450 ppm CO_2-e and under which major developing economies commit to substantially restrain emissions and advanced economies take on commitments comparable to Australia's.

Notes

171 Copenhagen Accord (2009) Decision 2/CP.15.

172 Copenhagen Accord (2009) Decision 2/CP.15 points 1 and 2.

173 Copenhagen Accord (2009) Decision 2/CP.15 point 4.

174 Copenhagen Accord (2009) Decision 2/CP.15 point 5.

175 The Copenhagen Accord emission reduction commitments of all Annex 1 Parties may be found at: www.unfccc.int/meetings/copenhagen_dec_2009/items/5264.php.

COP16: The Cancun Agreements

[32,700]

The 2010 Cancun Agreements were reached at the 16th Conference of the Parties (COP 16), held in Cancun, Mexico from 29 November to 10 December 2010.[176] These agreements included the Green Climate Fund, the Technology Mechanism, and the Cancun Adaptation Framework.[177]

COP16 also achieved a commitment to a maximum temperature rise of two degrees Celcius above pre-Industrial levels, with the possibility of lowering that maximum to 1.5 degrees Celcius. This commitment was overshadowed by the fact that the pledges put forward by countries accounted for approximately only 60 per cent of the emission reductions needed for a 50 per cent chance of stabilising temperatures at the two degrees Celcius goal.[178]

The 2010 Cancun Agreements[179] anchored the mitigation pledges made by developed and developing countries in the Copenhagen Accord to the UNFCCC. The Cancun Agreements recognise the imperative to ensure global temperature does not increase by more than two degrees Celcius above pre-industrial levels.

Notes

176 Copenhagen Accord (2009) Decision 2/CP.15.

177 The various Cancun Agreements are at: www.unfccc.int/meetings/cancun_nov_2010/items/6005.php.

178 See "A note on the gaps" at: www.unfccc.int/meetings/cancun_nov_2010/meeting/6266.php.

179 Cancun Agreements (2010) Decision 1/CP.16.

COP17: The Durban Platform

[32,725]

The 17th Conference of the Parties (COP 17) was held in Durban, South Africa from 28 November to 9 December 2011.

Decision I/CMP.7 was a major outcome of COP 17, and is known as the Durban Platform. Point 1 of the decision established a second commitment period under the Kyoto Protocol. It stated:[180]

> . . . that the second commitment period under the Kyoto Protocol shall begin on 1 January 2013 and end either on 31 December 2017 or 31 December 2020, to be decided by the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its seventeenth session.

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The decision also amended Annex B to the Kyoto Protocol. Although the decision failed to include quantified emission limitation and/or reduction commitments for the second commitment period (these remain listed as "n/a"), the decision did include pledges for the reduction of emissions by 2020.

Significantly, the decision added a seventh greenhouse gas to the original six listed in Annex A of Kyoto Protocol — nitrogen trifluoride (NF_3).

The Durban Platform included a decision to adopt a universal legal agreement on climate change as soon as possible, and no later than 2015. As discussed above, the form and status of this agreement will directly impact Australia's international obligations, as well as have practical relevance to the Australian carbon market established by the Clean Energy Act 2011 (Cth).

Notes

180 Durban Agreement (2011) Decision I/CMP.7 (UN Boc FCCC/KP/CMP/2011/10/Add.1).

COP18: Doha 2012

[32,750]

The 18th Conference of the Parties (COP 18) will be held in Doha, Qatar from 6 November to 7 December 2012. This will be the last COP in the first commitment period and the final meeting before the second commitment period commences.

LINKING

[32,775]

In the future, the Clean Energy Act 2011 (Cth) may also allow the emissions units (the units of currency) of emissions trading schemes in other countries to qualify as eligible emissions units, thereby directly linking the Clean Energy Act 2011 (Cth) with those emissions trading schemes.

Europe operates the European Union Emissions Trading System (EU ETS) with its second phase of operation spanning from 2008 to 2012, and a third phase planned for 2013 to 2020.

