



**Australian Government**  

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**Department of Climate Change**

SUMMARY  
KEY CHANGES TO THE CARBON POLLUTION REDUCTION  
SCHEME LEGISLATION

May 2009

## INTRODUCTION

An exposure draft of the core Carbon Pollution Reduction Scheme (CPRS) bills was released for public comment on 10 March 2009. The Government revised the legislation having carefully considered feedback from stakeholders on the draft bills and the impact of the global recession.

The most substantial changes, relating to the phased introduction of the CPRS, national emissions reductions targets and assistance to emissions-intensive trade exposed industries were announced by the Prime Minister, Treasurer and Minister for Climate Change on 4 May 2009.

Another important change, relating to treatment of 'legacy waste' emissions from the waste sector, was announced by the Parliamentary Secretary for Climate Change on 14 May 2009.

Other changes set out below are mostly technical changes introduced in response to stakeholder comment on the draft bills.

## PHASED START

Obligations placed on liable entities will now be deferred by one year to 2011-12. However, a number of aspects of the CPRS will start before 2011-12. In particular:

- the Australian Climate Change Regulatory Authority (ACCRA) will be established 28 days after Royal Assent for the bills, to give it time to establish its systems and to provide information to assist industry prepare for compliance with the Scheme (no change from exposure draft)
- to provide certainty, scheme caps for 2012-13 to 2014-15 are to be set before 1 July 2010 – after the Copenhagen conference but well before the full commencement of the scheme (the exposure draft required caps to be set for the period 2010-12 to 2014-15)
- auctions for Australian emissions units will commence in 2010-11, for emissions units that can be used to meet obligations in the 2012-13 and following financial years (no change from exposure draft)
- from 1 July 2010 eligible reforestation projects will be able to earn Australian emissions units for carbon sequestration – ensuring that the CPRS will encourage action to reduce carbon pollution from that date (no change from exposure draft).

## KEY CHANGES TO CARBON POLLUTION REDUCTION SCHEME BILL

### Changes in dates

Several amendments in the legislation reflect the one-year deferral, including in the following provisions:

- eligible financial year is defined as a financial year beginning on 1 July 2011 or later, to ensure that surrender obligations do not commence before 2011-12 [*clause 5*]
- national scheme caps are no longer required for 2010-11 and 2011-12 [*clause 14(1)(a)*]
- vintage of the first Australian emissions units [*clause 85(1)(a)*]
- periods in which Australian emissions units will be issued for a fixed charge [*clause 89(1)*]

- timing related to assistance for coal-fired electricity generation [*clauses 176, 183-187*]

### **Objects of the CPRS Bill (Part 1)**

The objects of the main bill now include the Government's commitment to reduce carbon pollution by 25 per cent of 2000 levels by 2020 if Australia is a party to a comprehensive international agreement that is capable of stabilising atmospheric concentrations of greenhouse gases at around 450 parts per million of carbon dioxide equivalence or lower [*clause 3(4)(a)*].

### **Scheme caps and gateways (Part 2)**

The scheme cap provisions have been amended to clearly focus on the constitutional basis of the legislation. The Minister must have regard to Australia's international obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol [*clause 14(5)(a)*]. The Minister may have regard to other matters listed in clauses 14(5)(b) and (c). Similar amendments have been made to provisions on Scheme gateways [*clause 15*].

There is also a new requirement to have a written statement tabled in Parliament outlining the Minister's reasons underlying the scheme caps and gateways set in regulations [*clauses 14(7) and 15(5)*]. The Government has made a commitment to include an explanation of how voluntary action to reduce emissions has been taken into account in the statements tabled in Parliament regarding caps and gateways.

### **Landfill facilities (Part 3, Division 2)**

Landfill facilities with emissions of 25,000 tonnes of carbon dioxide equivalence or more in a financial year will continue to be covered by the CPRS. However, while legacy emissions – emissions from waste deposited in landfill facilities before 1 July 2011 – will count towards this threshold, they will not attract liability to surrender emissions units [*clauses 20(8), 21(8), 22(7)*].

The provision which aims to avoid incentives for the displacement of waste from covered to uncovered facilities has been refined. A threshold of 10,000 tonnes will apply to a facility within a prescribed distance of another landfill facility accepting a similar classification of waste that exceeds the 25,000 tonne threshold [*clauses 20(13), 21(13), 22(12)*].

