28 July 2011

EXPOSURE DRAFT
OF THE
CLEAN ENERGY BILL 2011

COMMENTARY ON PROVISIONS

Department of Climate Change and Energy Efficiency
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Purpose of this commentary

Public engagement on the Clean Energy Legislation Package

This commentary is designed to assist in understanding the exposure draft of the Clean Energy Bill 2011, which was released for public comment on 28 July 2011, along with other bills in the Clean Energy Legislative Package. It will form the basis of the explanatory memorandum for the bill and will be updated to reflect the final form of the bill.

The exposure drafts of the Clean Energy Bill 2011 and related bills implement the policy announced by the Government on 10 July 2011 and set out in *Securing a clean energy future: The Australian Government’s climate change plan*.

The purpose of this public engagement process is to confirm that the draft bills implement the announced policy and that they do not, as drafted, create any uncertainties, ambiguities or risks of unintended consequences. The Government has also released draft commentaries on the bills, and seeks views as to whether they clearly explain the content of the bills.

The Government has had the benefit of the wide range of stakeholder views put forward as part of a major public policy debate, including through:

- the public release of discussion papers by the Australian Greenhouse Office in 1999;
- public engagement by the National Emissions Trading Taskforce in 2006-7;
- the development of the CPRS in 2008-10; and
- most recently, the work of the Government and the Multi-Party Committee on Climate Change since October 2010.

These processes have involved over a decade of analysis, modelling and engagement with stakeholders.
Making a submission

Submissions are invited from all interested stakeholders.

Where possible, please lodge your submission using the electronic form provided on www.climatechange.gov.au. Alternatively, written submissions should be sent to:

cleanenergybills@climatechange.gov.au

or:

Carbon Price Legislation Branch
Carbon Strategy and Markets Division
Department of Climate Change and Energy Efficiency
GPO Box 854
Canberra ACT 2601 Australia

Submissions will not be treated as confidential and may be published. If you would like your entire submission or a part of it to be kept confidential and not published, then you must clearly state in the submission that you would like your submission to be treated as confidential.

Submissions should be lodged by 5pm on Monday, 22 August 2011. The Department may not be able to consider late submissions.
The following abbreviations and acronyms are used in this commentary.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>ANREU Bill</td>
<td>Australian National Registry of Emissions Units Bill 2011</td>
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<td>Authority</td>
<td>Climate Change Authority</td>
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<td>Authority bill</td>
<td>Climate Change Authority Bill 2011</td>
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<td>bill or main bill</td>
<td>Clean Energy Bill 2011</td>
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<td>carbon pricing mechanism or</td>
<td>The carbon pricing mechanism set up by the Clean Energy Bill 2011</td>
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<td>mechanism</td>
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<td>CEI plan</td>
<td>clean energy investment plan</td>
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<td>CFI</td>
<td>Carbon Farming Initiative</td>
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<td>CFI Bill</td>
<td>Carbon Credits (Carbon Farming Initiative) Bill 2011</td>
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<td>Charges bills</td>
<td>The Clean Energy (Unit Shortfall Charge—General) Bill 2011; Clean Energy</td>
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<td></td>
<td>2011; Clean Energy (International Unit Surrender Charge) Bill 2011.</td>
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<tr>
<td>Clean Energy Legislative Package</td>
<td>The Clean Energy Bill 2011 and related legislation</td>
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<tr>
<td>CO$_2$-e</td>
<td>Carbon dioxide equivalence</td>
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<tr>
<td>Consequential Amendments bill</td>
<td>The Clean Energy (Consequential Amendments) Bill 2011</td>
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<td>CPRS</td>
<td>Carbon Pollution Reduction Scheme</td>
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<td>Database</td>
<td>Liable Entities Public Information Database</td>
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<td>DCCEE or Department</td>
<td>Department of Climate Change and Energy Efficiency</td>
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<tr>
<td>Eligible emissions unit</td>
<td>An Australian emissions unit or an</td>
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<tr>
<td>Abbreviation</td>
<td>Definition</td>
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<tr>
<td>eligible international emissions unit</td>
<td>A certified emission reduction (other than a temporary certified emission reduction or a long-term certified emission reduction), an emission reduction unit, a removal unit, a prescribed unit issued in accordance with the Kyoto rules</td>
</tr>
<tr>
<td>Fixed charge period</td>
<td>The financial years 2012-13, 2013-14 and 2014-15, being ‘fixed charge years’</td>
</tr>
<tr>
<td>Fund</td>
<td>The Energy Security Fund in Part 8 of the bill</td>
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<tr>
<td>Green Paper</td>
<td><em>Carbon Pollution Reduction Scheme Green Paper, July 2008</em></td>
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<tr>
<td>GW</td>
<td>Gigawatt</td>
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<tr>
<td>GWh</td>
<td>Gigawatt hour</td>
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<tr>
<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
</tr>
<tr>
<td>PEN</td>
<td>provisional emissions number</td>
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<tr>
<td>Program</td>
<td>The Jobs and Competitiveness Program in Part 7 of the bill</td>
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<tr>
<td>JV</td>
<td>Joint venture</td>
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<tr>
<td>Kyoto rules</td>
<td>This term is defined in section 5. In brief, it includes the Kyoto Protocol, decisions of the Meeting of the Kyoto Parties, certain standards adopted by such a Meeting and prescribed rules</td>
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Garnaut Review

Garnaut Review Update 2011


Green Paper

Carbon Pollution Reduction Scheme Green Paper, July 2008

GW

Gigawatt

GWh

Gigawatt hour

IPCC

Intergovernmental Panel on Climate Change

PEN

provisional emissions number

Program

The Jobs and Competitiveness Program in Part 7 of the bill

JV

Joint venture

Kyoto rules

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<thead>
<tr>
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<th><strong>Definition</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Kyoto units</td>
<td>An assigned amount unit, a certified emission reduction, an emission reduction unit, a removal unit or a prescribed unit issued in accordance with the Kyoto rules</td>
</tr>
<tr>
<td>LETI</td>
<td>Low Emissions Transition Incentive</td>
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<td>LTC</td>
<td>Liability transfer certificate</td>
</tr>
<tr>
<td>MW, MWh</td>
<td>Megawatt, Megawatt hour</td>
</tr>
<tr>
<td>MPCCC</td>
<td>Multi-Party Climate Change Committee</td>
</tr>
<tr>
<td>NGER Act</td>
<td>National Greenhouse and Energy Reporting Act 2007</td>
</tr>
<tr>
<td>Non-Kyoto international emissions units</td>
<td>A prescribed unit issued in accordance with an international agreement (other than the Kyoto Protocol) or a prescribed unit issued outside Australia under a law of a foreign country</td>
</tr>
<tr>
<td>OTN</td>
<td>Obligation transfer number</td>
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<tr>
<td>Registry</td>
<td>Australian National Registry of Emissions Units</td>
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<tr>
<td>Regulator</td>
<td>Clean Energy Regulator</td>
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<tr>
<td>Regulator bill</td>
<td>Clean Energy Regulator Bill 2011</td>
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Policy context

The Government’s Climate Change Plan

On 10 July 2011, the Government released Securing a clean energy future: The Australian Government’s climate change plan, which explains the policy basis for the introduction of the mechanism and related measures.

The need for action

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

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

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

Climate change won’t just damage the natural environment. Left unchecked, it also poses risks to Australia’s economic prosperity. Climate change will impose economic costs on our society. These costs can be reduced and managed if the world takes action to reduce carbon pollution. But the longer action is delayed, the more it will cost and the worse the impacts will be.

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

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

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

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

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

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

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

The remaining sources are ‘fugitive’ emissions—mainly the methane and carbon dioxide which escapes into the atmosphere when coal is mined and gas is extracted—along with pollution from industrial processes and decomposition of waste in landfills and elsewhere. Trees absorb carbon dioxide, so when land is cleared there is an increase in carbon pollution and when vegetation grows there is a decrease. The net impact of these sources—deforestation, reforestation and afforestation—contributes 3 per cent of Australia’s total carbon pollution.
Australia’s emissions are projected to continue to grow by almost 2 per cent a year without action to put a price on carbon. Even taking into account existing climate change policies such as the Renewable Energy Target and the CFI, our emissions are expected to be around 22 per cent higher than 2000 levels in 2020.

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

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

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

The carbon pricing mechanism

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

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

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

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

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

<table>
<thead>
<tr>
<th>Price</th>
<th>A two stage approach:</th>
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<tbody>
<tr>
<td>Fixed price period</td>
<td>The mechanism will commence on 1 July 2012, with a price that will be fixed for the first three years like a tax. The price will start at $23 per tonne and will rise at 2.5 per cent per annum in real terms. On 1 July 2015, the carbon price will transition to a fully flexible price under an emissions trading scheme, with the price determined by the market.</td>
</tr>
<tr>
<td>Emissions trading scheme</td>
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</table>

| Coverage | Broad coverage from commencement, encompassing the stationary energy sector, transport (as described below), industrial processes, non-legacy waste, and fugitive emissions. |

| Treatment of fuel and transport | Transport fuels will be excluded from the mechanism. However, where applicable, an equivalent carbon price will be applied through changes in fuel tax credits or excise. A carbon price will be applied to domestic aviation, domestic shipping, rail transport, and non-transport use of fuels. A carbon price will not apply to household transport fuels, light vehicle business transport and off-road fuel use by the agriculture, forestry and fishing industries. At a later date, the Government will seek to establish an effective carbon price on fuel use by heavy on-road transport from 1 July 2014. |

| International linking | International linking to credible international carbon markets and emissions trading schemes will be allowed from the commencement of the flexible price period. At least half of a liable party’s compliance obligation must be met through the use of domestic units or credits. |

| Price ceiling and floor | Price ceiling and floor will apply for the first three years of the flexible price period. The price ceiling will be set at $20 above the expected international price and will rise by 5 per cent in real terms each year. The price floor will be $15, rising annually by 4 per cent in real terms. |

| Carbon Farming Initiative | Kyoto-compliant credits created under the CFI can be used for compliance under the mechanism subject to a 5 per cent limit in the fixed charge period. |

| Governance | |
| Climate Change Authority | Establishment of the Authority to advise on pollution caps and progress towards meeting targets and undertake reviews of the mechanism. |
| Clean Energy Regulator | Establishment of the Regulator to administer the mechanism. |
| Productivity Commission | The Productivity Commission will undertake reviews relating to industry assistance, fuel tax arrangements and carbon pollution reduction activities internationally. |
Household assistance

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

A carbon price will add modestly to the cost of living. The average household will see cost increases of around $9.90 per week, while the average assistance provided will be around $10.10 per week. The prices of most household purchases will barely be affected by the carbon price—for almost everything other than electricity and gas, the estimated price impact is likely to be less than 1 per cent. Taking electricity and gas into account, the overall impact on the Consumer Price Index (CPI) is expected to be around 0.7 per cent in 2012–13. Households will not face a carbon price on transport fuels.

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

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

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

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

Other features of the household assistance package include:

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

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

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

**Jobs and Competitiveness Package**

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

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

The Jobs and Competitiveness Program will ensure that businesses that produce a lot of pollution and compete in international markets remain competitive, while still retaining strong incentives to reduce carbon pollution. Almost all emissions-intensive and trade-exposed activities are in the manufacturing sector. The Program will provide support to activities that generate over 80 per cent of emissions within the manufacturing sector.
The food processing, metal forging and foundry industries will also be assisted to support jobs in these parts of manufacturing. More general assistance for small businesses and manufacturing industries will target improvements in energy efficiency.

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

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

**Clean energy**

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

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

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

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

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

**Energy markets**

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

An Fund will be established to ensure there is a smooth transition which preserves energy security.

The Government will seek to negotiate the closure of around 2000 megawatts (MW) of highly polluting generation capacity by 2020. Closing down some of our highest polluting coal-fired capacity makes room for investment in lower pollution plant—and kickstarts the transformation of our energy industry in a managed way.
Electricity generators strongly affected by a carbon price will be supported in return for them adopting Clean Energy Investment Plans, which show how they will reduce their pollution.

Energy efficiency

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

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

The Low Carbon Communities Program will be significantly expanded to promote energy efficiency at a local level and among low-income households.

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

Land sector initiatives

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

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

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

The Government will also provide substantial funding for a range of new land-based measures, including an ongoing fund for landholders to undertake projects that establish, restore, protect and manage biodiverse carbon stores. The Biodiversity Fund will improve the resilience of Australia’s unique species to the impacts of climate change, enhance the environmental outcomes of carbon farming projects, and help landholders protect biodiversity and carbon values on their land.
An ongoing Carbon Farming Future program will help farmers and landholders benefit from carbon farming by supporting research and development, measurement approaches and action on the ground to reduce emissions or store carbon.

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

**Major steps to date**

**International commitments**

*United Nations Framework Convention on Climate Change*

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

*Ratification of the Kyoto Protocol*

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

*Cancun Agreements*

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

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

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

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

Previous policy development and legislative processes

In 1999, the Australian Greenhouse Office released a series of discussion papers on the design of an Australian emissions trading scheme.

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

In 2007, the Howard Government’s Prime Ministerial Task Group on Emissions Trading — a group of leading business representatives and senior officials — recommended that the Government adopt an emissions trading scheme.

On 16 July 2008 the Government released its CPRS Green Paper. This Paper reflected the Government’s preferred positions on issues relating to the CPRS.

On 15 December 2008, the Government released a White Paper called *CPRS: Australia’s Low Pollution Future*. The decisions in the White Paper formed the basis the CPRS legislative packages.

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

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Policy context

Treasury modelling

On 10 July 2011, the Government released *Strong growth, low pollution: Modelling a carbon price*[^4], which models various scenarios relating to the proposals set out in *Securing a clean energy future: The Australian Government’s climate change plan*. This built on *Australia’s Low Pollution Future: The Economics of Climate Change Mitigation*, which was released on 30 October 2008.

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

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

Architecture for a carbon pricing mechanism

In September 2010 the Government announced the establishment of the Multi-Party Climate Change Committee (MPCCC) to consult, negotiate, and report to the Cabinet, through the Minister for Climate Change and Energy Efficiency, on agreed options for the implementation of a carbon price in Australia; and to provide advice on, and participate in, building community consensus for action on climate change.[^5]

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

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

Securing a clean energy future

On 10 July 2011, the Government published *Securing a clean energy future: The Australian Government’s climate change plan*.[^6] This set out

[^6]: For further information on the policy, see [http://www.cleanenergyfuture.gov.au](http://www.cleanenergyfuture.gov.au)
the details of the mechanism and related proposals for fostering renewable energy generation, energy efficiency and action on the land. It also set out measures to assist Australian households and businesses to adapt to the mechanism and to support energy markets.

Exposure draft legislation

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

- Clean Energy Bill 2011;
- Clean Energy (Consequential Amendments) Bill 2011;
- Clean Energy Regulator Bill 2011;
- Climate Change Authority Bill 2011;
- Clean Energy (Unit Shortfall Charge—General) Bill 2011;
- Clean Energy (Unit Issue Charge—General) Bill 2011;
- Clean Energy (Charges—Excise) Bill 2011;
- Clean Energy (International Unit Surrender Charge) Bill 2011;
- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011;
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011;
- Fuel Tax Legislation Amendment (Clean Energy) Bill 2011;
- Excise Tariff Legislation Amendment (Clean Energy) Bill 2011; and
- Customs Tariff Amendment (Clean Energy) Bill 2011.
The 2011 Clean Energy Legislative Package

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

Table II: The Clean Energy Bill 2011 and related bills

<table>
<thead>
<tr>
<th>Main bill</th>
<th>The Clean Energy Bill 2011 creates the mechanism. It sets out the structure of the mechanism and process for its introduction. These include:</th>
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<tbody>
<tr>
<td></td>
<td>• entities and emissions that are covered by the mechanism;</td>
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<td></td>
<td>• liable entities;</td>
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<tr>
<td></td>
<td>• entities’ obligation to surrender emissions units corresponding to their emissions;</td>
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<td></td>
<td>• limits on the number of emissions units that will be issued;</td>
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<tr>
<td></td>
<td>• the nature of carbon units;</td>
</tr>
<tr>
<td></td>
<td>• allocation of carbon units, including by auction and the issue of free units;</td>
</tr>
<tr>
<td></td>
<td>• mechanisms to contain costs, including the fixed charge period and price floors and ceilings;</td>
</tr>
<tr>
<td></td>
<td>• linking to other emissions trading schemes;</td>
</tr>
<tr>
<td></td>
<td>• assistance for emissions-intensive trade-exposed activities and coal-fired electricity generators; and</td>
</tr>
<tr>
<td></td>
<td>• monitoring and enforcement.</td>
</tr>
<tr>
<td>Statutory bodies</td>
<td>The Clean Energy Regulator Bill 2011 sets up the Regulator, which is a statutory authority that will administer the mechanism and enforce the law. The responsibilities of the Regulator include:</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td></td>
<td>• providing education on the mechanism, particularly about the administrative arrangements of the mechanism;</td>
</tr>
<tr>
<td></td>
<td>• assessing emissions data to determine each entity’s liability;</td>
</tr>
<tr>
<td></td>
<td>• operating the Registry;</td>
</tr>
<tr>
<td></td>
<td>• monitoring, facilitating and enforcing compliance with the mechanism;</td>
</tr>
<tr>
<td></td>
<td>• allocating units including freely allocated units, fixed charge units and auctioned units;</td>
</tr>
<tr>
<td></td>
<td>• applying legislative rules to determine if a particular entity is eligible for assistance in the form of units to be allocated administratively, and the number of other units to be allocated;</td>
</tr>
<tr>
<td></td>
<td>• administering the National Greenhouse and Energy Reporting System (NGERS), the Renewable Energy Target and the CFI; and</td>
</tr>
</tbody>
</table>
The **Climate Change Authority Bill 2011** sets up the Authority, which will be an independent body that provides the Government expert advice on key aspects of the mechanism and the Government’s climate change mitigation initiatives. The Government will remain responsible for carbon pricing policy decisions. The Bill also sets up the Land Carbon and Biodiversity Board which will advise on key initiatives in the land sector.

### Consequential amendments

The **Clean Energy (Consequential Amendments) Bill 2011** makes consequential amendments to ensure:

- NGERS supports the mechanism;
- the Registry covers the mechanism and the CFI;
- the Regulator covers the mechanism, CFI, the Renewable Energy Target and NGERS;
- the Regulator and Authority are set up as statutory agencies and regulated by public accountability and financial management rules;
- that emissions units and their trading are covered by laws on financial services and regulated by ASIC;
- that activities related to emissions trading are covered by laws on money laundering and fraud;
- synthetic greenhouse gases are subject to an equivalent carbon price applied through existing regulation of those substances;
- the Regulator can work with other regulatory bodies, including ASIC, the ACCC and Austrac;
- the taxation treatment of emissions units for the purposes of GST and income tax is clear; and
- the Conservation Tillage Refundable Tax Offset is established.

### Procedural bills

Those elements of the mechanism which oblige a person to pay money are implemented through separate bills that comply with the requirements of section 55 of the *Constitution*. These bills are the **Clean Energy (Unit Shortfall Charge—General) Bill 2011**, **Clean Energy (Unit Issue Charge—General) Bill 2011**, **Clean Energy (Charges—Excise) Bill 2011**, **Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011** and **Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011**.

### Related bills

Other elements of the Government’s Climate Change Plan are being implemented through other legislation. These are:

- the **Excise Tariff Legislation Amendment (Clean Energy) Bill 2011** and the **Customs Tariff**
Amendment (Clean Energy) Bill 2011, which imposes an effective carbon price on aviation and non-transport gaseous fuels through excise and customs tariffs;

- the Fuel Tax Legislation Amendment (Clean Energy) Bill 2011, which reduces the business fuel tax credit entitlement of non-exempted industries for their use of liquid and gaseous transport fuels, in order to provide an effective carbon price on business through the fuel tax system; and

- the Clean Energy (Household Assistance) Amendment Bill 2011, which will implement the household assistance measures announced by the Government on 10 July 2011. This bill amends relevant legislation to increase pensions and allowances, income support allowances and family payments and provide income tax cuts for lower and middle income households. The Government is not exposing a draft of this bill.
Outline of the Clean Energy Bill 2011

Structure of the bill

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

Table III: Structure of the Clean Energy Bill 2011

<table>
<thead>
<tr>
<th>Part</th>
<th>Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part 1</td>
<td>Preliminary</td>
<td>Part 1 sets out the objects of the bill, arrangements for commencement, definitions and explains specific concepts of relevance to the mechanism.</td>
</tr>
<tr>
<td>Part 2</td>
<td>Carbon pollution cap</td>
<td>Part 2 provides that a carbon pollution cap can be set by the Government through regulations.</td>
</tr>
<tr>
<td>Part 3</td>
<td>Liable entities</td>
<td>Part 3 sets out how a person is liable under the mechanism for emissions and deals with Obligation Transfer Numbers.</td>
</tr>
<tr>
<td>Part 4</td>
<td>Carbon Units</td>
<td>Part 4 provides for carbon units and the way in which these are issued by the Regulator and dealt with under the Registry.</td>
</tr>
<tr>
<td>Part 5</td>
<td>Emissions Number</td>
<td>Part 5 sets out how a person’s emissions number is determined.</td>
</tr>
<tr>
<td>Part 6</td>
<td>Surrender of eligible emissions units</td>
<td>Part 6 sets out the way in which a person may make a payment or surrender units to meet their obligations under the mechanism.</td>
</tr>
<tr>
<td>Part 7</td>
<td>Jobs and Competitiveness Program</td>
<td>Part 7 provides for assistance to emissions-intensive trade-exposed industries to adjust to the mechanism.</td>
</tr>
<tr>
<td>Part 8</td>
<td>Coal-fired electricity generation</td>
<td>Part 8 provides for assistance to coal-fired electricity generators to support energy markets.</td>
</tr>
<tr>
<td>Part 9</td>
<td>Publication of information</td>
<td>Part 9 sets out the Regulator’s obligations to publish specific information about the mechanism.</td>
</tr>
<tr>
<td>Part 10</td>
<td>Frauds conduct</td>
<td>Part 10 sets out the circumstances in which a person may be ordered to relinquish units if they are convicted of a criminal offence involving fraudulent conduct.</td>
</tr>
<tr>
<td>Part 11</td>
<td>Relinquishment of</td>
<td>Part 11 sets out the way in which a person</td>
</tr>
<tr>
<td>Part</td>
<td>Title</td>
<td>Description</td>
</tr>
<tr>
<td>-------</td>
<td>-----------------------------------------------------</td>
<td>----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Part 12</td>
<td>Notification of significant holdings of carbon units</td>
<td>Part 12 sets out the obligations of corporate groups and others to notify the Regulator of a significant holding of units.</td>
</tr>
<tr>
<td>Part 13</td>
<td>Information gathering powers</td>
<td>Part 13 sets out the Regulator’s information gathering powers when investigating possible contraventions.</td>
</tr>
<tr>
<td>Part 14</td>
<td>Record-keeping requirements</td>
<td>Part 14 sets out liable entities’ reporting requirements under the mechanism and the consequences of not complying with them.</td>
</tr>
<tr>
<td>Part 15</td>
<td>Monitoring powers</td>
<td>Part 15 sets out the Regulator’s powers to engage in monitoring activities, including entering premises under warrant, when investigating possible contraventions.</td>
</tr>
<tr>
<td>Part 16</td>
<td>Liability of executive officers of bodies corporate</td>
<td>Part 16 provides that executive officers of bodies corporate may be liable for contraventions in certain circumstances.</td>
</tr>
<tr>
<td>Part 17</td>
<td>Civil penalty orders</td>
<td>Part 17 sets out the way in which civil penalties, including pecuniary penalties, are imposed for contraventions.</td>
</tr>
<tr>
<td>Part 18</td>
<td>Infringement notices</td>
<td>Part 18 sets out the way in which infringement notices may be issued.</td>
</tr>
<tr>
<td>Part 19</td>
<td>Offences relating to unit shortfall charge and administrative penalties</td>
<td>Part 19 sets out the way in which sanctions for contraventions of criminal offences are imposed.</td>
</tr>
<tr>
<td>Part 20</td>
<td>Enforceable undertakings</td>
<td>Part 20 provides that the Regulator may accept enforceable undertakings from persons who may have engaged in a contravention, and the way in which these undertakings may be enforced.</td>
</tr>
<tr>
<td>Part 21</td>
<td>Review of decisions</td>
<td>Part 21 provides for reviews of administrative decisions made by the Regulator and the Government.</td>
</tr>
<tr>
<td>Part 22</td>
<td>Reviews by Climate Change Authority</td>
<td>Part 22 sets out the obligations of the Authority to undertake periodic reviews about the mechanism and aspects of it and also specific reviews requested by the Minister or both Houses of Parliament.</td>
</tr>
<tr>
<td>Part 23</td>
<td>Miscellaneous</td>
<td>Part 23 provides for a range of matters which facilitate the operation of the mechanism</td>
</tr>
</tbody>
</table>
The objects of the carbon pricing mechanism

The objects of the mechanism are:

- to give effect to Australia’s international obligations on addressing climate change under the Climate Change Convention and the Kyoto Protocol;
- to support the development of an effective global response to climate change; and
- to take action directed towards meeting Australia’s long-term target of reducing net greenhouse gas emissions to 80 per cent below 2000 levels by 2050 and take that action in a flexible and cost effective way.

The constitutional basis of the mechanism is addressed in Part 23 (see Chapter 7).

The mechanism

The bill implements the mechanism from 1 July 2012. From that date, businesses that are covered by it will pay a charge for each tonne of carbon pollution they put into the atmosphere each year.

There will be two stages. For the first three years, the charge for each tonne of pollution will be fixed, like a carbon tax. Then, from 1 July 2015, the mechanism will shift to a ‘cap and trade’ emissions trading scheme. In this second ‘flexible charge’ stage, the carbon charge will be set by the market.

The fixed charge period

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

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

This issue is discussed in Chapters 1, 2, 3 and 4 of this commentary. The operation of the fixed charge period is covered in Parts 3, 4, 5 and 6.
Moving to a flexible price

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

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

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

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

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

Pollution caps

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

Table IV: Timeline for setting pollution caps

<table>
<thead>
<tr>
<th>Deadline</th>
<th>Pollution cap announced for financial year(s) beginning:</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 June 2016</td>
<td>2020</td>
</tr>
<tr>
<td>30 June 2017</td>
<td>2021</td>
</tr>
<tr>
<td></td>
<td>Pollution caps will continue to be set annually.</td>
</tr>
</tbody>
</table>

This issue is discussed in Chapter 2 of this commentary. Pollution caps are covered in Part 2.
Climate Change Authority

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

One of the Authority’s roles will be to make recommendations to the Government on the year-by-year steps, and on the longer-term path, that Australia should take towards the 2050 target. The Government will make the final decisions. The Authority will report regularly on progress, giving the public an independent assessment of whether we are on track to meet our targets.

The Authority will conduct regular, public reviews and its reports will be made public. The Government will respond to its recommendations within a limited timeframe.

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

This issue is discussed in Chapter 10 of this commentary. The Authority’s responsibilities are set out in Part 22.

Price ceilings and floors

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

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

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

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

Coverage of the carbon price

Carbon pollution from the following sources will be covered by a carbon price: stationary energy, waste, rail, domestic aviation and shipping, industrial processes and fugitive emissions. The Government also intends
to expand the coverage of the carbon price to include heavy on-road vehicles from 1 July 2014.  

The broad coverage of the carbon price will ensure that the economy as a whole starts moving towards a clean energy future and that the cheapest ways of reducing pollution will be implemented.

Treasury modelling shows that a broad-based carbon price will encourage pollution reductions across all sectors of the economy. If sectors are excluded, it means that Australia misses out on their contributions to the pollution reduction task. In turn, this means that other sectors would need to reduce their pollution even further (at higher cost), or that Australia would need to rely more heavily on buying pollution reduction from overseas through international carbon markets.

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

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

**Carbon Farming Initiative**

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

The CFI is covered by the CFI bill and the Carbon Credits (Carbon Farming Initiative – Consequential Amendments) Bill 2011.

**Gases**

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

Amendments to give effect to this coverage are covered by the Consequential Amendments bill.

**Large polluters**

It is important to ensure that the mechanism is practical and minimises costs to business. For this reason, only firms that release over a certain amount of carbon pollution a year, or are large suppliers of natural gas,
will pay the carbon price. Facilities that have direct greenhouse gas emissions of 25,000 tonnes of CO$_2$-e a year or more (excluding emissions from transport fuels and some synthetic greenhouse gases) will be covered. There will be a lower threshold for certain landfill facilities. Retailers of natural gas will be liable for carbon pollution from the use of the fuels they supply to customers.

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

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

**Transport**

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

A carbon price will apply to fuels used in domestic aviation, marine and rail transport.

Similarly, a carbon price will apply when transport fuels are used for other purposes, such as running diesel generators on a mine site.

No transport fuels will be covered directly under the mechanism. Where a carbon price applies, it will be achieved in a different way- through changes in fuel tax credits or changes in excise. The changes will be calculated to have the same effect as coverage by the mechanism. The changes to fuel tax credits or excise will be adjusted to ensure the carbon price on transport fuels is in step with the carbon price applying to the rest of the economy.

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

**Table V: Treatment of transport fuels**

<table>
<thead>
<tr>
<th>A carbon price will be applied to:</th>
<th>A carbon price will not apply to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Domestic aviation</td>
<td>• Fuel used by households for transport</td>
</tr>
<tr>
<td>• Domestic shipping</td>
<td>• Light on-road commercial vehicles</td>
</tr>
<tr>
<td>• Rail transport</td>
<td>• Ethanol, biodiesel and renewable diesel</td>
</tr>
<tr>
<td>• Off-road transport use of liquid and gaseous fuels</td>
<td>• Gaseous fuels used for on-road transport</td>
</tr>
</tbody>
</table>
The treatment of transport fuels will be addressed through the:

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

**Jobs and Competitiveness Program**

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

In most industries, a carbon price will represent a very small proportion of total revenue. However, some industries, particularly heavy manufacturing industries, are pollution intensive. For these industries, a carbon price could harm their international competitiveness.

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

The Government has designed the Program to keep our emissions-intensive industry onshore as we price carbon pollution. But it will maintain a strong price signal for industries to reduce the pollution intensity of their products. Making products like steel, aluminium, glass, clinker and chemicals in cleaner and more efficient ways is good for the environment, supports Australian jobs and will ensure our industry remains competitive.

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

**Energy Security Fund and coal-fired electricity generation**

An Energy Security Fund will be established to smooth the transition and maintain energy security. This Fund will incorporate two main initiatives. First, there will be scope for payments for the closure of around 2000
megawatts (MW) of very highly emissions-intensive coal fired generation capacity by 2020. This will start the process of replacing existing, highly polluting electricity assets with cleaner generation. Second, there will be transitional assistance to highly emissions-intensive coal fired power stations in Australia. This assistance will come with conditions to ensure security of supply and transparent information on the action taken by these generators to move to a cleaner energy future.

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

**International linking**

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

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

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

If reducing carbon pollution in Australia is more expensive than reducing carbon pollution in another country, Australian firms will be able to purchase an international unit. With international linking, the carbon price in Australia will be set by international supply and demand for units.
This issue is discussed in Chapter 3 of this commentary. International linking issues will be addressed in Part 4 of the bill and in the Consequential Amendments bill.

**Governance**

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

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

**Clean Energy Regulator**

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

The Regulator is set up through the Regulator bill. This issue is discussed in Chapter 7 of this commentary. The Regulator’s responsibilities and powers to administer and enforce the mechanism are set out throughout the bill.

**Climate Change Authority**

The Authority will review pollution caps, the future trajectory of Australia’s pollution levels and the performance of the carbon price and will track Australia’s progress towards meeting its targets for reducing carbon pollution.

The Authority is set up through the Authority bill. Its role is discussed in Chapters 2 and 10 of this commentary. The Authority’s responsibilities and powers to conduct reviews are set out in Part 23.

**Productivity Commission**

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

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

**Links to other Regulators**

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

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

The Australian Securities and Investments Commission (ASIC) administers and enforces Australia’s financial services laws, which will cover emissions units as these will be defined as financial products.

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

The bill's operation and background

Simplified outline

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

Date of effect and application

Once passed, the bill will commence 28 days after the Royal Assent. The first year for which entities will be liable under the mechanism will commence on 1 July 2012. This is achieved by use of the phrase ‘eligible financial year’ which is defined to mean the financial year beginning on 1 July 2012 or a later financial year.

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

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

Proposal announced

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

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

**Financial impact**

The financial impact associated with the legislative proposals in the Clean Energy Legislation Package, is reflected in Fiscal Tables 1 and 2 below.

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

The Government will use all of the revenue it receives from the sale of emissions units to help households and businesses adjust and move Australia to the low pollution economy of the future.
Fiscal Table 1: Plan for a clean energy future

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Revenue from the sale of units 8</td>
<td>0</td>
<td>7,740</td>
<td>8,140</td>
<td>8,590</td>
<td>24,470</td>
</tr>
<tr>
<td>Revenue from the application of carbon price via other measures 9</td>
<td>0</td>
<td>290</td>
<td>320</td>
<td>320</td>
<td>930</td>
</tr>
<tr>
<td>Fuel tax credit reductions</td>
<td>0</td>
<td>570</td>
<td>620</td>
<td>670</td>
<td>1,860</td>
</tr>
<tr>
<td>Household assistance measures</td>
<td>-1,533</td>
<td>-4,196</td>
<td>-4,820</td>
<td>-4,825</td>
<td>-15,356</td>
</tr>
<tr>
<td>Assistance for low- to middle-income households</td>
<td>-1,470</td>
<td>-4,096</td>
<td>-4,671</td>
<td>-4,700</td>
<td>-14,937</td>
</tr>
<tr>
<td>Increases in transfer payments 10</td>
<td>-1,470</td>
<td>-746</td>
<td>-2,301</td>
<td>-2,380</td>
<td>-6,897</td>
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<tr>
<td>Tax reform</td>
<td>0</td>
<td>-3,350</td>
<td>-2,370</td>
<td>-2,320</td>
<td>-8,040</td>
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<tr>
<td>Low Carbon Communities - redesign and extension</td>
<td>-5</td>
<td>-33</td>
<td>-78</td>
<td>-84</td>
<td>-200</td>
</tr>
<tr>
<td>Other household energy efficiency measures 11</td>
<td>-7</td>
<td>-13</td>
<td>-15</td>
<td>-13</td>
<td>-48</td>
</tr>
<tr>
<td>Household assistance implementation</td>
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8 Includes revenue from synthetic greenhouse gases and changes to aviation excise.
9 Ongoing fuel tax credit reductions with permanent shielding for heavy on-road transport, agriculture, fisheries and forestry.
10 Includes transfer payments for pensioners and beneficiaries, income support for veterans, Essential Medical Equipment payment, CPI indexation and residential aged care assistance.
12 Includes the Clean Technology Investment Program, the Clean Technology Food and Foundries Investment Program and the Clean Technology Innovation Program.
13 Includes Energy Efficiency Information Grants and Clean Technology Focus for Supply Chain Programs. The Clean Energy Skills Package has been allocated $32 million over four years, which is to be fully offset from existing resourcing.
14 Assumes investment of $2 billion per annum from 2013-14. The new Australian Renewable Energy Agency has been allocated $3.2 billion over the period to 2019-20 from existing grant funding programs.
15 Includes the Energy Security Fund and loans to generators for the purchase of future vintage carbon units at advance auctions.
16 Includes the Indigenous Carbon Farming Fund, the Carbon Farming Skills Initiative and the Land Sector Carbon and Biodiversity Advisory Board.
### Fiscal Table 2: Plan for a clean energy future

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

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

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### Regulation impact statement

PART 1

Design of the carbon pricing mechanism
Chapter 1
Liable entities and covered emissions

Outline of chapter

1.1 Chapter 1 explains:

• which greenhouse gas emissions give rise to liability;
• which entities are responsible for those emissions; and
• how obligations may be transferred voluntarily from one entity to another, to allow liability to be met more efficiently.

1.2 This chapter covers Part 3.

Context

1.3 The bill covers emissions from stationary energy, industrial processes, fugitive emissions and non-legacy waste. Amendments to other legislation covering fuel tax and synthetic greenhouse gases apply an equivalent carbon price to some business transport emissions, non-transport use of liquid and gaseous fuels (except natural gas), and synthetic greenhouse gases.

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

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

1.6 Treasury modelling shows that a broad-based carbon price will encourage pollution reductions across all sectors of the economy. If sectors are excluded, Australia misses out on their contributions to the pollution reduction task. In turn, this means that other sectors would need to reduce their pollution even further at higher cost, or that Australia would need to rely more heavily on buying pollution reduction from overseas through international carbon markets.
1.7 Agricultural emissions will not be covered. However, the CFI will give farmers and other land managers an opportunity to generate income from taking action to reduce their pollution.

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

1.9 Liability may be transferred from one entity to another under certain circumstances, through the use of liability transfer certificates (LTC) and obligation transfer numbers (OTNs). This allows liability to be transferred to entities that are in the best position to manage liability, respond to the carbon price by putting in place emission reduction measures, and meet obligations under the mechanism.

Summary of new law

Liable entities

1.10 Liable entities include:

• persons that are responsible for greenhouse gases emitted directly from a facility (direct emitters);
• natural gas retailers;
• persons that voluntarily assume liability for natural gas supplied by a natural gas retailer by quoting an OTN; and
• persons that use natural gas not supplied by a retailer.

1.11 A liable entity may be any type of legal person, including an individual, a trust (a trustee or trust estate), a body corporate, corporation sole, a body politic (that is the Commonwealth and the state and territory governments) and a local governing body (see ‘Persons’ who may be liable entities below).

Covered emissions

1.12 Entities will be liable in relation to ‘covered emissions’ from the operation of an emitting facility, or potential emissions embodied in supplies of natural gas. Covered emissions are direct ‘scope 1’ greenhouse gas emissions from the operation of a facility, and fall within the following broad categories:

• emissions from the combustion of energy sources;
• fugitive emissions;
Chapter 1: Liable entities and covered emissions

1.13 Some types of scope 1 emissions are excluded from ‘covered emissions’ under the mechanism, either because they are not intended to be covered by it, or a carbon price will apply through other legislation:

- emissions from the combustion of liquid petroleum fuel, LPG, LNG or compressed natural gas where those fuels have been subject to excise duty;
- fugitive emissions from decommissioned underground coal mines;
- emissions from agricultural sources;
- emissions from legacy waste;
- emissions from closed landfill facilities; and
- emission of synthetic greenhouse gases – except where those gases are attributable to aluminium production.

1.14 A person is responsible for covered greenhouse gases emitted from the operation of a facility if they:

- operate the facility;
- participate in a designated joint venture (JV) that has the facility; or
- hold an LTC for a facility.

1.15 Only those facilities that produce emissions above specified thresholds are covered by the mechanism. Emissions from smaller facilities do not count towards liability.

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

1.17 When a facility is operated exclusively for a JV by a third-party operator, JV participants have the ability to voluntarily assume the liability for emissions, with the operator’s consent. This is intended to provide JV participants more flexibility to manage emissions obligations.
from a facility by allowing them to directly assume those obligations if they wish to do so.

**Liability transfer certificates**

1.18 The Regulator may approve the transfer of liability for a particular facility from one entity to another by issuing an LTC. The Regulator must first be satisfied that the entity taking on liability will be able to comply with the obligations under the bill, to minimise the risk of non-compliance.

1.19 LTCs can be used to transfer liability:

- within the same corporate group, from a facility operator to another member of the group, including the controlling corporation of the group; or

- from a facility operator to another entity that has financial control over the facility.

**Liability for natural gas**

1.20 In order to achieve comprehensive and efficient coverage of emissions from natural gas which come from a large number of individual sources, liability is generally imposed on natural gas retailers for the natural gas they supply.

1.21 A facility operator who does not obtain natural gas from a retailer (for example, power stations that purchase gas directly from a producer) will be liable for emissions resulting from the combustion of natural gas at the facility. This liability will arise through the ‘direct emitter’ provisions if the facility meets the relevant liability threshold. Where the facility does not meet the threshold, liability arises through an ‘application to own use’ provision.

**Obligation transfer numbers – transferring liability for natural gas**

1.22 A person may voluntarily assume liability for the potential emissions embodied in natural gas supplied to them, by quoting their OTN to the retailer. This relieves the retailer from liability for emissions embodied in natural gas supplied in this way.