New Zealand has established the New Zealand Emissions Trading Scheme (NZ ETS).

California will commence a California Emissions Trading Scheme (California ETS) from 1 January 2013.

The EU ETS and NZ ETS already permit substitution of CERs and ERUs for their domestic units, and to that extent, the Clean Energy Act 2011 (Cth) indirectly links to those emissions trading schemes, because it allows (post-1 July 2015) the same Kyoto units to be used for compliance purposes in the carbon pricing mechanism.

AUSTRALIAN TARGETS AND CAPS

[32,800]

Australia has agreed by ratifying the Kyoto Protocol to limit annual national greenhouse gas emissions to 108 per cent of 1990 levels between 2008 and 2012.

While Australia is on track to meet this limit,[181] national greenhouse gas emissions are forecast to increase by 24 per cent by 2020 on 2000 levels (see Diagram 32,800-1).

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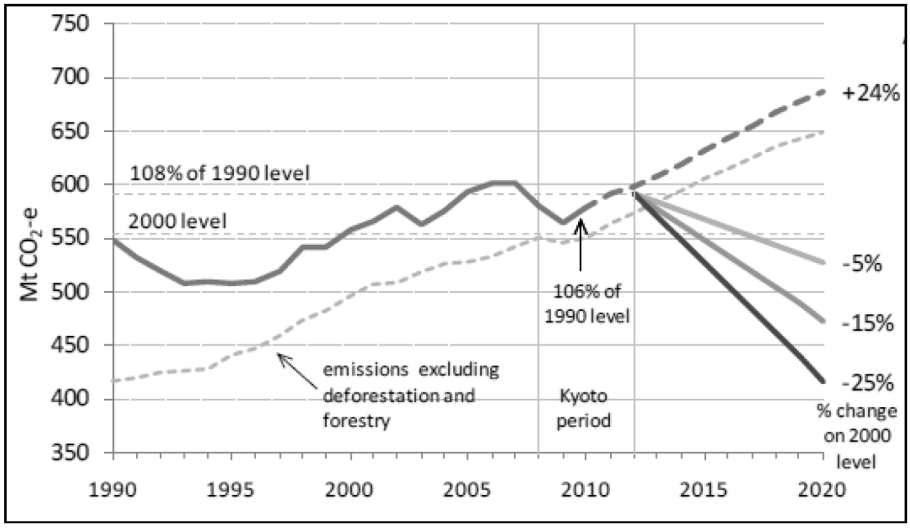
There are three critical concepts to Australia's emissions reduction commitments:

- the emissions reduction target;
- the carbon pollution cap; and
- the carbon budget.

Section 14 of the Clean Energy Act 2011 (Cth) provides that regulations may declare the carbon pollution cap number for a specified flexible charge year.

However, as noted above, ss 288–293 of the Clean Energy Act 2011 (Cth) specifically require the authority to review whether there should be changes to Australia's emission reduction targets and caps.

Diagram 32,800-1 — Australia's projected emissions and emission reduction targets[182]



Notes

181 Australian National Greenhouse Accounts Quarterly Update of Australia's National Greenhouse Gas Inventory, March Quarter 2012 (Australian Government, Department of Climate Change and Energy Efficiency, 2 August 2012) 15.

182 Source: Department of Climate Change and Energy Efficiency "Factsheet: Australia's emission reduction targets", Australian Government, Department of Climate Change and Energy Efficiency, 2012.

Australia's emissions reduction target

[32,825]

In addition to the Kyoto Protocol target, the Australian government committed to reducing emissions by five per cent below 2000 levels by 2020. The target is unconditional and has bipartisan support.[183] The government submitted this unconditional target to the Copenhagen Accord on 27 January 2010.[184]

In addition, the government committed:[185]

> Australia will reduce its greenhouse gas emissions by 25% on 2000 levels by 2020 if the world agrees to an ambitious global deal capable of stabilising levels of greenhouse gases in the atmosphere at 450 ppm CO2-eq or lower. Australia will unconditionally reduce our emissions by

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5% below 2000 levels by 2020, and by up to 15% by 2020 if there is a global agreement which falls short of securing atmospheric stabilisation at 450 ppm CO2-eq and under which major developing economies commit to substantially restrain emissions and advanced economies take on commitments comparable to Australia's.

