

# Australia- Carbon Pollution Reduction Scheme Bill

## Client Alert

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### Carbon Pollution Reduction Scheme Bill

On 10 March 2009 the Australian Government issued the exposure draft of the Carbon Pollution Reduction Scheme Bill 2009 (Bill) – the law intended to introduce emissions trading across Australia.

The Bill sets out the legal provisions designed to give effect to the policy positions in the Government's White Paper on the Carbon Pollution Reduction Scheme (CPRS) issued in December 2008 (White Paper). It is part of a package of draft legislation that includes a bill setting out the consequential amendments to existing Acts (including the National Greenhouse and Energy Reporting Act 2007) and a bill establishing the scheme's governing body – the Australian Climate Change Regulatory Authority (Authority).

Submissions on this package of bills are due by 14 April 2009. The Government aims to finalise and pass the legislation this year, with the first year of liability for emissions proposed to start on 1 July 2010.

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#### How to navigate the draft legislation

After preliminary material in Part 1 of the Bill (including definitions), the substantive sections of the draft Bill begin in Part 2, which deals with the cap – a central element of any emission trading scheme. Part 2 provides a framework for the establishment of **scheme caps and gateways** in regulations, and includes a back-up default scheme cap to ensure that caps are set for five years in advance, at all times.

To determine **whether an entity is covered by the CPRS**, see Part 3 of the Bill. This Part is quite lengthy in order to accommodate the unique characteristics of certain emissions sources, such as landfills and liquid petroleum fuels.

Part 4 contains provisions on emissions units, including the nature and allocation of **Australian emissions units**. The **price cap** for the period from 2010-11 to 2014-15 is quantified, starting at \$40 per unit (almost twice the \$23 initial unit price predicted by Treasury modelling) and ultimately reaching \$53.42 per unit. This will assist liable entities to determine their maximum compliance costs. The issuance and transfer of **Kyoto units** is also covered in Part 4.

To meet their scheme liabilities, entities must surrender eligible emissions units equal to their '**emissions number**' for a financial year. Part 5 explains how emissions numbers are determined and assessed.

The actual **surrender of eligible emissions units** is elaborated upon in Part 6. Consistent with the White Paper, unlimited banking of Australian emissions units is permitted and entities can discharge up to 5% of their liability using units from the following vintage year. The final date for surrendering units is 15 December following each financial year. An entity's emissions number will be increased in the subsequent financial year if it does not surrender sufficient units (to 'make good' the shortfall). It will also be required to pay an administrative penalty. On the other hand, an entity's emissions number will be reduced in the subsequent financial year if it surrenders excess units.

Legislative backing for the **National Registry of Emissions Units** (Registry) is provided in Part 7. All liable entities and auction participants must have an account in the Registry, in which Kyoto units and Australian emissions units will be held. The mechanical details about account opening procedures and unit transfers will be contained in regulations.

Parts 8 and 9 provide the foundation for assistance via the issuance of free Australian emissions units to **emissions-intensive trade-exposed** (EITE) activities and **coal-fired electricity generators** respectively.

The issuance of free Australian emissions units to **reforestation activities** that have opted-in to the CPRS is covered in Part 10, while Part 11 sets out the circumstances in which free Australian emissions units will be issued for **synthetic greenhouse gas destruction**.

Part 13 describes when Australian emissions units issued as a result of **fraudulent conduct** must be relinquished to the Government. Part 15 deals with the process for relinquishment, which can also be required under the EITE assistance program and the reforestation provisions.

The **voluntary cancellation** of Australian emissions units, Kyoto units and non-Kyoto international emissions units is permitted under Part 14. Voluntary cancellation allows entities to contribute to stronger national climate change mitigation, regardless of whether they have obligations under the CPRS, by reducing the supply of units.

Parts 17 to 23 contain comprehensive **compliance and enforcement** provisions, dealing with information-gathering powers, record-keeping requirements, monitoring powers, liability of executive officers of bodies corporate, civil penalty orders and criminal offences.

Part 24 sets out which decisions of delegates of the Authority are subject to **administrative review** by the Administrative Appeals Tribunal.

The periodic **independent reviews** of the CPRS itself will be established under Part 25.

The Government has also provided extensive commentary on the positions set out in the Bill (available [here](#)).

## Bill provides further detail on key issues

Minister Penny Wong has noted that the Bill does not present any significant changes from the policy positions set out in the White Paper. However, in several important areas the Bill expands upon information provided in the White Paper.

### **National Greenhouse and Energy Reporting Act (NGER Act)**

The NGER Act is central to the reporting and liability obligations under the Bill. Liable entities under the CPRS will report the emissions for which they are liable through the NGER Act. Definitions such as 'operational control', 'greenhouse gas' and 'facility' will have the same meaning as in the NGER Act (see section 5 of the Bill). However, the Bill does create a number of exceptions relating to liability transfer certificates, which allow the transfer of both liability under the Bill (discussed in more detail below) and transfer of reporting obligations under the NGER Act.

The Bill applies to 'persons' not just constitutional corporations, and as such the NGER Act will be amended to require those liable entities that are not currently reporting under the NGER Act to do so.