1.23 When liability is transferred from a retailer to another person via an OTN quotation, the price of natural gas supplied by the retailer should not include a carbon price.

1.24 Generally, the following entities will be able to quote an OTN to a natural gas retailer:

- **large users of natural gas** – these entities have better information on their use of gas, and are able to manage their own liability more effectively;
Chapter 1: Liable entities and covered emissions

• **persons approved by the Regulator:**

• **users of natural gas as a feedstock** – who are then exempted from liability if the gas is used in a way that does not generate greenhouse gas emissions; or

• **licensed manufacturers** of CNG, LNG or LPG, who are then exempted from liability related to the gas. This ensures that manufacturers and users of CNG, LNG and LPG pay a carbon price only once for these fuels under fuel tax legislation.

Detailed explanation of new law

Liability for direct emissions from facilities

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

- the person operates the facility; and
- the facility produced direct (scope 1) emissions covered by the mechanism; and
- the amount of those covered emissions exceeds a threshold.

Operational control

1.26 In general, the person with liability for emissions from a facility is the person with ‘operational control’ of that facility. Operational control has the same meaning as in the NGER Act ([Part 1, clause 5, definition of ‘operational control’]) and is held by the person that has the greatest ability to introduce and implement operational and environmental policies for a facility.

1.27 Any person can have operational control of a facility. The Consequential Amendments bill broadens the range of entities that can have operational control in the NGER Act from ‘a controlling corporation or another member of the corporation’s group’ to ‘a person’ (See Schedule 1, Part 2, items 340-347 of the Consequential Amendments bill). Further amendments to the definition and assignment of operational control for a facility in the NGER Act are discussed in the commentary for the Consequential Amendments bill.

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

1.29 Exceptions to this approach are provided through LTCs and designated JVs (see below).

Covered emissions from the operation of a facility

1.30 ‘Covered emissions’ are the types of greenhouse gas emissions that can count towards thresholds and give rise to liability under the mechanism. Broadly, these are scope 1 greenhouse gas emissions, where:

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

• the greenhouse gas is not one of the excluded types of emissions. [Part 3, clause 30]

1.31 The Consequential Amendments bill amends the NGER Act to require that regulations under that Act may specify scope 1 emissions covered by the mechanism (see Schedule 1, Part 2, item 335 of the Consequential Amendments bill).

1.32 ‘Greenhouse gas’ has the same meaning as in the NGER Act. [Part 1, clause 5, definition of ‘greenhouse gas’] This definition will be amended to provide for additional gases to be included through regulations (see Schedule 1, Part 2, item 323 of the Consequential Amendments Bill). This allows additional greenhouse gases which are internationally recognised to be brought into the mechanism in the future.

Exclusion of emissions from certain sources

1.33 Some sources of emissions are not included in the meaning of ‘emission of greenhouse gas from the operation of a facility’, and will therefore not be ‘covered emissions’.

Fuels not subject to excise or customs

1.34 Where liquid petroleum fuel, LPG, LNG or CNG are combusted and are not subject to excise or customs duty, the resulting emissions will count as covered emissions. For example, certain fuels are combusted at petroleum refineries and are exempt from excise – the emissions from the combustion of these fuels will count under the ‘direct emitters’ provisions.

1.35 An equivalent carbon price will be applied to some uses of excisable liquid petroleum fuels, LPG, LNG and CNG under fuel taxation legislation.
Agriculture
1.36 Agricultural emissions correspond to emissions sources covered by the CFI bill. These broadly correspond to the agricultural emissions that countries are required to report under international accounting rules.

1.37 The exclusion of soil-related emissions is limited to emissions that arise from, or that are produced in, soil. Emissions that result from carbon capture and storage, or emissions attributable to the operation of a landfill facility are not exempted. [Part 3, clause 23], [Part 3, clause 24], [Part 3, clause 25]

Synthetic greenhouse gases
1.38 Emissions from synthetic greenhouse gases (hydrofluorocarbons, perfluorocarbons and sulphur hexafluouride) are excluded from the mechanism, except for emissions of perfluorocarbons emitted as a result of aluminium production. These are subject to an equivalent carbon price using existing import and manufacture controls under the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (which is covered by the Consequential Amendments bill).

Legacy emissions
1.39 Emissions from legacy waste deposited prior to the application of the mechanism to landfill facilities (1 July 2012) are not included in a landfill facility’s liability. Therefore, the operator of a landfill facility is liable for total annual emissions, less annual legacy emissions. [Part 3, clause 23], [Part 3, clause 24], [Part 3, clause 25]

1.40 Legacy waste emissions are excluded from liability because, in many cases, there is little or no opportunity for landfill operators to recover the cost of meeting a liability for waste that was deposited in the past.

1.41 Details on developing a legacy emissions profile to allow liable landfill facilities to determine the ongoing annual emissions from legacy waste will be set out in regulations.

Closed landfill facilities
1.42 Landfill facilities which no longer accept waste and closed prior to 1 July 2008 are excluded from the mechanism. [Part 3, clause 23(6)], [Part 3, clause 24(6)], [Part 3, clause 25(6)]

1.43 The operator of a landfill facility that closed after 30 June 2008 will be a liable entity for that facility if the facility meets one of the thresholds outlined above. If there is a change in operational after the facility is closed, obligations transfer to the new entity with operational
control. In many cases, this will be the land owner. The liable entity will be determined through the operational control definition.

**Scope 2 and 3 emissions**

1.44 Scope 2 emissions, such as those relating to electricity use, are not included in the definition of a facility’s emissions. Scope 3 emissions are also not included.

**Facilities included in the mechanism**

**Facilities that exceed an emissions threshold**

1.45 Emissions thresholds determine whether a facility is covered by the mechanism. If a facility is covered, the operator of that facility is a liable entity.

1.46 A person is a liable entity if the facility emitted covered greenhouse gases with a CO$_2$-e of 25,000 tonnes or more during an eligible financial year. [Part 3, clause 20], [Part 3, clause 21], [Part 3, clause 22]. This threshold aligns with reporting thresholds in the NGER Act. The holder of an LTC for a facility or a participant in a designated JV that has the facility is also a liable entity if that facility met the 25,000 tonnes of CO$_2$-e threshold. [Part 3, clause 21], [Part 3, clause 22]

**Landfill facilities that exceed an emissions threshold**

1.47 An additional, lower threshold applies to landfill facilities to prevent diversion of waste from large landfill facilities to facilities below the 25,000 tonnes of CO$_2$-e threshold. A landfill facility has a liability if it emits 10,000 tonnes of CO$_2$-e or more in an eligible financial year, and is located within a specified distance of another landfill facility which:

- is open for the acceptance of waste; and
- met the 25,000 tonnes of CO$_2$-e threshold in the previous eligible financial year, and
- accepts a similar classification of waste. [Part 3, clause 23(10)(a)], [Part 3, clause 24(10)(a)], [Part 3, clause 25(8)(a)]

1.48 If a landfill facility triggered the 25,000 tonnes of CO$_2$-e threshold in the previous eligible financial year it is a ‘designated large landfill facility’. The Regulator may publish a list of designated large landfill facilities and their locations. This list will assist other landfill facilities to determine whether the 10,000 tonnes of CO$_2$-e threshold applies to them for an eligible financial year. [Part 1, clause 5, definition of 'designated large landfill facility'], [Part 12, clause 206]
Example 1.1: Application of 25,000 tonnes of CO₂-e threshold

During a financial year Coal Company Ltd operates a facility that emits 20,000 tonnes of CO₂-e from the combustion of coal, and 15,000 tonnes of CO₂-e from an industrial process.

The total emissions from the facility are 35,000 tonnes of CO₂-e. Coal Company Ltd is a liable entity.

Example 1.2: Application of 10,000 tonnes of CO₂-e threshold for landfill facilities

WasteCo, a landfill facility, emits 14,000 tonnes of CO₂-e in an eligible financial year.

WasteCo is within the specified distance of another open landfill facility, operated by TipCorp, which accepts a similar classification of waste and in the previous eligible financial year emitted 25,000 tonnes or more of CO₂-e.

WasteCo is covered by the mechanism.

Facilities that exceed a pro-rata emissions threshold

1.49 A pro-rata threshold is applied where the entity that has liability for a facility under the mechanism changes during an eligible financial year. This occurs when there is a change in operational control of a facility, when an entity holds an LTC for a facility for only part of the year, or when there is a designated JV in relation to the facility for only part of a year.

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

1.51 A pro-rata emissions threshold will apply to a facility where:

- the facility is under the operational control of an entity for part of a year; or
- an entity is a designated JV participant for that facility for part of a year; or
- an entity is the holder of an LTC for that facility for part of a year. [Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)]

1.52 If a facility’s emissions reach or exceed the relevant pro-rata threshold, then the operator of that facility or the holder of an LTC for that facility, or a participant in a designated JV relating to that facility will be a liable entity.
1.53 Pro-rata thresholds are calculated using a specified formula. [Part 3, clause 20(5)], [Part 3, clause 21(5)], [Part 3, clause 22(5)], [Part 3, clause 23(5)], [Part 3, clause 24(5)], [Part 3, clause 25(5)]

1.54 The calculation involves multiplying the relevant threshold by the number of control days or certificate days for a facility (whichever is relevant), and dividing the result by the number of days in the year.

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

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

**Example 1.3 Pro rata threshold**

If an entity had operational control of a facility for 100 days of the year, the threshold for that facility would be worked out using the formula:

\[
25,000 \times 100 \text{ control days} \div 365 = 6,849 \text{ tonnes of CO}_2\text{-e}
\]

If the emissions from that facility are 6,849 tonnes of CO$_2$-e or more during the 100 control days then those emissions will count towards the entity’s liability.

**Emissions that count towards determining whether thresholds are met**

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

1.58 For landfill facilities, all scope 1 emissions from the facility count for the purposes of determining whether that facility meets the threshold for inclusion in the mechanism. That is, all scope 1 emissions that are covered under the mechanism are counted, including emissions from combustion of energy sources at the facility, emissions from legacy waste and emissions from new waste.

**Avoidance of double counting**

1.59 Where a facility’s emissions are attributable to the combustion of natural gas supplied by a natural gas retailer through a distribution pipeline and the facility operator did not quote an obligation transfer number (OTN) for that natural gas, then these emissions count towards determining whether a facility meets the threshold but do not count towards the facility operator’s provisional emissions number (PEN). [Part 3, clauses 20(7)-(8)], [Part 3, clauses 21(7)-(8)], [Part 3, clauses 22(7)-(8)], [Part 3, clauses 23(7)-(8)], [Part 3, clauses 24(7)-(8)], [Part 3, clauses 25(7)-(8)]
Chapter 1: Liable entities and covered emissions

avoid double counting of emissions and the natural gas retailer is liable for the emissions from the combustion of the natural gas it supplied.

1.60 If the facility operator quotes an OTN for that supply of natural gas, then it is generally liable for emissions from the use of that gas. The OTN mechanism is explained below.

Example 1.4: Avoidance of double counting

Black Coal Company has operational control of a black coal mine. During a particular financial year fugitive emissions of 23,000 tonnes of CO2-e are emitted from the mine. A further 3,000 tonnes of CO2-e are emitted from the combustion of natural gas supplied by a natural gas retailer through a distribution pipeline. Black Coal Company does not quote an OTN for the supply of the natural gas.

Black Coal Company is a liable entity under the direct emitter provisions because total emissions from the mine are 26,000 tonnes of CO2-e.

Black Coal Company is only liable for the fugitive emissions of 23,000 tonnes of CO2-e. The natural gas retailer is liable for the emissions from Black Coal Company’s combustion of the natural gas.

Provisional emissions numbers

1.61 If an entity is liable for a facility, then the number of tonnes of CO2-e emitted from the facility will be a PEN for that facility. [Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)] PENs are used to work out an entity’s total mechanism liability, and therefore the number of eligible emissions units the entity must surrender (see Chapter 4).

Designated joint ventures

1.62 The general rule the facility operator is the liable entity for that facility’s emissions does not apply in the case of designated JVs.

Mandatory designated joint ventures

1.63 A mandatory JV exists where:

- a JV has a facility; and
- the JV participants have an agreement in relation to the facility; and
- two or more participants in the JV have the ability to introduce the operational and environmental policies at the facility; and
- no one participant has greater authority to introduce such policies (and no declaration has been made by the Regulator under the NGER Act that a person has operational control of the facility),
(see Example 1.5).

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

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

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

are intended to ensure that the JV is sufficiently related to the facility, and that the JV participants should have liability for the facility. [Part 3, clause 65]

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

1.68 There will be civil penalties for a failure to notify the Regulator of the JV. The participants will also be required to apply for a ‘participating percentage determination’, which will be used to allocate liability for the emissions from the facility between the JV participants. [Part 3, clause 66]
Example 1.5 Mandatory joint venture

Companies A, B and C are members of an unincorporated JV (UJV) that operates an emitting facility. They receive shares in the output of the facility of 20 per cent, 50 per cent and 30 per cent respectively. They collectively operate the facility, and no one party has the most authority to implement operational and environmental policies. Accordingly liability for the emissions from the facility will be allocated to the each company in proportion to its interest.

Voluntary designated joint ventures

A voluntary designated JV is where:

• the JV has a facility; and
• the participants in a JV are parties to an agreement in relation to the facility; and
• a facility is operated exclusively for the JV by a separate operator; and
• none of the participants is an individual; and
• none of the JV participants is a foreign person

(see Example 1.6).

The participants in the JV can apply to the Regulator for a transfer of liability if they have the written consent of the facility operator and the facility operator’s confirmation that the facility is operated...
exclusively for the JV, and provide any other information required by the regulations.

1.71 This transfer of liability recognises the potential complexity of JV arrangements and facilitates efficient management of emissions liabilities by the participants. [Part 3, clauses 67 and 68]

1.72 The Regulator can require the participants to provide more information about the application, and must not make a declaration unless satisfied that participants have, and are likely to continue to have the capacity, financial resources and access to information necessary to comply with their obligations under the mechanism and to discharge their emissions liabilities. [Part 3, clauses 67 and 68]

1.73 The facility operator will also be taken to guarantee the payment by the JV participants of any shortfall charges and related penalties for the emissions obligation of the facility. [Part 3, clause 139] These requirements provide certainty that obligations for emissions from the facility are met.

1.74 The declaration of the voluntary JV may come into effect from an earlier date than the declaration is made, as long as that date is within the same financial year. The declaration continues indefinitely, although the Regulator must revoke the declaration if requested by the participants with the consent of the operator. [Part 3, clauses 71 and 72]

**Participating percentage declaration**

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

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

1.77 The Regulator may also make a determination on the Regulator’s own initiative, but before making any such determination must provide a copy to the JV participants and have regard to submissions made within a specified period which is not to be less than 28 days. [Part 3, clause 77]
Example 1.6 Voluntary joint venture arrangements

Companies A, B and C are JV participants.

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

The JV members apply to the Authority for a liability transfer and each is liable for the facility’s emissions in proportion to its interest in the facility.
1.78 The participating percentage determination must be made according to a hierarchy of criteria, namely:

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

1.79 At each step the Regulator can accept an alternative percentage if it is satisfied that this reflects equally well or better the economic benefits received by JV participants. [*Part 3, clause 78*]

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

**Liability transfer certificates**

1.81 The general rule that the facility operator is the liable entity for that facility’s emissions does not apply in the case where liability is transferred to another party by means of an LTC.

**Corporate group transfer test**

1.82 A registered company can apply to the Regulator to transfer to itself liability in relation to a facility, where the facility is under the operational control of another company within the same corporate group. [*Part 3, clause 80*]

1.83 The operator of the facility must give its consent and this consent must be provided to the Regulator. [*Part 3, clause 81(4)(e)(ii)]

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

1.85 This ensures that there is always a liable entity for a covered facility and prevents the transfer being used to avoid emission liabilities.
Example 1.7 Corporate group liability transfer

A corporate group LTC is issued for Subsidiary Y in relation to Facility 2.

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

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

Subsidiary X will, however, have consented to the application for the transfer and in doing so will have given a statutory guarantee against liability incurred by Subsidiary Y.

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

1.86 Liability may be transferred from the operator of a facility to another person who has ‘financial control’ (see below) over the facility. [Part 3, clause 84]

1.87 Transfers are not allowed to certain persons:

- the person cannot be an individual: this avoids complications that may arise when an individual is liable, such as death.
- the person cannot be a foreign person: this prevents liability from being transferred to a person overseas to avoid compliance under the mechanism, recognising that it would be more difficult enforce obligations against a foreign person.
- the person cannot be within the same controlling corporation’s group as the operator: this is because an application for a transfer in this instance is intended to be made under the corporate group transfer test.

1.88 Liable entities should not need these provisions often, because the operator of a facility generally has financial control of that facility. However, in some circumstances, for example contract mining and pipeline operations, the person with financial control of a facility contracts out the operation of a facility to another person.

1.89 The operator generally has operational control of a facility and therefore liability for that facility. As the person with financial control of a facility may also have an influence over emissions from the facility, it is appropriate to let that person accept liability with the agreement of the operator.

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

1.91 ‘Financial control’ recognises that more than one person may have financial control over a facility. For example, several persons may be participants in a JV or partnership that collectively have financial control of a facility. In these circumstances, the person with the equal or greatest share in the economic benefits from a facility will have financial control for the purposes of the bill. [Part 3, clause 92]
Example 1.8 Transfer of liabilities from the operator to the financial controller of a facility

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

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

Corporation A will not have obligations or liability for Facility 1 under the mechanism or under the NGER Act.
Criteria for the issue of a liability transfer certificate

1.92 An entity must also meet the criteria for the issue of an LTC by the Regulator. [Part 3, clause 83], [Part 3, clause 87] These criteria are included to ensure that an entity has the capacity, access to financial resources and information to comply with its obligations under the mechanism as well as the NGER Act.

1.93 The financial criterion ensures that a person does not transfer liability to a person that cannot meet mechanism obligations in order to avoid or delay liability. This test is not, however, intended to involve an exhaustive explanation by the applicant of its financial situation. [Part 3, clause 83], [Part 3, clause 87]

Reporting obligations and liability transfer certificates

1.94 The obligations to report under the NGER Act for a facility which is the subject of a financial control LTC, will be transferred to the holder of the LTC. This includes reporting obligations concerning greenhouse gas emissions, energy production and energy consumption. This is given effect by the Consequential Amendments bill (see Schedule 1, Part 2, items 175-181 of the Consequential Amendments bill).

1.95 In the case of a corporate group LTC, general reporting obligations under the NGER Act do not follow the transfer.

Application process for a liability transfer certificate

1.96 An application to obtain an LTC must be made in writing in a form approved by the Regulator. An application for a corporate group liability transfer must be accompanied by a written statement from the operator of the facility that it has operational control of the facility, is a member of the same corporate group as the transferee and consents to the transfer.

1.97 An application for a financial control LTC must include the written consent of the controlling corporation of the corporate group (if the operator is a member of a corporate group), or the facility operator. In either case, the application must include any information and documents specified in the regulations. This is intended to include information and documents that support an entity’s application and demonstrate that the entity meets the criteria for the issue of an LTC. [Part 3, clause 83], [Part 3, clause 85]

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

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

1.100 An LTC may come into force on the start day set out on it, which must be during the same financial year as the application was made. This ensures that liability cannot be transferred from a financial year that has already passed and also allows a person to obtain an LTC for an entire financial year regardless of when the application is made or whether the LTC is issued during a financial year. [Part 3, clause 88]

1.101 The start date may only be earlier than the day on which the LTC is issued if the applicant and the relevant parties consent to the specification of that start day. This ensures that all persons that may be liable under the mechanism know who is liable for a given period. [Part 3, clause 88]

**Duration of a liability transfer certificate**

1.102 Once made, an LTC remains in force indefinitely, subject to provisions relating to surrender and cancellation of an LTC. [Part 3, clause 88]

**Voluntary surrender of liability transfer certificate**

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

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

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

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

- if a company ceases to pass a corporate group or financial control liability transfer tests;
- in the case of corporate group LTC, the company is no longer a member of the controlling corporations group;
- in the case of a financial control LTC, the holder of the LTC ceases to be a member of the corporate group of the controlling corporation that consented to the application;
- if a company has not paid a unit shortfall charge more than 30 days after it became due for payment;
- if the company has become an externally-administered body corporate (within the meaning of the Corporations Act 2001); or
- if regulations specify one or more other grounds for cancellation and at least one of those grounds is applicable to entity. [Part 3, clause 90]

1.106 The cancellation or surrender of an LTC will result in future obligations and liability returning to the person that would have had obligations and liability in the absence of the LTC. [Part 3, clause 89], [Part 3, clause 90]

1.107 Each LTC relates to a single facility. This allows a person to apply for the transfer of liability for particular facilities at different times, as the person’s circumstances change. [Part 3, Division 6, clause 80], [Part 3, clause 81]

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

‘Persons’ that may be liable entities

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

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

1.111 The Australian Government and the state, territory and local governments are bound by the bill. In line with normal practice, the
Crown is not subject to prosecution for a criminal offence or a pecuniary penalty, with the exception of penalties for late payment of shortfall charge and for failure to meet relinquishment requirements. This protection does not apply to an authority of the Crown, such as a body conducting a business activity. [Part 1, clause 8]

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

**Meaning of ‘facility’ and ‘landfill facility’**

1.113 ‘Facility’ is defined in the NGER Act. Broadly, a facility is an activity, or a series of activities, where:

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

1.114 The activity or activities must form a single undertaking or enterprise and meet requirements in the regulations, or they must be declared to be a facility by the GEDO.

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

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

**Measurement of covered emissions**

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

1.118 The Consequential Amendments bill provides for subsection 10(3) of the NGER Act to allow the Minister to determine the methods and criteria for methods by which amounts of emissions are to be measured. A single determination will apply for the mechanism and the NGER Act (see Schedule 1, Part 2, items 337-339 of the Consequential Amendments bill). These methods are published in the NGER (Measurement) Determination 2008.
Liability for emissions from natural gas

1.119 To achieve comprehensive and efficient coverage of emissions from the combustion of natural gas, liability is generally imposed on natural gas retailers for the natural gas they supply. Facilities that do not obtain natural gas from a retailer (for example, power stations that purchase gas directly from a producer) will be liable for the natural gas they use. This liability will arise through either the ‘direct emitter’ provisions, or through an ‘application to own use’ provision where the facility does not have direct emitter liability. [Part 3, clauses 33 to 36]

1.120 Natural gas retailers are liable for potential emissions embodied in natural gas where:

- the retailer supplies natural gas to a person who does not quote an OTN; and
- that natural gas is withdrawn from a distribution pipeline.

1.121 An OTN holder is liable for potential emissions embodied in an amount of natural gas supplied to them by a natural gas retailer where they quoted their OTN for that supply.

1.122 Otherwise, (that is, in cases where the natural gas has not given rise to liability for a natural gas retailer through being supplied by a natural gas retailer and withdrawn from a distribution pipeline), liability for greenhouse gas emissions from natural gas arises where

- the natural gas is withdrawn from a distribution pipeline or a transmission pipeline; and
- the natural gas has not given rise to liability for a natural gas retailer through being supplied by a natural gas retailer and withdrawn from a distribution pipeline.

1.123 If the person using this natural gas has a liability under the direct emitter provisions, the emissions from the combustion of that natural gas at a facility, calculated in tonnes of CO$_2$-e, will count towards the facility operator’s direct emitter liability.

1.124 If the person using this natural gas is not liable as a direct emitter, the person is liable under the ‘application to own use’ provision for the potential greenhouse gas emissions embodied in the amount of natural gas which they applied to their own use.

1.125 ‘Natural gas if withdrawn from a transmission or distribution pipeline’. This phrase will be defined in the NGER Regulations. It is not intended to define ‘natural gas’ itself, as the dictionary definition is sufficient. The definition of ‘natural gas if withdrawn from a transmission or distribution pipeline’ and the application of the natural gas liability rules will be broad enough to encompass situations where other substances (for example coal seam...
methane) are co-mingled with natural gas in a pipeline. This means that liability for emissions from natural gas cannot be avoided simply because other substances are co-mingled with natural gas at the time of combustion.

1.126 ‘Withdrawal’ will be defined in the regulations. This definition will encompass situations where:

- natural gas is taken out of a distribution or transmission pipeline for combustion at residential properties and upstream facilities; and
- amounts of gas are combusted by pipeline operators in pipeline compressors in the process of operating the pipeline. Including this situation in the definition of ‘withdrawal’ will ensure comprehensive mechanism coverage of natural gas.

1.127 ‘Distribution pipeline’ and ‘transmission pipeline’ will be defined in the NGER Regulations.

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

1.129 By basing liability on the concepts of both supply and withdrawal, liability will not be applied to amounts of gas which are supplied but are not combusted. For example, these rules will mean liability does not arise for amounts of gas which are supplied into or out of a wholesale gas market. Fugitive emissions from pipelines will be picked up through the ordinary application of the general facility rules. [Part 3, clause 20], [Part 3, clause 21], [Part 3, clause 22]

Potential greenhouse gas emissions

1.130 Liability for natural gas is based on potential greenhouse gas emissions, rather than actual emissions, except where direct emitters are liable for emissions from natural gas. This is because the liability generally arises before the fuel is combusted and emissions are released [Part 3, clause 33(1)(e)], [Part 3, clause 34(1)(g)], [Part 3, clause 35(1)(d)], [Part 3, clause 36(1)(e)]

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

- Under the first method, known as the default method, the Minister may determine that the amount of a particular greenhouse gas that would be released into the atmosphere as a result of the combustion of an amount of natural gas is taken, for the purposes of the mechanism, to be the amount of natural gas multiplied by a value specified in the regulations in relation to that fuel.

- Alternatively, a person may elect to use a prescribed alternative method to ascertain the potential greenhouse gas emissions embodied in an amount of natural gas. This involves, amongst other things, using a method specified in the determination which involves testing one or more samples of the natural gas.

**Natural gas supplied by a natural gas retailer and withdrawn from a distribution pipeline**

1.133 Natural gas retailers will be liable for the emissions embodied in the natural gas that they supply to their customers where:

- the natural gas has been withdrawn from a distribution pipeline; and

- the customer does not quote an OTN to the retailer for that natural gas. [Part 3, clause 33] The OTN mechanism is described below.

1.134 As a retailer’s liability is based on the concept of ‘withdrawal’, there are no gaps in the mechanism’s coverage of emissions from natural gas where natural gas is withdrawn from a distribution pipeline by one person and combusted by another person. For example, a retailer will be liable where it supplies natural gas to one person who withdraws the natural gas from a distribution pipeline, even where that person then sells the gas to another person who combuts it.

1.135 ‘Natural gas retailer’ will be defined in the regulations. [Part 1, clause 5, definition of ‘natural gas retailer’] This definition will cover persons who supply natural gas where the natural gas is delivered to the recipient through a distribution pipeline. The definition will exclude particular classes of persons, for example a person who supplies natural gas to a natural gas retailer where the retailer takes custody of the natural gas in the distribution pipeline, but does not withdraw the gas from the pipeline.
Chapter 1: Liable entities and covered emissions

**Provisional emissions number**

1.136 Each supply of natural gas for which a natural gas retailer is liable gives rise to a preliminary emissions number (preliminary EN) for that natural gas retailer. A preliminary EN is equal to the number of tonnes of potential greenhouse gas emissions embodied in the amount of natural gas supplied, in CO$_2$-e.

1.137 The PEN of the natural gas retailer is the sum of the retailer’s preliminary ENs for the financial year. [*Part 3, clause 33*]

**OTN holders may take on liability**

1.138 In certain situations, entities can take on liability for natural gas they receive from a natural gas retailer by quoting an OTN to their retailer. Quoting and OTN is voluntary. Accepting an OTN is generally voluntary, except where certain contracts are already in existence. A natural gas retailer is not liable for the natural gas it supplies to a person who has quoted their OTN. [*Part 3, clause 56*, *Part 3, clause 57*, *Part 3, clause 58*, *Part 3, clause 59*, *Part 3, clause 60*]

**Example 1.9: Natural gas retailer**

In a financial year, a natural gas retailer supplies a total amount of natural gas to its customers with potential emissions embodied in the natural gas of 150,000 tonnes of CO$_2$-e.

Of this amount of natural gas that the retailer supplies:

- natural gas with embodied emissions of 50,000 tonnes of CO$_2$-e is withdrawn by a customer from a transmission pipeline. The retailer is not liable for this amount of emissions, because the gas is not withdrawn from a distribution pipeline.

- natural gas with embodied emissions of 20,000 tonnes of CO$_2$-e is withdrawn by customers from distribution pipelines who quote an OTN to the retailer. The retailer is not liable for this amount of emissions – liability passes to the OTN holders.

- natural gas with embodied emissions of 80,000 tonnes of CO$_2$-e is withdrawn by customers from distribution pipelines who do not quote an OTN. The retailer is liable for this amount of emissions.

The retailer is a liable entity under the natural gas provisions. The retailer’s total liability is for 80,000 tonnes of CO$_2$-e.

**Other natural gas withdrawn from a distribution or transmission pipeline**

1.139 Where natural gas is obtained by a person, and that natural gas has not already given rise to liability for a natural gas retailer by being supplied by that retailer and withdrawn from a distribution pipeline, liability for the embodied greenhouse gas emissions arise in one of the two ways described below.
Natural gas counts towards direct emitter liability

1.140 If the facility that combusts the natural gas meets the relevant liability threshold, the person with operational control of that facility (or the holder of an LTC for that facility) is liable for the emissions from that natural gas under the ‘direct emitters’ provisions in Part 3, Division 2. This liability is described above in ‘Liable entities – direct emitters of greenhouse gases’. Emissions resulting from the combustion of natural gas are covered emissions under the mechanism and count towards a person’s provisional emission number under the direct emitters provisions. [Part 3, clause 20(1)], [Part 3, clause 21(1)], [Part 3, clause 22(1)], [Part 3, clause 23(1)], [Part 3, clause 24(1)], [Part 3, clause 25(1)]

1.141 The OTNs-no double counting provisions ensure that liability does not arise twice for natural gas emissions. Where a retailer has already accrued liability for natural gas supplied to a facility, the operator of the facility will not be liable for emissions from that natural gas. [Part 3, clause 20(8)-(9)], [Part 3, clause 21(8)-(9)], [Part 3, clause 22], [Part 3, clause 23(8)-(9)], [Part 3, clause 24(8)-(9)], [Part 3, clause 25(6)-(7)]

1.142 In other cases, natural gas gives rise to ‘application to own use’ liability

1.143 However, if the facility that combusts the natural gas does not meet the liability threshold under the ‘direct emitters’ provisions, the person who uses the gas will be a liable entity.

1.144 A person will be a liable entity if:

- they withdraw natural gas from a distribution pipeline or a transmission pipeline; and
- the natural gas has not given rise to liability for a natural gas retailer through being supplied by a retailer and withdrawn from a distribution pipeline; and
- the person uses this natural gas in a way which results in greenhouse gas emissions; and
- these emissions do not count towards the person’s direct emitter liability. [Part 3, clause 34]

1.145 This ‘application to own use’ liability ensures broad coverage of natural gas through applying liability to uses of natural gas at facilities which are not covered by direct emitter liability.

Provisional emissions number

1.146 Each amount of natural gas withdrawn gives rise to a preliminary EN for the person who puts the natural gas to their own use. A preliminary EN is equal to the number of tonnes of potential greenhouse gas emissions embodied in the amount of natural gas supplied, in CO₂-e.
1.147 The PEN of the person is the sum of the person’s preliminary ENs under this provision for the financial year. [Part 3, clause 34(2)]

Example 1.10 Smaller user of natural gas

Company L combusts natural gas in the course of a manufacturing process. Company L withdraws this natural gas directly from a transmission pipeline.

During a financial year Company L has total covered emissions of 20,000 tonnes of CO2-e, with 15,000 tonnes of these emissions coming from the company’s use of natural gas.

Company L:

• is not liable under the direct emitter provisions because total emissions from the facility are less than 25,000 tonnes of CO2-e
• is a liable entity under the application to own use provision
• is liable for 15,000 tonnes of CO2-e of emissions from its use of natural gas
• is not liable for the remaining 5,000 tonnes of CO2-e that it emits, because emissions from sources other than natural gas are not counted under the application to own use provision.

The obligation transfer number mechanism

1.148 In general, natural gas retailers are liable for the natural gas they supply to their customers through a distribution pipeline. However, in certain situations, obligations for natural gas can be transferred to natural gas users using the OTN mechanism. [Part 3].

1.149 Entities which are eligible to take on mechanism liability for natural gas by quoting an OTN to their retailer. Quoting an OTN allows the OTN holder to take on liability for the emissions embodied in the natural gas they receive. The OTN holder then becomes a liable entity under the mechanism. Quoting and accepting an OTN are generally voluntary, as explained above.

Eligibility to quote an OTN

1.150 Entities that will be able to quote their OTN to their natural gas retailer in relation to natural gas supplied are:

• large users of natural gas;
• persons approved by the Regulator;
• users of natural gas as a feedstock;
• users of natural gas in manufacturing CNG, LNG or LPG. [Part 3, clauses 56 to 58]
Large user of natural gas

1.151 If a person receives natural gas from a natural gas retailer (and that natural gas is withdrawn from a distribution pipeline), and the person qualifies as a large user of natural gas, that person is allowed to quote an OTN for a supply of natural gas.

1.152 A person qualifies as a large user of natural gas if:

- at the time that natural gas is supplied to them by a retailer, the person operates a facility; and
- in any financial year from the 2010-2011 financial year until the financial year immediately prior to the current financial year, that facility passed the ‘threshold test’.

1.153 To pass the ‘threshold test’ for a financial year, the facility’s emissions which were attributable to the combustion of natural gas during that financial year must have been at least 25,000 tonnes of CO₂-e, or the amount specified in the regulations. [Part 3, clause 56(2)]

1.154 The holder of an LTC for a facility is considered to be its operator for the purposes of the ‘large user’ provisions [Part 3, clause 56(10)]

1.155 There are a number of advantages to this approach. It allows large users of natural gas to manage all their liability for natural gas supplied by a retailer, as long as one facility they operate was over the ‘large users’ threshold in a previous financial year. This will simplify billing arrangements where a large fuel user purchases natural gas from one supplier for use at more than one facility.

1.156 This approach provides certainty at the start of the mechanism, because the ‘threshold test’ can be satisfied in either of the two financial years prior to the mechanism start (2010-2011 and 2011-2012). This will enable entities to determine their eligibility, apply for an OTN and get their OTN quotations in place prior to the mechanism start on 1 July 2012.

1.157 This approach also provides ongoing certainty for large users of natural gas. ‘Large users’ of natural gas may quote their OTN for every financial year starting from, and including, the first year in which they qualify as a ‘large user’. If an entity drops below the ‘large user’ threshold in any financial year, then they may continue to quote their OTN in respect of natural gas supplied by a retailer.

Approved person

1.158 An ‘approved person’ can also quote their OTN in relation to natural gas supplied to them by a retailer. [Part 3, clause 56(3)] Entities will be able to apply to the Regulator to become an approved person. The bill specifies procedures and requirements relating to such an application. The Regulator will only approve an application if satisfied that if the
person operates a facility and it is likely that this facility will have emissions from natural gas of at least a certain amount, which will be specified in the regulations. [Part 3, clause 56(8)]

Entities that do not yet qualify under the ‘large users’ provision may quote an OTN if a facility that they operate is likely to exceed the large users threshold. This may occur, for example, where an entity expects to increase production at an existing facility or establish a new facility.

**Example 1.11 Large user of natural gas**

Gas Corporation has operational control over a large manufacturing plant which withdraws natural gas from a transmission pipeline. In 2010-11 emissions from the plant comprise:

- 40,000 tonnes of CO2-e from use of natural gas; and
- 20,000 tonnes of CO2-e from other sources.

Gas Corporation also has operational control over another smaller plant which is a facility in its own right. This facility uses natural gas withdrawn from a distribution pipeline which is supplied to Gas Corporation by a natural gas retailer. In 2011 emissions from this second plant comprise:

- 15,000 tonnes of CO2-e from use of natural gas
- 5,000 tonnes of CO2-e from other sources.

In 2013 Gas Corporation is permitted to quote an OTN for the natural gas supplied to it by a retailer at the smaller plant because, in 2010-11, its emissions from natural gas exceeded the threshold of 25,000 tonnes of CO2-e.

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

**Example 1.12: Start-up company that expects to be a large user of natural gas**

NatGas is in the process of commissioning a manufacturing plant. It expects to emit 50,000 tonnes of CO2-e of greenhouse gases from the combustion of natural gas withdrawn from a distribution pipeline in its first year of operation. NatGas applies to the Regulator for an OTN and submits all information and documents specified in the regulations.

The Regulator assesses the application and decides that it is likely that NatGas’s emissions from natural gas combustion will exceed the threshold value specified in the regulations. The Regulator, by written notice, declares that the company is an approved person. NatGas is permitted to quote an OTN for the natural gas it purchases for its new electricity plant, and for any other fuel supplied to it.
User of natural gas as a feedstock

1.160 If a person uses natural gas as a feedstock, they may quote their OTN to their natural gas retailer for natural gas supplied to them. [Part 3, clause 57]

1.161 ‘Feedstock’ is ‘a substance that is converted by a chemical process into another substance that is not a greenhouse gas’. [Part 1, clause 5, definition of ‘feedstock’]

1.162 By quoting an OTN, the person can take on liability for the natural gas supplied to them. The person will be able to ‘net out’ any amounts of natural gas which are used as a feedstock and which therefore do not result in greenhouse gas emissions. The process of ‘netting-out’ amounts of natural gas is described below.

1.163 This mechanism means that no liability arises for uses of natural gas which ultimately do not result in the release of greenhouse gas into the atmosphere.

1.164 Where part of the natural gas supplied under an OTN is used as a feedstock and part is combusted, mechanism obligations will apply for the portion of natural gas resulting in greenhouse gas emissions. Liability arises for these emissions under the direct emitter provisions, or under the ‘application to own use’ provision where the direct emitter provisions do not apply. [Part 3, clause 20], [Part 3, clause 21], [Part 3, clause 22], [Part 3, clause 23], [Part 3, clause 24], [Part 3, clause 25], [Part 3, clause 33], [Part 3, clause 34], [Part 3, clause 35], [Part 3, clause 36]

User of natural gas in manufacturing CNG, LNG or LPG

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

1.166 Some entities manufacture these fuels from natural gas supplied by a retailer through a distribution pipeline. Without special provision, liability under the mechanism might arise for these fuels twice: once through the mechanism when the fuel is supplied by a natural gas retailer in natural gas form, and again when an ‘equivalent carbon price’ is applied at the time that excise or customs duty is paid on the CNG, LNG or LPG.

1.167 Therefore, if a person receives natural gas from a retailer, and carries on a business manufacturing CNG, LNG or LPG, they may quote their OTN to their natural gas retailer in respect of natural gas supplied. [Part 3, clause 58]

1.168 As with users of natural gas as a feedstock, the person can ‘net out’ any amounts of natural gas which are used to manufacture these fuels from their mechanism liability. This will avoid applying a carbon price twice to these fuels.
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Provisional emissions number

1.169 Each supply of natural gas for which an OTN is quoted gives rise to a preliminary EN for the OTN holder. A preliminary EN is equal to the number of tonnes of potential greenhouse gas emissions embodied in the amount of natural gas supplied, in CO\textsubscript{2}-e.