However, these commitments are not bipartisan.

The Gillard government has also committed to reduce emissions by 80 per cent below 2000 levels by 2050. Again, this is not a bipartisan target.

The third objective of the Clean Energy Act 2011 (Cth) addressed Australia's international commitments to reduce national emissions. The objective states that Australia will "take action directed towards meeting Australia's long-term target of reducing Australia's net greenhouse gas emissions to 80 per cent below 2000 levels by 2050."[186]

Table 32,825-1 outlines the means of setting the emission reduction targets in the European Union.

Table 32,825-1 — Setting emission reduction targets in the European Union

Each member state in the European Union has a National Allocation Plan (NAP), which must be approved by the European Commission. The combined reductions outlined in the NAPs sets the overall cap on the total emissions allowed from all the installations covered by the EU ETS.

The cap is converted into permits — one allowance equals one 1 t CO_2-e — which are then distributed to installations covered by the EU ETS.

Phase III (2013–2020) intends to achieve two-thirds of the EU's unilateral 20 per cent emissions reduction target by 2020 on 1990 levels — saving approximately 500Mt CO_2e per annum by 2020.[187] This emissions reduction target may be increased, as the EU has outlined a conditional offer to move to a 30 per cent reduction by 2020 compared to 1990 levels "if other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities."[188]

The cap for 2013 is 2,039,152,882 permits, which will decrease each year by 1.74 per cent of the average annual total quantity of permits issued by member states between 2008 and 2012 (equivalent to an annual reduction of 37,435,387).[189]

Notes

183 Liberal Party of Australia (2011) "*The Coalitions Direct Action Plan*". The Coalition's Direct Action Plan also specifies a 5 per cent greenhouse emissions reduction target below 2000 levels by 2020.

184 For a list of all targets submitted to the Copenhagen Accord, see: www.unfccc.int/meetings/copenhagen_dec_2009/items/5264.php.

185 UNFCCC (2011) "Appendix 1: Quantified economy-wide emission targets for 2020".

186 Clean Energy Act 2011 (Cth) Pt 1 s 3.

187 Department of Environment and Climate Change (2011) "EU ETS Phase III (2013–2020)".

188 United Nations Framework Convention on Climate Change (UNFCCC) (2011) "Appendix 1: Quantified economy-wide emission targets for 2020".

189 European Commission (2011) "Cap".

Australia's carbon pollution cap and carbon budget

[32,850]

Section 14 of the Clean Energy Act 2011 (Cth) defines the "carbon pollution cap" as:

- the total number of auctioned carbon units;

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- the total number of free carbon units issued through the Jobs and Competitiveness Program; and
- the total number of free carbon units issued to coal-fired electricity generators.

Section 5 of the Clean Energy Act 2011 (Cth) defines the "carbon budget" as the total amount of net Australian emissions of greenhouse gases during a specified period.

The carbon pollution cap

[32,875]

The carbon pollution cap will be determined by regulations: Clean Energy Act 2011 (Cth) s 14.

The DCCEE has stated that the regulations on pollution caps will be made before 31 May 2014.[190]

These regulations will determine the quantity of emissions (in the form of CO_2-e) that will be the carbon pollution cap for a specified flexible charge year.

The minister is responsible for making a recommendation to the Governor-General about regulations to be made for the purposes of s 14.

When making this recommendation, the minister must have regard:

- to Australia's international obligations under international climate change agreements;
- to the most recent report that was given to the minister by the authority under s 292 of the Clean Energy Act 2011 (Cth) and that dealt with carbon pollution caps and carbon budgets.