### **Joint Petroleum Development Area and Greater Sunrise Field (Part 3, Division 2)**

The bill provides for more certainty on the application of the CPRS to the Joint Petroleum Development Area and Greater Sunrise Field [*clause 11A*].

The Joint Petroleum Development Area is an agreed joint development area between Australia and Timor-Leste under the Timor Sea Treaty. The bill provides for regulations to specify the percentage of the emissions from facilities in the Joint Petroleum Development Area and the Greater Sunrise Field which are subject to the CPRS [*clauses 22A, 22B, 22C*].

### **Suppliers of fossil fuels (Part 3, Division 5)**

The application of the bill to suppliers of fossil fuels, including the approach to transferring liability from upstream suppliers of fuel to intermediate suppliers and users through the 'obligation transfer number', has been improved with considerable input from industry stakeholders [*various amendments in Part 3, Divisions 4 and 5*]. Key changes include:

- ‘supply’ has an expanded meaning, with ‘supply’ now taken to occur when a person makes an eligible upstream fuel available to another person for combustion at a facility, even if there is no change in ownership of the fuel [*clause 5A*]
- ‘supply’ is also taken to occur when ownership of the fuel or synthetic greenhouse gases is transferred even if there is not a physical delivery of the substance (the normal point at which ‘supply’ is taken to occur) [*clause 6(2)(b)*]
- clarification of OTN provisions to ensure that where eligible upstream fuel is supplied to a person who exports the fuel and the supplier has documentary evidence to show the fuel was exported, no liability arises for the potential emissions embodied in the fuel and an OTN does not need to be quoted [*clauses 33(4), 35(4)*]
- special provisions relating to supply of natural gas into and out of prescribed wholesale gas markets to reflect the operation of those markets [*clauses 33(1)(fa), 33(1)(b), 33A(1)(c), 34(1)(f), 37(1)(ba), 52(1)(aa), 53(1)(aa), 56(1)(aa), 56(2)(aa), 58(aa), 59(aa), 60(aa)*]
- OTN quotation is now mandatory when refinery grade propene and ethane (as well as liquid petroleum gas previously included in the exposure draft) are supplied as feedstocks to be consumed (otherwise than by way of combustion) in a chemical process to produce another product [*clauses 55(1)*]
- greater clarity and flexibility in the procedures for quotation and withdrawal of OTNs [*for example, clauses 51-51G, 64A, 64B*].

### **Liability transfer certificates (Part 3, Division 6)**

Liability transfer certificates provide flexibility for business by allowing liability for a particular facility to be transferred in certain circumstances, on the basis that the company with initial responsibility provides a guarantee that liabilities will be met. In response to industry feedback, refinements have been made to these provisions to cater for transfer of liability within joint ventures and to allow liability to be transferred to entities that have the economic benefit of a facility [*clause 81(1)*].

The provisions have also been amended to prevent liability being transferred to a foreign entity, both because of the difficulty with enforcement against foreign entities and to maintain consistency with greenhouse and energy reporting laws [*clause 73(b)*].

The Government has been consulting with industry on whether further amendments can be made to resolve some contract (carbon price) pass-through issues using the liability transfer certificate mechanism. The Government will continue to consult industry and legal experts on this issue and may introduce amendments should there be a satisfactory policy outcome.

### **Fixed-price emissions units in 2011-12 (Part 4, Division 2)**

As a transitional measure, an unlimited number of Australian emissions units will be available in 2011-12 at a fixed price of \$10 per tonne [*clause 89(1), item 1*].

These units will not be able to be banked for use in future years, relinquished or transferred [*clauses 89(5) and 89(6)*].

## **Fixed-price emissions units from 2012-13 to 2015-16 (Part 4, Division 2)**

The first year of the flexible price phase of the Scheme, 2012-13, will commence with a price cap that will be based on the original White Paper figure of \$40 in 2010-11, with 5 per real growth per annum calculated using actual CPI growth over 2010-11 and 2011-12 [*clause 89(1), item 2*].

The price cap for 2013-14 and following years will increase each year at 5 per cent real, calculated using actual CPI growth [*clause 89(1), items 3-5 and clause 89(7)*].