1.170 The PEN of the OTN holder is the sum of the OTN holder’s preliminary ENs for the financial year. [Part 3, clause 35(2)]

1.171 If an OTN holder has a PEN, they are a liable entity under the mechanism.

Netted-out numbers

1.172 Particular amounts of natural gas can be ‘netted out’ from an OTN holder’s PEN. The OTN holder’s PEN is reduced by the netted-out numbers (but not below zero). [Part 3, clause 35(4)-(6)]

1.173 This means that no liability arises for natural gas which is used in a way which is not intended to give rise to liability under the mechanism. Uses of natural gas which do not result in greenhouse gas emissions can be netted out, as can natural gas which is manufactured into a substance which will have a carbon price applied through alternative arrangements. [Part 3, clause 35(4)-(6)]

1.174 If an OTN holder quotes their OTN for an amount of natural gas, a netted-out number arises for the OTN holder where:

- the OTN holder used an amount of that natural gas as a feedstock or used in a way that did not result in greenhouse gas emissions; [Part 3, clause 35(4)]

- an amount of that natural gas counts towards the OTN holder’s ‘direct emitter’ liability under Division 1 of Part 3; and [Part 3, clause 35(4)]

- the OTN holder manufactures CNG, LNG or LPG from an amount of that natural gas, and the OTN holder holds a licence under the *Excise Act 1901* to manufacture that fuel, and that fuel is entered for home consumption and attracts excise duty. [Part 3, clause 35(6)]

1.175 The netted-out number is equal to the potential greenhouse gas emissions embodied in the relevant amount of natural gas. Potential greenhouse gas emissions are used in this case because the OTN holder’s original liability for the natural gas they receive is measured in potential greenhouse gas emissions.

Reporting requirements

1.176 The NGER Act will be amended to require liable entities to register under the Act and report their PENs for a financial year.
Amendments to this Act will also allow regulations to specify reporting requirements for entities that either use or accept the quotation of an OTN (see Schedule 1, Part 2, item 367 of the Consequential Amendments bill).

**Example 1.13: Feedstock user of natural gas**

A person receives an amount of natural gas from a retailer and quotes their OTN to their retailer in relation to the supply. The person uses a portion of the natural gas as a feedstock in a fertiliser manufacturing process that completely sequesters the natural gas into the fertiliser. The person also uses a portion of the natural gas for heating purposes.

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

**Issue of an OTN, OTN cancellation and surrender**

**Issue of an OTN**

1.177 An OTN is issued to a person, and is not transferable. [Part 3, clause 44] An OTN may be issued either as a result of an application, or on the Regulator’s own initiative. [Part 3, clause 37], [Part 3, clause 40], [Part 3, clause 41]

1.178 Allowing the Regulator to issue OTNs without an application is intended to simplify the process for entities that the Regulator can readily identify as requiring an OTN. For example, the Regulator will be able to identify large natural gas users from emissions data reported under the NGER Act.

1.179 Where the issue of an OTN is by application, the bill specifies procedures and requirements relating to that application. [Part 3, clause 37], [Part 3, clause 39], [Part 3, clause 40]

1.180 Before issuing an OTN, either as a result of an application or on the Regulator’s own initiative, the Regulator must:

- be satisfied that the person is, or is likely to be, permitted to quote an OTN; and
- have carried out an identification procedure, the details of which will be set out in the regulations, that enables the Regulator to verify the identity of the person. [Part 3, clause 40], [Part 3, clause 41]
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Cancellation or surrender of an OTN

1.181 OTN holders who are not currently permitted to quote their OTN may continue to hold their OTN if they wish, provided they are likely to be required or permitted to quote it in the future.

1.182 A person may surrender their OTN with the written consent of the Regulator. [Part 3, clause 42]

1.183 The Regulator may, by written notice, cancel an OTN that is held by a person that is not permitted to quote it and is unlikely to be permitted to do so in the future. [Part 3, clause 43(1)]

1.184 The Regulator may also cancel an OTN if a person has contravened a provision of the bill or an associated provision. It is anticipated that the Regulator may take this step where there is an unacceptably high risk of further breaches of the bill or associated provisions relating to the use of that OTN. [Part 3, clause 43(2)]

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

The OTN register

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

1.187 An entry in the OTN register will include an OTN, the identity of the person that was issued with that OTN, that person’s last known address, and their ABN if they have one. This information will assist a supplier in identifying and confirming an OTN holder, lowering compliance costs.

1.188 The OTN Register will also include a list of natural gas retailers who are willing to accept quotations of OTNs. The Regulator must, if requested by a natural gas retailer, include an entry for that retailer. An entry for a natural gas retailer will include the name of the natural gas retailer, their last known address, their telephone number, their website address, their ABN if they have one and any conditions which the retailer places on acceptance of OTN quotations.

1.189 This listing of natural gas retailers on the OTN Register will assist users of natural gas to find a supplier who will accept their OTN.

1.190 An OTN holder (or a natural gas retailer with an entry in the Register) who changes their name or address as set out in the register
must within 14 days notify the Regulator of the change. A person who fails to meet this requirement may incur a civil penalty. [Part 3, clause 47]

**OTN quotation and acceptance of OTN quotation**

**Quoting an OTN**

1.191 Quoting an OTN is voluntary. Accepting an OTN quotation is generally voluntary. A voluntary approach to OTN quotation allows suppliers and recipients of fuel to come to a commercial agreement about who should pay the carbon liability as part of normal contract negotiation processes. This approach also significantly simplifies mechanism rules and implementation and compliance procedures for the Regulator.

1.192 An OTN may only be quoted by the person to whom it was issued. [Part 3, clause 48], [Part 3, clause 64]

1.193 A person may quote their OTN in relation to a particular supply or a class of supplies. A quotation remains in effect unless it is withdrawn before the supply occurs (see section on OTN withdrawal, below). [Part 3, clause 48(1)]

1.194 A person quotes their OTN in relation to a supply or a class of supplies of natural gas by making a statement in writing. The statement may be included in a contract, order or similar document and may be in electronic form. [Part 3, clause 48(2)]

1.195 A quotation must set out:

- the words ‘quotat
  - the person’s name;
- if the person has an ABN, the person’s ABN; and
- any other information that is specified in the regulations. [Part 3, clause 48(1)]

**Acceptance of OTN quotation**

1.196 Acceptance of an OTN quotation by a natural gas retailer is generally voluntary. However, a natural gas retailer must accept a quotation where the gas is supplied under a particular type of existing contract, as described below. An OTN quotation must be accepted by the retailer in order for the quotation to come into effect.

1.197 Acceptance takes place when a retailer notifies the OTN holder in writing. This may be included in a contract, order or similar document and may be in electronic form. Acceptance ensures that both the OTN holder and supplier understand when an OTN quotation comes into effect.

1.198 The notice of acceptance must set out:
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- the words ‘acceptance of quotation of OTN’ followed by the OTN;
- the OTN holder’s name;
- if the OTN holder has an ABN, that ABN;
- a description of the supply or class of supplies;
- the name of the natural gas retailer;
- if the natural gas retailer has an ABN, that ABN; and
- any other information that is specified in the regulations. [Part 3, clause 59], [Part 3, clause 60]

1.199 If the natural gas retailer does not accept the quotation, the retailer may still choose to supply to the OTN holder, however the supply would take place as if the quotation had not been made. [Part 3, clause 59], [Part 3, clause 60]

1.200 As a transitional arrangement, natural gas retailers will be required to accept an OTN quotation for the supply of natural gas where the natural gas is supplied under a contract which was entered into before the Royal Assent is given, and where

- the recipient intends to use the natural gas as a feedstock in a facility under their operational control, and provides a written notice to the retailer to this effect; or
- more than 25,000 tonnes of CO2-e per year is attributable to the natural gas supplied under the contract. [Part 3, clause 61]

1.201 These transitional arrangements are designed to mitigate situations where the presence of a long term supply contract could enable suppliers to force higher prices for the supply of natural gas in exchange for allowing the recipient to take on mechanism liability through the OTN mechanism.

Withdrawal of OTN quotation

1.202 In certain circumstances an OTN quotation can be withdrawn. When withdrawn an OTN quotation ceases to be in place.

1.203 There are two situations in which an OTN holder may withdraw a standing OTN quotation by notifying the supplier in writing. The first situation is where an OTN holder ceases to be permitted to quote their OTN in relation to the classes of supplied to which the quotation relates. [Part 3, clause 51]

1.204 The second circumstance is where the supplier agrees to the withdrawal of a quotation in relation to a supply or class of supplies. [Part 3, clause 52]
1.205 An OTN quotation is deemed to have been withdrawn if a person’s OTN is surrendered or cancelled and a quotation of that OTN was in effect immediately prior to the surrender or cancellation. [*Part 3, clause 50*]

1.206 In these circumstances the natural gas retailer may not be aware of the withdrawal, as it occurs without the OTN holder notifying the retailer. Therefore, where a supply occurs in the 28 days from when the surrender or cancellation of an OTN takes effect and where the OTN holder has not notified the natural gas retailer of the cancellation or surrender, the Act will have effect as if the person held an OTN and the OTN had been quoted in relation to that supply. [*Part 3, clause 54*, *Part 3, clause 55*]

**Quotation of bogus OTN**

1.207 A person must not purport to quote a number as their OTN if it is not their OTN. [*Part 3, clause 64(1)*]

1.208 If a person purports to quote a number as their OTN for a supply of natural gas, and that number is not shown in the OTN register as the person’s OTN, the natural gas retailer must not supply natural gas to the person. [*Part 3, clause 64(3)*]

1.209 Retailers will therefore need to check the details in the OTN register at the time an OTN quotation is made and ensure that the person quoting it matches the identity details in the register against that OTN.

1.210 Upon application by the Regulator, the Federal Court may order a person to pay the Commonwealth a civil penalty if it decides that the person has, for example, aided a contravention of the requirement that a person must not quote a bogus OTN or supply natural gas to a person that quotes a bogus OTN or, for example, aided such a contravention. [*Part 3, clause 64*, *Part 21, clause 252*]

1.211 For evidentiary purposes the Regulator may, for a fee, supply a copy of or extract from the OTN register certified by an official of the Regulator to be a true copy or true extract. This certified copy or extract will be admissible as evidence in all courts and proceedings without further proof or production of the original. [*Part 3, clause 46*]

1.212 If an OTN holder purports to quote a number as their OTN in relation to a supply and the purported quotation is due to an honest mistake the Regulator may determine that the Act has, and is taken to have had, effect as if the OTN holder had quoted the OTN holder’s OTN in relation to the supply. A determination by the Regulator must be in writing and must be given to the OTN holder and the natural gas retailer.

1.213 A determination of this kind is not a legislative instrument. [*Part 3, clause 53*] Such a determination is not of a legislative character and
is therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

Misuse of OTN

1.214 The mere issue of an OTN does not permit a person to quote it. When a person quotes an OTN for a particular supply or class of supplies the person must, at the time of quotation, be permitted to do so. An OTN holder breaches the provisions in the bill if they quote an OTN in circumstances where they are not permitted to do so. [Part 3, clause 63]

1.215 If a person quotes an OTN in circumstances where they are not permitted to do so, the validity of the transaction is not affected by the breach. That is, the quotation will relieve the supplier of liability in relation to that supply. However, unlike a quotation which is permitted, a person that misuses their OTN is liable for the potential greenhouse gases embodied in the fuel supplied. [Part 3, clause 36], [Part 3, clause 63(4)]

1.216 Upon application by the Regulator, the Federal Court may order a person to pay the Commonwealth a civil penalty, if it decides that the person has contravened the requirement not to quote an OTN in circumstances where it is not required or permitted or has, for example, aided such a contravention. [Part 3, clause 63(1)], [Part 21, clause 252]

Territorial application of the mechanism

1.217 The mechanism will extend to every external territory of Australia. [Part 1, clause 9] It will also extend to the coastal sea in accordance with section 15B of the Acts Interpretation Act 1901.

1.218 It will extend to a matter relating to the exercise of Australia’s sovereign rights in the exclusive economic zone or the continental shelf. [Part 1, clause 10]

1.219 This means that those responsible for carbon capture and storage facilities in the exclusive economic zone or the continental shelf will be responsible under the general provisions of the bill for any emissions from these facilities.

1.220 However, the mechanism will not apply to the extent that its application would be inconsistent with the exercise of rights of foreign ships in the territorial sea, exclusive economic zone or waters of the continental shelf in accordance with the United Nations Convention on the Law of the Sea. [Part 1, clause 12]

1.221 The operation of the bill extends to the Joint Petroleum Development Area because Australia is responsible for a proportion of the emissions from this region under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. [Part 1, clause 11]
The regulations will specify the percentage of the emissions from facilities in the Joint Petroleum Development Area and the Greater Sunrise Field which are subject to the mechanism. These regulations will specify percentages consistent with Australia’s responsibilities under international law. [Part 3, clause 26], [Part 3, clause 27], [Part 3, clause 28]

1.222 The express application of the Act to the Joint Petroleum Development Area — an agreed joint development area under the *Timor Sea Treaty* [2003] ATS 13 — is consistent with the obligations of Australia under article 4(1) of the *Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea* [2007] ATS 12.

1.223 Apart from these provisions, reliance is placed on the general presumption that legislation does not have extraterritorial effect and section 21 of the *Acts Interpretation Act 1901* to limit the scope of the legislation.

**Anti-avoidance**

1.224 Chapter 7 outlines the provisions addressing schemes entered into with the substantial purpose of obtaining the advantage of a threshold. Put briefly, attempts to avoid the mechanism’s operation may result in any benefit of the threshold provision being lost. [Part 3, clause 29], [Part 3, clause 30]
Chapter 2

Pollution caps

Outline of chapter

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

Context

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

2.3 Pollution caps will be reduced over time and will determine the emissions reduction trajectory for meeting Australia’s emission reduction targets. Pollution caps can reflect different trajectories towards the same emissions target.

2.4 In the first stage of the mechanism (covering the eligible financial years beginning on 1 July 2012, 1 July 2013 and 1 July 2014), liable entities can purchase carbon units at a fixed charge and the Commonwealth will allocate a limited number of free carbon units as industry assistance.

2.5 In the second stage of the mechanism (starting on 1 July 2015), liable entities can buy a limited number of carbon units at auction and the Commonwealth will allocate a limited number of free carbon units as industry assistance.

2.6 This means that there is a limit on the total number of carbon units - a pollution cap – for an eligible financial year for covered sector emissions. Covered sector emissions can exceed the pollution cap where they are offset by the surrender of other eligible emissions units, such as eligible international units or eligible ACCUs.

Summary

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

2.8 If regulations setting pollution caps are not tabled or are disallowed by Parliament, default pollution caps will take effect. The default caps are consistent with the trajectory implied by Australia’s
unconditional target of reducing national emissions to 5 per cent below 2000 levels by 2020.

**Detailed explanation of new law**

**Setting national pollution caps**

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

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

2.11 The regulations may be disallowed if either House of Parliament passes a resolution within 15 days of the regulations being tabled. *[Part 2, clause 15]*

2.12 The Authority will make recommendations to the Government about pollution caps (see Chapter 10). The Government must respond to these recommendations and table its response in Parliament.

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

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

2.15 After 1 July 2016, if, at the beginning of the month of May 14 months prior to the start of an eligible financial year, no pollution cap has been set, then the Minister must take all reasonable steps to table regulations setting pollution caps for that year no later than 31 May (and they must not be tabled after that date). *[Part 2, clauses 16(3) and (4)]*

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

2.17 The phrase ‘take all reasonable steps’ is used because, despite his or her best endeavours, a Minister cannot guarantee that the Governor-General will make regulations and that the Parliament will not disallow them.

Default pollution caps

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

2.19 Having a default in the legislation ensures that the mechanism continues to operate in the event that regulations setting pollution caps do not come into effect. The default caps are consistent with the trajectory implied by Australia’s unconditional target of reducing national emissions to five per cent below 2000 levels by 2020, taking into account projections for emissions from uncovered sectors.

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

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

2.22 For example, if regulations setting the first five years of pollution caps are tabled in the Parliament in May 2014 and are subsequently disallowed in June 2014, then the first pollution cap (for the year beginning 1 July 2015) will be 38 Mt less than the emissions reported by entities liable under the carbon price for the year beginning 1 July 2012.

2.23 The Government must then continue to table regulations setting the next five years of pollution caps each year by 31 May until they take effect (that is, they are not disallowed).

2.24 For example, if:

- regulations setting the first five years of pollution caps are in effect; and
- the Government has tabled regulations in the Parliament for the annual extension of pollution caps by one year (that is, to
the end of the eligible financial year after the last year for which a pollution cap was set); and

• these regulations are then disallowed and 31 May has passed, then the default cap would apply for that year. The default cap for that year would be 12 Mt less than the previous year’s cap.

Matters to be taken into account when setting pollution caps

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

• Australia’s international obligations under international climate change agreements. [Part 2, clause 14(2)(a)]
  – The mechanism will be the primary means by which Australia will meet its international obligations.

• the most recent report outlining recommendations for pollution caps by the Authority. [Part 2, clause 14(2)(b)]
  – Pollution caps are a fundamental component of the mechanism, and the provision of independent expert advice enhances the transparency and accountability of cap setting process. [Part 22, clause 292]

2.26 While taking into account Australia’s international obligations and the most recent report of the Authority plays a central role in setting pollution caps, the Minister may also have regard to twelve additional factors:

2.27 **Factor 1:** Australia’s medium-term and long-term emissions reduction targets. [Part 2, clause 14(2)(c)(i)]

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

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

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

2.29 **Factor 3:** global action to reduce greenhouse gas emissions. [Part 2, clause 14(2)(c)(iii)]
• This includes progress towards, and development of, comprehensive global action under which all major economies commit to substantially restrain emissions and advanced economies take on reductions comparable to Australia.

• Actions by major economies can impact decisions on the trajectory of Australia’s emissions and so should be considered when setting pollution caps.

2.30  **Factor 4:** Estimates of the global greenhouse gas emissions budget. [*Part 2, clause 14(2)(c)(iv)*]

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

2.31  **Factor 5:** The economic and social implications associated with various levels of pollution caps, including implications of the carbon price. [*Part 2, clause 14(2)(c)(v)*]

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

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

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

2.32  **Factor 6:** The extent of actions voluntarily taken to reduce Australia’s greenhouse gas emissions. [*Part 2, clause 14(2)(c)(vi)*]

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

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

• Voluntary action can be achieved through the mechanism through voluntary cancellation of units, whereby a person
voluntarily gives up a greater number of units than they would otherwise have to (voluntary cancellation is covered by the ANREU Bill).

- As a matter of policy, the Government is committed to taking account of GreenPower purchases in setting pollution caps.\(^\text{17}\) Households and businesses that purchase GreenPower increase the supply of renewable energy and assist in the transition to cleaner energy sources. To recognise individual action in purchasing GreenPower, the Government will take all GreenPower purchases into account in setting future pollution caps.

- In the fixed charge period the Government will measure GreenPower purchases on an annual basis and take these into account when setting the initial pollution caps. As initial pollution caps are to be tabled by 31 May 2014, only those GreenPower purchases measured at the time of making regulations would be counted, that is only the first year of GreenPower purchases would be measured.

- In the flexible price period the Government would measure GreenPower purchases on an annual basis and directly take these into account in setting pollution caps five years into the future. For example, voluntary action from 2017-18 will be taken into account when caps are next set. This would be by 30 June 2019 for the year 2023-24.

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

2.33 **Factor 7:** Estimates of emissions that are not covered by the mechanism. [*Part 2, clause 14(2)(c)(vii)]

- The Government will set pollution caps based on the difference between the indicative national emissions trajectory (that is, its proposed path for national emissions) and the latest projection of emissions that are not covered by the mechanism (excluding abatement from the CFI). In this way, sufficient ‘room’ is left for uncovered emissions, and national targets can still be met.

2.34 **Factor 8:** Estimates of the likely issue of ACCUs. [*Part 2, clause 14(2)(c)(viii)]

\(^{17}\) Australian Government (2011) *Securing a clean energy future: The Australian Government’s climate change plan* para. 3.3.3 p. 3
Chapter 2: Pollution caps

- Abatement from the CFI will decrease emissions from the uncovered sectors and ACCUs will either be exported, voluntarily cancelled or used to offset increased emissions covered by the mechanisms, which will impact the accounting for national emissions targets.

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

2.35 **Factor 9:** The extent of non-compliance under the mechanism. ([Part 2, clause 14(2)(c)(ix)]

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

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

2.36 **Factor 10:** The extent (if any) to which liable entities have failed to surrender sufficient units to avoid liability for unit shortfall charge. ([Part 2, clause 14(2)(c)(x)]

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

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

2.37 **Factor 11:** Any past or planned government purchase of international units. ([Part 2, clause 14(2)(c)(xi)]

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

2.38 **Factor 12:** When setting caps, the Minister may take into account such other matters (if any) as the Minister considers relevant. ([Part 2, clause 14(2)(c)(xii)]
Chapter 3
Emissions units

Outline of chapter

3.1 Chapter 3 explains the nature of the various emissions units (domestic and international) recognised under the mechanism. It also explains the ways in which carbon units are issued under the mechanism.

3.2 This chapter covers Part 4.

Context

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

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

3.5 During the fixed charge period from 1 July 2012 to 30 June 2015, the Regulator will allocate free carbon units under Parts 7 and 8 (see Chapters 5 and 6) and entities can purchase carbon units for a fixed charge from the Regulator.

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

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

3.8 Letting liable entities use eligible ACCUs links the mechanism and the CFI. This will provide an incentive for those actions that reduce emissions or increase carbon sinks that are covered by the CFI.
Letting liable entities surrender international units links the mechanism and the international market for emissions units. It lets liable entities access lower cost abatement opportunities and allows for emission reduction targets to be achieved in a flexible and cost-effective way. However, the use of international units is subject to qualitative and quantitative restrictions, to ensure the environmental integrity and ongoing credibility of the mechanism.

Allowing for the sale and transfer to foreign registries of Australian emissions units, such as the carbon units and ACCUs, will open up foreign markets and has the potential to increase the flow of foreign capital, providing a stimulus for domestic abatement and investment in low-pollution technologies.

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

### Summary

**The fixed and flexible charge periods**

3.12 There will be a fixed carbon price for fixed charge years (namely, 2012-13, 2013-14, and 2014-15). The mechanism will then become a cap-and-trade emissions trading scheme on 1 July 2015.

3.13 In fixed charge years, the amount of the fixed charge per carbon unit is equal to $23.00 in 2012-13, $24.15 in 2013-14 and $25.40 in 2014-15.

3.14 In flexible charge years, there will be pollution caps restricting the total number of carbon units that are issued each year.

**Eligible emissions units**

3.15 Units that can be surrendered under the mechanism are known as ‘eligible emissions units’. An eligible emissions unit is a carbon unit, an eligible international emissions unit, or an eligible ACCU (see Chapter 4).

3.16 The Regulator issues carbon units. These have characteristics which ensure transparent and secure property rights. Their ‘vintage year’ is the first eligible financial year in which they can be surrendered, except for when units are surrendered under limited ‘borrowing’ arrangements.
Eligible emissions units in the fixed charge period

3.17 In the fixed charge period the Regulator will issue free carbon units to liable entities (see Chapters 5 and 6). These free carbon units will be transferable but must be surrendered in the eligible financial year that corresponds to their vintage year. They cannot be banked for future use.

3.18 The Regulator may ‘buy back’ these free carbon units to ensure that the entities to whom they were issued can sell these units should they not wish to surrender them.

3.19 The Regulator will also issue carbon units at a fixed charge that will be available to liable entities to discharge their emissions obligations under the mechanism. These carbon units will be automatically surrendered for the eligible financial year corresponding to their vintage year.

3.20 Liable entities can surrender eligible ACCUs to discharge up to five per cent of their total emissions obligations.

Eligible emissions units in the flexible charge period

3.21 In the flexible charge years, the Regulator will issue carbon units equal to the pollution cap. These units will be transferable between Registry accounts. The Regulator will continue to issue some carbon units free of charge for industry assistance and these will be able to be used in the eligible financial year that corresponds to the vintage year as well as any later years. The remaining carbon units will be issued through auctions conducted by the Regulator.

3.22 Liable entities may also surrender eligible ACCUs with no limit and surrender eligible international emissions units to discharge up to 50 per cent of their total emissions obligations.

Price ceiling and price floor

3.23 In the first three flexible charge years there will be a price ceiling and price floor:

- The price ceiling will operate by the Regulator issuing fixed charge carbon units that are similar to the fixed charge carbon units for the fixed charge period. The level of the price ceiling will be set in regulations at $20 above the international price and will rise in real terms by 5 per cent per year.

- The price floor will operate by a minimum reserve auction price for carbon units and a surrender charge for eligible international emissions units. The level of the price floor will start at $15 and rise in real terms by 4 per cent per year.
**Export of units**

3.24 Export of carbon units (with the exception of Kyoto ACCUs) will not be permitted in flexible price years where a domestic price ceiling is in place, except as part of a bilateral link to another emissions trading scheme with appropriate provisions in place to maintain the environmental integrity of the linked schemes. Unrestricted export of units will be permitted when there is no longer a domestic price ceiling in place.

**Detailed explanation of new law**

**Eligible emissions units**

3.25 The Regulator may issue carbon units, which a liable entity may surrender to meet its obligations under the mechanism. [Part 4, clause 93]

3.26 An ‘eligible emissions unit’ is a carbon unit, an eligible international emissions unit, or an eligible ACCU issued under the CFI. [Part 1, clause 5, definition of ‘eligible emissions unit’]

**Link to the CFI**

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

- in the fixed charge period, a liable entity may use eligible ACCUs up to an amount equal to five per cent of its total emissions liability; and
- in the flexible charge period, a liable entity may surrender as many eligible ACCUs as it wants to meet its emissions liability.

**Eligible international emissions units**

3.28 The mechanism is linked to other international emissions trading markets by allowing liable entities to surrender eligible international emissions units. A liable entity may ‘import’ international emissions units for the purposes of meeting its emissions liability under the mechanism. Eligible international emissions units cannot be surrendered during the fixed charge period. [Part 6, clause 122(8)]

3.29 The bill provides a power for the Government to disallow, by regulation, eligibility of certain international units to ensure that only credible international emissions units will be eligible for compliance, supporting the environmental integrity of Australia’s pollution reduction efforts. [Part 6, clause 123] The Authority will play a key advisory role to ensure that the types of units which are allowed are credible.
Chapter 3: Emissions units

3.30 The bill sets out key criteria to consider in relation to the credibility and integrity of international units. These include:

- Australia’s international objectives and obligations (which are essential to ensuring that any credits accepted can be counted towards our international commitments);
- the environmental integrity of the mechanism;
- the expert recommendations of the Climate Change Authority; and
- whether the units are accepted by either the European Union or New Zealand schemes (as the considerations of these jurisdictions can be drawn upon to maintain the integrity of the mechanism). [Part 6, clause 123]

3.31 The Government has already decided that the following units will not be eligible:

- removal units (RMUs) issued by a Kyoto Protocol country on the basis of land use, land-use change and forestry activities under Article 3.3 or 3.4 of the Kyoto Protocol;
- either certified emissions reductions (CERs) or emission reduction units (ERUs) from nuclear projects, the destruction of trifluoromethane, the destruction of nitrous oxide from adipic acid plants or from large-scale hydro-electric projects not consistent with criteria adopted by the EU (based on the World Commission on Dams guidelines);
- a long-term or temporary CERs.

3.32 The fixed price period will allow the international markets develop further and give time for the Authority to provide considered advice on further limitations or new types of units which should be eligible.

3.33 A unit is an eligible international emissions unit if it is defined to be such under the ANREU Bill. [Part 1, clause 5, definition of ‘eligible international emissions unit’] The initial list of eligible international emissions units represents currently traded units which are likely to continue to be traded through 2015. This includes eligible Kyoto units and also provides for further credible units from bilateral, regional, plurilateral or multilateral agreements, and any further credible Kyoto units (if agreed internationally).

3.34 The ANREU Bill currently defines eligible international emissions units to include:

- certified emission reductions (CERs, other than a long-term or temporary CERs);
• emission reduction units (ERUs);
• removal units (RMUs);
• any further prescribed units issued in accordance with the Kyoto rules; and
• any other international unit (which is prescribed in regulations).

3.35 Consistent with the policy of accepting only credible international emissions units, not all international units qualify as eligible international units. For example, Kyoto assigned amount units and temporary and long-term CERs cannot be considered for surrender under the mechanism. The Government has also stated that linking with the New Zealand and European Union schemes is in Australia’s national interest. The ability to prescribe other additional units could be used to prescribe European Allowances or New Zealand Units should linking arrangements be agreed.

Carbon units

Issue of carbon units and entry onto the Registry

3.36 The Regulator may issue carbon units on behalf of the Commonwealth. [Part 4, clause 94]

3.37 To hold a carbon unit, a person must have a Registry account. [Part 4, clause 98(3)] The Regulator issues a carbon unit by making an entry for the carbon unit a Registry account. [Part 4, clause 98(1)] The carbon unit is represented by an electronic entry in the Registry, and not by any form of paper certificate. [Part 4, clause 98(2)]

3.38 Each carbon unit will have a unique number known as the ‘identification number’. [Part 4, clause 95] An entry in the Registry for that unit will consist of its identification number. [Part 4, clause 98(2)]

Vintage year of a carbon unit

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

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

Example 3.1 Allocation of a carbon unit

The Regulator may, at any time before the end of 1 February 2014, issue a carbon unit with the vintage year that ends on 30 June 2013. This will allow for an auction of units in the interval between the end
Chapter 3: Emissions units

of the relevant financial year and 1 February, the final date for surrender.

Units issued for flexible charge years

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

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

Units issued in fixed charge years

3.43 An unlimited number of carbon units whose vintage year is a fixed charge year will be available to liable entities at a fixed charge. These units will not be able to be banked for use in future years.

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

3.45 ‘Borrowing’ will not be allowed during the fixed charge years [Part 6, clause 122(7)] A liable entity cannot surrender a carbon unit of a later vintage to meet its obligations for a fixed charge year.

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

Circumstances in which the Regulator can issue carbon units

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

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

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

- offered at auction (whether before or during that year);
- allocated under Part 7 (see Chapter 5); and
- allocated under Part 8 (see Chapter 6).

does not exceed the pollution cap for that vintage year. [Part 4, clause 102]

This provision does not apply to carbon units with vintage years that are fixed charge years, as there will be no pollution cap for those years.

**A carbon unit is a property right**

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

3.50 This will promote confidence in the integrity of carbon units and reduce uncertainty for their holders, and further promote confidence in the development of the market for carbon units.

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

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

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

**Transfer and transmission of carbon units**

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

- transmit carbon units by assignment; [Part 4, clause 105]
- transmit carbon units by operation of law; [Part 4, clause 106]
- transfer of carbon units between Registry accounts that are both in the name of that person; [Part 4, clause 107]
- transfer carbon units to a foreign account held by that person or another person; and [Part 4, clause 108]
- receive a transfer of carbon units from a foreign account. [Part 4, clause 109]

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

**Transfers of carbon units by operation of law etc**

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

**Example 3.2 Transfer from a deceased estate**

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

3.58 A person must provide the Regulator with a ‘declaration of transmission’, along with evidence of the transmission, within 90 days, to ensure that the new holder of the carbon units has ample time to provide the proof of that ownership. The Regulator may extend the period. [Part 4, clause 106(2)], [Part 4, clause 106(5)]

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

3.60 The Regulator must effect the transfer of carbon units as soon as possible after receiving a declaration of transmission and the required evidence from the transferee and set out a record of that transmission. [Part 4, clause 106(6)], [Part 4, clause 106(7)], [Part 4, clause 106(8)]

If the Commonwealth is the transferee of the units, then the Minister may give the declaration of transmission and provide any required evidence. [Part 4, clause 106(9)]
**Fixed charge carbon units, including those issued under price ceiling arrangements**

*Fixed charge carbon units*

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

*The fixed charge for a unit*

3.62 The fixed charge per carbon unit is:

- $23.00 in 2012-13;
- $24.15 in 2013-14; and

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

3.64 The amount of the fixed charge for fixed charge carbon units issued in 2015-16 will be prescribed in regulations. [Part 4, clause 100(1)]

*Price ceiling*

3.65 A price ceiling will apply to the first three flexible charge years. The regulations will set the level of the price ceiling. [Part 4, clause 100 (1)] The Government has announced that this will be set at $20 above the expected international price in 2015-16.18 These regulations are to be made before the end of 31 May 2014 and can be amended before 1 June 2015, in case the expected international price has moved considerably from that originally estimated. [Part 4, clauses 100(14) and (15)]

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

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

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Acquisition of units in fixed charge years

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

3.69 A liable entity may also access fixed charge units once its emissions number is published until 1 February of the following year (the final surrender date). These carbon units are for a liable entity to meet its liability to surrender carbon units by 15 June. [Part 4, clause 100(1)]

Safeguards

3.70 There are safeguards to prevent liable entities from acquiring more fixed charge units than they need to meet their liabilities under the mechanism. This is important because, as discussed below, fixed charge units are automatically surrendered (see Chapter 4). [Part 2, clause 100(7)]

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

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

- in the second issue period (from emissions number publication time (31 October at the latest) to 1 February), the limit is the number of fixed charge units that can be acquired by a liable entity is limited to the emissions number for the liable entity minus the number of eligible emissions units that have already been surrendered. This also applies to carbon units issued under price ceiling arrangements. [Part 4, clause 100(4)]

3.72 The Regulator must not issue a fixed charge carbon unit to a person unless the person pays the charge. [Part 4, clause 100(2)] This avoids the need for the Regulator to collect debt owing on fixed charge carbon units, and lowers the cost of administering the mechanism.

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19 See ‘Charges for the issue of units’ below for an explanation of the treatment of charges in the Clean Energy Legislation Package.
Free carbon units during the fixed charge period

3.73 Free carbon units may be allocated to liable entities under Parts 7 and 8 (see Chapters 5 and 6). The rules for these free carbon units ensure the integrity of future pollution caps.

3.74 These free carbon units:
• can only be surrendered for their vintage year; [Part 6, clause 122(7)]
• must be cancelled by the Regulator if they have not been surrendered at the end of 1 February of the eligible financial year after their vintage year; [Part 4, clause 115]
• may, on request, be bought-back and cancelled by the Regulator during the period between 1 September of their vintage year and 1 February of the financial year following from their vintage year at the fixed charge for the relevant year discounted by a factor in the regulations; and [Part 4, clause 116]
• are cancelled if they are relinquished, rather than transferred to the Commonwealth relinquished units account. [Part 11, clause 210(3)]

3.75 Some liable entities that receive free carbon units with fixed charge vintage years may not want to surrender these units against a liability for that vintage year.

3.76 To ensure that persons who are issued with carbon units can sell these units when they do not wish to surrender them, the mechanism allows the Regulator to ‘buy-back’ these units. [Part 4, clause 116(2)]

Example 3.3 Circumstances where a person may not want to surrender free carbon units

A person may receive units for the cost increase it faces from:
• its use of electricity in an emissions-intensive trade-exposed activity; or
• from the cost increase it faces that is related to the upstream emissions from the extraction, processing and transportation of natural gas and its components used as feedstock in an emissions-intensive trade-exposed activity.

The person may wish to sell these units to receive cash, which can then be used to offset the increase in monetary costs it faces due to its use of electricity or natural gas and its components as a feedstock, rather than hold these units for surrender.

3.77 The buy-back facility will be open from 1 September of the vintage year of the carbon units until 1 February of the next calendar year. It lets persons receive the corresponding level of the fixed charge for each
free carbon unit he or she wants to sell back to the Regulator, discounted by a factor specified in the regulations. [Part 4, clause 116(2)]

3.78 For buy-backs occurring in the period before 15 June of the relevant eligible financial year, the Government proposes that the price paid by the Regulator for these carbon units will be discounted to 15 June of the relevant eligible financial year by the latest Reserve Bank of Australia index of the BBB corporate bond rate, so that the buy-back price reflects the present market value of the carbon unit. From 15 June onwards the price paid will be equal to the fixed charge carbon units of that vintage.

3.79 If the Regulator receives a request to buy-back free carbon units, then it must, within a time period specified by the Regulations, cancel the units and remove the entries for those units from the Registry account of the liable entity that held them and, as soon as practicable after that day, pay the buy-back amount to the person and set out a record of that cancellation. [Part 4, clause 116(3)], [Part 4, clause 116(4)]

3.80 There will be a standing appropriation for the Regulator for the purpose of making payments for the buyback of free carbon units. [Part 4, clause 114(5)]

3.81 This standing appropriation is limited in the sense that the buy-back facility will, at most, apply to the number of units that can be issued under Parts 7 and 8 for fixed charge years (see Chapters 5 and 6).

**Auctions**

3.82 The Regulator may issue carbon units through auctions. [Part 4, clause 111]

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

3.84 The detailed policies, procedures and rules for the conduct of auctions will be determined by the Minister in a legislative instrument. [Part 4, clause 113] This will be a disallowable legislative instrument for the purposes of the Legislative Instruments Act 2003 and will be finalised following consultation.

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

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

[Part 4, clause 113(2)], [Part 4, clause 113(3)], [Part 4, clause 113(4)]

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

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

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

Advance auctions of carbon units

3.89 The Regulator may auction carbon units with vintage years that are flexible charge years in fixed charge years. This can occur in advance of regulations for pollution caps for the corresponding eligible financial years taking effect. The amount of carbon units that can be auctioned is limited to 15 million carbon units for each vintage per year.

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20 Australian Government (2011) Securing a clean energy future: the Australian Government’s climate change plan, Commonwealth of Australia, Canberra, Table 3, page 104
21 See ‘Charges under the mechanism’ below for an explanation of the treatment of charges in the Clean Energy Legislation Package.
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until 12 months before the beginning of the corresponding eligible financial year. [Part 4, Division 2, clause 101]

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

3.91 By the time of the auction the pollution cap should either be set by the regulations taking effect or by the default cap, meaning that the Regulator will be able to auction carbon unit consistent with pollution cap. The detailed auction schedule will be set out in the auction design instrument. [Part 2, clause 113] This arrangement will allow for the auction of carbon units with a flexible year vintage during the fixed charge years in such a way that these auctions do not limit the ability to set pollution caps.

Secondary auctions

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

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

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

Benchmark average auction charge

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

- the administrative penalty for a failure to comply with relinquishment requirements; [Part 15, clause 212], [Part 15, clause 213]
- the unit shortfall charge in a flexible price year (as specified in the Charges bills, see Chapter 4); and
- the manufacture levy and import levy of synthetic greenhouse gases (as set out in the Ozone and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011 and the Ozone and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011 (see the commentary for the
Consequential Amendments bill for an explanation of these bills).

3.95 The benchmark average auction charge is the maximum of two numbers:

- the average auction charge for the whole financial year (calculated by dividing the auction proceeds by the number of units sold, including units sold with a future vintage); and
- the average auction charge for the final auction where the units auctioned have the same vintage as the year of auctioning (also calculated by dividing the auction proceeds by the number of units sold, including units sold with a future vintage). [Part 4, clause 114]

Publication of auction results

3.96 The Regulator will publish and maintain a record of all auction results (see also Chapter 9). This will include that date of each auction, the vintages of carbon units issued at the auction, the per unit charges for the carbon units that are auctioned, and the number of carbon units auctioned for a given per unit charge. [Part 9, clause 195]

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

Publication of price relevant information is discussed in more detail in Chapter 9.

Charges for the issue of units

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

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

3.100 If a charge is a tax, the Regulator must not exercise powers or functions in a way which would not contravene the constitutional requirement that taxation must not be arbitrary. [Part 4, clause 111(7)]
Chapter 3: Emissions units

Price Floor

3.101 When the mechanism moves into its second stage, a cap-and-trade emissions trading scheme, in 2015-16, a price floor will apply for the first three years of the flexible charge period. A price floor is a minimum carbon price. The responsible Minister will request the Authority to review, by 30 June 2017, the role of the price floor beyond the first three years of the flexible price period.

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

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

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

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

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

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

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

3.107 If regulations setting a surrender charge for eligible international units are not in effect, then there will not be a minimum auction reserve price, but the Regulator may still choose to have an auction reserve price for reasons other than implementing a price floor. [Part 4, clause 111(5)] The surrender of eligible international emissions units is described in more detail in Chapter 4.
Chapter 4
Assessing and meeting liabilities

Outline of chapter

4.1 Chapter 4 explains how a liable entity determines its liability for emissions under the carbon pricing mechanism (the mechanism) and the process by which it meets its liabilities through the payment and surrender process. This chapter covers Parts 5, 6 and 11.

Context

4.2 The mechanism imposes a liability on a liable entity for the emissions or potential emissions for which they are responsible.

4.3 Liable entities must report emissions or potential emissions under the NGER Act, which is to be amended by the Consequential Amendments bill (these changes are explained in a separate commentary for that bill).

4.4 The mechanism creates a system for:

- assessing liability for emissions, which is how a liable entity knows whether it is liable for emissions;
- meeting liability for emissions through payment and surrender processes for eligible emissions units, which cover the fixed charge and the flexible charge periods of the mechanism; and
- in certain circumstances, relinquishing units, which is where units are returned to the Commonwealth without them being surrendered.