### **Transferring liability for emissions**

**Liability transfer certificates:** The Bill allows liability for emissions to be transferred between entities via a system of liability transfer certificates. Certificates can be issued in two situations:

- Within a corporate group: A liability transfer certificate will enable the transfer of CPRS liability from the controlling corporation to another member of the controlling corporation's corporate group. This will be particularly useful in situations where placing CPRS obligations on the controlling corporation would impair the pass through of carbon costs in existing contracts.
- To an entity with financial control: Liability may be transferred from the controlling corporation to an entity that has financial control of the facility.

All reporting obligations under the NGER Act (including reporting of greenhouse gas emissions, energy production and energy consumption data), in relation to the facility for which a liability transfer certificate is issued, will be transferred to the holder of the liability transfer certificate. (See Part 3, Division 6 of the Bill.)

**Obligation transfer numbers (OTN):** This is a mechanism designed to manage CPRS obligations between upstream fuel suppliers and direct emitters so as to avoid double-counting of emissions and gaps in coverage. It allows CPRS obligations to be transferred from upstream suppliers of fuels and synthetic greenhouse gases to intermediate suppliers and end users. If an entity quotes a valid OTN to an upstream supplier, the supplier is relieved of liability for the relevant supply, and the potential liability is transferred to the entity that quoted the OTN. (See Part 3, Division 5 of the Bill.)

## **Use of international units for compliance**

The types of international emissions units that entities will be able to use for compliance with the CPRS remain as set out in the White Paper, and there will be no limit on the number of these units that can be used.

The Government has clearly signalled its intention to pursue linking opportunities with other emissions trading schemes by allowing the Government to prescribe non-Kyoto international emissions units, which will then be eligible for surrender under the CPRS. For example, if a bilateral link is established with the New Zealand emissions trading scheme, New Zealand units may be specified as being able to be used for compliance under the CPRS. The Bill also enables the Government to add to the types of Kyoto units that are eligible for surrender. (See definition of 'eligible international emissions unit' in section 5 and section 129 of the Bill.)

## **Enforcement regime and anti-avoidance provisions**

The Authority has a range of powers to gather information and request civil penalty orders for breaches of the Bill. Directors and officers of a company that has breached the law may also be fined (see Part 20 of the Bill). Breaches of some provisions will be criminal offences, punishable by up to 10 years in jail. If the criminal offence of fraudulent conduct was related to the issue of Australian emissions units, the offender may be required to relinquish those units (see Part 13 of the Bill).

The Bill also contains anti-avoidance provisions relating to the exemptions from liability for small facilities (generally, those emitting less than 25,000 tonnes of CO<sub>2</sub> equivalent a year). These are intended to prevent entities from avoiding CPRS liability by taking artificial measures to ensure their facilities are under this threshold. (See section 23 of the Bill.)

## **Information still to come**

The Government has flagged a number of issues on which additional provisions will be included in the Bill at a later stage, or which will be addressed in forthcoming regulations.

## **Further development of the Bill**

Areas on which further details will be included in the Bill at a later stage include forestry and the ability to take security over Australian emissions units.

**Forestry:** The government intends to introduce several additional forestry provisions, including:

- definitions of 'forestry right' and 'carbon sequestration right';
- criteria for declaring a project to be an 'eligible reforestation project'; and
- criteria applying to a reforestation project on land granted under Commonwealth, State or Territory land rights legislation (or held for the benefit of Aboriginal peoples or Torres Strait Islanders under Commonwealth, State or Territory legislation), and land subject to native title rights. (See Part 10 of the Bill.)

**Security:** It is intended that an Australian emissions unit will be personal property. The Government has flagged that in the coming months it will further consider the mechanisms for taking security over these units. (See Part 4, Division 2, section 94 of the Bill.)

### **Information to be provided in regulations**

There is a significant amount of detail which will only be provided in the regulations, due to be released for public comment in June 2009. This includes:

- **Caps:** Detailed scheme cap numbers for each relevant financial year will be provided in the regulations. (The Government intends that these be consistent with the 2020 and 2050 national emissions targets.) The Minister is required to take all reasonable steps to ensure that regulations are made to set the scheme caps within the range specified for the relevant year. (See Part 1, sections 14-15 of the Bill.)
- **EITE assistance:** Part 8 of the Bill provides for the EITE assistance program to be created by the regulations. The regulations will set out the Government's decisions relating to the eligibility of activities and the allocative baselines for eligible activities. Regulations will also set out the rate at which assistance will be reduced.
- **Kyoto units:** The regulations are to provide the detail for the administration of the Registry as it relates to Kyoto units. The regulations may prevent, restrict or limit the transfer of Kyoto units from a Registry account to a foreign or voluntary cancellation account or the transfer of Kyoto units from a foreign account to a Registry account (for the purposes of giving effect to the Kyoto Protocol rules). Regulations may also be made detailing arrangements for the banking of Kyoto units after the end of the first commitment period of the Kyoto Protocol. (See Part 4, Division 3 of the Bill.)

### **What should companies do now?**

Although the legislation is not yet final, entities that are likely to have liability under the CPRS should read the relevant sections of the Bill and commentary, and raise any concerns in submissions to the Government.

If you would like our assistance in considering the potential implications for your business or drafting a submission, please contact us.