## **Free units issued in 2011-12 (Part 4, Division 2)**

As trading in emissions units with a 2011-12 vintage is likely to be limited, the Authority will, from 15 July 2011 until 1 December 2012, buy back units allocated for emissions-intensive trade-exposed activities and coal-fired electricity generation upon application by the registered holders of those units. Persons wishing to sell these units will receive \$10 for each unit, discounted by a factor specified in the regulations to reflect the present value of the units at the time they are sold back. [*clause 103B*]

These units:

- can only be surrendered in relation to the 2011-12 financial year [*clause 129(5a)*]
- there is no carry-over of these units (in the form of an ‘excess surrender number’) if an excess number are surrendered for 2011-12 [*clause 143(3)*]
- must be cancelled by the Authority if they have not been surrendered at the end of 15 December 2012 [*clause 103A*]
- cannot be voluntarily cancelled (the same applies to all units with a vintage of 2011-12) [*clause 282(2A)*]

## **Kyoto units (Part 4, Division 3)**

Kyoto units and non-Kyoto units held in the Australian National Registry will be treated as personal property for the limited purpose of facilitating the transmission or disposition of these units in situations of bankruptcy, external administration and death. In these situations the transmission procedures are the same as for Australian emissions units [*clauses 116B, 116C, 122A, 122B*].

## **Emissions-intensive trade-exposed industries (Part 8)**

Regulations will implement the Government’s commitment to provide additional units for emissions-intensive trade-exposed through a Global Recession Buffer for the first five years of the Scheme. These regulations can be made under clause 167.

A new provision will empower the Minister to obtain information from companies to use in future assessment of emissions-intensive trade-exposed activities [*clause 173A*], with non-compliance leading to forgoing of assistance for a period of two years [*clause 173B*].

## **Coal-fired electricity generation (Part 9)**

A number of changes have been made to timing limits for various processes, including an application for assistance [*clauses 177, 180*] and the submission about windfall gain [*clauses 185, 186*].

To provide greater certainty about the operation of the power system reliability test, new provisions will allow a person who owns, controls or operates a generation complex to apply to the appropriate

energy market operator for a certification to the effect that a reduction in the complex's nameplate rating, or a cessation of its registration, would pass the power system reliability test [*clauses 189A, 189B*].

## **Reforestation (Part 10)**

As a consequential change related to the introduction of fixed price emissions units, the reforestation provisions ensure that reforestation projects earn full-value units, rather than the \$10 units used in 2011-12 [*clause 191(2A)*].

In response to stakeholder comments, the Government proposes to introduce further amendments to the reforestation provisions. The key changes will include:

- to allow reforestation projects over multiple (instead of single) land titles – this will allow larger entities to manage forests across different geographical locations in order to reduce some forms of risk, for example, from natural events such as fire
- to enable projects to be declared 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
- to allow a group of persons to be scheme participants – this will allow for participation by a greater range of entities, for example, farmers who might own land in partnership with other family members
- to allow the carbon sequestration right holder (the person who receives scheme units) to transfer scheme liabilities (such as reporting requirements or relinquishment obligations) to another entity, with the agreement of the Authority – this will enable a broader range of legal and commercial arrangements for reforestation projects
- to convert the forest maintenance obligation from a positive to a restrictive obligation – requiring all persons with an interest in the land (not just the forestry right holder) to ensure that long-term forest carbon stores are not reduced, and removing the obligation on landowners to re-establish the forest unless they were responsible for breaching the conditions of forest maintenance obligation. This approach reduces the risk to landowners of allowing reforestation projects on their land.
- to allow for forests to transition from existing climate change mitigation schemes, for example the NSW Government's Greenhouse Gas Reduction Scheme.

## **Enforcement**

Enforcement provisions have been refined. Penalties have been increased in some cases and reduced in others to more closely tailor the penalty to the nature of the offence (see Attachment).