4.5 The surrender of eligible emissions units is relevant to unit banking (where carbon units can be surrendered in years that are later than their vintage year); unit borrowing; international linking; linking with the CFI; and the price floor.

4.6 If a liable entity does not meet its emissions obligations through the surrender of eligible emissions units, then it will be subject to a unit shortfall charge for those units it has not surrendered. This charge is set at 130 per cent of the fixed charge for the relevant fixed charge year. Once the mechanism moves to a flexible price, the unit shortfall charge will be up to 200 per cent of the benchmark average auction price for the
relevant period. The amount of the charge is designed to provide a clear incentive to liable entities to surrender units, and thereby avoid the need to pay any charge.

4.7 Unit shortfall charges are imposed through the Charges bills, so as to ensure compliance with the requirements of section 55 of the Constitution.

4.8 Quantitative and qualitative restrictions are also imposed on the surrender of eligible international emissions units which help safeguard the environmental integrity of Australia’s pollution reduction efforts.

Summary

The emissions number

4.9 The total quantity of emissions for which the entity is responsible is known as the ‘emissions number’. A person’s emissions number for an eligible financial year is defined to be the sum of the person’s PENs for the eligible financial year. PENs represent the emissions from each facility, or embodied emissions from total supplies of natural gas, for which a person is responsible for an eligible financial year. PENs are discussed in Chapter 1.

Assessment of a liable entity’s liability for emissions

4.10 Under the mechanism, liable entities will assess their own emissions numbers and report them to the Regulator under the NGER Act. This is designed to remove any unnecessary duplication for liable entities, by retaining the existing emissions reporting framework with appropriate amendments.

4.11 The Regulator may issue assessments of the emissions number to a liable entity if the Regulator does not receive a report under the NGER Act from the entity; does not receive an estimate from the entity; or has reasonable grounds to believe that the entity’s emissions number is incorrect.

Payment and surrender

4.12 Under the mechanism, a liable entity has a choice about how to meet the liability for their emissions. The entity may discharge this liability by surrendering the required number of units to the Regulator. If the liable entity surrenders no units, or an insufficient number of units, it will be liable to pay a unit shortfall charge.
Chapter 4: Assessing and meeting liabilities

Payment and surrender in fixed charge years

4.13 In a fixed charge year, most liable entities must meet their liability for emissions at two points:

- a provisional surrender must be made before the end of 15 June of the eligible financial year to avoid a provisional unit shortfall charge. This covers 75 per cent of estimated emissions for the year; and
- a final surrender must be made before the end of 1 February of the following financial year to avoid a final unit shortfall charge, at which time the liable entity discharges its liability for the full year.

Payment and surrender in flexible charge years

4.14 In a flexible charge year, a liable entity must meet its liability for emissions by 1 February of the following financial year to avoid a final unit shortfall charge.

Calculation of unit shortfalls

4.15 A liable entity’s unit shortfall is calculated with reference to:

- its emissions number;
- the number of emissions units it has surrendered; and
- in fixed charge years:
  - the amount of any error in a liable entity’s estimate of its emissions at the provisional surrender date; and
  - any surplus surrender of units at an earlier surrender point;
- in flexible charge years, any surplus surrender in the previous financial year.

4.16 The Regulator has the power to make an advisory assessment of a unit shortfall and unit shortfall charge.

Amounts of unit shortfall charges

4.17 The level of the unit shortfall charges for fixed charge years is set at 130 per cent of the fixed charge for the eligible financial year.

4.18 The level of the unit shortfall charges for flexible charge years is set at 200 per cent of the benchmark average auction charge for the previous financial year, subject to regulations setting a different rate. The different rate must be between 130 per cent and 200 per cent of the benchmark average auction charge for the previous financial year.
4.19 The charges are specified and imposed by the Clean Energy (Unit Shortfall Charge—General) Bill 2011 and the Clean Energy (Charges—Excise) Bill 2011.

4.20 The level of the charge provides a clear incentive for liable entities to avoid payment of the charge by surrendering units. The amount of the unit shortfall charge is lower for fixed charge years to assist in the adjustment process following the start of the mechanism.

Payment of unit shortfall charges

4.21 The provisional and final unit shortfall charges become due and payable on the relevant provisional and final surrender dates. If a unit shortfall charge is not paid within 5 business days of the surrender date, the liable entity becomes liable for a late payment fee which, in effect, imposes interest on the unpaid unit shortfall charge.

Refunds for surplus surrender in fixed charge years

4.22 In fixed charge years, if a liable entity surrenders units greater than the amount of its total emissions liability for the relevant year, then these units cannot be carried forward to count towards any liability for following years. The Regulator will pay a cash refund to the liable entity for the value of the excess surrendered units.

Surrender and Australian carbon credit units

4.23 To meet its liability, a liable entity may surrender Australian carbon credit units (ACCUs) up to an amount equal to five per cent of its total emissions liability for the relevant year. In both the fixed and flexible charge periods, any excess surrendered ACCUs will be carried over to count towards the liable entity’s surrender in the next year.

4.24 There are specific rules covering the issue of ACCUs in the CFI bill.

Surrender and international units

4.25 Liable entities may not surrender international units to meet a domestic emissions liability in the fixed charge period. In flexible charge years, a liable entity may also surrender eligible international emissions units up to (but not more than) an amount equal to 50 per cent of its total emissions liability for the relevant year. Surrendered eligible international emissions units may be carried over to count towards the liable entity’s surrender in the next year.

4.26 The ANREU Bill lists international units which may potentially be used, from 1 July 2015, for surrender. This list may be adjusted by regulation. The Government has indicated that qualitative restrictions will apply, which will be established in initial regulations, will apply to the use of certain units from 1 July 2015.
4.27 The Government will consider recommendations from the Authority in the lead-up to 2015 and beyond in relation to making additional credible international units eligible for surrender, or, potentially, to prohibit the use of certain units in order to ensure the environmental integrity and effectiveness of the carbon pricing mechanism and consistency with Australia’s international objectives and obligations.

Relinquishment of units

4.28 A person may relinquish carbon units under the mechanism. The bill provides that a person may be required to relinquish units:

- under Part 7, where, for example, planned production ceases during a year (see Chapter 5); or
- where a court has ordered relinquishment following conviction under specified provisions of the Criminal Code relating to fraudulent conduct, including those relating to false or misleading statements in information given to the Regulator (see Chapter 7).

4.29 Where units with a vintage year which is not a fixed charge year are relinquished, the permits are transferred into the Commonwealth relinquished permits account. These units may then be auctioned by the Regulator.

4.30 Where units with a vintage year which is a fixed charge year are relinquished, the units are cancelled.

Detailed explanation of new law

Emissions number

4.31 Liability will be based on the emissions number which liable entities must include in their report to the Regulator in accordance with new section 22A of the NGER Act (see Consequential Amendments bill, Schedule 1, Part 2, item 367).

4.32 A person’s emissions number for an eligible financial year is defined to be the sum of the person’s PENs for the eligible financial year. [Part 5, clause 118]

4.33 A PEN represents the emissions which give rise to liability under the Scheme. Part 3 of the bill describes the situations which result in a PEN. The person with operational control of a facility, or the holder of an LTC or a designated JV in relation to a facility, may have a PEN calculated by reference to the emission of greenhouse gases from that facility during a financial year (Part 3, Division 2). Natural gas retailers and others may have PENs calculated by reference to potential emissions.
embodied in natural gas supplied or used during a financial year (Part 3, Division 3). PENs are discussed in Chapter 1 of this commentary.

Example 4.1: Calculation of emissions number

In 2014-15, Company A has operational control over three facilities.

Facility B emits less than 25,000 tonnes of carbon dioxide equivalence and the facility is therefore exempt from the mechanism.

Facility C emits 530,000 tonnes.

Facility D emits 220,000 tonnes.

Company A has PENs of 530,000 and 220,000, and an emissions number of 750,000.

Example 4.2: Calculation of emissions number

Entity Y is a natural gas retailer that supplies natural gas with a carbon dioxide equivalence of 30,000 tonnes. It supplies the gas to customers, none of which quote an obligation transfer number.

It has a PEN of 30,000. If it does not engage in any other activity which gives it a PEN, its emissions number is 30,000.

Assessment of a liable entity's liability for emissions

4.34 There are two circumstances in which the Regulator may make an assessment of the person’s emissions number for a financial year and provide the person with written notice of it:

- when a liable entity has provided a report under section 22A of the NGER Act by 31 October but the Regulator has reasonable grounds to believe that the number specified in the report as the person’s emissions number is incorrect; [Part 5, clause 119]

- where no such report has been provided by 31 October and the Regulator has reasonable grounds to believe that the person is a liable entity for the financial year. [Part 5, clause 120]

4.35 In both cases the assessment must be accompanied by a statement explaining that the person may need to surrender eligible emissions units to avoid being liable for a unit shortfall charge. [Part 5, clauses 119(3) and 120(3)]

4.36 Each of these assessments may be amended by the Regulator at any time. If this is done, then written notice of it must be provided. [Part 5, clauses 118(4), 118(5), 119(4), 119(5)]

4.37 The original and any amended assessments are advisory in nature, [Part 5, clauses 118(7) and 119(7)] The number of units that need to be surrendered to avoid a unit shortfall charge units depends on the emissions
number (emissions measured and attributable to the liable entity in accordance with the law), not on any action taken by the Regulator.

**Surrender: unit shortfall and excess surrender**

4.38 In each financial year, each liable entity must surrender the number of eligible emissions units equal to its emissions number to avoid a unit shortfall. In general, liable entities must surrender eligible emissions units by 1 February of the following financial year in order to avoid having a unit shortfall. If the liable entity has a unit shortfall, it will be required to pay a charge. The mechanism is designed so that paying a charge would be more expensive than surrendering units.

**The progressive surrender obligation**

4.39 In the fixed charge period, most liable entities must surrender sufficient units by 15 June to account for 75 per cent of the entity's estimated emissions for the current financial year. If a liable entity does not meet its progressive surrender obligation, it will have a provisional unit shortfall and be required to pay unit shortfall charge. [Part 6, clauses 125, 134]

4.40 All liable entities will be required to make a progressive surrender, with the exception that a progressive surrender will not be required in relation to direct emissions from facilities that:

- were not required to provide a report under the NGER Act for the previous financial year (noting that this exception does not apply to retailers of natural gas, which will be required to make a progressive payment in relation to supplies of natural gas);

- had covered emissions of less than 35,000 tonnes in the previous year; or are reasonably expected to have emissions of less than 35,000 tonnes in the current financial year [Part 6, clause 127]

4.41 Liable entities will then surrender the rest of the eligible emissions units by 1 February of the following year, in order to avoid a shortfall (the ‘true-up’). [Part 6, clause 128]

4.42 The estimated emissions number used for the progressive obligation is known as the interim emissions number. Liable entities that are required to make a progressive surrender will be required to submit a report to the Regulator by 15 June providing interim emission numbers for each facility, or supplies of natural gas, for which they are liable to make a progressive payment, under new section 22AA of the NGER Act (see Consequential Amendments bill, Schedule 1, Part 2, item 367).

4.43 These liable entities will have the option of estimating their interim emissions numbers based on the reported provisional emission
number of each facility reported in the previous year’s NGER report, or providing a reasonable alternative estimate. \[Part 6, clause 126\]

4.44 If a liable entity provides an estimate that is not based on the previous year’s NGER report, then that estimate will be subject to an estimation error calculation that may give rise to a unit shortfall, as discussed below.

4.45 The use of the previous year’s report for a facility under the NGER Act is intended to be simple and minimise administrative and compliance costs associated with the progressive obligation. However, in some cases use of the previous year’s emissions as an estimate for the current year may result in an overestimate of the progressive obligation (if emissions have decreased from the previous year). In this case the liable entity will be able to choose to use an alternative estimate of emissions.

4.46 Suppliers of natural gas will not have the option of using a previous year’s NGER Act report but will instead be required to provide an estimate of actual emissions for the first three quarters of the financial year. As these entities do not currently report under the NGER Act, suppliers of natural gas will not have a report on which to base an estimate in the first year of the scheme. In addition these entities are expected to have well-developed reporting systems for the purposes of billing and accordingly have capacity to estimate emissions in the current year.

4.47 The interim emissions number for the purposes of the progressive surrender will be 75 per cent of the liable entity’s estimated PEN. \[Part 6, clause 126\]

4.48 The progressive surrender obligation during the fixed charge period is similar to the approach taken to payments for some forms of taxation, such as company tax and the GST. With a progressive surrender of 75 per cent, it is expected that the cash flow impact on business should be minimal as they should receive revenue from production before they need to meet their surrender obligation.

**Example 4.3: The progressive surrender obligation**

A liable entity submits a report of its interim emissions numbers under section 22AA of the NGER Act for the financial year 2013-14.

The report estimates the entity’s PEN based on the previous year’s reported emissions for 2012-13 of 100,000.

By 15 June 2014, the liable entity will be required to surrender 75,000 permits (75 per cent of its PEN for 2012-13) in order to discharge its progressive surrender obligation. In other words, the liable entity’s interim emissions number for 2013-14 is 75,000.

Alternatively, the liable entity may elect to provide an alternative estimate of emissions from a facility. If the liable entity does so and estimates that its emissions number for 2013-14 will be 80,000, the
liable entity will be required to surrender 60,000 permits in order to
discharge its progressive surrender obligation.

**Unit shortfalls for fixed charge years**

4.49 Because of progressive surrender, unit shortfall works
slightly differently in fixed charge years compared to flexible charge
years.

4.50 For fixed charge years, there will be a unit shortfall
calculated in accordance with the obligation to surrender permits by 15
June during the compliance year – this is known as the ‘provisional unit
shortfall’. The provisional unit shortfall is equal to the total interim
emissions numbers minus the number of eligible emissions units
surrendered for the liable entity, rounded to the nearest whole number. If
this number is zero, there is no unit shortfall; if this number is negative,
the entity has a ‘provisional surplus surrender number’ which is positive
and of equal magnitude to this number; if this number is positive, the
entity has a unit shortfall, which is the provisional unit shortfall. [Part 6,
clause 125]

4.51 During the fixed charge period, there will also be a unit
shortfall calculated in accordance with the obligation to surrender permits
by 1 February following the compliance year. This is known as the ‘final
unit shortfall’. The final unit shortfall for a liable entity is calculated by
starting with the liable entity’s emissions number and then subtracting:

- the number of eligible emissions units surrendered after
  15 June and before 1 February;

- the number of units that needed to be surrendered to avoid
  having a provisional unit shortfall (in other words, to comply
  with the progressive surrender obligation); and

- the surplus and estimation error adjustment. [Part 6, clause 128]

4.52 If the final unit shortfall is calculated to be zero, the liable
entity does not have a shortfall; if it is calculated to be negative, the entity
has a ‘final surplus surrender number’, which is positive and equal in
magnitude to the final unit shortfall; if the final unit shortfall is calculated
to be positive, the liable entity has a final unit shortfall for the eligible
financial year. [Part 6, clause 128]

4.53 If a liable entity has a positive final surplus surrender
number corresponding to a fixed charge year, the liable entity will be
refunded in cash. The refund is equal to the final surplus surrender
number multiplied by the level of the fixed charge for that year. The
Consolidated Revenue Fund is appropriated for the purpose of making
these refunds. [Part 6, clause 132]

4.54 For the progressive surrender, it is possible for a liable
entity to provide its own estimate of emissions. [Part 6, clause 126] If the
estimate is incorrect, then there may be an estimation error unit shortfall on which unit shortfall charge will be payable. The estimation error for each facility will be equal to the difference between the estimated facility emissions (which was 75 per cent of estimated emissions for the year) and 75 per cent of the actual emissions from the facility for that year. [Part 6, clauses 129, 134]

4.55 If a liable entity relies on its estimated emissions from the NGER Report and surrenders sufficient units to discharge this liability but the estimated emissions do not represent the actual emissions for the current compliance year, then that entity does not have unit shortfall arising from the discrepancy.

4.56 The purpose of the estimation error shortfall is to provide a strong incentive for entities that choose to provide an alternative estimate of emissions to provide an accurate estimate. However, the amount of an estimation error is netted off against any surplus of units acquitted in the provisional surrender (i.e. the surplus can be used to reduce or eliminate the estimation error) via the calculation of the surplus and estimation error adjustment. This netting off is carried out as it could be unfair to impose a 130 per cent charge for an estimation error where the liable entity had in total surrendered more than 75 per cent of actual emissions for the year as a progressive payment. [Part 6, clauses 128, 131]

4.57 The Regulator has power to remit some or all of a unit shortfall charge arising out of an estimation error. This allows the Regulator to respond to particular circumstances where it would be unfair or unreasonable to impose the unit shortfall charge.

**Example 4.4: Unit shortfall and the progressive surrender obligation**

As in Example 4.3, a liable entity has provided an alternative estimate of its emissions number for the 2012-13 financial year of 80,000.

It must surrender 60,000 permits by 15 June 2014 to avoid a provisional unit shortfall. The liable entity surrenders the required 60,000 units on 15 June, and therefore has no provisional unit shortfall or surplus.

When the entity submits its final emissions report for the year to the Regulator, its actual emissions number reported for the financial year 2012-13 is 100,000.

This means that the entity’s estimation error unit shortfall will be 15,000 (the difference between the 75 per cent of the entity’s actual emissions number and the units surrendered to meet the progressive surrender obligation).

The liable entity will be required to surrender a further 25,000 permits to meet its final surrender obligation, and will have an estimation error shortfall of 15,000 that will give rise to a shortfall charge of 1.3 times the shortfall multiplied by the fixed charge for that year.
Chapter 4: Assessing and meeting liabilities

Unit shortfalls for flexible charge years

4.58 During the flexible charge period, the unit shortfall corresponds to the obligation to surrender permits by 1 February. The unit shortfall is calculated by taking the liable entity’s emissions number, subtracting the number of units surrendered before 1 February, and subtracting the final surplus surrender number. If the unit shortfall is zero, the liable entity has no unit shortfall; if the unit shortfall is positive, the liable entity has a unit shortfall; if the unit shortfall is negative, the liable entity has a surplus surrender number equal in magnitude to the unit shortfall. [Part 6, clause 133]

Unit shortfall charges

4.59 When a liable entity has a unit shortfall, a unit shortfall charge is imposed, and is payable 5 business days after the surrender date. [Part 6, clause 134] The amount of unit shortfall charge is specified by clause 9 of the Clean Energy (Charges—Excise) Act 2011 (so far as the charge is a duty of excise) or clause 8 of the Clean Energy (Unit Shortfall Charge—General) Act 2011 (so far as the charge is not a duty of excise). [Part 1, clause 5, definition of ‘unit shortfall charge’]

4.60 For the fixed charge period, the amount charged for each unit in the shortfall is 130 per cent of the relevant fixed charge issue charge under clause 100(1).

4.61 For the flexible charge period, the amount charged for each unit in the shortfall is 200 per cent of the benchmark average auction charge for the previous financial year. The charge can also be set in regulations, but cannot be lower than 130 per cent, or exceed 200 per cent, of the benchmark average auction charge for the previous financial year. [Clean Energy (Charges—Excise) Act 2011, clause 9(3), (4); Clean Energy (Unit Shortfall Charge—General) Act 2011, clause 8(3), (4)]

4.62 After the time the unit shortfall charge becomes payable, a late payment penalty will accrue at a rate of 20 per cent per annum (or a lower rate if prescribed in regulations). The Regulator may remit the late payment penalty in whole or part. [Part 6, clause 135]

4.63 The unit shortfall charge and the late payment penalty are debts due to the Commonwealth which can be recovered by the Regulator in a court with the relevant jurisdiction. [Part 6, clause 136]

4.64 Amounts of a kind specified in regulations and due from the Commonwealth may be set off against the amount due to the Commonwealth arising from the unit shortfall charge or late payment penalty. [Part 6, clause 137]

4.65 Overpayments of the unit shortfall charge or late payment penalty can be refunded. [Part 6, clause 140]
4.66 Where liability has been transferred to another member of a corporate group under an LTC, the controlling corporation which consented to the transfer is taken to have guaranteed the payment of the unit shortfall charge and late payment penalty. [Part 6, clause 138]
Equivalent provision is made in relation to a person who consents to transfer of liability to a designated JV. [Part 6, clause 139]

Assessment of unit shortfall and unit shortfall charge
4.67 The Regulator may make an assessment of a liable entity's unit shortfall and unit shortfall charge for a financial year and provide the entity with written notice of its assessment. The Regulator may rely on a report provided under the NGER Act in making the assessment. [Part 6, clause 141(2), (5)]

4.68 The assessment may be amended by the Regulator at any time. If this is done, then written notice of it must be provided. [Part 6, clause 141(3), (4)]

4.69 The original and any amended assessments are advisory in nature. [Part 6, clause 141(7)] Calculation of a unit shortfall and unit shortfall charge depends on the operation of the law (the bill and related legislation), not on any action taken by the Regulator.

Surrender of units
Which units are eligible emissions units
4.70 Only ‘eligible emissions units’ can be used for surrender. [Part 6, clause 122(1)] This phrase is defined to mean carbon units, eligible international emissions units and eligible Australian carbon credit units. [Part 1, clause 5, definition of ‘eligible emissions unit’] ‘Eligible international emissions units’ is defined to have the same meaning as in the ANREU Bill (see further below). [Part 1, clause 5, definition of ‘eligible international emissions unit’]

Limits on surrender
4.71 In any financial year, units can be surrendered only for that financial year or an earlier financial year. [Part 6, clause 122(3)]

4.72 Carbon units of the current, later or the immediately preceding vintage years may be surrendered. [Part 6, clause 122(4)] This in effect allows for ‘banking’ of units.

4.73 In the fixed charge period, a carbon unit cannot be surrendered unless it has a vintage year of that financial year. [Part 6, clause 122(6)]

4.74 A carbon unit with a vintage year that is a fixed charge year, which was issued in accordance with the Jobs and Competitiveness Program or Part 9 (which relates to coal-fired electricity generation), can only be surrendered with respect to that year. [Part 6, clause 122(7)]
Chapter 4: Assessing and meeting liabilities

**Borrowing limit for flexible charge years**

4.75 There is a limit on the number of ‘borrowed’ units (that is, units of the next vintage year) which can be used for surrender. If surrendered carbon units representing more than 5 per cent of the emissions number are ‘borrowed’, then the excess number of units over the 5 per cent is not regarded as surrendered for the relevant financial year when calculating the unit shortfall and is instead treated as surrendered at the next surrender date. [Part 6, clause 133(6)]

4.76 In addition, ‘borrowed’ units can only be surrendered within a specified period when the entity’s emissions number is known. [Part 6, clause 122(5)]

**Example 4.5: Calculation of shortfall**

On 31 October 2018, a liable entity submits its report under the NGER Act for the financial year 2017-18. The report indicates that the entity’s emissions number is 100,000. On 15 December 2018, the liable entity transmits a notice to the Regulator specifying the surrender of the following units for the financial year 2017-18:

<table>
<thead>
<tr>
<th>Vintage of units</th>
<th>Number of units</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015-16</td>
<td>10,000</td>
</tr>
<tr>
<td>2016-17</td>
<td>10,000</td>
</tr>
<tr>
<td>2017-18</td>
<td>70,000</td>
</tr>
<tr>
<td>2018-19</td>
<td>10,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100,000</strong></td>
</tr>
</tbody>
</table>

The surrender of units with vintages belonging to the current year and previous financial years will be accepted. However, only 5 per cent of 100,000 units, or 5,000 units, with a 2018-19 vintage may be surrendered for the year 2017-18. The liable entity will therefore have a unit shortfall of 5,000 for the financial year 2017-18.

**Limits on linking with the CFI**

4.77 During the fixed charge period, liable entities may surrender eligible ACCUs totalling no more than 5 percent of their obligation. There are provisions that ensure that if a liable entity surrenders ACCUs that are in excess of 5 per cent of the liable entity’s emissions number or interim emissions number, the excess does not contribute to addressing any unit shortfall. Excess ACCUs that are surrendered before 30 June are treated as if they are surrendered as part of the 'true up' before 1 February of the following year. Excess ACCUs that are surrendered after 15 June and before 1 February are treated as if they are surrendered in the corresponding period of the next financial year. ([Part 6, clauses 125(7), 128(7)-(9)]

4.78 In the flexible charge period, there will be no limit on the surrender of ACCUs.
**Use of eligible international emissions units**

4.79 The initial list of eligible international emissions units, as set out in the ANREU Bill, covers eligible Kyoto units (and provision for any further credible Kyoto units which might be created through international agreements) and also provision for other credible international units which might arise through bilateral, regional or multilateral agreements which Australia is party to. Eligible international emissions units may be used for surrender from 1 July 2015 subject to qualitative and quantitative restrictions outlined below.

4.80 The eligible international emissions units (as defined in the ANREU Bill as amended by the Consequential Amendments bill) are:

- certified emission reductions (CERs), other than long-term or temporary CERs;
- emission reduction units (ERUs);
- removal units (RMUs);
- any further prescribed units issued in accordance with the Kyoto rules; and
- any other international unit (which is prescribed in regulations).

**Quantitative restrictions on eligible international emissions units**

4.81 In the flexible charge period, until 2020, liable entities must meet at least 50 per cent of their annual liability with domestic carbon units. During this period, if a liable entity surrenders a number of eligible international emissions units that exceeds 50 per cent of its emissions number, then the excess does not count toward the calculation of the emissions number for that financial year. Instead, the excess counts toward the calculation of the emissions number for the subsequent financial year. [Part 6, clause 133(7)]

**Qualitative restrictions on eligible international emissions units**

4.82 Eligible international units cannot be surrendered in the fixed charge period as the fixed charge period is intended to provide certainty over the price for carbon units over the period. [Part 6, clause 122(8)] During the flexible price period such units can be surrendered subject to restrictions set out below. Any restrictions placed on the acceptance of international units will be to ensure the stability and ongoing credibility of the carbon pricing mechanism, and consistency with Australia’s international objectives and obligations.

4.83 Regulations may prohibit the surrender of specified eligible international emissions units. [Part 6, clauses 123, 122(9)] In making a recommendation to the Governor-General about such regulations, the Minister may have regard to:
Chapter 4: Assessing and meeting liabilities

- Australia’s international objectives and obligations (including under international climate change agreements);
- the environmental integrity of this Act and the associated provisions;
- relevant advice from the Authority (under Part 22);
- the types of units accepted and qualitative restrictions on use imposed by the EU Emissions Trading Scheme and the New Zealand Emissions Trading Scheme; and
- such other matters (if any) as the Minister considers relevant. [Part 6, clause 123(2)]

4.84 Including these provisions is consistent with the policy that a type of eligible international emissions unit can be disallowed for surrender at any time to ensure the environmental integrity of the mechanism and consistency with Australia’s international objectives. However, the regulation-making power is restricted in that if an eligible international emissions unit is disallowed, liable entities holding such units in their Registry accounts will be able to use those units for compliance in the compliance year in which the unit was disallowed, but not subsequently. [Part 6, clause 123(3)]

4.85 The Government has already indicated that it intends that certain CERs and ERUs will not be permitted for compliance from 2015, namely those sourced from:
- a nuclear project;
- destruction of trifluoromethane (HFC-23);
- destruction of nitrous oxide from an adipic acid plant;
- a large-scale hydro-electric project not consistent with criteria adopted by the European Union (EU) (based on the World Commission on Dams guidelines).

How eligible emissions units are surrendered

4.86 A person may surrender eligible emissions units by electronic notice transmitted to the Regulator. [Part 6, clause 122(1)]

4.87 What constitutes an ‘electronic notice transmitted to the Regulator’ is described in clause 7. [Part 1, clause 7] This allows the Regulator to require the use of particular information technology requirements. [Part 1, clause 8]

4.88 The notice must specify the eligible emissions units being surrendered, the financial year to which the surrender relates and the person’s relevant account number. [Part 6, clause 122(2)]
When eligible emissions units must be surrendered

4.89 As indicated above, eligible emissions units must be surrendered by 15 June or 1 February. However, to provide for the remote possibility that entities cannot gain computer access to the Regulator in the period shortly before the deadline, the Regulator is empowered to extend the deadline by legislative instrument. [Part 6, clause 142]

What happens when a unit is surrendered

4.90 When a carbon unit is surrendered, it is cancelled and the Regulator must remove the entry for the unit from the Registry account of the person who has surrendered it. [Part 6, clause 122(10)]

4.91 However, different processes are required in relation to eligible international emissions units. When an eligible international emissions unit is surrendered, the Regulator must remove the unit from the Registry account of the person who has surrendered it. In addition:

- If the unit is a Kyoto unit, the Regulator must make an entry for the unit in a Commonwealth holding account. [Part 6, clause 122(11)] This enables the Commonwealth to use the Kyoto unit to meet Australia’s emissions reduction target under the Kyoto Protocol.

- If any other international emissions unit is surrendered, then the action required of the Regulator will be specified in the regulations. [Part 6, clause 122(11)]. It is necessary to provide that this action will be specified in the regulations because the concept of an ‘eligible international emissions unit’ provides for units issued under future international agreements and units issued outside Australia under a law of a foreign country. [Part 1, clause 5, definitions of ‘eligible international emissions unit’, ‘prescribed international unit’] This provision therefore seeks to provide for future recognition of new and additional units without the need to amend the Act.

Surrender charge for eligible international units

4.92 During the first three years of the flexible charge period, there will be a price floor – a minimum carbon price. The price floor will be implemented through a minimum reserve auction price and a surrender charge for international units. [Part 6, clause 124] The price floor is described in more detail in Chapter 3.

Relinquishment

When is relinquishment required

4.93 The situations in which relinquishment of carbon units can be required are discussed in other parts of this commentary. In brief, persons will be required to relinquish units in the following situations:
Chapter 4: Assessing and meeting liabilities

- in the Jobs and Competitiveness Program, where, for example, units are provided at or before the beginning of each financial year but planned production ceases during a year. Relinquishment prevents windfall gains from units associated with production that does not take place and reductions in the supply of units that would otherwise be available for auction; [See Part 7, clause 146]

- where a court has ordered relinquishment following conviction under specified provisions of the Criminal Code, including those relating to false or misleading statements in information provided to the Regulator. In this case, relinquishment is required because the units would not have been issued if fraudulent conduct had not occurred. [See Part 10, clause 208(2)]

How carbon units are relinquished

4.94 A person who holds carbon units can relinquish them by electronic notice transmitted to the Regulator. The notice must specify, among other things, the reason for relinquishment. [Part 11, clause 210(1) and (2)]

What happens to relinquished units

4.95 For a carbon unit for a fixed charge year, if it is relinquished, then it is cancelled and the Regulator must remove it from its owner’s Registry account. [Part 11, clause 210(3)]

4.96 For a carbon unit for a flexible charge year, if it is relinquished, then it is transferred to the Commonwealth relinquished units account and property is transferred to the Commonwealth. [Part 10, clause 210(4)] The Regulator may auction the units (see Chapter 3). [Part 4, clause 112]

Failure to comply with relinquishment requirements

4.97 The consequences of a failure to comply with a relinquishment requirement are comparable to the consequences of a unit shortfall described above. The most significant difference is that the liable entity pays a penalty rather than a charge and that the penalty is calculated at double the unit charge (subject to regulations to the contrary in a flexible period year). [Part 11, Division 3]
Chapter 5
Jobs and Competitiveness Program

Outline of chapter

5.1 Chapter 5 explains the Jobs and Competitiveness Program (the Program). The Government may make regulations which allocate free carbon units to persons who conduct emissions-intensive trade-exposed activities.

5.2 This chapter covers Part 7.

Context

5.3 As Australia moves towards a clean energy future, a carbon price may impact on the international competitiveness of its industries which undertake activities that are both emissions-intensive and trade-exposed. The Program provides significant support for jobs and protects the competitiveness of these emissions-intensive trade-exposed industries from risks of carbon leakage. The Program also ensures that industry, local communities and workers have a smooth transition to a clean energy future.

5.4 The Program is designed to target assistance in as practical and effective a fashion as possible, within a transparent assistance framework.

5.5 The Program is designed to provide assistance in an economically and environmentally efficient manner. It accommodates growth in industries conducting emissions-intensive trade-exposed activities by directly linking allocations to the production levels of existing and new entities. The Program is based on the expectation that all industries should contribute to the national emissions reduction effort and maintains a strong price signal for all entities to pursue abatement opportunities to reduce the pollution intensity of their products.

5.6 Accordingly, the Program is:

- targeted towards industries that conduct trade-exposed activities and have the most significant exposure to a carbon price;
- provided on an activity basis to ensure that assistance is targeted to the emissions-intensive transformation taking place;
5.7 Assistance is designed to preserve the incentives for entities conducting emissions-intensive trade-exposed activities to transition to a clean energy future by:

- providing assistance only for the most emissions-intensive activities carried out by an entity;
- providing assistance on the same basis to all entities, new and existing, conducting a given eligible activity; and
- providing assistance on the basis of historical information on the emissions from these activities, to ensure that entities have an ongoing incentive to reduce their emissions.

5.8 The linking of assistance to production levels, and not future emissions levels, means that the allocation of free carbon units will maintain the financial incentives for firms to reduce their emissions intensity — that is, the number of emissions generated per unit of output produced. Entities conducting emissions-intensive trade-exposed activities, like all other entities in the economy, will therefore retain the incentive to pursue abatement opportunities that are cost effective relative to the full carbon price.

5.9 Assistance will be provided to entities that conduct emissions-intensive trade-exposed activities through the issuance of free carbon units by the Regulator early in each compliance period.

5.10 During the fixed charge period, all of the allocations for indirect emissions and 75 per cent of the allocations for direct emissions will be made early in a compliance year. The remaining 25 per cent of the allocations for direct emissions will be deferred until early in the following year. This is consistent with the payment and surrender obligations of the mechanism (see Chapter 4). The Regulations will provide detail on when this deferred payment will take place.

5.11 Assistance will be provided on an activity basis to ensure that it is well targeted and is equitably distributed within and across industries. The assistance will be provided for the following:

- the direct emissions associated with an activity, that gives rise to an obligation under the mechanism, which can be discharged by surrendering eligible emissions units
- the emissions associated with the use of steam in an activity
Chapter 5: Jobs and Competitiveness Program

- the cost increase associated with the indirect emissions from the use of electricity in an activity, which is assessed as resulting from the introduction of the mechanism
- the cost increase related to the upstream emissions from the extraction, processing and transportation of natural gas and its components, such as methane, used as feedstock and sequestered by an activity.

5.12 Eligibility for assistance will be assessed based on an emissions-intensity and trade-exposure test:

- Trade-exposure is to be assessed for trade shares (the ratio of the value of imports and exports to the value of domestic production) being greater than 10 per cent in any one of the 2004-05, 2005–06, 2006–07 or 2007–08 financial years, or there being a demonstrated lack of capacity to pass through costs due to the potential for international competition.
- Emissions-intensity is to be assessed as to whether the industry-wide weighted average emissions intensity of an activity is above a threshold of:
  - 1,000 tonnes CO₂-e per million dollars of revenue; or
  - 3,000 tonnes CO₂-e per million dollars of value added.

5.13 Activity assessments and activity definitions that were completed in the context of the Renewable Energy Target or the 2009-10 CPRS will remain valid and will be specified in the Regulations.

5.14 A Guidance Paper called Assessment of Activities for the Purposes of Emissions-Intensive Trade-Exposed Assistance Program22, was published on 18 February 2009. Any revisions to this Guidance will continue to advise entities on the process and information required by Government to make an informed decision on the eligibility of an activity for Program assistance and the rate of assistance provided to the activity.

5.15 In making its decision on the eligibility of activities and the allocative baselines for eligible activities (that is, the number of free carbon units that will be issued for each unit of production of an emissions-intensive trade-exposed activity), the Government will consider, in addition to data supplied by entities, publicly available information on pricing, trade and emissions intensity from Australian and international sources.

5.16 An Expert Advisory Committee is in place and provides advice to the Government on the definition of activities and the assessment of eligibility for the Program. Decisions taken by the

Government on the eligibility of activities were most recently published in March 2011, in an explanatory paper *Establishing the eligibility of emissions-intensive trade-exposed activities*.23

5.17 The Program will provide assistance at two different rates, reflecting the need to provide relatively more assistance to relatively more emissions-intensive activities in order to reduce the likelihood of carbon leakage.

5.18 Initial assistance to eligible activities will be set in the regulations at:

- 94.5 per cent of the allocative baseline for activities that have an emissions intensity of at least 2,000 tonnes of CO₂-e/million dollars of revenue or 6,000 tonnes of CO₂-e/million dollars of value added in the specified assessment period; or

- 66 per cent of the allocative baseline for activities that have an emissions intensity between 1,000 tonnes CO₂-e/million dollars of revenue and 1,999 tonnes of CO₂-e/million dollars of revenue, or between 3,000 tonnes of CO₂-e/million dollars of value added and 5,999 tonnes of CO₂-e/million dollars of value added in the specified assessment period.

5.19 The initial rates of assistance accorded each emissions-intensive trade-exposed activity will be reduced in the Regulations by the ‘carbon productivity contribution’ of 1.3 per cent a year. This is intended to broadly ensure that entities conducting emissions-intensive trade-exposed activities share in the national improvement of carbon productivity.

5.20 The Program will deliver carbon units in accordance with an entity’s payment and surrender obligations (see Chapter 4). However, the units issued for each of the fixed charge years cannot be banked for use in future years. In recognition that firms receiving assistance are likely to want to use some units to meet increased electricity costs, the units are transferable and the Regulator will operate a buy-back mechanism for these units.

5.21 The allocative baselines for each activity will be set in the regulations. They will take into account historic emissions and production information submitted to the Department about emissions and production levels in 2006-07 and 2007-08. To maximise abatement incentives, the baselines for allocations will not be updated over time for changes in the emissions intensity of entities conducting emissions-intensive trade-exposed activities.

5.22 For electricity use baselines, an electricity allocation factor will be set at one unit per megawatt hour (MWh) nationwide for the purpose of the eligibility assessment and when setting allocative baselines. This factor may be adjusted for existing large electricity supply contracts for entities consuming greater than 2,000 gigawatt hours (GWh) per annum, and where contractual arrangements entered into before 3 June 2007 are still in force (without having been renegotiated or reviewed) within 60 days after the bill receiving the Royal Assent. In such a situation, these contracts will be considered by the Regulator with a view to determine an entity-specific electricity allocation factor as outlined in the regulations.

5.23 Allocations of assistance to entities conducting emissions-intensive trade-exposed activities will be directly linked to the level of production of individual entities conducting an activity. In any given year, the number of free carbon units to be issued to an entity will be determined using the previous financial year’s production of the activity by that entity adjusted for any over or under allocation in the previous year, with the following exceptions:

- concerning new entrants and significant expansions, the Regulator will be afforded the discretion to determine an allocation for the expected production in a given year;
- entities operating newly established facilities who will have their allocations limited by regulations in a manner to avoid windfall gains from assistance; and
- liquified natural gas (LNG) projects will receive a supplementary allocation to ensure that they receive an effective rate of assistance at or above 50 per cent.

5.24 To retain the full incentive to invest in emissions reductions technologies, unit allocations will be uncapped for existing facilities.

5.25 If an entity ceases conducting an emissions-intensive trade-exposed activity, it will be required to relinquish carbon units that had been issued to it for production that did not occur.

5.26 Where an emissions-intensive trade-exposed activity is conducted at a single facility, the entity which has, or would have, liability for direct emissions from the facility may apply for assistance. Where more than one entity has liability or potential liability (such as where more than one facility is involved), there must be a joint application from those entities, and that joint application must specify how the entities request that the assistance be allocated.

5.27 The Program will be reviewed by the Productivity Commission in the third year of the mechanism (2014-15) and thereafter consistent with the timing of general scheme reviews.
5.28 A review of assistance provided to a particular activity could be conducted earlier than 2014-15 if requested by the Government. Where the Government refers specific activities to the Productivity Commission for priority reviews it could be ordered as follows:

- industry sectors receiving the greatest level of assistance;
- industry sectors experiencing the fastest rates of growth in assistance; or
- industry sectors where there is strong evidence of windfall gains as a result of the assistance.