The minister may also have regard to:

- undertakings relating to the emission reductions that Australia has given under international climate change agreements;
- the national medium-term and long-term emission reduction targets;
- progress towards reducing emissions;
- global action to reduce emissions;
- estimates of the global emissions budget;
- the economic and social implications associated with various levels of carbon pollution caps;
- voluntary action to reduce national emissions;
- estimates of emissions that are not covered by the Clean Energy Act 2011 (Cth);
- estimates of the number of ACCUs likely to be issued;
- the extent of non-compliance with the Clean Energy Act 2011 (Cth) and associated regulations;
- the extent to which liable entities incur liability for the unit shortfall charge;
- any acquisitions or proposed acquisitions of eligible international emissions units by the government; and
- other matters the minister considers relevant.

The minister must take all reasonable steps to ensure regulations that:

- declare the carbon pollution cap and the carbon pollution cap number for the flexible charge year beginning on 1 July 2015; and
- declare the carbon pollution cap and the carbon pollution cap number for each of the next four flexible charge years

are tabled in each House of the Parliament under s 38 of the Legislative Instruments Act 2003 (Cth) not later than 31 May 2014.[191] These regulations must not be made after 31 May 2014.

If no regulations have been made at the start of May 2014, the minister must take all

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reasonable steps to ensure that such regulations are passed. These regulations must not be made after the end of the relevant month of May.

Following a motion upon notice, either House of the Parliament may pass a resolution disallowing the regulations (Clean Energy Act 2011 (Cth) s 15). For the resolution to be effective:

- the notice must be given in that House within 15 sitting days after the copy of the regulations was tabled in the House;
- the resolution must be passed within 15 sitting days of that House after the giving of that notice.

If no such resolution is passed, the regulations take effect on the day immediately after the last day upon which such a resolution could have been passed (assuming that notice of a motion was given in each House on the last day of the 15 sitting day period).

If there are no regulations that declare the carbon pollution cap and the carbon pollution cap number for the flexible charge year beginning on 1 July 2015, the default carbon pollution cap for 2015–16 will be determined according to the formula:

Total emissions numbers for the eligible financial year beginning on 1 July 2012 — 38,000,000[192]

In this formula, "total emissions numbers for the eligible financial year beginning on 1 July 2012" means the estimate entered in the LEPID in relation to the eligible financial year beginning on 1 July 2012.

If there are no regulations that declare the carbon pollution cap and the carbon pollution cap number for a particular flexible charge year beginning on or after 1 July 2016, then the default carbon pollution cap for the flexible charge year will be determined according to the formula:

Carbon pollution cap number for the previous flexible charge year — 12,000,000[193]

Part 4 of the Clean Energy Act 2011 (Cth) also deals with the carbon pollution cap.

Section 101 provides that the regulator must ensure that no more than 15 million carbon units with a particular vintage year are issued as a result of auctions during a financial year if:

- the financial year begins more than 12 months before the start of the vintage year;
- there are no regulations in effect that declare the carbon pollution cap and the carbon pollution cap number for the vintage year.

If there are no regulations that declare the carbon pollution cap and the carbon pollution cap number for the vintage year the regulator must also ensure that no more than 15 million carbon units with a particular vintage year are issued during auctions conducted during the first six months of the financial year immediately preceding the vintage year.

Further, the regulator must ensure that the sum of the:

- total number of carbon units with a particular vintage year offered at auctions;
- total number of free carbon units with that vintage year issued in accordance with the Jobs and Competitiveness Program; and
- total number of free carbon units with that vintage year issued in accordance with Pt 8 (to coal-fired electricity generators)

equals the carbon pollution cap number for that vintage year.[194]

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Notes

190 DCCEE, "Regulations", Australian Government, Department of Climate Change and Energy Efficiency, 2012.

191 Clean Energy Act 2011 (Cth) s 16.

192 Clean Energy Act 2011 (Cth) s 17.

193 Clean Energy Act 2011 (Cth) s 18.

194 Clean Energy Act 2011 (Cth) s 102.

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