There is greater flexibility in some provisions, for example:

- the Authority will be able to extend the deadline for surrendering emissions units in the event that liable entities cannot gain computer access to the Authority in the period shortly before the deadline of 15 December due to a fault or malfunction in a computer system under the control of the Authority or a telecommunications failure or malfunction [*clause 143A*]
- the Authority will have discretion to remit late payment penalty (but not the administrative penalty for the breach of the surrender obligation) in special circumstances, such as when the person did not contribute to the delay in payment or contributed to the delay but has taken reasonable steps to mitigate the causes of the delay [*clause 288(2)*].

More detail has been included in the provisions relating to liability of executive officers of corporate bodies, to ensure that the standards of negligence and recklessness are appropriate [*clauses 324(2) and (3)*].

### **Independent reviews (Part 25)**

In order to provide additional certainty, provisions relating to emissions-intensive trade-exposed assistance now include more detail, including matters that would be considered in the five-yearly independent reviews of assistance [*clause 353*].

Appointment to the expert advisory committees is now less restrictive – a person would be ineligible only if he or she is a director, officer or employee of a liable entity in the financial year in which the appointment is made [*clause 360(5)*].

### **Other changes**

Additional modifications of a technical nature or consequential to changes described above were made in clauses 3(5), 5, 5A, 6, 12, 23, 93, 98A, 103, 108, 110, 116, 116A, 129, 133, 135, 156 (deleted), 159, 262, 267A, 267B, 267C, 271, 278A-G, 280, 286, 287, 288, 293(8), 294(8), 306(1), 351(1), 378, and 382.

## **KEY CHANGES TO CARBON POLLUTION REDUCTION SCHEME (CONSEQUENTIAL AMENDMENTS) BILL 2009**

### **Commencement**

Clause 2 has been amended in light of the fact that the National Greenhouse and Energy Reporting Amendment Bill 2009 is currently before Parliament. If that Bill is passed and enacted before the Carbon Pollution Reduction (Consequential Amendments) Bill, then certain amendments in the latter bill will not be required.

### **Anti-Money Laundering and Counter-Terrorism Financing**

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is amended to ensure that intermediaries such as stockbrokers will be covered by that Act when buying or selling emissions units on behalf of others. These intermediaries will need to abide by the identity check and other obligations in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, as is already the case for financial products such as shares, insurance and bonds [*Schedule 1, items 1A-1C*].

### **Enforcement provisions**

Enforcement provisions have been updated in a number of respects:

A number of penalties have been altered and some new penalties have been introduced, as indicated in the attached table.

- New amendments to the *National Greenhouse and Energy Reporting Act 2007* (NGER Act), relating to liability of executive officers, have been included in the bill introduced on 14 May 2009 (the introduced bill) [*Schedule 1, items 118 and 188AC-188A*]. These provisions align with Part 20 of the Carbon Pollution Reduction Scheme Bill 2009.

- The exposure draft bill sought to amend the *Criminal Code Act 1995* to ensure that section 136.1 of that Act applies to false and misleading statements in CPRS applications. On further consideration, this amendment was not considered necessary and does not appear in the introduced bill.
- The NGER Act is to be amended to provide that a court may, rather than must, have regard to specified factors in determining a pecuniary penalty [*Schedule 1, item 188AA*]. Additional factors which the court may consider have also been added *Schedule 1, item 188AB*].

Transitional provisions have been inserted to clarify that some amendments only apply to proceedings instituted after the CPRS bills are enacted [*Schedule 1, items 224A, 224B*].

### **Definition of ‘activity’**

A ‘facility’ is defined (in both the CPRS Bill and the *National Greenhouse and Energy Reporting Act 2007*) by reference to ‘an activity or series of activities’ that involve greenhouse gas emissions (and for NGER purposes only, the production of energy or the consumption of energy). A broader definition of ‘activity’ has been adopted, to include storage, stockpiling and any other matter or thing, (in addition to solid waste, carbon capture and storage, which were included in the exposure draft bill) [*Schedule 1, item 110, emphasis added*].

The revised definition of ‘activity’ removes any doubt that actions such as the storage of solid waste in landfills, storage of carbon dioxide in geological formations, and stockpiling of substances such as coal, are in fact ‘activities’ and emissions resulting from those activities can therefore be covered by the Scheme.