5.29 The Productivity Commission reviews will consider:

- the operation of assistance arrangements under the Program; and
- the impact of the Program on emissions-intensive trade-exposed industries; and
- the economic and environmental efficiency of assistance arrangements under the Program.

5.30 The Government has agreed to provide three years’ notice of any modifications to the emissions-intensive trade-exposed allocations that will have a negative effect on recipients of assistance under the Program, unless the modifications were required for compliance with Australia’s international trade obligations. A further commitment is that, to ensure that there is a minimum of five years of assistance from the start of the mechanism, any modifications to the assistance arrangements that will have a negative effect on recipients will not occur before 1 July 2017.

5.31 The Government has also agreed to implement the approach proposed by the Garnaut Review Update 2011 if the Productivity Commission recommends that it is the most effective and efficient means of preventing carbon leakage and assisting the industry to transition and recommends that the Government adopt this approach. This would be subject to the minimum notice period set out above.

5.32 The Government will publish draft regulations to set up the Program and engage with relevant entities. As at July 2011, 31 activities were found to be eligible under the criteria and process outlined above.

Summary

Introduction

5.33 Division 1 provides that the Program recognises the issues relating to the impact that the mechanism may have on the international
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competitiveness of emissions-intensive trade-exposed activities carried on in Australia. [Part 7, clause 143]

5.34 An object of the Program is to provide transitional assistance to entities conducting emissions-intensive trade-exposed activities in a manner that is both economically and environmentally efficient in order to reduce the risk of carbon leakage.

Formulation of the Jobs and Competitiveness Program

5.35 Division 2 sets out the core components of the Program. In particular it provides for:

• the creation of a program in regulations that involves the allocation of free carbon units for activities that are taken to be emissions-intensive trade-exposed activities and are carried on in Australia during a particular financial year;
• the Program will require those persons who are issued free carbon units to relinquish units in specified circumstances. This is intended to be used to provide for relinquishment of units on the closure of a facility;
• the imposition of reporting and record-keeping requirements for persons issued free carbon units under the Program. This is intended to be used to ensure that the Regulator is aware of potential closures and whether production levels claimed in assistance applications were actually produced; and
• the Program is to set out comprehensive application and assessment requirements.

Compliance

5.36 Division 3 requires that persons comply with reporting and record-keeping requirements under the Program. Failure to comply will incur a civil penalty.

Special information-gathering powers

5.37 Division 4 allows the Minister to request from constitutional corporations information relevant to decisions about the formulation of the assistance under the Program. This information gathering power is limited to the circumstances where an activity is not yet listed as an emissions-intensive trade-exposed activity and a party has requested that the activity be added to the regulations.

Productivity Commission inquiries

5.38 Division 5 provides for a series of reviews of the assistance under the Program to be undertaken by the Productivity Commission.
Division 5 outlines the timing of such reviews, the matters to be considered and the requirements for the Government response to the report.

These reviews will consider whether an alternative pattern and level of assistance would meet the Program’s objectives, particularly economic and environmental efficiency, more effectively. Further details of the issues to be taken into account are set out below.

During the general reviews the Productivity Commission must consult with the Authority on whether the established pattern of assistance is avoiding carbon leakage, facilitating industry transition and whether it is supporting emissions reduction objectives.

**Aspects of the Jobs and Competitiveness Program outside of Part 7**

Part 9 requires the Regulator to publish information about the Program. The general enforcement and accountability framework for the Regulator is also relevant to the Program.

Part 11, Divisions 2 and 3 set up the legal architecture around compliance with the relinquishment requirements which will operate on the closure of a facility. Accordingly, if a person does not relinquish carbon units as necessary they will be required to pay a penalty, for any units not relinquished, of 200 per cent of the benchmark average auction charge of the previous financial year or another amount specified in regulations. In the fixed charge period, the penalty charge will be specified for each year. If this is not paid, a penalty of 20 per cent per annum is payable or another lower rate specified in regulations.

**Detailed explanation of provisions**

**Introduction**

**Aims and objects**

The aim of Part 7 is to recognise issues relating to the impact of the mechanism on the international competitiveness of emissions-intensive trade-exposed activities carried on in Australia. [Part 7, clause 143(1)] References to assistance in this chapter are references to assistance under Part 7, unless otherwise indicated.

Unless the Program is implemented, the costs associated with the mechanism may adversely impact the competitiveness of entities conducting emissions-intensive trade-exposed activities in Australia in the period before broadly comparable emissions reduction policies or carbon constraints are applying in other countries at an industry or economy-wide level. Entities conducting these activities may be constrained in their ability to pass on the costs of the carbon price, while competitors do not
Chapter 5: Jobs and Competitiveness Program

5.46 Part 7 allows the delivery of assistance for emissions-intensive trade-exposed activities. [Part 7, clause 143(2)(a)] Carrying out defined activities in Australia creates eligibility for assistance, rather than a firm’s historic or future emissions.

5.47 The Government provides assistance to reduce the risks of ‘carbon leakage’, understood in terms of the incentives on businesses to move production to foreign countries or locate new investment in a foreign country rather than Australia. [Part 7, clause 143(2)(b)] Such incentives may be created by the treatment of emissions and level of regulation to reduce emissions in Australia relative to foreign countries.

5.48 The Government also provides assistance to give transitional support to entities undertaking such activities when they are carried out in Australia. [Part 7, clause 143(2)(c)] Given the significant differences between the emissions profiles of industries, the impact of the carbon price will be greater for some than for others. Transitional assistance is provided through the administrative allocation of free carbon units under the Program to the most emissions-intensive and trade-exposed of Australia’s industries.

5.49 Assistance will be given in a way that ensures that the level of assistance for emissions-intensive trade-exposed activities is both economically and environmentally efficient. [Part 7, clause 143(2)(d)]

5.50 The objects of Part 7 recognise that circumstances may change such that assistance may no longer be warranted. In particular, it outlines two distinct circumstances where this may be the case:

- where comparable or more stringent measures to reduce emissions of carbon dioxide and other greenhouse gases have been implemented for the markets in which entities conducting emissions-intensive trade-exposed activities in Australia compete; or [Part 7, clause 143(2)(e)]
- where other countries responsible for a substantial majority of global emissions have implemented comparable measures to reduce those emissions. [Part 7, clause 143(2)(f)]

5.51 The Government will determine whether the assistance is no longer warranted based on advice from the Productivity Commission review of the assistance under the Program.

5.52 Measures to reduce emissions do not necessarily need to consist of a cap on emissions and other approaches to reduce emissions are also intended to be considered in the analysis. It will be important to consider whether all relevant market-based and regulatory measures,
taken together, impose broadly comparable carbon constraints as those in Australia, taking into account assistance arrangements.

5.53 Other factors may also come into play which renders the assistance unwarranted in terms of its aim and primary objective of reducing carbon leakage and providing transitional assistance. [Part 7, clause 143(2)(g)] However, the Government’s intention is that the factors listed in the legislation are the primary criteria that determine that assistance is no longer warranted.

5.54 Reviews of the assistance under the Program will play an important role in advising the Government on the consistency of the assistance with these aims and objects and the likelihood of the assistance being unwarranted because of international developments. When circumstances arise that may render assistance unwarranted, the Government has committed to provide three years’ notice of any modifications to the Program, unless the modifications were required for compliance with Australia’s international trade obligations.  

Formulation of the Jobs and Competitiveness Program

5.55 Part 7, Division 2 lets the Government set up the Program in regulations. The technical aspects of precisely defining emissions-intensive trade-exposed activities, the eligibility criteria and relevant production units, and the need for flexibility to make changes and to include new activities over time, make it appropriate to do this in regulations.

5.56 After the Government has assessed detail on emissions, electricity use, revenue and/or value added for a given activity, the regulations can provide a relatively simple allocation methodology per unit of production which provides investment certainty, minimises ongoing compliance costs and reduces the risk of assistance decisions being subject to lengthy appeal and review processes which may divert resources.

Creating the Program

5.57 The Program will allow for the issue of free carbon units for defined emissions-intensive trade-exposed activities. [Part 7, clause 145(1)(a)]

5.58 Such activities must be carried on in Australia during an eligible financial year. [Part 7, clause 145(1)(b)] For this purpose, Australia includes external territories, the exclusive economic zone, the continental shelf and the Joint Petroleum Development Area. [Part 1, clause 5, definition of ‘Australia’] Assistance may be delivered before an activity is carried on

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so long as the activity is actually carried out in the relevant eligible financial year.

5.59 While the eligibility of activities will be determined by the Government in decisions on whether or not to list activities in the regulations, the individual eligibility requirements for the assistance will be specified in the Program. [Part 7, clause 145(2)(a)]

5.60 A Registry account is a prerequisite to assistance. [Part 7, clause 145(2)(b)] Without a Registry account, it would not be possible for the Regulator to issue the free carbon units. It is intended that eligibility will essentially rest upon whether a defined emissions-intensive trade-exposed activity is being carried out, what relevant levels of production have been achieved and that the person applying is the one ordinarily liable for the emissions from the relevant activity under the carbon pricing mechanism.

5.61 Coal mining is not to be defined as an eligible emissions-intensive trade-exposed activity. [Part 7, clause 145(3)] The Government has outlined its intention to provide a separate program of transitional assistance to support emissions-intensive coal mines.25

5.62 The Minister must take all reasonable steps to establish the Program in regulations before 1 March 2012. [Part 7, clause 145(4)] Activities found eligible after this point will be added to the Program through amendments to the regulations.

Relinquishment requirement

5.63 The Program may provide for the relinquishment of free carbon units. [Part 7, clause 146] This is intended to be utilised for the closure of a facility. Accordingly, where free carbon units are issued early in a financial year attributable to production that is to take place in that year, and production ceases during the year (other than for maintenance or similar temporary closures), units attributable to the production which did not take place will be required to be relinquished.

5.64 Such a requirement may be defined about events, circumstances or a decision of the Regulator according to criteria in the Program. [Part 7, clause 146(1)(b)] This provision will ensure that the assistance is contingent upon continued production by the activity and will avoid the potential for an entity to receive a windfall gain from being issued free carbon units for production which is then closed or moved offshore.

5.65 Relinquishment requirements only apply to persons issued units under the Program [Part 7, clause 146(1)(a)] and cannot exceed the

number of units issued to the person under the Program. [Part 7, clause 146(2)]

5.66 The relinquishment of units to comply with the Program can be done by submitting an electronic notice to the Regulator. [Part 11, clause 210]

**Reporting requirements**

5.67 The Program can include reporting requirements on persons issued units under it, which will allow the Regulator to adequately monitor situations where a closure may have occurred and be alerted to situations where it may need to trigger a relinquishment requirement. [Part 7, clause 147]

**Record-keeping requirements**

5.68 The Program can include record-keeping requirements on persons issued units under it. [Part 7, clause 148] This will allow the Regulator to monitor any closure of a facility and ensure that the production records which determined assistance levels are kept for subsequent validation or investigation. These records are needed because production levels will be the central factor which determines the levels of assistance and these levels will not be collected and reported under the NGER Act.

5.69 Part 14 (see Chapter 7) is not applicable because the Program is separate from the mechanism and not contained in the bill. However, the record-keeping obligations for the Program are not to duplicate other reporting mechanisms or significantly increase the regulatory burden on business.

**Other matters and ancillary or incidental provisions**

5.70 Other aspects of the Program will be in the regulations. [Part 7, clause 149], [Part 7, clause 150] In particular, the regulations can provide for the form and content of applications for assistance.

5.71 Given the value of the free carbon units to be issued, it will be important for the Regulator to have enough verified information to support the relevant production levels which determine the level of number of free carbon units assistance to be issued to a particular person in a particular year. [Part 7, clauses 149(1)-(3)]

5.72 Verification could include that a relevant company officer verify the information by statutory declaration or that the information is accompanied by particular documents or reports, such as an assurance report as to whether the level of production was actually undertaken in the previous financial year or engineering reports to demonstrate that a particular activity is in fact conducted. It is intended that the Regulator will establish a single online portal for these applications.
5.73 The regulations may prescribe in full the process and procedural requirements for the Regulator to deal with applications. It is anticipated that applications will be made between 1 July and 31 October of each year and assessed by the Regulator on a case-by-case basis. Entities will be able to apply for an extension of this timeline to allow them to have until 31 December to apply. The Regulator will be able to issue units to applicants as soon as it is satisfied about each application.

5.74 The Regulator may also issue guidelines to assist entities in including information in their applications for assistance under the Program, such as how production should be measured, and other information that would assist the Regulator in assessing an application for assistance. [Part 7, clause 149(4)]

5.75 The Program can also include ancillary or incidental provisions to facilitate its operation. [Part 7, clause 150]

5.76 It is also intended that the Program will, where necessary, adopt various industry standards and confer administrative decision making functions on the Regulator. [Part 23, clause 309], [Part 23, clause 310]

Compliance with reporting and record-keeping requirements under the Jobs and Competitiveness Program

Compliance with record-keeping and reporting requirements

5.77 There is a direct obligation on persons under the Program to comply with any record-keeping or reporting requirements. A person under such an obligation, along with others involved, who contravenes (or potentially contravenes) reporting or record-keeping requirements is liable for their behaviour. [Part 7, clause 151] This is a civil penalty provision (see Chapter 7). [Part 7, clause 151(4)]

Special information-gathering powers

5.78 The simplicity, effectiveness, fairness and timely implementation of the Program will be greatly helped when the Government has the verified detailed information it needs to decide whether an activity is covered by the Program.

5.79 The Department has received verified information about a number of activities, which is sufficient for the Government to make decisions on them. There are a number of potential emissions-intensive trade-exposed activities that are yet to be formally assessed.

5.80 It is important, to let the Government be certain that all participants in an industry that may have information that may materially impact this assessment have provided that information. This ensures that historical information can be the primary input into the decision-making process. Good quality historical information will reduce the need for detailed comparison of international information as part of decisions on
eligibility and baselines. Reliance on international comparisons may disadvantage those who properly comply with information requests.

5.81 Division 4 deals with situations where an entity has come forward and requested an assessment of an emissions-intensive trade-exposed activity and the Government cannot decide whether to include that activity in the regulations without formally requesting information from other companies with information relevant to the decision.

5.82 If a person has indicated to the Government that an activity, which is not listed in the regulations as being covered by the Program, may be or should be covered by it, then the Minister may issue notices to a constitutional corporation to provide information and verify reports relevant to the activity. [Part 7, clause 152] It is intended that this power would only be exercised as a last resort where a potential recipient of assistance is unwilling to provide the necessary information.

5.83 If only information is requested, then the Minister must give at least 30 days to a corporation to comply with the notice. If a report is also requested to accompany that information, then the Minister must give 60 days to comply with the notice. [Part 7, clause 152(5)], [Part 7, 152(3)]

5.84 If a corporation refuses or fails to comply with a notice, then it may be ineligible for assistance under the Program for the first two eligible financial years which begin after the date of the notice. The corporation will be ineligible for assistance if they were capable of complying with the notice and the Minister informs the Regulator that its non-compliance was significant. [Part 7, clause 153] This consequence is proportionate, given the potential for the withholding of such information to result in windfall gains for a particular entity over the course of the Program.

5.85 The Minister may also disclose this information to the Regulator to assist it in the exercise of its functions and powers. [Part 7, clause 154]

Compliance with relinquishment requirements

5.86 A person who does not relinquish carbon units as required under the Program will be subject to an administrative penalty (see Chapter 7). [Part 11, clause 212]

Public information on the Jobs and Competitiveness Program

5.87 The Regulator must inform the public about carbon units issued under the Program (see also Chapter 9) [Part 9, clause 198], [Part 9, clause 199] This will inform the market as to how many units are available for auctioning and will provide public accountability for the application of the assistance for emissions-intensive trade-exposed activities.

5.88 In particular, the Regulator must publish on its website:
• a notice when carbon units are issued to a person under the Program which includes the number of units issued to that person and the activity for which they were issued; [Part 9, clause 198(1)]

• the total number of carbon units issued during a particular quarter for each activity; and [Part 9, clause 199]

• the total number of carbon units claimed under the Program but for which no decision has been made, so as to indicate to the market the potential number of units which may not be available for auctioning. [Part 9, clause 199(c)]

Administration, enforcement and monitoring of the Program

5.89 The Regulator will run the Program, in keeping with governance arrangements in the Regulator bill. These include the secrecy provisions to protect confidential information submitted concerning the Program, and circumstances allowing disclosure in specified circumstances.

5.90 The Regulator’s decisions on eligibility and delivery of carbon units under the Program will be subject to a review procedure, including merits review in the Administrative Appeals Tribunal (see Chapter 8).

5.91 The Regulator will be able to draw upon its investigation and enforcement powers in Parts 13 to 21 to enforce the requirements of the Program. This will support the application requirements to ensure that the Regulator has clear, verified and comprehensive information to make decisions under the Program.

Productivity Commission reviews

5.92 Part 8, Division 5 covers the Productivity Commission’s role in conducting scheduled reviews of the assistance under the Program.

5.93 From time to time, the Government will ask the Productivity Commission to conduct reviews of the Program and advise the Government on whether the established pattern of assistance avoids carbon leakage, facilitates industry transition and whether it does so in the most economically and environmentally efficient way.

5.94 The reviews by the Productivity Commission (the ‘first scheduled review’) will be conducted in the 2014-15 financial year. [Part 7, clause 155(1)(a)] Subsequent reviews will be consistent in timing with general scheme reviews. [Part 7, clause 155(1)(b)], [Part 7, clause 155(1)(c)]

5.95 In accordance with the Productivity Commission Act 1998, the Minister responsible for the Productivity Commission, currently the Treasurer (and referred to in the bill as the Productivity Minister), may, during the reviews mentioned above, refer matters about the operation of
the assistance under the Program, its impact on emissions-intensive trade-exposed industries and the efficiency of the assistance. [Part 7, clause 155(2)(a) to (c)] This does not limit the Productivity Minister’s powers under the Productivity Commission Act 1998. [Part 7, clause 158]

5.96 The Productivity Minister must specify the review period to which each inquiry applies which includes the timeframe within which the Productivity Commission must submit its report. [Part 7, clause 155 (3)]

5.97 Under the Productivity Commission Act 1998, each matter the Productivity Commission review covers must relate to industry, industry development and productivity. [Part 7, clause 155(4)]

5.98 The Productivity Commission must have regard to, but is not limited to, the following matters in conducting each review of the Program: [Part 7, clause 156]

- the feasibility, and data availability, of amending the emissions-intensive trade-exposed assessment framework to one based on an assessment of the estimated expected global uplift of prices of individual emissions-intensive trade-exposed products if other countries had implemented a carbon price equivalent to that applied in Australia, as proposed by the Garnaut Review Update 2011. This review will consider whether it is the most effective and efficient means of preventing carbon leakage and assisting the industry to transition and whether the Government should adopt this approach;
- whether emissions-intensive trade-exposed activities are making progress towards best practice energy and emissions efficiency for the industrial sector to which those activities relate;
- whether additional activities should be added to the Program on account of commodity price movements or other relevant matters;
- whether windfall gains are being conferred on entities carrying out emissions-intensive trade-exposed activities;
- the effect of existing facilities having no cap on unit allocations;
- the growth in the emissions-intensive trade-exposed sector and implications for total free unit allocations under an emissions cap;
- the existence of broadly comparable carbon constraints applying internationally;
Chapter 5: Jobs and Competitiveness Program

- the appropriateness of the LNG supplementary allocation policy;
- the impact of carbon pricing on the competitiveness of emissions-intensive trade-exposed industries, including an analysis of carbon cost pass-through, the level of abatement achieved and the effect of the carbon productivity contribution on emissions-intensive trade-exposed activities over time, and whether the carbon productivity contribution should be changed for a specific industry; and
- whether less than 70 per cent of relevant competitors in each industry have introduced comparable carbon constraints, taking into account all mitigation policies and relevant assistance policies, and hence whether the application of the carbon productivity contribution rate for a specific industry should pause when the assistance rate for a particular activity reaches 90 per cent for highly emission intensive activities, or 60 per cent for moderately emissions-intensive activities.

5.99 In responding to the Productivity Commission’s recommendations, the Government may have regard to advice from the Regulator, particularly concerning the implementation of any recommended changes to assistance, and the Authority, particularly concerning broader issues such as pollution caps. [Part 7, clause 156(5)]

5.100 The Productivity Commission must publish review reports on its website. [Part 7, clause 157(6)]

5.101 The Productivity Commission will also be commissioned under the Productivity Commission Act to undertake:

- ongoing work to quantify mitigation policies in other major economies;
- a review of assistance provided to a particular activity earlier than 2014-15, if requested by the Government, if this is appropriate having regard to industry sectors receiving the greatest level of assistance, experiencing the fastest rates of growth in assistance or where there is strong evidence of windfall gains as a result of the assistance;
- an examination of the impact of a carbon price and associated Government assistance measures on the coal mining sector, taking into account advice from the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and industry on the availability of cost-effective abatement technology;
- a review of the impact of the mechanism on industries as referred by the Government; and
• a review of fuel excise/taxation, with any changes to be implemented after three years (that is, 2015-16). It is anticipated that this review will include examination of the merits of a regime based explicitly and precisely on the carbon/energy content of fuels.
Chapter 6
Energy security

Outline of chapter

6.1 Chapter 6 explains the Energy Security Fund (the Fund), including:

- the way that the Regulator will determine the number of free carbon units to issue to eligible coal-fired electricity generators under the Fund;
- the issue of free carbon units subject to compliance with certain conditions, namely the ‘power system reliability test’ and the submission of a clean energy investment plan (CEI plan); and
- the interaction of the allocation of free carbon units under this Part with the Government’s policy that it proposes to enter into closure contracts with very highly emissions-intensive coal-fired generators, which forms another component of the Fund.

6.2 Chapter 6 covers Part 8.

Context and object of Part 8

6.3 The object of Part 8 is to maintain energy security by assisting highly emissions-intensive coal-fired generators transition to a carbon price, by providing allocations of free carbon units under the Fund. This will help generators that face sizable losses in the value of their assets. These free allocations will also support investor confidence in the electricity generation sector, which will underpin investment in the new energy infrastructure needed to meet our future energy needs. Allocations of free carbon units under Part 8 are available from 2013-14 to 2016-17.

6.4 The Fund will also provide for:

- assistance to highly emissions-intensive coal-fired generators of $1 billion in the form of cash payments in 2011-12; and
- payments for the closure of some of Australia’s most emissions-intensive generation capacity, which the Government will seek to negotiate to make room for investment in lower pollution plant.
6.5 These elements of the Fund will be dealt with outside the bill, except for the interaction between any payments for closure and the allocation of free carbon units under Part 8.

6.6 The transition to a carbon price has significant transformational implications for the electricity generation sector. These allocations of free carbon units will reduce the negative impacts of a carbon price on the operation of highly emissions-intensive generators in the short-term.

6.7 The mechanism will make fossil fuel-fired electricity generators pay for the cost of the carbon pollution they emit, which they will pass on in their offers to supply electricity to customers.

6.8 Highly emissions-intensive coal-fired generators are likely to face an increase in their operating costs greater than the general increase in the level of electricity prices. Competition from less emissions-intensive generators, which face lower costs under the mechanism, may cause more emissions-intensive generators to lose profitability.

6.9 With the start of the mechanism, investors in new generation assets can account for the impact of a carbon price in their investment decisions. For this reason, the issue of free carbon units is only available for highly emissions-intensive coal-fired generation assets operating between 1 July 2008 and 30 June 2010.

6.10 In this way, the Fund supports a smooth transition for highly emissions-intensive coal-fired generators to a carbon price by reducing the short-term financial impact on them and maintaining long-term investor confidence in the sector, without supporting investment in new coal-fired generation.

6.11 The allocation of free carbon units is conditional on eligible generators complying with a power system reliability test. This will support energy security during the shift to a carbon price by minimising the risk of premature retirement of emissions-intensive generation capacity ahead of sufficient replacement capacity being available.

6.12 The allocation of free carbon units will also be conditional on the publication of a CEI plan, to identify proposals by recipients of assistance to reduce their emissions, invest in research and development, invest in new low emissions capacity, and to include possible projects identified under the Energy Efficiency Opportunities program.

6.13 The Government also recognises the importance of the proper regulation of electricity markets to ensure continued efficient investment in the generation sector. The issue of free carbon units complements the continued reform of energy market regulatory frameworks to promote efficient investment in and reliable supply by Australia’s electricity markets.
Chapter 6: Energy Security

Summary

6.14 Part 8, Division 2 requires the Regulator to issue free carbon units for particular generation complexes based on the annual assistance factors set out in certificates of eligibility for coal-fired generation assistance for those complexes. It also clarifies those persons who may be allocated free carbon units by the Regulator.

6.15 Part 8, Division 3 sets out the circumstances in which the Regulator should issue a certificate of eligibility for coal-fired generation assistance. It also sets out how the Regulator should determine an annual assistance factor in each of those certificates.

6.16 Part 8, Division 4 provides that generation complexes covered by certificates of eligibility for coal-fired generation assistance must comply with the power system reliability test before they can receive free carbon units.

6.17 Part 8, Division 5 provides that no free carbon units will be issued to a generator unless it gives a CEI plan to the Minister for Resources and Energy for a particular generation complex.

6.18 Part 8, Division 6 provides that the Regulator cannot issue carbon units to generators that have separately entered into a closure contract with the Commonwealth, where this contract acknowledges that these units will be withheld.

Detailed explanation of new law

6.19 The objective of Part 8 is to support energy security and maintain investor confidence through financial support for highly emissions-intensive coal-fired generators in adjusting to a carbon price.

[Part 8, clause 159], [Part 8, clause 160]

Important definitions used in this Part

6.20 Assistance under Part 8 is not provided for a particular person, such as the person making an application for assistance, but rather is provided for a collection of equipment used for the generation of electricity known as a ‘generation complex’. [Part 1, clause 5, definition of ‘generation complex’] References to assistance in this chapter are references to assistance under Part 8, unless otherwise indicated.

6.21 The concept of a ‘generation complex’ is not the same as the concept of a ‘facility’ as defined in the NGER Act. Assistance is focused on coal-fired electricity generators, which must meet certain eligibility criteria. However, a ‘facility’ under the NGER Act could include, for example, the activities of a co-located coal-fired generator and coal mine. For this reason, the separate definition of a ‘generation
complex’ is used to capture those elements of a facility that may be eligible for coal-fired generation assistance.

6.22 For operational reasons, equipment used for the generation of electricity is often engineered such that, within a ‘generation complex’, there are multiple sets of equipment that can generate electricity independently of one another (although they may share some common infrastructure, such as cooling systems or coal conveyor belts). Each independent set of generating equipment is a ‘generation unit’. [Part 1, clause 5, definition of ‘generation unit’] A ‘generation complex’ consists of one or more ‘generation units’ at the same location.

6.23 Assistance under Part 8 is provided for ‘generation complexes’ rather than ‘generation units’. There is no requirement for applicants for assistance to aggregate generation units at the same location together to form one generation complex, although it may be practical to do so.

**Applying for assistance**

6.24 If a person wants to apply to the Regulator for a certificate of eligibility for coal-fired generation assistance covering a particular generation complex, then he or she must do so within 270 days of the commencement of the provision. [Part 8, clause 162(1)] The provision is one of the substantive provisions of the bill (clauses 3 to 312) which commence on the same date. [Part 1, clause 2]

6.25 A person must own, operate or control a generation complex to make an application for assistance. [Part 8, clause 162(2)] Each application for assistance must cover different generation units. Multiple applications for the same generation units cannot be made. [Part 8, clause 162(3)]

6.26 The Regulator may extend the time limit for applications by up to 30 days, but may only do so up to an extended time limit of 300 days after the commencement of the provision and provided the application does not cover generation units which are the subject of other applications. [Part 8, clause 162(7)]

6.27 If an application is submitted after the time limit (whether extended or not), then it is not a valid application and the Regulator cannot issue a certificate of eligibility for coal-fired generation assistance for that generation complex.

6.28 An application must be made for a generation complex, not the applicant. [Part 8, clause 162(1)] The act of applying for assistance does not entitle the applicant to free carbon units issued for a given generation complex. Instead, the recipient of assistance is defined by reference to the relationship of a person to a generation complex receiving assistance, not by reference to the applicant. [Part 8, clauses 161(6)and (7)]
6.29 The concept of ‘owning, controlling or operating’ a generation complex is intended to have the same meaning as the equivalent terms in laws on the regulation of energy markets that require the registration of electricity generators. The primary laws (and subordinate instruments) relevant to the application of Part 8 are:

- for the National Electricity Market (NEM), the National Electricity Rules as made and amended under Part 7 of the Schedule to the National Electricity (South Australia) Act 1996 (South Australia) and given force of law in other jurisdictions through application legislation; and

- for the Western Australian Wholesale Electricity Market (WA WEM), the Wholesale Electricity Market Rules provided for under section 123 of the Electricity Industry Act 2004 (WA) and the Electricity Industry (Wholesale Electricity Market) Regulations 2004 (WA).

6.30 A person may not make multiple applications for all or part of a generation complex. [Part 8, clause 162(3)] Overlapping assistance could lead to the Regulator issuing too many certificates of eligibility for coal-fired generation assistance and annual assistance factors and delivering additional, unwarranted assistance for some generation complexes.

6.31 An application for free carbon units must satisfy specific requirements set out in regulations. [Part 8, clause 163] These include particular information, documents or prescribed reports to be provided with an application for coal-fired generation assistance. [Part 8, clauses 163(1)(c)-(e)]

6.32 Having received an application, the Regulator may consider that it needs more information to assess it properly. [Part 8, clause 164] The Regulator must ensure that any additional information requested is relevant to its consideration of the application and must exercise this power reasonably. [Part 23, clause 297]

The Regulator’s assessment

6.33 Ordinarily, the Regulator will use its best endeavours to assess an application within 90 days of the date of the application. [Part 8, clause 165(4)(b)(i)] However, the Regulator may make its assessment up to 300 days after the commencement of the substantive provisions of the bill. [Part 8, clause 165(4)(b)(ii), Part 1, clause 2] This is because the Regulator cannot reasonably ensure that an application is mutually exclusive in its coverage of generation units until it has all valid applications.

6.34 To ensure that the Regulator has sufficient time to make a decision, it may have an additional 90 days to decide on an application where it has requested additional information. [Part 8, clause 165(4)(a)]
6.35 This may be an iterative process in which the Regulator requests information more than once to clarify the issues involved. The time for making a decision may be extended multiple times. Where more than one request for information is made, the extension of time applies to the last of those requests. However, nothing prevents the Regulator from making a decision before the end of the initial or extended period where it can do so.

6.36 The Regulator’s assessment of an application has two key elements:

- determining the eligibility of the generation complex for assistance; and
- determining an ‘annual assistance factor’ for that generation complex.

The annual assistance factor is needed to determine the total number of free carbon units to be issued for that generation complex.

**Determining eligibility**

6.37 The Regulator must apply the ‘generation complex assistance eligibility test’ to decide whether to issue a certificate of eligibility for coal-fired generation assistance. [Part 8, clause 165(2)], [Part 8, clause 166(1)]

6.38 The test has two elements:

- A generation complex must have been in operation at any time during the period beginning on 1 July 2008 and ending on 30 June 2010. [Part 8, clause 166(2)(a)] This ensures that a new generation complex that entered service after 1 July 2010 is not eligible for assistance. Similarly, this requirement ensures that a generation complex that retired from service prior to 1 July 2008 is not eligible for assistance.

- A generation complex must also have an emission intensity of greater than 1.0 kilotonnes (kt) of CO₂-e per GWh of electricity generated. [Part 8, clause 166(2)(c)] Emissions intensity is defined in the same way as when determining the annual assistance factor of a generation complex (see below).

  - This requirement is needed to ensure that assistance is effectively targeted to the most emissions-intensive generation complexes. The most acute impacts of a carbon price are likely to emerge for highly emissions-intensive coal-fired generators, and therefore assistance to these generators will be most effective in addressing energy security risks.

6.39 Assistance is only available for coal-fired electricity generators. To be eligible a generation complex must use coal as its
primary energy supply, such that 95 per cent of the electricity it generated in the period from 1 July 2008 to 30 June 2010 is attributed to the combustion of coal. [Part 8, clause 166(2)(b)]

6.40 To warrant assistance under the Fund, the Government has decided that a generation complex must be connected to an electricity grid of a size sufficient to expose it to significant competition. Emissions-intensive coal-fired generators not exposed to competition from low emissions generation are likely to be able to pass on carbon costs to electricity consumers and therefore will are not likely to be acutely impacted in a way that impacts energy security.

6.41 On this basis, generation complexes must be connected to a grid with a capacity of at least 100 MW to pass the generation complex assistance eligibility test. (Part 8, clause 166(2)(a)) This is the same as the threshold size of an electricity grid used in the Renewable Energy (Electricity) Act 2000 (Renewable Act) to determine the sales of electricity liable under that Act. The method for calculating the capacity of a grid is also the same that used in the Renewable Act and regulations made under the Renewable Act, in that it excludes standby and privately-owned domestic generation sources. (Part 8, clause 166(3))

6.42 If the Regulator refuses to issue a certificate of eligibility for coal-fired generation assistance, it must notify the applicant of the decision. [Part 8, clause 165(5)]

**Determining the annual assistance factor**

6.43 A certificate of eligibility for coal-fired generation assistance must include an ‘annual assistance factor’. [Part 8, clause 165(3)] This is used to determine the correct number of carbon units to issue for a particular generation complex. [Part 8, clauses 161(2) and (3)]

6.44 The two key elements used in the formula to determine the annual assistance factor for a generation complex are its ‘historical energy’ and its ‘emissions intensity’. [Part 8, clause 167]

6.45 These elements are combined such that the annual assistance factor for a generation complex is the product of its historical energy and the difference between its emissions intensity in kilotonnes (kt) of carbon dioxide equivalence of emissions per GWh of electricity and 0.86 kt of CO₂-e per GWh of electricity generated. 0.86 kt of CO₂-e per GWh of electricity generated reflects the average estimated emissions intensity of electricity generation in Australia.

**Historical energy**

6.46 For generation complexes that entered service on or before 1 July 2008, the measure of ‘historical energy’ is actual output over the two year period from 1 July 2008 to 30 June 2010. [Part 8, clause 167(a)]
6.47 Importantly, historical energy for these assets is defined as being the amount of electricity generated ‘as measured in GWh at all generator terminals of the generation complex’, including electricity associated with auxiliary use (that is, electricity consumed by the generation complex). [Part 8, clause 167(a)] Historical energy is determined on an ‘as generated’ basis, rather than a ‘sent out’ basis.

6.48 Using this measure for generation complexes that entered service after 1 July 2008 would unfairly reduce their annual assistance factor, and the number of free carbon units they receive. Therefore, for generation complexes or generation complex projects that entered service after 1 July 2008, the ‘nameplate rating’ of the generation complex is used to calculate a proxy for its likely energy output over a notional two year period. [Part 8, clause 167(b)]

6.49 The nameplate rating of a generation complex is its maximum continuous electrical generation capacity as registered with the appropriate energy market operator. [Part 1, clause 5, definition of ‘nameplate rating’] Accordingly, the output of the generation complex can be estimated by considering its nameplate rating and its likely ‘capacity factor’, that is, the percentage of its maximum output that an asset produces on average over a period of time.

6.50 Multiplying the nameplate rating of the generation complex in MW by 14.016 approximates the energy output in GWh of such a generation complex over a notional two year period, if it operates at an 80 per cent capacity factor over that period (that is, if its average output over the period is 80 per cent of its maximum output).

6.51 The number 14.016 is worked out as follows:

\[
14.016 = \frac{(365 \text{ days} \times 24 \text{ hours} \times 2 \text{ years}) \times 0.8}{1,000}
\]

**Emissions intensity**

6.52 The ‘emissions intensity’ of a generation complex is its emissions divided by the amount of electricity it generates, estimated over a specified period of time.

6.53 For the purposes of calculating a generation complex’s annual assistance factor, its emissions intensity is estimated by reference to its actual emissions and actual energy output over the two year period from 1 July 2008 to 30 June 2010. [Part 8, clause 168(1)]

6.54 Importantly, these emissions must be ‘emitted from the combustion of fuel in the generation complex’ and do not include, for example, emissions from the combustion of fuel to operate mining equipment. Further, fuel combustion must be for ‘the purposes of the generation of electricity’ and does not include, for example, emissions
created for the purposes of the production of steam in a cogeneration plant.

6.55 The concept of ‘gigawatt hours of electricity generated’, which is used as the denominator for calculating the emissions intensity of these generation complexes, is defined as being the amount of electricity generated ‘as measured at all generator terminals of the generation complex’. [Part 8, clause 168(1)] The emissions intensity estimate derived in this way is therefore defined on an ‘as generated’ basis, rather than a ‘sent out’ basis.

6.56 For a generation complex that entered service on or before 1 July 2008, the energy output of the generation complex (described as the ‘gigawatt hours of electricity generated’) is exactly the same number as its ‘historical energy’. [Part 8, clause 167] However, for a generation complex that entered service after 1 July 2008, historical energy and ‘gigawatt hours of electricity generated’ will differ.

6.57 For the purposes of assistance, the emissions intensity of a generation complex cannot exceed 1.3 kt of carbon dioxide equivalence per GWh. [Part 8, clause 168(2)] This ensures that assistance is not inappropriately skewed towards the most emissions-intensive generation complexes.

Example 6.1: A generation complex that entered service on or before 1 July 2008

To estimate the historical energy of a generation complex that entered service on or before 1 July 2008, the applicant should provide, and the Regulator should assess, historical data relating to the generation of electricity by that generation complex over the period from 1 July 2008 to 30 June 2010.

The Regulator could verify this data through comparison with data publicly available from independent bodies such as the market operator in the market in which the generation complex operates. For example, this investigation might find that the historical energy of a generation complex over the two year period in question was 16,000 GWh of electricity.

To estimate the emissions intensity of a generation complex, the applicant should also provide, and the Regulator should assess, historical information relating to the emissions produced by the generation complex over the period 1 July 2008 to 30 June 2010.

The primary source for this information is likely to be information reported to the Australian Government as required under the NGER Act. For example, data provided under the NGER Act might substantiate that the generation complex in question produced approximately 20,000 kt of CO₂-e over the two year period in question.

Based on these estimates, the Regulator’s reasonable estimate of the generation complex’s emissions intensity would be:
20,000 kt of CO$_2$-e per GWh = 1.250 kt of CO$_2$-e per GWh

\[
\frac{20,000}{16,000} = 1.250
\]

Accordingly, the Regulator would find the generation complex’s annual assistance factor to be:

\[
16,000 \times (1.250 - 0.86) = 6,240
\]

**Example 6.2: A generation complex that entered service after 1 July 2008**

To estimate the historical energy of a generation complex that entered service after 1 July 2008, the applicant should provide the Regulator with the nameplate rating of the generation complex as registered with the relevant market operator as of 1 July 2010.

For example, the generation complex’s nameplate rating might be 500 MW. This being the case, the Regulator would estimate the historical energy of the generation complex over a notional two year period to be:

\[
500 \times 14.016 = 7,008 \text{ GWh}
\]

However, the Regulator must use the actual emissions and actual electricity output of this generation complex over the period 1 July 2008 to 30 June 2010 for the purpose of determining its emissions intensity. If the generation complex did not generate any electricity during this period it would not be eligible for assistance and so it does not matter that it would not be possible to estimate its emissions intensity in this way.

Accordingly, the applicant should provide, and the Regulator should assess, historical information relating to the emissions produced by the generation complex over the period 1 July 2008 to 30 June 2010 such as that reported under the NGER Act. This data might substantiate that the generation complex produced approximately 4,000 kt of CO$_2$-e over the two year period in question.

To estimate the ‘GWh of electricity generated’ by this generation complex the applicant should provide, and the Regulator should assess, historical data relating to the generation of electricity by that generation complex over the period from 1 July 2008 to 30 June 2010.

In this example, the Regulator finds that the historical energy of the generation complex over the two year period in question was 3,750 GWh (this number is less than the deemed ‘historical energy’ of the generation complex, reflecting that it was not in service for the full two year period from 1 July 2008 to 30 June 2010).

Based on these estimates, the Regulator’s reasonable estimate of the generation complex’s emissions intensity would be:

\[
\frac{4,000}{3,750} = 1.067 \text{ kt of CO$_2$-e per GWh}
\]
Based on these estimates, the Regulator would find the generation complex’s annual assistance factor to be:

\[ 7,008 \times (1.067 \times 0.86) = 1,450.656 \]

**Issuing assistance**

6.58 The Regulator must decide whether to issue a certificate of eligibility for coal-fired generation assistance for each application it receives and, if so, what the annual assistance factor in the certificate should be. [Part 8, clause 165] Each of these decisions may be reconsidered or reviewed under Part 21 (see Chapter 8).

6.59 The number of free carbon units that should be issued for a generation complex is a function of both the annual assistance factor specified for that generation complex and of all other annual assistance factors for all other generation complexes. [Part 8, clause 161(2)]

6.60 This is because the Regulator must take the annual assistance factor in each certificate of eligibility for coal-fired generation assistance and divide it by the sum of all annual assistance factors in all such certificates (the ‘total annual assistance factors for that eligible financial year’).

6.61 For the eligible financial years beginning on 1 July 2013, 1 July 2015 and 1 July 2016, the result of this calculation (which must be less than 1) is then multiplied by 41,705,000 (being the total number of free carbon units that may be issued) to determine the share of the total pool of free carbon units available in those years to be issued for a generation complex. [Part 8, clause 161(2)] This calculation is subject to rounding provisions. [Part 8, clause 161(4)]

6.62 In the eligible financial year beginning on 1 July 2014, a different formula is adopted (see below).

6.63 In this way, the available pool of free carbon units per year is distributed among all eligible recipients of these units in each year in which allocations of free carbon units are made, which achieves the Government’s policy of ‘capping’ the total number of free carbon units to be issued under the Fund.

**Example 6.3: Calculating the number of free carbon units to issue to particular generation complexes**

Example 6.1 and Example 6.2 outlined the calculation of annual assistance factors for two hypothetical generation complexes. These generation complexes, which we shall call ‘Generation complex A’ and ‘Generation complex B’, had annual assistance factors of 6,240 and 1,450.656 respectively.

Other generation complexes are likely to be found to be eligible for assistance, and to be issued certificates of eligibility for coal-fired generation assistance containing annual assistance factors. For
example, these annual assistance factors, including those of Generation complex A and Generation complex B, might add up to 39,100,000.

In this case, Generation complex A and Generation complex B would receive the following number of free carbon units in each of the eligible financial years beginning on 1 July 2013, 1 July 2015 and 1 July 2016 (provided they comply with the power system reliability test, that a CEI plan has been submitted for these generation complexes, and that they are not party to a closure contract fitting the requirements of Part 8, Division 6 that specifies units will be withheld in given years):

- **Generation complex A**
  
  \[
  \frac{6,240}{39,100} \times 41,705,000 = 6,655,734.015
  \]
  
  \(\approx 6,655,700\) (after rounding)

- **Generation complex B**
  
  \[
  \frac{1,450.646}{39,100} \times 41,705,000 = 1,547,293.898
  \]
  
  \(\approx 1,547,300\) (after rounding)

In the year beginning on 1 July 2014, the number of free carbon units issued to these generation complexes would depend on changes to the number of units issued as a result of review events. In the event that no successful reviews of annual assistance factors were concluded prior to 1 September 2014, these generation complexes would effectively receive the same number of units as calculated above in that year (with some slight difference possible due to rounding).

6.64 Ordinarily, a review that changes the annual assistance factor determined for a generation complex would change the ‘total annual assistance factors for that eligible financial year’. This would change the number of free carbon units that should have been issued for all other generation complexes with certificates of eligibility for coal-fired generation assistance. This may create uncertainty for recipients of assistance as it could, for example, involve the relinquishment of incorrectly issued units.

6.65 To prevent alterations to all previous issues of assistance, the definition of the ‘total annual assistance factors for that eligible financial year’ includes certificates purportedly issued by the Regulator. This means that it includes annual assistance factors in certificates later found through a review process to have been issued incorrectly. [Part 8, clause 161(2)]
6.66 The ‘total annual assistance factors for that eligible financial year’ cannot change after 1 September of each financial year and that previous provisions of assistance to a given generation complex cannot be altered due to a review of an annual assistance factor for a different generation complex.

6.67 A review could require the issue or relinquishment of additional free carbon units for the generation complex subject to review. The fact that other allocations are not adjusted could mean that the number of units issued in a given financial year exceeds the Government’s cap for that year.

6.68 If, after a review, no adjustment is made, the Regulator could issue more free carbon units than was intended by the Government in setting up the Fund. While the number of units to be issued for the eligible financial years beginning on each of 1 July 2013, 1 July 2015 and 1 July 2016 is set at 41,705,000, the total number of units allocated in the eligible financial year beginning 1 July 2014 may differ from this amount and is calculated according to a different formula. [Part 8, clause 161(3)]

6.69 The formula firstly looks at the number of free carbon units that would be issued for a given generation complex for the eligible financial years beginning on 1 July 2013 and 1 July 2014, in the event that all annual assistance factors for all generation complexes had never varied from their value on 1 September 2014. This amount is equal to:

\[
\frac{\text{annual assistance factor in respect of that generation complex as of 1 September 2014}}{\text{total annual assistance factors for that eligible financial year}} \times 83,410,000
\]

6.70 To determine the amount of free carbon units that should be allocated for each generation complex on 1 September 2014, the Regulator then must consider how many free carbon units have already been issued for that generation complex (term ‘A’), and how many units would have been issued for that generation complex but were not due to the operation of various other provisions of the bill (term ‘B’). [Part 8, clause 161(3)]

6.71 The amount of units already issued in term ‘A’ should include units issued on 1 September 2013 and any additional units allocated as a result of a review of a decision on the generation complex’s annual assistance factor. This formula ensures that no more than 83,410,000 free carbon units can be issued over the first two years of allocations, and that the total allocation to individual assets over those two years reflects their annual assistance factor as of 1 September 2014 (including any adjustments as a result of a review of decisions).
6.72 The full formula is given as:

\[
\text{annual assistance factor in respect of that generation complex as of 1 September 2014} \times 83,410,000 - \text{the total number of free carbon units issued before 1 September 2014 for the generation complex} - \text{the Regulator’s reasonable estimate of the number of free carbon units with a vintage year beginning on 1 July 2013 that were not issued for a generation complex because of the operation of Part 8, Divisions 4, 5, or 6 (‘B’)}.
\]

6.73 However, the number of free carbon units issued could still exceed the level anticipated by the Government, notwithstanding the true up arrangements in the payment and surrender process (see Chapter 4), in the unlikely event that a review of a generation complex’s annual assistance factor did not conclude until after 1 September 2014.

6.74 The Regulator’s allocation decisions under clause 161 are not subject to review under Part 21 as they simply involve the mechanical application of a formula to determine the correct number of free carbon units to issue for a generation complex, and the correct application of the provisions that determine the correct recipient of assistance for that generation complex. [Part 8, clauses 161(6) and (7)] Judicial review is available if, for example, the incorrect number of units is issued for a generation complex or free carbon units are issued to the wrong recipient.

6.75 The Regulator must publish each certificate of eligibility for coal-fired generation assistance as soon as practicable after it is issued. [Part 8, clause 165(6)] This is important because, as outlined above, the number of free carbon units issued for a generation complex is a function of not only the annual assistance factor specified in the certificate of eligibility for coal-fired generation assistance issued for that asset, but also all other annual assistance factors specified for all other generation complexes.

6.76 The public disclosure of the issue of all certificates of eligibility for coal-fired generation assistance, and the annual assistance factors in those certificates, is important to ensure that all potential recipients of assistance have access to information that impacts on the allocation of units. This means that the Regulator can publish annual
assistance factors despite the secrecy provisions of Part 4 of the NGER Act.

6.77 Free carbon units issued for a particular generation complex are issued to the entity that was liable for the emissions created from the operation of that asset as of the end of the previous financial year. To achieve this, it is assumed that the generation complex was a facility as defined under the NGER Act, and that this facility created sufficient greenhouse gas emissions to meet the mechanism’s threshold for liability (see Chapter 1).

6.78 The rules for determining liability for emissions under the mechanism are then applied to identify the person who would be liable for the emissions from the generation complex given those assumptions (see Chapter 2). This person is the recipient of assistance. [Part 8, clause 161(6)] In this way, the recipient of assistance identified under this clause is one of three possible persons:

- the controlling corporation of a group where one or more members of the group has operational control of the generation complex;
- the non-group entity with operational control of the generation complex; or
- the person with an LTC for the facility that includes the generation complex (for example, a company with financial control of the facility).

6.79 The issue of units for a generation complex is subject to:

- compliance with the power system reliability test; [Part 8, clause 161(10)]
- a CEI plan being provided to the Minister for Resources and Energy for that generation complex; or [Part 8, clause 161(11)]
- whether a person who owns, controls or operates the generation complex has entered into a ‘closure contract’ and recognised in that contract that the effect of doing so is to forego some or all of their free carbon units under Part 8. [Part 8, clause 161(12)]

**Power system reliability test**

6.80 To ensure energy security during at the beginning of the mechanism, the Government has imposed conditions on assistance. This is designed to reduce the risk of unexpected behaviour from owners, controllers or operators of generation assets (or their creditors) affecting the supply reliability in Australia’s electricity markets. For example, a reduction in asset value of a generator causes its creditors to force it to
shut down even though it still has to operate to maintain sufficient supply in an electricity market.

6.81 Generation complexes must comply with the ‘power system reliability test’ in order to receive assistance. The power system reliability test uses the value of free carbon units to influence the decisions of owners, operators or controllers of some generation complexes about when to withdraw generating capacity, to promote the secure supply of electricity. [Part 8, clause 170]

6.82 Depending on electricity market conditions, a decision to withdraw generating capacity could affect energy security by reducing the maximum amount of electricity that can be generated below the level that needed to reliably meet peak demand.

6.83 The power system reliability test focuses on changes to a generation complex’s ‘nameplate rating’ because the reliability of a power system depends, in part, on the maximum continuous electrical output of all generators connected to the system being sufficient to supply the maximum likely demand for electricity in the system, allowing for contingencies like malfunctions of generators and technical constraints on the safe system operation.

6.84 The power system reliability test is structured around concepts and processes set out in laws regulating energy markets. The primary laws (and instruments made under those laws) likely to be applied in the Regulator’s assessments of the power system reliability test are:

- for the NEM, the National Electricity Rules; and
- for the WA WEM, the Wholesale Electricity Market Rules.

6.85 These laws require generators to register with the operator of the energy market in which they operate:

- Rule 2.2 of the National Electricity Rules requires a person who engages in the activity of owning, controlling or operating a generator in the NEM to register with the Australian Energy Market Operator (AEMO), unless it is the subject of an exemption.

- Regulations 14 and 19 of WA’s Electricity Industry (Wholesale Electricity Market) Regulations 2004 require a person who engages in the activity of owning, controlling or operating a generator in the WA WEM to register with the Independent Market Operator of WA (IMOWA), subject to exemptions and a minimum capacity requirement.

Registration as a generator under these two laws requires compliance with a range of technical and operational conditions, which supports the reliable and safe operation of the NEM and WA WEM, and gives AEMO and IMOWA powers necessary to manage system security.
6.86 By using the value of assistance to create incentives that influence the decision of a recipient of assistance to cease its registration as a generator, or reduce its nameplate rating, the power system reliability test supports the reliable and safe operation of the NEM and WA WEM.

6.87 A generation complex’s ‘nameplate rating’ is defined as its maximum continuous electrical output in MW of the generation complex, as registered with AEMO or IMOWA. The National Electricity Rules and the WA Wholesale Electricity Market Rules require registered generators to register various parameters relating to the generating capacity of their various generation units and generation complexes.

6.88 Of these various parameters, the Regulator needs to determine which registered parameter most closely fits the definition of the nameplate rating, and therefore which parameter must be considered when applying the power system reliability test.

6.89 Where a generator provides a particular parameter for individual generation units, the various values might need to be aggregated to the level of the generation complex (to which assistance applies) for the purpose of the power system reliability test. For example, Schedule 3.1 of the National Electricity Rules requires a person classified a scheduled generator to register the maximum generation of each scheduled generating unit in MW with AEMO.

6.90 This parameter could be considered by the Regulator to be the nameplate rating of a generation complex, once appropriately aggregated to apply to the generation complex. Whilst the National Electricity Rules separately defines the concept of a ‘nameplate rating’, this parameter is not registered with AEMO under the National Electricity Rules, and would not fit the definition of a nameplate rating.

6.91 Appendix 1, clause (b)(ii) of the WA Wholesale Electricity Market Rules requires a scheduled generator to register its nameplate capacity in MW with IMOWA. The nameplate capacity registered in this way could be considered by the Regulator to be the nameplate rating of a generation complex, once appropriately aggregated.

6.92 The Regulator must not issue free carbon units for a generation complex where it does not meet the power system reliability test. [Part 8, clause 169(2)] This test must be applied to each generation complex individually each time carbon units are issued for that asset. [Part 8, clauses 161(2) and (3)], [Part 8, clause 161(10)]

6.93 A generation complex can pass the power system reliability test in three ways:

- the nameplate rating of the generation complex is not reduced over time, meaning that it continues to contribute to power system reliability; or
• the nameplate rating of the generation complex is reduced over time, but AEMO or IMOWA certifies that, despite these reductions, there is unlikely to be a breach of relevant power system reliability standards within two years (the ‘certification approach’); or
• the nameplate of the generation complex is reduced, but the person that is registered as a generator for that generation complex also constructs new ‘replacement capacity’ that complies with relevant requirements set out in the bill and regulations (using the Low Emissions Transition Incentive).

The status quo approach
6.94 A generation complex passes the power system reliability test if the nameplate rating of that generation complex remains the same as, or exceeds, the level it was on 1 July 2010.
6.95 In this case, the generation complex receiving assistance has not reduced its maximum continuous generation capacity, and so has not reduced its ability to contribute to satisfying the maximum likely demand for electricity within the system. Further, the generation complex that is registered with this capacity is, through the act of remaining registered, required to comply with technical and operational requirements that improve the likelihood that it will be physically capable of supplying that amount of electricity at times of high demand when it is most required.
6.96 Therefore, breaches of relevant power system reliability standards cannot be reasonably attributed to the actions of generation complexes that comply with these clauses, but are more likely to be due to insufficient investment in new generation capacity to satisfy growth in demand for electricity.

The certification approach
6.97 It is possible that the mechanism will change the relative cost of different generators in an energy market such that the owner, operator or controller of a generation complex will seek to retire all or part of that generation complex from service.
6.98 Such a retirement is generally necessary to ensure a gradual transition to a lower emissions electricity generation sector. However, such a retirement would be concerning if it were to be likely to lead to a breach of relevant power system reliability standards, and jeopardise energy security.
6.99 Given this, the certification approach to passing the power system reliability test lets a generator reduce the nameplate rating of a generation complex where there is unlikely to be a breach of relevant power system reliability standards within two years after that event, taking
into account the reduction in generation capacity from the generation complex. [Part 8, clause 170(2)(c)]

6.100 The power system reliability test also lets a generator cease its registration where there is unlikely to be a breach of relevant power system reliability standards applicable to the energy market it operates in within two years, taking into account the removal of the generation capacity of the generation complex from the market. [Part 8, clause 170(2)(d)]

6.101 Both the National Electricity Rules and the WA Wholesale Electricity Market Rules set out various power system reliability standards that assess the likelihood of the system being able to satisfy the maximum likely demand within the system. However, not all of these power system reliability standards will be relevant to an assessment of whether a change in the nameplate rating of a generation complex will affect energy security.

6.102 Assessing whether the reduction in the nameplate rating of a generation complex is likely to breach power system reliability standards, and which power system reliability standards are relevant to that assessment, are best performed by AEMO or IMOWA, rather than the Regulator.

6.103 For this reason, the Regulator must rely on an appropriate certification by AEMO or IMOWA, rather than on its own judgement of the circumstances. [Part 8, clause 170] Owners, operators or controllers of generation complexes receiving assistance must obtain appropriate documentation from AEMO or IMOWA to the satisfaction of the Regulator if they wish to cease their registration as a generator or reduce the nameplate rating of a generation complex.

6.104 A person who owns, controls or operates a generation complex may apply to AEMO or IMOWA for a certification to the effect that a reduction in the generation complex’s nameplate rating, or a cessation of its registration, would pass the power system reliability test. [Part 8, clause 174], [Part 8, clause 175]

6.105 AEMO or IMOWA may consider a range of power system reliability standards that might be affected by a reduction in a generation complex’s nameplate rating, or the cessation of a generator’s registration, when:

• considering whether to provide such a certification; and

• making a judgement as to which power system reliability standards are relevant to the assessment,

because they are directly impacted by changes to the nameplate rating of the generation complex in question. AEMO or IMOWA may choose not to certify positively or negatively in response to the application.
6.106 If, within 120 days after the application, AEMO or IMOWA has not certified positively or negatively in response to the application, the Regulator must take AEMO or IMOWA to have certified that the reduction or cessation is unlikely to breach relevant power system reliability standards within two years of the reduction or cessation. [Part 8, clause 174(4)], [Part 8, clause 175(4)]

6.107 This places an effective time limit on the considerations of AEMO or IMOWA, giving recipients of assistance certainty that their applications for certifications for the power system reliability test will be considered in a timely manner.

6.108 Nothing prevents a person who owns, controls or operates a generation complex from applying to AEMO or IMOWA for a certification in writing after a reduction in a generation complex’s nameplate rating has already taken place, or after a cessation of its registration has occurred.

6.109 If the person does not receive the certification before 1 September of a given eligible financial year, free carbon units available to be issued in that year for the generation complex in question would be withheld under the power system reliability test, except where AEMO or IMOWA has not certified or refused to certify the application within 120 days of receiving an application. [Part 8, clause 174(4)], [Part 8, clause 175(4)]

The Low Emissions Transition Incentive (LETI)

6.110 As an alternative to the certification approach, a generator may also seek to reduce the registered capacity of a generation complex, or cease its registration, using the LETI. This approach sharpens incentives for these generators receiving assistance to invest in low emissions replacement capacity by allowing them to receive direct credit for such investments when assessing compliance with the power system reliability test.

6.111 The LETI allows recipients of assistance to retire existing emissions-intensive generation capacity without relying on a certification from AEMO or IMOWA (which takes into account a range of factors in the energy market that are beyond the control of the recipient of assistance, such as growth in demand and retirement of other generation units). As a result, the LETI supports a smooth and timely transition to a lower carbon generation sector, whilst protecting energy security.

6.112 To use the LETI the generator that is registered for a generation complex subject to a certificate of eligibility for coal-fired generation assistance must also be registered for one or more new generation units that satisfy a range of conditions set out in the bill and therefore constitute replacement capacity for the purpose of the incentive. [Part 8, clause 170(2)(e)], [Part 8, clause 171], [Part 8, clause 172]
6.113 A generation complex is deemed to pass the power system reliability test if it has:

- previously passed the power system reliability test using the LETI and satisfies particular conditions in subsequent years. [Part 8, clause 170(2)(f)-(g)]

- previously reduced its nameplate rating, has been found to have passed the power system reliability test using the LETI and has not subsequently reduced its nameplate rating. [Part 8, clause 170(2)(f)] This reflects that the passing of the test in the earlier year occurred through the full replacement of the retiring generation capacity at that time, protecting energy security, and that no reductions in the capacity of the generation complex have occurred since that time.

- has previously ceased its registration and has been found to have passed the power system reliability test under the LETI. [Part 8, clause 170(2)(g)] This reflects the fact that the generation complex was fully retired from service on the cessation of its registration, and that capacity was fully replaced at that time. As the nameplate rating of a retired generation complex cannot reduce any further, the generation complex can appropriately be considered to pass the power system reliability test in all future years.

6.114 It is not necessary to consider the existence of replacement capacity if a particular generation complex passes the power system reliability test because it has never reduced its nameplate rating. [Part 8, clause 171(2)-(3)]

6.115 If replacement capacity is needed to pass the power system reliability test, the generation unit(s) providing the replacement capacity must be registered by the same person who is registered for the generation complex subject to a certificate of eligibility for coal-fired generation assistance. [Part 8, clause 171(4)] Replacement capacity must have been nominated by that person for this purpose. [Part 8, clause 171(4)(a)] The requirements for nomination are specified. [Part 8, clause 172]

6.116 Replacement capacity must not be part of the generation complex subject to a certificate of eligibility for coal-fired generation assistance. [Part 8, clause 171(4)(b)] Otherwise, the replacement capacity would be counted twice for the purpose of the power system reliability test:

- as part of the nameplate rating of the generation complex that is subject to a certificate of eligibility for coal-fired generation assistance; and [Part 8, clause 171(5)(a)]

- as replacement capacity. [Part 8, clause 171(5)(b)]
This does not mean that generation units providing replacement capacity cannot be co-located with the generation complex subject to a certificate of eligibility for coal-fired generation assistance.

6.117 A new generation unit built at the same location should not be considered to form part of the generation complex subject to a certificate of eligibility for coal-fired generation assistance. This is because the extent of this generation complex was defined at the time the certificate was issued. A new generation unit can be built at the same location without being considered to be part of the original generation complex.

6.118 Replacement capacity must also be connected to the same interconnected electricity system as the generation complex subject to a certificate of eligibility for coal-fired generation assistance. [Part 8, clause 171(4)(c)] If the market related to the system is divided into regions, replacement capacity must be located in the same region. [Part 8, clause 171(4)(d)] This is because retiring capacity can only be replaced in a way that maintains power system reliability when the new generation unit or units supply electricity to the same interconnected electricity system.

6.119 The NEM is divided into regions, which generally reflect physical constraints on the transmission of electricity between different parts of the system. Replacement capacity located in a different region to the retiring capacity would be unlikely to provide the same amount of electricity to that region at times of high demand because of transmission constraints. For this reason, replacement capacity must be located in the same region to maintain energy security.

6.120 To maintain energy security, replacement capacity must enter service on or before 1 December of a given financial year. [Part 8, clause 171(4)(e)] This is because extreme peaks in electricity demand are most likely to occur on very hot summer days when air-conditioning loads peak.

6.121 The difficulty of meeting these summer peaks is compounded because some generation units cannot produce their maximum electrical output on very hot days. This feature of the power system reliability test allows a generator to retire capacity after 1 April of a given year (1 April being the date against which the power system reliability test is assessed).

6.122 The generator can then bring replacement capacity into service on or before 1 December of that same calendar year (the subsequent eligible financial year). This replacement capacity would then be assessed on the subsequent 1 April to determine whether carbon units should be issued for a given generation complex on the subsequent 1 September. [Part 8, clause 161(2)] The concept of entering service is defined in the bill. [Part 8, clause 171(8)]]
Finally, it is essential that the generation capacity of the replacement capacity equals or exceeds the amount of capacity that is being retired so as to maintain energy security. Without this, there is a risk of shortfalls to supply that may jeopardise energy security. This broad requirement can be fulfilled in a range of ways set out in the bill. [Part 8, clause 171(5)]

This assessment relies on looking at the amount of generation capacity that a particular generator can provide to the system at a particular point in time to support energy security. Accordingly, the nameplate rating of the generation complex which has a certificate of eligibility for coal-fired generation assistance is assessed on the various days on which the power system reliability test is applied, that is, on 1 April of each relevant eligible financial year. [Part 8, clause 171(5)(a)] Changes to this nameplate rating indicate a situation where the ability of that generation complex to contribute to energy security has changed, and therefore where it may be in breach of the power system reliability test.

Firstly, if a generation complex’s nameplate rating has not reduced since the previous 1 April, the generation complex passes the power system reliability test in the absence of any replacement capacity having been commissioned. [Part 8, clause 170(2)(a)], [Part 8, clause 170(2)(b)], [Part 8, clause 170(2)(c)], [Part 8, clause 170(2)(f)(iii)] Where this is not the case, the nameplate rating of the generation complex will reflect some reduction in generating capacity that must be made up with replacement capacity. This reduced nameplate rating is summed with the replacement capacity that satisfies the various requirements set out in the bill. [Part 8, clause 171(5)(b)]

Replacement capacity can only be taken into account once for the purpose of the power system reliability test. [Part 8, clause 171(4)(g)] The nameplate rating of the generation complex can also be summed with any ‘relevant excess megawatts’, where this is an amount of replacement capacity that was excess to requirements when the LETI was used previously. [Part 8, clause 171(5)(c)]

To pass the power system reliability test using the LETI, the amounts added together under paragraphs 171(5)(a)-(c) [Part 8, clauses 171(5)(a)-(c)] must equal or exceed the lowest of three different ‘target’ generation capacities. [Part 8, clauses 171(5)(d)-(f)]

These target generation capacities reflect the minimum amount of generation capacity that must be retained in the system (consisting of both the original generation capacity and some replacement capacity) to maintain energy security under three difference circumstances, these being when:

- the nameplate rating of the generation complex is reduced for the first time; [Part 8, clause 171(5)(d)]
• the nameplate rating of the generation complex has previously been reduced but the generation complex has satisfied the power system reliability test under the certification approach; or [Part 8, clause 171(5)(e)]

• the nameplate rating of the generation complex has previously been reduced but the generation complex has satisfied the power system reliability test using the LETI. [Part 8, clause 171(5)(f)]

6.129 When the nameplate rating of the generation complex is reduced for the first time, the sum of the (reduced) nameplate rating as of the most recent 1 April and the nameplate rating of all generation unit(s) that constitute replacement capacity must equal or exceed the original nameplate rating to maintain energy security. [Part 8, clause 171(5)(d)]

6.130 In that case, the reduction in capacity has been fully replaced and energy security has been maintained. Where the original nameplate rating is exceeded, the excess constitutes the relevant excess MW and can be used subsequently, if needed. [Part 8, clause 171(5)]

6.131 When the nameplate rating of the generation complex has previously been reduced and the generation complex has passed the power system reliability test under the certification approach, maintaining energy security requires the sum of:

• the (reduced) nameplate rating as of the most recent 1 April;
• the nameplate rating of all generation unit(s) that constitute replacement capacity; and
• any relevant excess MW.

to equal or exceed the reduced nameplate rating that applied at the most recent time the certification was awarded. [Part 8, clause 171(5)(e)]

6.132 In that event, the replacement capacity will overcome the reduction in capacity since AEMO or IMOWA last certified that power system reliability standards were not likely to be breached, and will therefore maintain that situation.

6.133 When the nameplate rating of the generation complex has previously been reduced and the generation complex has passed the power system reliability test using the LETI, maintaining energy security requires the sum of:

• the (reduced) nameplate rating as of the most recent 1 April; and
• the nameplate rating of all generation unit(s) that constitute replacement capacity; and
• any relevant excess MW,
to equal or exceed the reduced nameplate rating that applied following the most recent retirement and replacement of capacity. [Part 8, clause 171(5)(f)]

6.134 In that event, the replacement capacity will overcome the reduction in capacity that has occurred since that prior reduction, thereby maintaining energy security.

6.135 The structure of the power system reliability test involves the ‘target’ nameplate rating required to maintain energy security being ‘reset’ each time the generator passes the power system reliability test using the certification approach or the LETI. Once replacement capacity has been used to pass the test once using the LETI, this capacity has contributed to lowering the ‘target’ nameplate rating used in subsequent assessments of the test, and so should not be considered again. As a result, replacement capacity can only be counted once under the LETI. [Part 8, clause 171(4)(f)] This is illustrated in Example 6.4 and Example 6.5 below.

Example 6.4: Complying with the power system reliability test using the certification approach and the Low Emissions Transition Incentive

A generation complex, ‘Hillside A’, is a coal-fired electricity generator consisting of four units of 400 MW each. It is located in the NEM region of NSW. It is owned and operated by the company Hillside Electricity.

Following the introduction of the mechanism, Hillside Electricity decide to progressively retire units of Hillside A from service due to their high emissions intensity.

Hillside Electricity seeks a certification from AEMO that a reduction in Hillside A’s nameplate rating from 1,600 MW to 1,200 MW on 2 April 2013 (reflecting the retirement of one unit) will be unlikely to cause a breach of power system reliability standards in the two year period ending on 2 April 2015.

AEMO certifies that application in accordance with clause 174(3), and so Hillside Electricity reduces Hillside A’s nameplate rating to 1,200 MW on 2 April 2013. On 1 September 2014, the Regulator assesses whether or not Hillside A complied with the power system reliability test on 1 April 2014.

The Regulator finds that, by virtue of the certification, Hillside A does comply with the test and so Hillside Electricity can continue to receive Fund assistance for the Hillside A generation complex, providing they also meet the other conditions of receiving the assistance.

In the meantime, Hillside Electricity has progressed development of three 180 MW open cycle gas turbine generation units that are necessary to meet increasing peaking demand in NSW. The gas turbines are not co-located with Hillside A, but remain within the NEM region of NSW.

Anticipating this development, Hillside Electricity retires a second generation unit at Hillside A from service on 2 April 2014, reducing
the nameplate rating of Hillside A to 800 MW. Hillside Electricity progresses development of the three open cycle gas turbine generation units such that they enter service during November 2014.

Before 1 April 2015, Hillside Electricity nominates these three units under clause 172(2). On 1 September 2015, the Regulator considers whether or not Hillside A passed the power system reliability test on 1 April 2015.

The Regulator finds that Hillside A did pass the power system reliability test because:

- the three new open cycle gas turbine generation units satisfied the conditions set out in clause 171(4) and so constitute replacement capacity of 540 MW;
- the sum of the nameplate rating of Hillside A as of 1 April 2015 (800 MW) and the nameplate rating of the three new generation units (540 MW) is 1,340 MW; and
- this sum exceeds the nameplate rating of Hillside A on 1 April 2014 (1,200 MW), and so satisfies clause 171(5)(e).

Hillside Electricity would continue to receive allocations of free carbon units for the Hillside A generation complex, providing it also meets the other conditions of receiving the assistance, and would have a ‘relevant excess megawatts’ amount of 140 MW as provided for by clause 171(5).

Hillside Electricity subsequently retires a third unit at Hillside A on 2 April 2015 while it constructs and commissions a new combined cycle gas turbine generation unit of 500 MW at the same site. This new generation unit enters service during November 2015. Hillside Electricity nominates this new unit under clause 172(2) before 1 April 2016.

On 1 September 2016, the Regulator finds that Hillside A passed the power system reliability test as of 1 April 2016 because:

- the new combined cycle gas turbine generation unit satisfies the conditions set out in clause 171(4) and so constitutes replacement capacity of 500 MW;
- the sum of the nameplate rating of Hillside A as of 1 April 2016 (400 MW), the nameplate rating of the new generation unit (500 MW) and the relevant excess MW (140 MW) is 1,040 MW; and
- this sum exceeds the nameplate rating of Hillside A on 1 April 2015 (800 MW) (satisfying clause 171(5)(f)).

Hillside Electricity receives its final allocation of free carbon units on 1 September 2016, providing it also meets the other conditions of receiving the assistance.
Example 6.5: Complying with the power system reliability test using the Low Emissions Transition Incentive to retire a generator

A generation complex, "Smithtown power station", is a coal-fired electricity generator consisting of four units of 100 MW each. It is located in the NEM Region of Queensland. It is owned and operated by the company Smithtown Energy.

Following the start of the mechanism, Smithtown Energy decides to retire the entire Smithtown power station as soon as it can be replaced under the LETI.

Smithtown Energy constructs four 120 MW open cycle gas turbines, which enter service during November 2015. Before 1 April 2015, Smithtown Energy nominates these four units under clause 172(2).

Anticipating this development, Smithtown Energy retires the Smithtown power station on 2 April 2015. On 1 September 2015, the Regulator considers whether or not the Smithtown power station passed the power system reliability test on 1 April 2015.

The Regulator finds that the Smithtown power station did pass the power system reliability test because:

- the four new open cycle gas turbine generation units satisfied the conditions set out in clause 171(4) and so constitute replacement capacity of 480 MW;
- the sum of the nameplate rating of the Smithtown power station as of 1 April 2015 (0 MW) and the nameplate rating of the four new generation units (480 MW) is 480 MW; and
- this sum exceeds the nameplate rating of the Smithtown power station on 1 April 2014 (400 MW) (satisfying clause 171(5)(e)).

The Smithtown power station is now fully retired and its registration as a generation complex has ceased.

On 1 September 2016, the Smithtown power station will be able to pass the power system reliability test under clause 170(2)(g) and Smithtown Energy will receive its final allocation of free carbon units for that generation complex, providing they also meet the other conditions of receiving the assistance.

6.136 Replacement capacity may need to comply with further conditions in the regulations. [Part 8, clause 171(6)]

6.137 The replacement capacity provisions consider new generation units separately, rather than considering combinations of generation units as a generation complex. For the purpose of these provisions, the term ‘nameplate rating’ is defined with respect to generation units. [Part 8, clause 171(7)] By contrast, the definition of ‘nameplate rating’ generally applies with respect to generation complexes throughout the bill. [Part 1, clause 5, definition of ‘nameplate rating’]
6.138 To make clear that a particular generation unit is being used to provide replacement capacity, the person who owns, controls or operates that generation unit (the ‘first person’) must nominate it for this purpose. [Part 8, clauses 172(1)(a) and (2)]

6.139 The first person must also have been registered as a generator for that generation unit when it was first registered under a law relating to the regulation of energy markets. [Part 8, clauses 172(1)(a) and (c)] This is intended to ensure continuity of registration from the time the generation unit is first registered until it is used as replacement capacity, thereby increasing the coordination between the decision to develop the new generation unit and the decision to retire existing generation capacity.

6.140 If this provision was not in place, new generation units developed by persons who are not potential recipients of assistance would be able to be transferred into the control of a person registered for a generation complex that is subject to a certificate of eligibility for coal-fired generation assistance and then used as replacement capacity. In such an instance, the new generation unit could not be genuinely considered to have been developed for the purpose of replacing a particular quantum of generation capacity, and so would not support the objectives of sharpening incentives for recipients of free carbon units to invest in new low emissions capacity to replace existing emissions-intensive capacity.

6.141 To provide replacement capacity, a generation unit must have been first registered on or after 1 July 2011. [Part 8, clause 172(1)(b)] Further, this project should not have been fully committed as of 1 July 2011 having regard to a range of factors reflecting the definition of a ‘committed project’ set out in the National Electricity Rules. [Part 8, clause 172(1)(d)] These provisions ensure that replacement capacity is genuinely new capacity and had not been committed to be constructed prior to the announcement of the LETI.

6.142 To maintain energy security, replacement capacity must have output that is readily predictable and not significantly dependent on factors beyond the control of the operator. [Part 8, clause 172(1)(e)] If these conditions are not satisfied, there is a significant risk that the replacement capacity will not be able to generate electricity near its maximum output at times of peak demand when it is most needed to maintain energy security.

6.143 These conditions broadly reflect the definitions of ‘intermittent’ generation in the National Electricity Rules and WA’s Wholesale Electricity Market Rules, such that the replacement capacity must not be intermittent. Some technologies may not be used as replacement capacity, most likely wind generation and some solar and hydro technologies.

6.144 Solar or hydro generation with significant storage capability could be considered to be suitable as replacement capacity if the storage...
capacity allows its output to be readily predicable and significantly within the control of the operator. It is expected that gas-fired generation technologies could generally satisfy these conditions and be used as replacement capacity.

6.145 To ensure that the LETI supports a transition to a lower emissions generation sector, replacement capacity must also have an emissions intensity lower than the emissions intensity of current best-practice coal-fired generation capacity in Australia.

6.146 This emissions intensity is set at the level of 0.80 kt of CO$_2$-e of emissions per GWh of electricity generated. [Part 8, clause 172(1)(f)] This is mathematically equivalent to 0.80 tonnes of CO$_2$-e of emissions per MWh of electricity generated. To substantiate that this condition is satisfied, a nomination must be accompanied by a report setting out an independent estimate of the likely emissions intensity of the replacement capacity over the two year period beginning when the generation unit enters service. [Part 8, clauses 172(3)-(4)]

6.147 The report must focus on the generation unit’s likely emissions intensity over its first two years of service, because longer-term technological developments (such as carbon capture and storage) or fuel substitutions (such as gas for coal) could substantially alter the emissions intensity of a particular generation unit. Accordingly, this assessment is focused on the more immediate technical characteristics of the generation unit in question and cannot take into account more uncertain longer-term developments.

6.148 Within 60 days of receiving a nomination the Regulator must take all reasonable steps to inform the person of whether or not the Regulator is satisfied that the nomination or purported nomination is validly made. [Part 8, clause 173] This will give generators greater certainty as to whether their nomination is likely to be valid, and therefore greater certainty to pursue plans to retire existing generation capacity.

**Dealing with intermediaries**

6.149 Compliance with the power system reliability test requires a person who owns, controls or operates the generation complex to be registered as a generator under a law of the Commonwealth, a State or Territory on the regulation of energy markets. This primarily applies to registration under the *National Electricity Law* and *National Electricity Rules*.

6.150 In respect of some generation complexes, an ‘intermediary’ may be registered instead of the owner, controller or operator of the asset. There may be legal doubt as to whether the intermediary either operates or controls the generation complex. This applies particularly to intermediaries registered under rule 2.9.3 of the *National Electricity Rules*.
as well as intermediaries created by jurisdictional derogations (such as rule 9.34.6 of the National Electricity Rules).

6.151 To remove any legal doubt, the provisions apply as if the intermediary controlled the generation complex. [Part 8, clause 176] A generation complex that is registered in the name of the intermediary under a law of the Commonwealth, a State or a Territory relating to the regulation of energy markets will be able to comply with one of the necessary conditions of the power system reliability test. [Part 8, clause 170(2)(a)(i), [Part 8, clause 170 (2)(b)(i)],[Part 8, clause 170 (2)(c)(ii)],[Part 8, clause 170 (2)(d)(ii)], [Part 8, clause 171(4)]

6.152 This deeming provision will not have effect for other purposes, such as the application for assistance elsewhere under the Part. [Part 8, clause 162(2)], [Part 8, clause 162(3)]

Clean Energy Investment Plans (CEI plans)

6.153 Generators that receive assistance must develop and submit a CEI plan for publication. This provides a transparent public statement of the measures these companies are taking to reduce their emissions and transition to lower-carbon energy sources.

6.154 A person who owns, controls or operates a generation complex must give the Minister for Resources and Energy a CEI plan to receive assistance for that generation complex. [Part 8, clause 177] This must occur by 15 August of a given financial year, in order for free carbon units to be issued on the following 1 September.

6.155 The person must submit a CEI plan in each eligible financial year. [Part 8, clause 177(a)] The plan for any given year can be an updated version of the previous year’s plan. There are no specific requirements on the extent of updating required to substantiate that the updated plan is in fact a new plan. For example, if only limited changes to the generation complex’s circumstances occurred in the intervening year, then the updated plan could outline this and set out the reasons.

6.156 The Minister for Resources and Energy must provide a copy of the CEI plan to the Regulator. [Part 8, clause 179]

6.157 A CEI plan could include a range of information about the steps that the person who owns, controls or operates the generation complex in question, or related corporate entities, is undertaking to reduce emissions from its operations. Details of the information requirements for a CEI plan will be set out in regulations made by the Minister for Resources and Energy.

6.158 The Government intends that a CEI plan should include the following information:

• the plans (if any) the person has for investment in new generation capacity. This new generation capacity could be
Chapter 6: Energy Security

co-located with, or entirely separate from, the generation complex in question. Technically, a generation complex could be owned, controlled or operated by another person (for example, due to the choice of corporate structure), in which case it would not be mandatory for such investment to be reported. However, in such circumstances it would be best practice for this to be included in the CEI plan.

- the plans (if any) the person has for investing to reduce the emissions intensity of the generation complex for which free carbon units are issued. For example, efficiency improvements and use of alternative fuels could be used to reduce the emissions intensity of these generation complexes.

- the plans (if any) the person has for investment in research and development in clean energy technologies. For example this could include trials or pilots taking place at the generation complex in question, or at another generation complex, or could include in kind or direct support for research and development programs undertaken elsewhere.

- energy efficiency opportunities identified for the generation complex in question as required under the Energy Efficiency Opportunities Act 2006.

6.159 The CEI plan must be published on the website by the Department administered by the Minister for Resources and Energy. [Part 8, clause 180]

Closure contracts

6.160 As part of the Fund, the Government will also seek to negotiate the closure of some of Australia’s most emissions-intensive coal-fired power stations. This initiative will start the process of transforming the Australian electricity generation sector to cleaner technologies.

6.161 The Government intends that eligibility to participate in negotiations is limited to very highly-emissions-intensive coal-fired generators with an emissions intensity greater than 1.2 tonnes of CO₂-e per MWh of electricity on an ‘as generated’ basis.

6.162 This initiative will largely be implemented outside of the bill. The Government intends to make cash payments to honour closure contracts, in return for commitments by the generator counter-parties, such as a schedule of retirement, requirements that support energy security during the retirement process, payment of workers’ entitlements
and arrangements for appropriate remediation of the site of the power station (and related coal mines where appropriate).26

6.163 Without specific provisions, it could be possible that the obligations of Part 8 could conflict with the terms and conditions contained in closure contracts. For example, the power system reliability test established in Part 8, Division 4 requires a generator to seek certification from AEMO or IMOWA before deregistering generation capacity, or to replace this capacity with new low-emissions capacity.

6.164 Failure to do either of these things would result in free carbon units being withheld for that generation complex. As a closure contract will require deregistration of generation capacity, it may be difficult for the generation complex to comply with both the power system reliability test and the requirements of a closure contract.

6.165 The Government intends to negotiate closure contracts that replace the value of free carbon units for the generation complex in question, with additional payments as needed to secure closure and compliance with the associated conditions.27

6.166 To this end, there is a mechanism to prevent the allocation of free carbon units for generation complexes subject to a closure contract, where this is specified in the contract. [Part 8, clause 181]

6.167 Withholding of free carbon units under Part 8, Division 6 is triggered by the act of entering into a closure contract, not the ongoing operation of a closure contract. [Part 8, clause 181(1)(a)], [Part 8, clause 181(2)(a)] This is needed to give the Government with certainty at the time the contract is struck that it will not duplicate payments to the generation complex through both payments under the closure contract and allocations of free carbon units.

6.168 The person who enters into the contract must own, control or operate the generation complex. [Part 8, clause 181(1)(a)], [Part 8, clause 181(2)(a)] Unless the person fits this description they could not give effect to the closure as anticipated by the closure contract. The Commonwealth must be the other party to the contract.

6.169 The contract must explicitly acknowledge that it is a closure contract for the purposes of the mechanism. [Part 8, clause 181(1)(b)], [Part 8, clause 181(2)(b)] This ensures that the person who owns, controls or operates the generation complex in question is aware of and has consented to the possible withholding of free carbon units, and gives other generators confidence that other contracts they enter into as a normal part of their

operations are not inadvertently deemed to be closure contracts for the purposes of Part 8, Division 6.

6.170 The bill provides for two separate circumstances to apply:

• where the closure contract anticipates the withholding of free carbon units in all four years they are available; and [Part 8, clause 180(1)]

• where the closure contract anticipates the withholding of free carbon units in some, but not all, of the years they are available. [Part 8, clause 180(2)]

6.171 These provisions do not adjust or remove the annual assistance factor of the relevant generation complexes in any way. Importantly, this means that the annual assistance factor of a generation complex that is party to a closure contract is still captured in the definition of ‘total annual assistance factors for that eligible financial year’. [Part 8, clauses 161(2) and (3), definition of ‘total annual assistance factors for that eligible financial year’]

6.172 In turn, this ensures that the pro-rata allocation approach implemented in Division 2 is not distorted by the operation of Division 6 and that units that are withheld as a result of Division 6 are not then distributed to other generation complexes.

**Fixed charge carbon units**

6.173 Persons who are issued free carbon units should note the special nature of the carbon units issued with a vintage year beginning on 1 July 2013 or 1 July 2014. In particular, free carbon units allocated in these eligible financial years cannot be used for subsequent years of the mechanism. [Part 6, clause 122(5A)]

6.174 The limited nature of the carbon market during the fixed charge years means that it is necessary to implement a buy-back arrangement for carbon units issued for the fixed charge years. [Part 4, clause 116] The facility will be open to requests from 1 September to 1 February in the relevant eligible financial year. It allows persons to receive the fixed charge applying for carbon units in the relevant eligible financial year for each unit they wish to sell back to the Regulator, discounted by a factor specified in the regulations.
PART 3
Administration
Chapter 7
Compliance, enforcement and administration

Outline of chapter

7.1 Chapter 7 explains the way in which the mechanism is supported through measures promoting compliance and providing for enforcement. These include provisions on information gathering, record keeping, monitoring, enforceable undertakings, administrative penalties, infringement notices, civil penalties, criminal sanctions, liability of company officers, and anti-avoidance.

7.2 This chapter covers Parts 3, 10, 11, 13 to 21 and 23 of the bill and related provisions.

Context

7.3 Effective enforcement arrangements are vital to promote compliance with the carbon pricing mechanism and to achieving its objectives.

7.4 The Regulator is responsible for administering the mechanism. It has investigation and enforcement powers to enforce the rules governing the mechanism’s operation to ensure compliance by those covered by it. These powers give it a range of proportionate tools to use when administering the mechanism, taking account of the various circumstances of those covered by it.

Summary

7.5 The Regulator has powers to promote compliance and provide for enforcement and imposes specific obligations on entities covered by the mechanism.

7.6 The specific powers and obligations are described below with reference to the simplified outlines or provisions in the bill.
7.7 Liable entities are subject to general obligations to keep records, and the Regulator has powers to seek and obtain information to ensure compliance with the mechanism. In some cases, the exercise of these powers is subject to court supervision.

7.8 The relevant parts of the bill are:

- requirements to make and keep records; [Part 14, clause 226]
- information-gathering powers; and [Part 13, clause 220]
- monitoring powers. [Part 15, clause 229]
7.9 Enforcement powers range in seriousness from
administrative penalties for failing to pay on time, to criminal sanctions
for dishonest or fraudulent behaviour.

7.10 The relevant parts of the bill are:

- administrative and late payment penalties; [Part 19, clause 272], [Part 6, Division 4, clauses 135], [Part 11, clause 213]
- enforceable undertakings; [Part 20, clause 277]
- infringement notices; [Part 18, clause 264]
- civil penalties; [Part 17, clause 250]
- relinquishment orders; [Part 11, clause 209]
- offences, including offences relating to administrative penalties and fraudulent conduct [Part 10, clause 207], [Part 19, clause 272]
- provisions relating to liability of officers of bodies corporate; and [Part 16, clause 247]
- anti-avoidance provisions. [Part 3, clause 29]
7.11 The Regulator’s investigation and enforcement powers, such as those covering information gathering and monitoring, are consistent with those of other national economic Regulators.

**Detailed explanation of new law**

**The Regulator’s information-gathering powers**

7.12 The Regulator has broad powers to gather information to let it monitor compliance with the mechanism, investigate possible contraventions and, where necessary, take enforcement action. [Part 13, clause 220]

7.13 If the Regulator believes on reasonable grounds that a person has information or a document that is relevant to mechanism, then it may require, by written notice, that person to give information or documents, or to provide copies of documents, within at least 14 days of the notice. [Part 13, clause 221] A person, in complying with a notice, is entitled to reasonable compensation for making copies of documents. [Part 13, clause 222]

7.14 A failure to respond to a notice is subject to a civil penalty. A court may order the payment of pecuniary penalties of up to 10,000 penalty units for a corporation and up to 2,000 penalty units for any other person. [Part 17, clause 252(5) and (6)]

7.15 Once a person has complied with a notice, the Regulator may inspect the documents or copies produced and make its own copies of or take extracts from those documents. It may retain possession of any copies it makes. [Part 13, clause 223]

7.16 The Regulator may take and retain possession of documents produced for as long as is necessary. If a person is otherwise entitled to possess the document (for example, the person who supplied it), then that person is also entitled to a certified copy of the document provided by the Regulator. [Part 13, clause 224]

7.17 A person is not excused from giving information or producing a document because it might incriminate them or expose them to a penalty. However, the information or documents produced are not admissible in evidence against an individual in:

- civil proceedings for the recovery of a pecuniary penalty under a civil penalty order; and

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28 An explanation of the level of civil penalties in the bill is set out below, under the heading ‘Reasons for the level of civil penalties’.
• criminal proceedings, unless the proceedings are for an
  offence that relates to information-gathering by the
  Regulator, involving the provision of false or misleading
  information or documents. [Part 13, clause 225]

Record-keeping requirements for liable entities

7.18 To support the operation of the mechanism, participants
  must keep records to support compliance with their obligation to report to
  the Regulator. [Part 14, clause 226] The Regulator and, where relevant,
  inspectors and auditors, may check the accuracy and completeness of
  information provided by participants, for example information provided in
  applications leading to the administrative allocation of carbon units.

7.19 The Regulator’s ability to audit emissions data is essential
  to monitoring compliance and ensuring the integrity of the mechanism.
  The NGER Act includes obligations for liable entities to maintain records
  concerning greenhouse and energy reports. These obligations are
  expanded to cover the new requirements of the mechanism through
  amendments in the Consequential Amendments Bill.

7.20 Record-keeping obligations may be prescribed in
  regulations, where the specified information is relevant to the Act and
  related legislation. [Part 14, clause 227]

7.21 Records must be kept by suppliers of natural gas:
  • where a recipient quotes its OTN for the supply and the
    supplier accepts the quotation, thereby passing liability to the
    recipient; and [Part 14, clause 228]
  • where the recipient has quoted its OTN but the supplier has
    rejected the quotation in order to retain liability. [Part 14, clause
    228]

7.22 The OTN reporting provisions will allow the Regulator to
  ensure that OTN requirements are being met and OTNs are not misused
  by either suppliers or purchasers of natural gas.

7.23 Records must be kept for five years. This period is
  consistent with obligations under the taxation system. A failure to comply
  is subject to a civil penalty. [Part 14, clause 227], [Part 14, clause 228] A court
  may order the payment of pecuniary penalties of up to 10,000 penalty
  units for a corporation and up to 2,000 penalty units for any other
  person. [Part 17, clause 252(5) and (6)]

29 An explanation of the approach taken to the privilege against self-incrimination in the bill are
  set out below, under the heading ‘Self-incrimination’.
30 An explanation of the level of civil penalties in the bill is set out below, under the heading
  ‘Reasons for the level of civil penalties’.
The Regulator's monitoring powers

7.24 The Regulator will have powers to enter facilities operated by liable entities to monitor their activities under the mechanism and to investigate potential contraventions. The Regulator may appoint inspectors who may enter premises for these purposes.

7.25 Generally, an inspector would examine records kept by liable entities and operators of facilities covered by the mechanism, but may undertake other monitoring functions. Inspectors are subject to specific rules concerning whether and how they may enter premises and conduct themselves. The occupier of the premises also has specific rights and responsibilities concerning the exercise of monitoring powers. [Part 15, clause 229]

Appointment of inspectors

7.26 An inspector is appointed by the Regulator and may be a member of the Regulator’s staff or an Australian Federal Police officer.

7.27 If a member of the Regulator’s staff, the inspector must be either an SES employee or acting SES employee; an employee who holds APS Executive Level 1 or 2 positions or an equivalent position (or is performing those functions). In appointing an inspector, the Regulator must be satisfied that he or she has suitable qualifications and experience to properly exercise the functions of an inspector. [Part 15, clause 230]

7.28 An inspector must comply with any direction given by the Regulator in exercising his or her powers. [Part 15, clause 230(3 and 4)] A written direction is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

7.29 Inspectors require detailed knowledge of the mechanism and the ability to identify and interpret technical data, such as data used in the measurement of emissions at the facility or organisational level, which are used to calculate a liable entity’s emissions number. For this reason, inspectors should be SES or APS Executive Level 1 and 2 staff.

7.30 The Regulator must issue inspectors with an identity card which the inspector must carry. The card must contain a photograph of the inspector and its form is to be prescribed in regulations. Failure to return the card is an offence with a penalty of 1 penalty unit, unless it was lost or destroyed.31 [Part 15, clause 231]

31 An explanation of the level of criminal penalties in the bill are discussed below, under the heading ‘Offences’.
Chapter 7: Compliance, enforcement and administration

**Powers of inspectors**

7.31 An inspector can enter premises and exercise monitoring powers to determine whether the Act or the associated provisions have been complied with or for the purpose of substantiating information provided under the Act or associated provisions. The inspector can only enter premises with the consent of the occupier or under a monitoring warrant. [Part 15, clause 232]

7.32 Having entered the premises, an inspector may search the premises and anything on them, to examine any activity, to inspect, examine, measure or test anything, to photograph or record the premises and anything on them, to inspect and copy documents and to take such equipment onto the premises to exercise these powers. An inspector may also operate electronic equipment to see whether it contains relevant information and transfer this to a storage device. [Part 15, clause 233]

**Example 7.1 Inspector’s powers**

An inspector could examine emissions monitoring equipment at a facility or search computer files relating to greenhouse gas emissions either at the facility or an office of the liable entity or the controlling corporation.

7.33 The inspector may also secure things for up to 24 hours if entry to the premises was under a monitoring warrant in specific circumstances. This period can be extended by a magistrate, provided the inspector has given notice to the occupier of the premises or their representative. An extension may not be granted more than three times. [Part 15, clause 233(5, (6), (7), (8) and (9)]

7.34 In exercising their powers, inspectors may be assisted by other persons if this is necessary and reasonable. A person assisting may enter the premises and exercise monitoring powers but only in accordance with a direction given to him or her by the inspector. This will ensure that monitoring activities are at all times carried out by or under the direction of a properly qualified person. [Part 15, clause 234]

7.35 A written direction is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the *Legislative Instruments Act* is not sought or required.

7.36 If the inspector has entered the premises with the consent of the occupier, then he or she may ask the occupier to answer questions relevant to the Act or associated provisions or to produce relevant documents. If the inspector has entered the premises under a monitoring warrant, then the inspector may require the occupier to answer relevant questions or produce relevant documents. [Part 15, clause 235]
7.37 It is an offence for the person not to comply with such a requirement. A court may impose a maximum penalty of 6 months’ imprisonment or 30 penalty units, or both. \[Part 15, clause 235\]

**Obligations of inspectors**

7.38 In the exercise of their functions, inspectors are subject to a range of obligations aimed at protecting the rights and interests of the occupiers of premises, including:

- the inspector must obtain the voluntary consent of the occupier before entering premises, including informing the occupier that consent may be refused, subject to limitations or withdrawn. If consent is withdrawn, the inspector and any person assisting him or her must leave the premises. \[Part 15, clause 237\]

- where a monitoring warrant has been obtained, the inspector must, before entering the premises, announce that he or she is authorised to enter the premises, show his or her identity card and give the occupier of the premises the opportunity to permit entry into the premises. \[Part 15, clause 238\]

- when executing a monitoring warrant, the inspector must be in possession of the warrant. \[Part 15, clause 239\]

- the inspector must provide a copy of the monitoring warrant to the occupier who is present and inform him or her of the rights and responsibilities of the occupier. \[Part 15, clause 240\]

- specific requirements for securing electronic equipment (for example, computers containing relevant data) until an expert assistance is able to attend and operate the equipment. \[Part 15, clause 241\]

- the Commonwealth must provide compensation for damage to electronic equipment due to a failure to exercise sufficient care. \[Part 15, clause 242\]

7.39 The occupier can be present when a monitoring warrant is executed, but cannot impede its execution \[Part 15, clause 243\]

7.40 The occupier must provide the inspector, and persons assisting the inspector, with all reasonable facilities and assistance where

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32 An explanation of the approach taken to the privilege against self-incrimination in the bill are set out below, under the heading ‘Self-incrimination’.

33 An explanation of the level of criminal penalties in the bill are discussed below, under the heading ‘Offences’.
a monitoring warrant applies to the premises. Failure to do so is an
offence, with a maximum penalty of 30 penalty units.\footnote{An explanation of the level of criminal penalties in the bill are discussed below, under the heading ‘Offences’.
}

**Monitoring warrants**

7.41 An inspector must apply to a magistrate for a monitoring
warrant, which must contain specified information. \[Part 15, clause 245(4)\]
The magistrate may issue a warrant if he or she is satisfied, based on
information given under oath or affirmation (including further information
sought by the magistrate), that access to the premises is needed to
determine whether the Act or the associated provisions are being complied
with or to substantiate information provided under the Act or the
associated provisions. \[Part 15, clause 245\]

7.42 The power to issue a monitoring warrant is conferred on a
magistrate in his or her personal capacity. The power need not be
accepted, but when it is exercised the magistrate has the same protection
and immunity as if he or she were exercising the power as a member of
the court of which the magistrate is a member. \[Part 15, clause 246\]

7.43 A magistrate for these purposes is a magistrate of a state or
territory court, and not a Federal Magistrate (see section 16C of the *Acts
Interpretation Act* 1901).

**Self-incrimination**

7.44 When responding to an inspector’s questions or requests
under the Regulator’s information gathering and monitoring powers, a
person is not excused from giving an answer or producing a document in
response to such a requirement if the answer or production of the
document might tend to incriminate the person. \[Part 13, clause 225(1)], \[Part
15, Division 3, clause 236(1)\]

7.45 While information and documents must be provided, the
information, document or things obtained are not admissible in evidence
in proceedings for the recovering of a civil penalty or in criminal
proceedings against an individual. \[Part 13, clause 225(2)], \[Part 15, Division 3,
clause 236(2)\]

7.46 A person does not have the benefit of the immunity in
circumstances where they are the subject of civil or criminal proceedings
concerning the provision of false or misleading information or documents.
\[Part 13, clause 225(2)(d) and (e)], \[Part 15, clause 236(2)(d) and (e)\]

7.47 An individual’s privilege against self incrimination may be
overridden, but this is limited because self-incriminatory disclosures
cannot be used against the person who makes the disclosure, either
directly in court (known as ‘use’ immunity) or indirectly to gather other
evidence against the person (known as ‘derivative use’ immunity) with limited exceptions. However, the information could be used against a third party, such as an accomplice.

7.48 The effective administration of the mechanism is an issue of major public importance with a significant impact on the Australian community and the conduct of business. Non-compliance could undermine the capacity of the mechanism to drive reductions in greenhouse gas emissions so as to meet Australia’s international climate change obligations, result in unfair competition between compliant and non-compliant businesses, and reduce the auction revenues to be used to assist households and businesses in adjusting to the carbon pricing mechanism.

7.49 The treatment of self-incrimination in the bill is consistent with enforcement powers in other Commonwealth legislation, and is appropriate when they assist in the effective administration of those laws. They enhance the ability of the Regulator to monitor and ensure compliance with the mechanism in a way that is consistent with the views of the Senate Standing Committee for the Scrutiny of Bills, as well as the Australian Government’s legal policy regarding the privilege against self-incrimination.

**Enforceable undertakings**

7.50 The Regulator may accept enforceable undertakings from liable entities about their compliance with the Act or associated provisions. [Part 20, clause 278] A person may, for example, undertake to do a particular thing directed to compliance with their obligations under the Act, or to not do specific things which are not in compliance with the Act.

7.51 The Regulator must publish such undertakings on its website. [Part 20, clause 278(5)]

7.52 Where a Regulator considers that the person has breached any of the terms of the undertaking, it may apply to the court for an order:

- directing the person to comply with the term of the undertaking;
- directing the person to pay the Commonwealth an amount up to the amount of any financial benefit reasonably attributable to the breach of the term of the undertaking;
- directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and
- any other orders. [Part 20, clause 279]
7.53 Enforceable undertakings are a useful tool for the Regulator to promote compliance, without the need to take court action. They are used extensively by other national economic Regulators.

**Example 7.2 Enforceable undertakings**

An undertaking might be accepted when a liable entity has lodged inadequate reports and its data collection and quality assurance systems are found to have deficiencies that make it difficult to comply with reporting obligations. The entity may be willing to enter into an enforceable undertaking setting out the steps it will take to improve its data collection and quality assurance systems, so that it can produce compliant reports in the future.

**Administrative and late payment penalties**

7.54 The bill provides that where a person under an obligation to do something (including the making of a payment) does not do so, then they are liable to pay an administrative penalty or a late payment penalty (see Table 7.1 for a list of administrative penalty provisions).

**Table 7.1 Administrative and late payment penalties and amounts**

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Administrative penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>135</td>
<td>Late payment penalty – unit shortfall charge</td>
<td>An amount calculated at the rate of 20 per cent per annum or such rate as is specified in regulations</td>
</tr>
<tr>
<td>212(2)</td>
<td>Administrative penalty - Failure to relinquish units at all</td>
<td>Determined according to the formula in sub-clause 212(2)</td>
</tr>
<tr>
<td>212(3)</td>
<td>Administrative penalty - Failure to relinquish sufficient units</td>
<td>Determined according to the formula in sub-clause 212(3)</td>
</tr>
<tr>
<td>213</td>
<td>Late payment penalty - relinquishment</td>
<td>An amount calculated at the rate of 20 per cent per annum or such rate as is specified in regulations</td>
</tr>
</tbody>
</table>

7.55 Liability for administrative and late payment penalties is an automatic consequence of non-compliance and the Regulator has no discretion about whether the person is liable.

7.56 However, in specific circumstances, the Regulator may remit a late payment penalty to the person where:

- the Regulator is satisfied that the person did not contribute to the late payment and took reasonable steps to mitigate the delay; or
- the Regulator is satisfied that the person contributed to the delay in payment and took reasonable steps to mitigate the delay and, having regard to the reasons causing the delay, it would be fair and reasonable to remit some or all of the
amount. [Part 6, clauses 135(2) and (3)], [Part 11, clauses 213(2) and (3)]

7.57 Administrative and late payment penalties are debts due and payable to the Commonwealth and may be recovered by the Regulator, on the Commonwealth’s behalf, in a court of competent jurisdiction [Part 6, clause 136], [Part 11, clause 214] The Regulator may set off such penalties against other amounts owing and remit them, if the reason that the administrative or late payment penalty was incurred was not reasonably within the person’s control. [Part 11, clause 215], [Part 11, clause 216]

**Infringement notices**

*The role of infringement notices*

7.58 The Regulator may issue an infringement notice for any civil penalty provision. [Part 18, clause 264] Infringement notices allow the Regulator to take action against minor contraventions more efficiently and effectively than through court action alone, and provide the potential for a speedier resolution of matters than is possible through the courts (although this would depend on the complexity of each matter).

7.59 The capacity to issue an infringement notice is not intended to amount to the imposition of a financial penalty by the Regulator. It is a mechanism through which a person, in circumstances where the Regulator has reasonable grounds to believe has contravened a civil penalty provision, may forestall an application to the court by the Regulator for the imposition of a civil penalty. [Part 18, clause 265(1)]

**Formal requirements**

7.60 The Regulator must give the person an infringement notice within 12 months after the day on which the alleged conduct took place. [Part 18, clause 265(2)]

7.61 The notice must include specified information, namely:

- the name of the person to whom it is given and the name of the person giving the notice;
- brief details of the alleged contravention and the date on which it is alleged to have occurred;
- a statement to the effect that proceedings will not be brought concerning the alleged contravention if the penalty specified in the notice is paid to the Regulator, on behalf of the Commonwealth, within 28 days of the notice being given or, if allowed by the Regulator, a longer period;
- an explanation of how to pay the penalty;
• information about what occurs if the Regulator withdraws the notice; and
• any other matters required by regulations to be included. [Part 18, clause 266]

7.62 The Regulator may withdraw an infringement notice by giving the person a withdrawal notice. This must be given within 28 days of the infringement notice being given to the person. If the person has already paid the penalty prior to receiving the withdrawal notice, then the Commonwealth is liable to refund the penalty. [Part 18, clause 268]

7.63 Other matters relating to infringement notices may be set out in regulations. [Part 18, clause 271]

Infringement notice penalties

7.64 An infringement notice penalty must equal one-fifth of the maximum civil penalty amount (see Table 7.2 for infringement notice provisions and the penalties that may be obtained). [Part 18, clause 267]

7.65 The amounts of infringement notice penalties are set in accordance with the guidance in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. They are substantially less than the maximum amounts that apply to a contravention of a civil penalty35, but are still significant, reflecting the seriousness of any potential contravention and the potential impact of such conduct on the operations and integrity of the mechanism.

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35 An explanation of the level of civil penalties in the bill is set out below, under the heading ‘Reasons for the level of civil penalties’.
Table 7.2 Infringement notice penalties

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Infringement Notice penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>47(1)</td>
<td>Notification of change of name or address of OTN holder</td>
<td>100 penalty units (currently $11,000) for a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>20 penalty units (currently $2,200) for any other person</td>
</tr>
<tr>
<td>61(2)</td>
<td>Mandatory acceptance of OTN – pre-commencement contracts</td>
<td></td>
</tr>
<tr>
<td>63(1)-(2)</td>
<td>Misuse of OTN</td>
<td></td>
</tr>
<tr>
<td>151(1)-(3)</td>
<td>Compliance with JCP reporting and record-keeping requirements</td>
<td></td>
</tr>
<tr>
<td>218(2),(4)</td>
<td>Notification of significant holding — controlling corporation of a group</td>
<td>2,000 penalty units (currently $220,000) for a corporation</td>
</tr>
<tr>
<td>219(2),(4)</td>
<td>Notification of significant holding — non-group entity</td>
<td>400 penalty units (currently $44,000) for any other person</td>
</tr>
<tr>
<td>221(4),(5)</td>
<td>Regulator may obtain information and documents</td>
<td></td>
</tr>
<tr>
<td>227(2),(3)</td>
<td>Record-keeping requirements — general</td>
<td></td>
</tr>
<tr>
<td>228(2),(3)</td>
<td>Record-keeping requirements — quotation of OTN</td>
<td></td>
</tr>
<tr>
<td>64(1)-(4)</td>
<td>Quotation of bogus OTN</td>
<td>Section 64 (1) or (2) – three times the total benefit received by a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Section 64 (3) or (4) - 100 penalty units (currently $11,000) for a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Section 64(3) or (4) – 20 penalty units (currently $2,200) for any other person</td>
</tr>
<tr>
<td>248(1)</td>
<td>Civil penalties for executive officers of bodies corporate</td>
<td>400 penalty units (currently $44,000) for any other person</td>
</tr>
</tbody>
</table>

7.66 A ‘penalty unit’ is defined by reference to section 4AA of the *Crimes Act 1914*. [Part 1, clause 5, definition of ‘penalty unit’] At present, a penalty unit is $110.
Effect on civil penalty proceedings

7.67 Where the person pays the penalty, then any liability that person has for the contravention of the relevant civil penalty provision is discharged and the Regulator may not bring proceedings against that person for the alleged contravention. [Part 18, clause 269]

7.68 The Regulator is not required to issue an infringement notice where there is an allegation of a contravention of a civil penalty provision, and the Regulator is free to take such enforcement action as is appropriate in the circumstances. [Part 18, clause 270(a)]

7.69 An infringement notice does not give rise to an enforceable requirement to pay the financial penalty. If a person does not comply with the infringement notice within the period of time specified, the Regulator cannot enforce the infringement notice. Instead, the Regulator may bring civil proceedings against the person for the same alleged contravention, but not for failure to pay the penalty in the infringement notice, and the fact that a notice has been issued does not affect the liability of the person for any contravention of a civil penalty provision. [Part 18, clause 270(b)]

7.70 An infringement notice does not limit the court’s discretion when determining the amount of a penalty where it finds that there has been a contravention of a civil penalty provision. [Part 18, clause 270(c)]

Civil penalties

Civil penalty provisions and amounts

7.71 The Regulator may apply to the court for a civil penalty order against a person who has contravened a civil penalty provision. [Part 17, clause 253] Apart from the Commonwealth Director of Public Prosecutions, no other person may apply for a civil penalty order. The Regulator must seek the order no later than six years after the contravention. [Part 17, clause 255] The court may order a civil penalty if it is satisfied a person has contravened a civil penalty provision. [Part 17, clause 252]

7.72 The bill applies to the Australian, state and territory governments (that is, the Crown in right of each Australian jurisdiction). However, no government is liable to a pecuniary penalty. This protection does not apply to authorities of the Crown or to administrative penalties or late payment penalties. [Part 1, clause 9]

7.73 The majority of penalty provisions in the bill are civil penalty provisions (see Table 7.3 for a list of civil penalty provisions). Ancillary contraventions, such as aiding a contravention, are also civil penalty provisions.

7.74 Each civil penalty provision has a specified maximum pecuniary penalty (see Table 7.3 for each maximum penalty amount).
7.75 These are civil penalty provisions because contravening them does not involve conduct of such serious moral culpability that criminal prosecution and sanctions are warranted. Further, as most liable entities are expected to be bodies corporate, the financial disincentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool, reflecting the practice of other areas of business regulation.

**Reasons for the level of civil pecuniary penalties**

7.76 The levels of civil penalties in the bill reflect the seriousness of the contraventions and represent clear and strong disincentives for non-compliance. The integrity of the mechanism could be compromised by liable entities failing to maintain records adequately or at all, failing to report accurately or at all or misusing OTNs.

7.77 For example, liable entities must adhere to requirements for reporting emissions and the use of OTNs (which determine whether an entity has a liability under the mechanism for natural gas it receives). This is essential to maintaining the integrity of the mechanism, ensuring that there is no unfair competition and ensuring that Australia meets current and future emissions reduction targets in accordance with its international obligations.

7.78 Indeed, a person who does not comply could obtain substantial financial gains through holding and selling units under the mechanism, while not meeting his or her emissions obligations. For this reason, penalties are significant.
Civil penalties and amounts

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Maximum Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>47(1)</td>
<td>Notification of change of name or address of OTN holder</td>
<td>500 penalty units (currently $55,000) for a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100 penalty units (currently $11,000) for any other person</td>
</tr>
<tr>
<td>61(2)</td>
<td>Mandatory acceptance of OTN – pre-commencement contracts</td>
<td></td>
</tr>
<tr>
<td>63 (1)-(2)</td>
<td>Misuse of OTN</td>
<td></td>
</tr>
<tr>
<td>151 (1)-(3)</td>
<td>Compliance with JCP reporting and record-keeping requirements</td>
<td></td>
</tr>
<tr>
<td>218 (2), (4)</td>
<td>Notification of significant holding — controlling corporation of a group</td>
<td>10,000 penalty units (currently $1.1 million) for a corporation</td>
</tr>
<tr>
<td>219 (2), (4)</td>
<td>Notification of significant holding — non-group entity</td>
<td>2,000 penalty units (currently $220,000) for any other person</td>
</tr>
<tr>
<td>221 (4), (5)</td>
<td>Regulator may obtain information and documents</td>
<td></td>
</tr>
<tr>
<td>227 (2), (3)</td>
<td>Record-keeping requirements — general</td>
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<td>64 (1)-(4)</td>
<td>Quotation of bogus OTN</td>
<td>Section 64(1) or (2) – three times the total benefit received by a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Section 64(3) or (4) – 500 penalty units (currently $55,000) for a corporation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Section 64(3) or (4) – 100 penalty units (currently $11,000)</td>
</tr>
<tr>
<td>248(1)</td>
<td>Civil penalties for executive officers of bodies corporate</td>
<td>2,000 penalty units (currently $220,000) for an individual</td>
</tr>
</tbody>
</table>

**Example 7.3 The scale of penalties under the bill**

The maximum penalty of 10,000 penalty units (currently $1,100,000) is equivalent to 47,826 carbon units at $23 per unit. At present, more than half of liable entities are expected to emit more than this annually.

There are circumstances in which such a penalty may be a small proportion a liable entity’s total emissions for a given year, and for this reason an additional form of civil penalty is included in the bill: the penalty for a body corporate for quoting a bogus OTN may be up to three times the total benefit received by a corporation.
times the total benefits that are reasonably attributable to the contravention. [Part 17, clause 252(5)]

7.80 This is designed to penalise the liable entity in a way which directly reflects the considerable profit that could be made from quoting a bogus OTN, acquiring natural gas without a carbon price, selling it on the basis that the carbon price has been paid and not surrendering units to the Regulator as a holder of an OTN would usually be required to do. The financial advantage to the entity quoting the bogus OTN is borne by the Commonwealth and, accordingly, the Australian people.

7.81 The profit that could be made out of this conduct could amount to several lifetimes’ worth of imprisonment on the standard penalty/imprisonment ratio. It is for this reason that the standard ratio is varied. This is consistent with A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers that the penalty should be adequate for the worst possible case and that it should reflect the seriousness of the offence in the legislative scheme.

7.82 Lower penalties apply to a supplier of natural gas who fails to check an OTN (as there is a greater onus on the user of the OTN, that is, the recipient of natural gas supplies) and for the misuse of information obtained from the Registry. [Part 17, clauses 252(4)(b) and (6)(a)]

7.83 Amendments to the civil penalties included in the NGER Act are included in the Consequential Amendments bill. They reflect the significance of the reporting and auditing regime for the mechanism as a whole.

The role of the court

7.84 Both the Federal Court of Australia and State and Territory courts with sufficient jurisdiction may make civil penalty orders. [Part 17, clause 251] For these purposes a State and Territory court is a court with jurisdiction to decide matters covered by the bill. This is generally determined by any limits on the amount of pecuniary orders that may be made by a court.

7.85 If a court is satisfied that a person has contravened a civil penalty provision, then it may order the person to pay a civil penalty. [Part 17, clause 252]

7.86 The court may have regard to all relevant matters in determining the amount of the penalty. To assist the court, the bill identifies specific matters to which it may have regard, including the nature and extent of the contravention and the loss or damage it resulted in, the circumstances in which the contravention took place, whether the person has engaged in similar conduct and whether they have cooperated with the authorities, and, if the person is a body corporate, the seniority of the involved officers and employees, whether any due diligence was
undertaken and whether the corporation has a corporate culture conducive to compliance. [Part 17, clause 252(4)]


Evidential burden

7.88 Civil pecuniary penalties are imposed by the courts according to civil standard of proof. [Part 17, clause 256] As such, a matter brought to the court seeking a civil pecuniary penalty is not subject to criminal standard of proof, but the lower standard of proof of ‘on the balance of probabilities’, though the court will construe the standard more strictly the higher the penalty sought.  

7.89 Clause 261 relates to a mistake of fact and, in general terms, provides that a person is not liable to have a civil penalty order made against him for a contravention of a civil penalty provision if the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts and had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision. [Part 17, clause 261]  

7.90 This is framed in such a way as to alter the usual evidential burden, to place it on the defendant in certain circumstances. This approach is justified where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution. This is particularly the case in mistake of fact and misuse of information from the registry.

7.91 This approach is consistent with the guidance in A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers, concerning situations where matters are peculiarly within the defendant’s knowledge and not available to the prosecution.

Continuing contraventions

7.92 A person who contravenes specified civil penalty provisions which involve, for example, a requirement to do something within a particular period, commits a separate contravention on each of the days on which he or she fails to comply. [Part 17, clause 263]  

7.93 Generally, the daily amount of the penalty is limited to 5 per cent of the maximum penalty for the initial contravention. However, in the case of a contravention of a requirement by the Regulator to provide information or documents [Part 13, clause 221(4)] the daily amount of the penalty

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36 See Briginshaw v Briginshaw (1938) 60 CLR 336, 12 ALJ 100.
penalty is up to 10 per cent of the maximum penalty for the initial contravention. [Part 17, clause 263(3)]

7.94 This approach is consistent with the guidance in A Guide to Framing Commonwealth Offence, Civil Penalties and Enforcement Powers, which suggests that the daily amounts for continuing penalties should be significantly less than where the penalty is a global maximum, while still providing sufficient disincentive for ongoing non-compliance.

7.95 The applicable daily penalties are set out in Table 7.4.

Table 7.3 Continuing civil penalties and amounts

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Maximum Daily Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>47(1)</td>
<td>Notification of change of name or address of OTN holder</td>
<td>25 penalty units (currently $2,750) for a corporation 5 penalty units (currently $550) for any other person</td>
</tr>
<tr>
<td>151(1)</td>
<td>Compliance with JCP reporting and record-keeping requirements</td>
<td></td>
</tr>
<tr>
<td>151(2)</td>
<td>Compliance with JCP reporting and record-keeping requirements – reporting requirement</td>
<td>500 penalty units (currently $55,000) for a corporation 100 penalty units (currently $11,000) for any other person</td>
</tr>
<tr>
<td>218(2)</td>
<td>Notification of significant holding — controlling corporation of a group – notice requirement</td>
<td></td>
</tr>
<tr>
<td>219(2)</td>
<td>Notification of significant holding — non-group entity – notice requirement</td>
<td></td>
</tr>
<tr>
<td>221(4)</td>
<td>Regulator may obtain information and documents – compliance with notice</td>
<td>1,000 penalty units (currently $110,000) for a corporation 200 penalty units (currently $22,000) for any other person</td>
</tr>
</tbody>
</table>

Other provisions about civil penalties

7.96 A court may direct that two or more proceedings for a civil penalty may be heard together. [Part 17, clause 254] For example, the court may do this for proceedings concerning multiple contraventions by a single entity or members of a corporate group.

7.97 If a person has been convicted of a criminal offence concerning conduct which is substantially the same as that to which the alleged contravention relates, then the court must not make a civil pecuniary penalty order against the person. [Part 17, clause 257] However, criminal proceedings may be commenced even if a civil penalty has been imposed for substantially similar conduct. [Part 17, clause 259]
7.98 Civil proceedings for a contravention of the Act must be stayed if criminal proceedings are commenced concerning conduct which is substantially the same as that to which the alleged contravention relates, [Part 17, clause 258] but evidence given in civil proceedings is not admissible in subsequent criminal proceedings, unless that evidence concerns the question of whether the evidence in the civil proceedings was false. [Part 17, clause 260]

7.99 The bill provides that where a person who is alleged to have contravened a civil penalty provision was, for example, under the mistaken belief about facts which, if true, would mean that there would not have been a contravention of the civil penalty provision, then that person is not liable to have a civil penalty order made against them. [Part 17, clause 261]

7.100 The bill provides that, in proceedings for contraventions of specified provisions, it is not necessary to provide the person’s intention, knowledge, recklessness, negligence or any other state of mind of the person.

**Court-ordered relinquishment of units**

7.101 In circumstances where carbon units are obtained by fraud, the bill provides that the court may order that a person must relinquish these units.

7.102 On an application by the Commonwealth Director of Public Prosecutions or the Regulator a court may order the relinquishment of units, and specify the time within which those units must be relinquished, where a person has obtained those units as a result of fraudulent conduct and has been convicted of an offence under the *Criminal Code* concerning that conduct. [Part 10, clauses 208(1) and (2)] The relevant provisions of the *Criminal Code* are specified in the bill.

7.103 An application may be made to:

- the court that convicted the person of the offence;
- the Federal Court of Australia; or
- the Supreme Court of a State or a Territory. [Part 10, clause 208(8)]

7.104 Before making such an order, the court must be satisfied that the issue of any or all of the units was attributable to the offence. [Part 10, clause 208(1)(c)]

7.105 A person must comply with such an order. This includes where he or she is not the registered holder of any carbon units or the holder of the units to be relinquished. [Part 10, clause 208(5)]

7.106 The court must provide a copy of the order to the Regulator. [Part 10, clause 208(7)]
**Example 7.4 Relinquishment of units**

Emissions Ltd is a liable entity under the mechanism which receives assistance through the Jobs and Competitiveness Program.

In November 2012, Emissions Ltd applies for assistance under the Program. Tom Dodge, the Chief Financial Officer of Emissions Ltd, knowingly includes false information in the report, which increases Emissions Ltd’s reported emissions beyond their actual level so as to increase the allocation of carbon units to Emissions Limited.

As a result, Emissions Ltd receives 100,000 more units than it is entitled to under the Jobs and Competitiveness Program.

The fraudulent conduct is discovered and Emissions Ltd and Tom Dodge are found guilty of offences under the *Criminal Code*, including providing false and misleading statements in applications (section 136.1). The court orders Emissions Ltd to relinquish 100,000 emissions units.

Emissions Ltd then fails to relinquish the units by the specified time, and is further exposed to an administrative penalty under clause 287(2). The fixed charge for the year is $23. The ‘prescribed amount’ for calculating the penalty is 200 per cent of this price. The penalty is therefore $46 x 100,000 units $4.6 million.

**Offences**

7.107 The bill provides for criminal offences in certain circumstances (see Table 7.5).

7.108 These are offences which generally relate to behaviour which involves dishonest or fraudulent conduct, or could involve considerable harm to society or the environment and involve such culpability that criminal penalties are justified.

7.109 The maximum penalties for each offence are justified by the potential financial incentives for liable entities to avoid their liabilities under the mechanism. In general, the penalties are designed to ensure there is an adequate penalty for the worst possible case.
Table 7.4 Offences and criminal sanctions

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Maximum Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>61(4)</td>
<td>Mandatory acceptance of an OTN – pre-commencement contracts – false or misleading declarations</td>
<td>Imprisonment for 12 months</td>
</tr>
<tr>
<td>231</td>
<td>Identity cards for inspector – failure to return</td>
<td>1 penalty unit (currently $110)</td>
</tr>
<tr>
<td>235</td>
<td>Inspector may ask questions and seek production of documents – failure to comply</td>
<td>Imprisonment for 6 months or 30 penalty units (currently $3,300), or both</td>
</tr>
<tr>
<td>244</td>
<td>Occupier to provide inspector with facilities and assistance</td>
<td>30 penalty units (currently $3,300)</td>
</tr>
<tr>
<td>275</td>
<td>Scheme to avoid existing liability to pay administrative penalty – objective purpose</td>
<td>Imprisonment for 3 years or 850 penalty units (currently $93,500) or both</td>
</tr>
<tr>
<td>276</td>
<td>Scheme to avoid future liability to pay administrative penalty – intention, knowledge or belief</td>
<td>Imprisonment for 10 years or 10,000 penalty units (currently $1.1 million) or both</td>
</tr>
</tbody>
</table>

Reasons for the level of criminal sanctions

Mandatory acceptance of an OTN - False or misleading declarations

7.110 If a person provides false or misleading information concerning OTNs, then this would compromise the operation of the mechanism by giving a false impression of the person’s activities and their liabilities or responsibilities. The offence also one of dishonesty, the conduct of which is intended to provide that person with a benefit, and for these reasons a strong deterrent effect is warranted. For this reason a substantial sanction is warranted and the maximum sanction for an offence under clause 61 is 12 months imprisonment. [Part 3, clause 61(4)]

Failing to comply with requests for information or failing to provide facilities or assistance

7.111 Liable entities are likely to have far more information about their emissions than the Regulator, particularly if they have failed to report. It is therefore essential that the Regulator’s information gathering and monitoring powers are adequate and that the requirements of inspectors are complied with. For this reason, the maximum sanction for contravention of clause 235 (a failure to answer questions or produce documents to an inspector) is 6 months imprisonment or 30 penalty units or both. [Part 15, clause 235] The maximum sanction for a contravention of clause 320 (which relates to assistance to an inspector under a monitoring warrant) is 30 penalty units. [Part 15, clause 244]
Scheme to avoid existing liability to pay administrative penalty

7.112 Entering into schemes aimed at ensuring that a body corporate or trust, for example, becomes unable to pay an existing or future liability to pay an administrative penalty is a criminal offence. [Part 19, clauses 275], [Part 19, clause 276] These provisions are comparable to those which apply to various taxes.

7.113 They are aimed at artificial schemes involving, for instance, ‘asset-stripping’ whereby a corporation’s assets are moved leaving only liabilities, and creating a situation where the corporation is forced into liquidation. For this reason, the maximum sanction is 10 years imprisonment or 10,000 penalty units, or both. These are significant and are justified by the potentially very large financial incentives that liable entities may have to avoid their liabilities under the mechanism.

Failing to return an identity card

7.114 The offence of a failure by an inspector to return his or her identity card promptly after ceasing to be an inspector is an offence of strict liability. [Part 15, clause 231] This is justified because the criminal sanction is small (a fine of 1 penalty unit) and is intended to place those appointed as inspectors on notice to guard against the possibility of any contravention.

7.115 This is consistent with the guidance in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, which sets out three criteria, all of which are relevant in this case, concerning strict liability offences, namely:

- the penalty imposed is no more than 60 penalty units for an individual and 300 penalty units for a body corporate;
- the punishment of offences not involving fault is likely to significantly enhance enforcement; and
- there are legitimate grounds for penalising persons lacking ‘fault’.

Other matters

7.116 Ancillary contraventions, such as aiding a contravention, are addressed by the Criminal Code.

7.117 The bill applies to the Australian, state and territory governments (that is, the Crown in right of each Australian jurisdiction). However, consistent with A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, the Crown is not liable to a criminal sanction. This protection does not apply to servants or authorities of the Crown. [Part 1, clause 9]
7.118 In addition to the offences listed in Table 7.5 above, conduct concerning the mechanism may constitute contravention of provisions of the Criminal Code. Conviction for an offence against specified provisions of the Criminal Code is one of the preconditions for a court order to relinquish units. [Part 10, clause 208] The offences specified include making a statement in information provided to the Regulator or in an application for a benefit, knowing that it is false. An example is a false statement in an application for a Registry account or an OTN or for free carbon units.

7.119 The specified provisions in the Criminal Code are also defined as being ‘associated provisions’ of the Act. [Part 1, clause 5, definition of ‘associated provisions’]

**Liability of executive officers of bodies corporate**

7.120 The bill provides that executive officers of bodies corporate are liable for a contravention of a civil penalty provision by that body corporate in certain circumstances.

7.121 It is appropriate that extended accessorial liability applies to such officers, given the importance of ensuring compliance with the mechanism is taken seriously at all levels within liable entities, and particularly at high levels. Liability is not being imposed simply because the person is an officeholder at the relevant time, but requires a degree of responsibility on the part of the officer concerned before a civil penalty may be imposed.

**Example 7.5 Liability of an executive officer**

A chief financial officer is aware that her company is quoting a bogus OTN and receiving natural gas supplies without a carbon price, and is in a position to influence this conduct, but fails to take all reasonable steps to prevent this.

The CFO could be found liable for the company’s contravention and subject to a civil penalty order.

7.122 An ‘executive officer’ is a director, chief executive officer, chief financial officer or secretary of the body corporate. [Part 1, clause 5, definition of ‘executive officer’]

7.123 Where a body corporate contravenes a civil penalty provision, and one of its executive officers knew that (or was reckless or negligent as to whether) the contravention would occur, then the officer is subject to a civil penalty if he or she was in a position to influence the conduct of the body corporate concerning the contravention, but failed to take all reasonable steps to prevent it. [Part 16, clause 248]

7.124 An executive officer is ‘reckless’ if he or she was aware of a substantial risk that the contravention would occur and having regard to
the circumstances known to him or her, it is unjustifiable to take that risk. [Part 16, clause 248(2)]

7.125 An executive officer is ‘negligent’ if his or her conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and his or her conduct involves such a high risk that the contravention would occur, that a pecuniary penalty should be imposed. [Part 16, clause 248(3)]

7.126 The terms ‘reckless’ and ‘negligent’ are explained because the provisions are civil penalty provisions and the required standard of conduct should be made clear to enable corporate officers to comply with the law.

7.127 Executive officers have a defence that they took reasonable steps to prevent the contravention. In considering whether an officer failed to take reasonable steps, the court may have regard to all relevant matters. These matters may include what action (if any) the officer took directed towards ensuring (to the extent that the action is relevant to the contravention) that the body corporate arranges regular professional assessments of its compliance with civil penalty provisions. The word ‘professional’ refers to the qualifications and experience of the person undertaking the assessment and does not require, on every occasion that the assessment be undertaken by a person outside the organisation. [Part 16, clause 249]

**Anti-avoidance provisions**

7.128 The bill addresses the avoidance of liability under the mechanism by artificial schemes designed to bring facilities or activities below thresholds without reducing emissions from those facilities. A significant threshold which is used in a number of provisions in the bill is 25,000 tonnes of greenhouse gas emissions per facility for direct emitters.

7.129 Where a person enters into an artificial scheme aimed at obtaining the benefit of being below an applicable threshold, then the Regulator may determine that the relevant provisions apply to the corporation as if it was above the threshold. The bill lists the sections to which a threshold relates. The Regulator must make its determination in writing and publish it on its website. [Part 3, clause 29]

7.130 A determination is not a legislative instrument. It is not of a legislative character and is therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

7.131 The Regulator may make a determination about a scheme entered into or commenced after 15 December 2008, when the Government first announced the details of the CPRS. [Part 3, clause 29(1)]
Example 7.6 Anti-avoidance prior to the commencement of the mechanism

In February 2012, a corporation enters into a scheme designed to give the appearance that a facility, which has 40,000 tonnes of emissions, is two facilities emitting only 20,000 tonnes each. The corporation does not register under the NGER Act nor does it surrender any eligible emissions units by 15 June 2013.

The Regulator is empowered to ‘look through’ the scheme and to apply liability for the 40,000 facility. The corporation would be liable for a provisional shortfall charge under Part 6.

Example 7.7 Anti-avoidance prior to the announcement of the mechanism

In 2010, Pollute Limited decided that it would take steps to ensure that any future emissions trading scheme would not cover it by entering into a scheme designed to give the appearance that each of its facilities, which each had 60,000 tonnes, each have the appearance of being three separate facilities emitting less than 20,000 tonnes each.

Pollute Limited makes the changes gradually and does not register under the NGER Act nor does it surrender any eligible emissions units by 15 June 2013.

The Regulator is empowered to ‘look through’ the scheme and to apply liability for Pollute Limited’s facilities. The corporation would be liable for a provisional shortfall charge under Part 6.

Miscellaneous functions of the Regulator under the bill

7.132 As well as the specific functions of the Regulator provided through the bill, the Regulator will monitor and promote compliance, conduct and co-ordinate education programs and advise and assist persons (and their representatives) concerning their obligations. [Part 23, clauses 295(a), (b), (c), (e) and (f)] This is expected to be a significant part of the Regulator’s work in the period leading to the commencement of the mechanism and the initial period of the mechanism’s operation.

7.133 The Regulator will also be empowered to collect, analyse, interpret and disseminate statistical information relating to the operation of the mechanism. [Part 23, clause 295(h)] This is expected to add to the body of information available to participants in the carbon market and other people who are interested in how the mechanism is operating. Other sources of information are the public information released under Part 9 and the Regulator’s annual report.

7.134 The Regulator will also liaise with regulatory and other relevant bodies about co-operative arrangements for matters relating to the mechanism or emissions trading schemes more generally. [Part 23, clause 295(g)] This liaison may be with domestic or overseas bodies, and will be important in handling the international transfers of units and will enable the Regulator to learn from experience with other trading schemes.
The Regulator will also advise the Minister on matters relating to the mechanism and other emissions trading schemes. [Part 23, clause 295(d)]

States and Territories

Concurrent operation of State and Territory law

The bill is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it. [Part 23, clause 301]

Arrangements with the States and Territories

The Minister may make arrangements with a Minister of a State, the ACT, Northern Territory or Norfolk Island about the administration of the bill, including arrangements for the performance of the functions by magistrates and the exercise of certain powers by land registration officials. A copy of each instrument by which such an arrangement is made is to be published in the Commonwealth Gazette, but it is not a legislative instrument. [Part 23, clause 303] These instruments are not of a legislative character and is therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

This provision may be used, for example, to establish arrangements for magistrates to exercise power concerning the granting of monitoring warrants (see above). [Part 15, clause 246]

Delegation by a State Minister or a Territory Minister

The Minister of a State or Territory may delegate any functions or powers under the bill the power to a person who is an officer or employee of the State or Territory and who holds or performs duties that is equivalent to a position occupied by a Senior Executive Service (SES) employee in the Australian Public Service (APS). [Part 23, clause 299]

Administrative matters within the Australian Government

Delegation by the Minister

The Minister may delegate any or all of his or her functions or power under the Act or regulations to the Secretary or an SES, or acting SES, employee of the Department. This power does not extend to making, varying or revoking legislative instruments. The delegate must comply with any direction of the Minister. [Part 23, clause 298]

Executive power

The Act does not, by implication, limit the executive power of the Commonwealth. [Part 23, clause 305] This makes it clear that the bill
does not, for example, limit the Commonwealth’s executive power to take various actions to meet Australia’s obligations under the Kyoto Protocol.

**Notional payments by the Commonwealth**

7.142 The Crown, in each of its capacities, will be bound by the bill, except in respect of a pecuniary penalty or an offence. [Part 1, clause 9]

7.143 Provision is made for the Minister administering the *Financial Management and Accountability Act 1997* to give written directions relating to, among other things, transfers of amounts within or between accounts operated by the Commonwealth to allow for payment of notional amounts by the Commonwealth. [Part 23, clause 306]

**Compensation for acquisition of property**

7.144 If the operation of the Act or regulations would result in an acquisition of property from a person other than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. The bill provides for the institution of proceedings to recover such compensation if agreement has not been reached. The terms ‘acquisition of property’ and ‘just terms’ have the same meaning as in section 51(3xxi) of the Constitution. [Part 23, clause 308]

**Constitutional basis**

7.145 The bill and the Charges bills and are intended to be supported by the Commonwealth’s power to make laws with respect to external affairs in section 51(3xxi) of the Constitution. The object of the bill is to implement Australia’s obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. [Part 1, clause 3(a)]

7.146 The bill and the Charges bills are intended also to be supported, wholly or partly, by several other Commonwealth legislative powers. [Part 23, clause 307]

7.147 For instance, subclause 307(3) gives the provisions of the bills the effect they would have if they applied only to the extent that they related to taxation. The unit shortfall charge is a tax and the provisions imposing and otherwise dealing with the charge are laws with respect to taxation and relate to taxation. The provisions of the bills which do not deal directly with the unit shortfall charge nevertheless deal with the charge because they establish the liability for the charge or are incidental to establishing that liability. The provisions are supported by the taxation power in the alternative to the external affairs power. [Part 23, clause 307(3)]

7.148 Another example is subparagraph 307(4)(b)(i) which gives the provisions of the bills the effect they would have if they applied only to a liable entity which was a constitutional corporation. A constitutional corporation is a corporation to which the corporations power in section 51(xx) of the Constitution applies (foreign, trading and financial
corporations). The corporations power gives the Commonwealth power to impose legal obligations on constitutional corporations, including the obligations imposed by the bills on liable entities. To the extent that they apply to liable entities which are constitutional corporations, the provisions are supported by the corporations power in the alternative to the external affairs power. [Part 23, clause 307(4)]

Regulations

7.149 The bill includes a general regulation-making power. [Part 23, clause 312]

7.150 The regulations may apply, adopt, or incorporate with or without modification, a matter contained in another instrument as it exists from time to time, despite subsection 14(2) of the Legislative Instruments Act 2003. The instrument referred to must be published on the Regulator’s website unless this would infringe copyright. [Part 23, clause 309]

7.151 An example would be adoption of a matter contained in a standard published by International Organization for Standardisation, as in force from time to time.

7.152 In addition, the regulations may confer a power to make a decision of an administrative character on the Regulator. [Part 23, clause 310]

7.153 This provision is expected to be used in connection with the Jobs and Competitiveness Program, which will be implemented through regulations. In particular, the Regulator will need to make administrative decisions about a person’s eligibility for, and quantum of, assistance in accordance with the requirements in the regulations. It may also need to make administrative decisions to require the relinquishment of carbon units, such as on the closure of a facility. [Part 7, clause 146]

Liability for damages

7.154 Certain specified persons are not liable to an action for damages for acts done in good faith (or omissions) in the performance of their functions or powers under the bill or the associated provisions. (The provision includes where such acts or omissions are done in the purported performance of functions or powers.) The persons include the Minister, the Regulator, the Regulator’s staff and delegates of either the Minister or the Regulator. [Part 23, clause 304]

Legal professional privilege

7.155 The doctrine of legal professional privilege has been described by the High Court in Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 as follows:
’It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.’

7.156 The Act will not affect the law relating to legal professional privilege. [Part 23, clause 302]
Chapter 8
The Regulator’s decisions and review of decisions

Outline of chapter

8.1 Chapter 8 explains the way in which the Regulator may make decisions and the provisions in the bill on merits review of administrative decisions made by the Regulator.
8.2 It covers Parts 21 and 23.

Context

8.3 The mechanism allows the Regulator to make a wide range of administrative decisions and includes a robust review process for administrative decisions made by the Regulator, including judicial review under the Administrative Decisions (Judicial Review) Act 1977 and merits review by the Administrative Appeals Tribunal (AAT).

Summary

8.4 The bill provides for merits review of specified administrative decisions made by the Regulator. It does not exclude judicial review of those decisions on questions of law. [Part 21, clause 280]
Diagram 8.1 Reconsideration, review and appeal under the carbon pricing mechanism

- Decision made by a delegate of the Regulator
  - Reconsideration by the Regulator
- Decision made by the Regulator or a reconsideration of a decision by a delegate of the Regulator
  - Merits review by the AAT
- Decision made by the AAT
  - Appeal on a question of law to the Federal Court of Australia

Detailed explanation of new law

Computerised decision-making by the Regulator

8.5 The Regulator has the capacity to make use of a computer program for the purposes of decision making provided that it makes arrangements to do so by means of a legislative instrument. [Part 23, clause 296]

Reviewable decisions

8.6 The bill sets out those decisions by the Regulator that are ‘reviewable decisions’. A ‘reviewable decision’ is a decision identified by the bill as being such a decision (see Table 8.1). [Part 21, clause 281]
### Table 8.1 Reviewable decisions

<table>
<thead>
<tr>
<th>Clause</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>29(2)</td>
<td>A determination concerning the application of the Act to an entity which has engaged in a scheme to avoid its liabilities</td>
</tr>
<tr>
<td>40</td>
<td>A decision to refuse to issue an OTN</td>
</tr>
<tr>
<td>42</td>
<td>A decision to refuse to give consent to the surrender of an OTN</td>
</tr>
<tr>
<td>43</td>
<td>A decision to cancel an OTN</td>
</tr>
<tr>
<td>56(7)</td>
<td>A decision to refuse to declare that a person is an approved person</td>
</tr>
<tr>
<td>83, 87</td>
<td>A decision to refuse to issue a liability transfer certificate</td>
</tr>
<tr>
<td>89</td>
<td>A decision to refuse to give consent to the surrender of a liability transfer certificate</td>
</tr>
<tr>
<td>90</td>
<td>A decision to cancel a liability transfer certificate</td>
</tr>
<tr>
<td>106(5)</td>
<td>A decision to refuse to extend a period</td>
</tr>
<tr>
<td>109</td>
<td>A decision to refuse to make an entry in a Registry account</td>
</tr>
<tr>
<td>113(1)</td>
<td>A prescribed decision under a determination relating to policies, procedures and rules for auctioning carbon units</td>
</tr>
<tr>
<td>119</td>
<td>A decision concerning the assessment of an emissions number</td>
</tr>
<tr>
<td>119(4)</td>
<td>A decision concerning amending an assessment of an emissions number</td>
</tr>
<tr>
<td>119(4)</td>
<td>A decision concerning a refusal to amend an assessment of an emissions number</td>
</tr>
<tr>
<td>120</td>
<td>A decision concerning the assessment of an emissions number where no report is given by a liable entity</td>
</tr>
<tr>
<td>120(4)</td>
<td>A decision concerning amending an assessment of an emissions number where no report is given by a liable entity</td>
</tr>
<tr>
<td>120(4)</td>
<td>A decision concerning a refusal to amend an assessment of an emissions number where no report is given by a liable entity</td>
</tr>
<tr>
<td>130(2)</td>
<td>A decision to refuse to remit the whole or part of a unit shortfall charge imposed on an estimation error unit shortfall</td>
</tr>
<tr>
<td>135(2)</td>
<td>A decision to refuse to remit the whole or part of a late payment penalty</td>
</tr>
<tr>
<td>Part 7</td>
<td>A prescribed decision under the Jobs and Competitiveness Program</td>
</tr>
<tr>
<td>165(3)</td>
<td>A decision to state that a specified number is the annual assistance factor in respect of a generation complex</td>
</tr>
<tr>
<td>165</td>
<td>A decision to refuse to issue a certificate of eligibility for coal-fired electricity assistance</td>
</tr>
<tr>
<td>184</td>
<td>A decision to refuse to remove an entry for a person in the Information Database</td>
</tr>
<tr>
<td>213(2)</td>
<td>A decision to refuse to remit the whole or part of a late payment penalty</td>
</tr>
</tbody>
</table>
8.7 A decision made by the Regulator includes decisions made by officers of the Regulator or other departments under a delegation made under clause 35 of the Regulator bill.

Reconsideration of decisions by a delegate of the Regulator

8.8 A person affected by a decision made by a delegate of the Regulator may apply to the Regulator within 28 days of being informed of the decision (or a longer period, if it is extended by the Regulator) for a reconsideration of that decision if that person is dissatisfied with the decision. [Part 21, clause 282]

8.9 An application must be in writing, set out the person’s reasons for seeking a reconsideration and include any applicable fee. The application must be in a form approved by the Regulator and the fee must be in a form specified in a legislative instrument made by the Regulator. [Part 21, clause 282]

8.10 On receiving an application, the Regulator must reconsider the decision and either, affirm, vary or revoke the decision within 90 days of receiving the application. [Part 21, clause 283], [Part 21, clause 284(1)] The Regulator’s reconsideration has the same legal basis and effect as the original decision.

8.11 The Regulator must give written reasons for its decision on the reconsideration within 28 days of making this decision. [Part 21, clause 283]

8.12 If the Regulator does not make a decision on the reconsideration within 90 days, its original decision is deemed to be affirmed. [Part 21, clause 284(2)]

Review by the Administrative Appeals Tribunal

8.13 A person affected by a decision may apply to the AAT for a review of a reviewable decision if the Regulator has affirmed or varied that decision under clause 283 or it is a decision that was not made by a delegate of the Regulator. [Part 21, clause 285]

Stay of proceedings

8.14 If a person is the subject of an action to recover a shortfall charge, an administrative penalty or a late payment penalty, then the court may stay those proceedings pending the completion of a review or reconsideration under Part 21. [Part 21, clause 286]
Chapter 9
Public information

Outline of chapter

9.1 Chapter 9 explains the way in which information about the mechanism is made public. It covers Part 9.

Context

9.2 The operation of the mechanism is to be transparent to ensure its optimal operation. To this end, general, aggregated information about transactions is to be made public. For units to flow to their highest value uses, the price needs to reflect all available information. This will provide a price signal that will inform business investment.

9.3 The regular publication of market information by the Regulator will assist participants and financial market and other analysts to identify and understand the supply and demand conditions for carbon units, enabling efficient price discovery and facilitating trade and efficient business decision making.

Summary

9.4 The bill provides the Regulator must publish information about the operation of the mechanism, emissions, participants and compliance. [Part 9, clause 182]
Diagram 9.1 The Regulator’s obligations to publish information under the carbon pricing mechanism

The Clean Energy Regulator must:

- maintain the Liable Entities Public Information Database
- publish specific information about auction results
- publish information about liabilities and non-compliance
- if required, publish information about designated large landfill facilities
- publish information about the issue and surrender of units and relinquishment
- publish information about Registry Account holders and significant holdings of eligible emissions units
Detailed explanation of new law

Liable Entities Public Information Database

9.5 The Regulator must keep a database known as the Liable Entities Public Information Database (the Database). [Part 9, clause 183]

9.6 Since liability in some situations is determined at the end of the financial year, persons may be included in the Database if the Regulator has reasonable grounds to believe that a person is or is likely to be a liable entity for a particular financial year. [Part 9, clause 184] This allows the Database to be maintained continuously on the basis of information available to the Regulator, such as emissions from previous years.

9.7 When the Regulator makes an entry, it must give written notice of it to the person. [Part 9, clause 184] There is provision for removal of entries [Part 9, clause 184] and for correction of the Database. [Part 9, clause 193]

9.8 The Regulator must enter the following information onto the Database:

- as soon as possible after the report or assessment is made, each liable entity’s emissions number, which will be drawn from a report under the NGER Act or an assessment or amended assessment of the Regulator; [Part 9, clause 185]

- before the end of 28 February of the next eligible financial year, the Regulator’s estimate of the total of emissions numbers; [Part 9, clause 186]

- at the time the Regulator makes its assessment or estimate, any unit shortfall and any unit shortfall charge payable:
  - based on an assessment made by the Regulator [Part 6, clause 141] (including, where appropriate, the details of the Regulator’s assessment and annotations if the assessment is being reconsidered by the Regulator or reviewed by the AAT), [Part 9, clause 187(3)]
  - based on an estimate by the Regulator (which may be based on a report under the NGER Act); [Part 9, clause 187(4)]

- at the time the reconsideration or review commences, annotations indicating that particular administrative decisions concerning the mechanism are being reconsidered by the Regulator or are under review by the AAT; [Part 9, clause 187(5)]

- after the time for payment of the charge has passed, any unpaid unit shortfall charge; [Part 9, clause 188]
as soon as practicable after receiving a notice under clause 129 surrendering units, details of the number and types of eligible emissions units surrendered by each liable entity; [Part 9, clause 189]

at the time the Regulator makes its assessment or estimate, the details of any relinquishment requirement under the bill or the Jobs and Competitiveness Program, including annotations if the relinquishment decision is being reconsidered by the Regulator or subject to review by the AAT; [Part 9, clause 190]

after the time for payment of the charge has passed, any unpaid administrative penalties for a failure to relinquish units as required under the bill or the Jobs and Competitiveness Program; [Part 9, clause 191]

as soon as practicable after receiving the notice of relinquishment, the number of units relinquished by a person as required under the Jobs and Competitiveness Program. [Part 9, clause 192]

Information about holders of Registry accounts

9.9 The Regulator must publish on its website the name of each person with a Registry account and the person’s address last known to the Regulator and must keep that information up to date. [Part 9, clause 194]

Information about units

9.10 The Regulator must publish on its website the following information about units:

- as soon as practicable, the date of each auction of carbon units, the vintage year or vintage year of carbon units, and for each vintage year auctioned, the per unit charge payable and the total of units issued for that per unit charge; [Part 9, clause 195]

- within 7 days of the end of May 2015 and May of every year after that and November 2015 and November of every year after that, the average auction price of current eligible financial year units for the six month period prior to that, worked out in accordance with the formula:

\[
\text{Total auction proceeds} \div \text{Number of units issued as the result of auctions}
\]

This is relevant to the adjustments to fuel taxes which will take place every 6 months; [Part 9, clause 196(1) and (2)]
• as soon as practicable after 1 February of 2014, the total number of carbon units issued for a fixed charge from 2012-13; [Part 9, clause 197(1)]

• as soon as practicable after 15 February of the eligible financial year after the end of that year, the total number of carbon units issued for a fixed charge for each for each subsequent year following 2012-13 until 2017-2018; [Part 9, clause 197(2)-(6)]

• as soon as practicable after the issue of units, the identity of recipients, the number of units provided free of charge under Parts 7 and 8, and details of the activities to which they relate; [Part 9, clause 198]

• as soon as practicable after the end of each quarter, a quarterly report of the following information:
  – the total number of free carbon units with a particular vintage year issued under Part 7;
  – for each activity under Part 7 that is an emissions exposed activity, the total number of free carbon units with a particular vintage year that relate to that activity;
  – the total number of free carbon units with a particular vintage year which relate to pending applications under Part 7; and
  – the total number of free carbon units with a particular vintage year issued under Part 8. [Part 9, clause 199]

• as soon as practicable after 15 February of the next eligible financial year, the total number of borrowed carbon units for the relevant year and the total number of banked carbon units for the relevant year; [Part 9, clause 200]

• as soon as practicable after 1 March following an eligible financial year, a calculation of total emissions numbers and total unit shortfalls for the relevant year; and [Part 9, clause 201]

• as soon as practicable after the establishment of the Regulator; a statement setting out a concise description of carbon units, which must be kept up to date. [Part 9, clause 202]

Information about relinquishment by persons other than liable entities

9.11 The Regulator must publish on its website the following information about relinquishment requirements by persons other than liable entities:

• when the requirement arises, the name of a person and details of the relinquishment requirement to which that person is
subject, where that person is under a liability to do so under the bill or the Program and there is no entry included on the Database for that person (see above); [Part 9, clause 203(1) and (2)]

• when the reconsideration or review commences, annotations indicating that particular decisions concerning relinquishment requirements are being reconsidered by the Regulator or are under review by the Administrative Appeals Tribunal; [Part 9, clause 203(3)]

• after the time for the payment of the penalty has expired, details of any unpaid administrative penalties for a failure to relinquish units as required; and [Part 9, clause 204]

• as soon as practicable after receiving the notice of relinquishment, the name of a person and the details of the carbon units relinquished under the bill or the Program where there is no entry included on the Database for that person. [Part 9, clause 205]

Information about designated landfill facilities

9.12 The Regulator must, if required by Regulations, publish on its website, at a time specified in the Regulations, a list of the landfill facilities that, in the Regulator’s opinion, were designated landfill facilities for the previous eligible financial year (including, for these purposes, the year commencing on 1 July 2011). This should include the location of each listed landfill facility. [Part 9, clause 206]

9.13 This list will help landfill operators determine whether they are a liable entity operating a facility within the prescribed distance of a designated large landfill facility.

Information about significant holdings

9.14 Significant holdings of carbon units must be disclosed to the Regulator and this information is published. [Part 12, clause 217] This provides additional information to the market which may be relevant to price.

9.15 A controlling corporation must, where the members of that controlling corporation’s group hold a total of 5 per cent or more of the national scheme cap number for the particular vintage year, give written notice of this to the Regulator, in a form which includes the required information. [Part 12, clause 218] In other cases, the obligation rests on the entity holding the units. [Part 12, clause 219]

9.16 Civil penalties and infringement notices apply to a contravention of these provisions (see also Chapter 7). [Part 12, clause 218(2) and (4)], [Part 16, clause 219(2) and (4)]
9.17 The Regulator must publish a notice concerning a significant holding on its website. [Part 12, clauses 218(6) and 219(6)]

Other information

9.18 The Regulator must maintain other published information concerning the mechanism and its participants, including:

- the OTN Register; [Part 3, clause 45]
- the ‘benchmark average auction price’ by the Regulator (which relates to setting the administrative penalties for failure to pay unit shortfalls and the failure to relinquish units); and [Part 4, clause 114(4)(b)]
- certificates of eligibility for coal-fired generation assistance. [Part 8, Division 3, clause 165(6)]

9.19 Related legislation also permits public disclosure of relevant information. This includes:

- clause 52 of the Regulator bill, for example, will also permit the disclosure of summaries and statistics of protected information, where they are not likely to enable the identification of a person; and
- the NGER Act, which is to be amended by the Consequential Amendments bill.
Chapter 10
Independent reviews

Outline of chapter

10.1 Chapter 10 explains how the Authority conducts reviews of the Clean Energy Act 2011 (once enacted) and aspects of the mechanism. It covers Part 22.

Context

10.2 The mechanism is a significant, long-term reform. It is essential that regular, expert, independent and public reviews are carried out to ensure its ongoing relevance, robustness and integrity.

10.3 In particular, reviews are required to provide a considered basis for decisions on the level of pollution caps and changes to the design of the mechanism.

Summary

10.4 The Authority is an expert statutory advisory body which will conduct public reviews of the mechanism. The bill contains information about the reviews the Authority must undertake and the matters which must be taken into account.

10.5 The bill provides that the Authority must undertake four types of reviews:

- reviews of the carbon pricing mechanism;
- reviews of the level of the pollution caps, the indicative national trajectory and carbon budget;
- reviews of progress towards meeting emissions reduction targets and carbon budgets; and
- reviews requested by the Minister or by both Houses of Parliament.

10.6 The Authority must give the first review recommending pollution caps to the Minister by 28 February 2014, giving sufficient time for the recommendations to be considered by the Minister before setting the first set of pollution caps.
10.7 From 2016 onwards, the Authority must provide such a review annually. While undertaking these reviews, the Authority will also provide advice on an indicative national trajectory or carbon budget. A carbon budget is the total number of net Australian emissions over a specified time period. An indicative national trajectory is a suggested path for meeting Australia’s emissions targets. The trajectory will provide an indication of the net national emissions in any one year over a specified time period.

10.8 The Authority will also review the progress in achieving emissions reductions targets and any carbon budgets. The first such report must be given to the Minister by 28 February 2014 and subsequent reports on progress will be provided annually.

10.9 The first review of the mechanism will be completed by 31 December 2016, the second review by 31 December 2018 and subsequent reviews every five years.

10.10 In addition to these specific reviews, the bill further provides that the Minister may at any time commission special reviews to investigate matters identified by the Minister.

10.11 Two other bills contain provisions for the Authority to undertake reviews. Under the Consequential Amendments bill, the Authority is also required to undertake other reviews as set out in the:

- National Greenhouse and Energy Reporting Act 2007;
- Renewable Energy (Electricity) Act 2000; and
- CFI bill,

(see the commentary for the Consequential Amendments bill for further detail).

10.12 In addition, the Authority may also undertake other reviews on matters relating to climate change. Relevant provisions are included in the Authority bill (see the commentary for that bill for further detail).

10.13 In addition to these reviews, the Productivity Commission is to undertake reviews related to assistance under Part 7 (see Chapter 5).

10.14 The Authority must make provision for public consultation in all of its reviews, and once a review report is complete it must be published on the Authority’s website and tabled in the Parliament by the Minister. The Australian Government must also table a response to any recommendations made by the Authority. These requirements will ensure a high level of transparency and accountability for the decisions made concerning the mechanism.
Detailed explanation of new law

10.15 The Authority must undertake reviews of the mechanism every 5 years. The Authority will also carry out reviews of specific aspects of the mechanism, including the level of pollution caps and progress towards meeting emissions reduction targets and carbon budgets. In addition, the Authority must conduct special reviews relating to the mechanism as requested. [Part 22, clause 287]

10.16 The Authority bill constitutes the Authority as a statutory agency and provides for its membership and administration (see the commentary for that bill for further detail).

Periodic reviews of the carbon pricing mechanism

10.17 The Authority must undertake periodic reviews of the mechanism as follows:

- the first periodic review must be completed before 31 December 2016. [Part 22, clause 288(2)]
- the second review must be completed before 31 December 2018. [Part 22, clause 288(3)]
- subsequent periodic reviews must be completed within five years, measured from the deadline for the completion of the previous review. [Part 22, clause 288(4)]

10.18 The Authority, in conducting a periodic review, will cover certain matters:

- the effectiveness and efficiency of the mechanism;
- whether national targets relating to emissions of greenhouse gases should be changed or extended;
- the process for setting pollution caps;
- the arrangements for the auctioning of units;
- the operation of the price ceiling and price floor;
- whether other units besides carbon units should be able to be surrendered and the way in which the payment and surrender process operates;
- the governance and administration of the mechanism;
- the relationship of the mechanism to other legislation, including the CFI bill; and
Reviews recommending the level of pollution caps, and the indicative national emissions trajectory and national carbon budget

10.19 The Authority must conduct reviews:

- recommending the level of pollution caps; and
- any indicative national emissions trajectory and national carbon budget,

under the mechanism as follows:

- the first review must be completed by 28 February 2014. [Part 22, clause 289(3)] This review must include recommendations on the pollution caps for the first five years of the flexible price period (namely 2015-16, 2016-17, 2017-18, 2018-19, and 2019-20) and must also provide advice on an indicative national trajectory or carbon budget. [Part 22, clauses 289(4) and (8)]
- subsequent reviews must be completed annually by 28 February. [Part 22, clause 289(5)]

10.20 Any report dealing with an indicative national emissions trajectory and national carbon budget, must address how these are expected to be met by emissions covered and not covered by the mechanism and the purchase of eligible international emissions units by the Australian Government or by other persons. [Part 22, clause 289(11)]

10.21 The Authority, in conducting a review, must consider:

- Australia’s medium-term and long-term targets for reducing net greenhouse gas emissions;
- progress towards the reduction of greenhouse gas emissions;
- global action to reduce greenhouse gas emissions;
- estimates of the global greenhouse gas emissions budget;
- the economic and social implications associated with various levels of carbon pollution caps;
- voluntary action to reduce Australia’s greenhouse gas emissions;
- estimates of greenhouse gas emissions not covered by the bill;

37 See ‘Written instruments’ below
Chapter 10: Independent reviews

- estimates of the number of ACCUs that are likely to be issued;
- the extent (if any) of non-compliance with the bill and the associated provisions;
- the extent (if any) to which liable entities have failed to surrender sufficient units to avoid liability for unit shortfall charge;
- any acquisitions, or proposed acquisitions, by the Commonwealth of eligible international emissions units;
- such other matters (if any) as the Authority considers relevant. [Part 22, clause 289(2)]

10.22 These considerations are intended to have the same meaning as the Minister’s considerations in formulating the pollution cap regulations (see Chapter 2).

10.23 If, on 1 November 2014, there are no regulations that declare a carbon pollution cap and the carbon pollution cap number for the flexible charge year commencing on 1 July 2015, then the Authority must conduct an additional review of the carbon pollution cap for the flexible charge year commencing on 1 July 2020. [Part 22, clauses 290(1) and (2)]

10.24 This review must be completed before the end of February 2015. [Part 22, clause 290(4)]

Reviews of progress in achieving emissions reduction targets and carbon budgets

10.25 The Authority must review the progress in achieving emissions reductions targets and any carbon budgets [Part 22, clause 291(1)] as follows:

- the first review must be completed by 28 February 2014. [Part 22, clause 291(3)]
- subsequent reviews must be completed annually by 28 February. [Part 22, clause 291(4)]

10.26 The Authority, in conducting a review, must consider:

- the level of domestic emissions;
- the level of purchases of international units;
- the level of emissions in the uncovered sectors; and
- the level of recognised voluntary action. [Part 22, clause 291(2)]
Other reviews of the mechanism

10.27 In addition to the mandatory periodic reviews:

• the Minister (by a written instrument to the Chair of the Authority[^38]); or

• both Houses of Parliament (by a resolution),

may request that the Authority conduct a review of the matters specified in the written instrument or the resolution [Part 22, clause 293(1)].

10.28 A review under this section may cover:

• the effectiveness and efficiency of the mechanism;

• whether national targets relating to emissions of greenhouse gases should be changed or extended;

• the process for setting pollution caps;

• the arrangements for the auctioning of units;

• the operation of the price ceiling and price floor;

• whether other units besides carbon units should be able to be surrendered and the way in which the payment and surrender process operates;

• the governance and administration of the mechanism;

• the relationship of the mechanism to other legislation, including the CFI bill; and

• such other matters relating to the mechanism, if any, that the Minister specifies. [Part 22, clause 293(4)]

10.29 The Government has announced[^39] that the Minister will request the Authority to examine the role of the price floor and the price cap beyond the first three years of the flexible price period. The Minister will also request the Authority to review methodologies for recognising additional voluntary action. It is intended that this provision will be used to give effect to this policy.

Procedures for conducting reviews

Procedures

10.30 In conducting a review the Authority must make provision for public consultation. [Part 22, clause 288(6)], [Part 22, clause 288(7)], [Part 22, clause 291(6)], [Part 22, clause 293(3)]

[^38]: See ‘Written instruments’ below
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10.31 For these purposes, a review is ‘completed’ when the report of the review is given to the Minister. [Part 22, clause 288(5)], [Part 22 clause 289(6)], [Part 22, clause 290(5)], [Part 22, clause 291(5)]

10.32 The Authority must give a report to the responsible Minister. [Part 22, clause 292(1)], [Part 22, clause 294(1)] The Authority must publish reports on its website as soon as practicable after delivering them to the Minister. [Part 22, clause 292(1)], [Part 22, clause 294(1)]

10.33 The Minister must, within 15 sitting days of receiving the report, cause the report to be tabled in both Houses of Parliament. [Part 22, clause 292(2)], [Part 22, clause 294(2)]

Recommendations

10.34 If a report includes recommendations to the Australian Government, then the report must set out reasons for the recommendations. [Part 22, clause 292(6)], [Part 22, clause 294(6)] In formulating a recommendation that the Government take a particular action, the Authority must assess the costs and benefits of that action, although that does not prevent the Authority from taking other matters into account. [Part 22, clauses 292(4) and (5)], [Part 25, clauses 294(4) and (5)]

10.35 If a report makes recommendations to the Australian Government, the Government must respond to those recommendations as soon as practicable. The Minister must table this response in each House of Parliament within 6 months from receipt of the report. [Part 25, clause 292(7)-(8)], [Part 22, clause 294(7)-(8)]

Written instruments

10.36 An instrument provided by the Minister to the Chair of the Authority about a review is not a legislative instrument. [Part 22, clause 288(7)], [Part 22, clause 293(5)] It is not of a legislative character and is therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. This provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.