### **‘Operational control’ test**

In general, an operational control test is used to allocate emissions obligations from covered facilities. The exposure draft bill did not address the situation in which operational control is evenly divided. The introduced bill does so, by providing that where a single legal entity does not have the greatest authority to make decisions for a facility and a single entity is not nominated as the liable entity, liability will be divided equally amongst the parties to that facility. This ensures that there is always a liable entity or entities for a covered facility [*Schedule 1, item 172*].

Changes to the exposure draft bill also ensure that a foreign entity cannot nominate, unless there is no Australian entity. This ensures that difficulties with enforcement against foreign entities are avoided where possible [*Schedule 1, item 172*].

The test of whether an entity has ‘operational control’ has been refined to maintain consistency with the *National Greenhouse and Energy Reporting Act 2007* [*Schedule 1, item 190*].

### **Registration and reporting requirements**

Changes have been made to the exposure draft bill to strengthen registration and reporting obligations. In particular, registration and reporting obligations now apply to holders of an Obligation Transfer Number (OTN) that are not liable entities, and to fuel suppliers that are not liable entities [*various provisions in Schedule 1, items 173-181*].

The exposure draft bill required persons manufacturing, importing or exporting synthetic greenhouse gases to provide annual reports in accordance with the regulations. The introduced bill provides for quarterly reports, in line with existing requirements under section 46 of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* [*Schedule 1, Item 217*].

## **Amendments to taxation provisions**

Refinements have been made to the taxation treatment of emissions units to provide additional flexibility to business and to make technical amendments. These refinements will have a minimal impact on revenue [*Schedule 2*].

## **Other changes**

In addition to the changes outlined above, a number of minor changes have been made to other provisions in the exposure draft bill. Most of these changes are minor drafting improvements, consequential changes to those outlined above or changes for consistency with other CPRS bills or existing legislation. Minor changes have been made to the following items in Schedule 1: 15A, 15B, 29, 34, 34B, 34C, 35, 64, 64A-64C, 64C, 65, 92, 95, 101, 103, 104, 109, 110A, 118-119B, 119C, 125, 125A, 126A, 131A, 136A, 136B, 136C, 171, 174A, 174C, 174F, 174G, 191B, 175A, 174B, 174D, 176, 181, 182-184, 193, 179, 180, 180A, 187, 191A, 194, 224, 224A, 224B and 227-235.

## **KEY CHANGES TO THE AUSTRALIAN CLIMATE CHANGE REGULATORY AUTHORITY BILL 2009**

### **Disclosure of information**

The introduced bill lists three additional bodies to which protected information may be disclosed: the Australian Energy Market Operator, Western Australia's Independent Market Operator and the Australian Energy Market Commission where the Chair of the Authority is satisfied that this will assist them to perform or exercise their functions or powers [*clause 48*].

In addition, some constraints have been placed on disclosure of information: disclosure of information is only permitted to State, Territory and foreign government bodies whose functions include a function that corresponds to a function of the Authority.

### **Other changes**

Minor amendments have been made to clauses 4 and 9.

Consistent with the main bill, the CPRS extends to the Joint Petroleum Development Area [*clause 8A*].

Clause 13 has been removed as it is unnecessary and inconsistent with usual drafting practice.

## Amendments to penalty provisions

Bill provision	Subject matter of offence	Maximum Penalties (Exposure Draft)	Maximum Penalties (introduced bill)	Rationale
Clause 50A, CPRS Bill	New offence - failure to notify change in name or address.	Not included in exposure draft.	100 penalty units (\$11,000) for individuals  500 penalty units (\$55,000) for bodies corporate	Ensures that the Authority and fuel suppliers can rely on the accuracy of the OTN Register at all times.
Clause 66A, CPRS Bill	New offences – unauthorised mandatory quotation of OTN.	Not included in exposure draft.	2,000 penalty units (\$220,000) for individuals  10,000 penalty units (\$1,100,000) for bodies corporate	Compliance with OTN obligations will be essential for the effective allocation of liability for emissions. The penalty level is consistent with those for other breaches relating to the use of OTNs.
Item 181, Schedule 1, Consequential Amendments Bill  (amending penalties in proposed sections 22A and 22B, NGER Act)	Reporting and record-keeping by liable entities.	400 penalty units for individuals (\$44,000)  2,000 penalty units for corporations (\$220,000)	2,000 for individuals (\$220,000)  10,000 penalty units (\$1,100,000) for bodies corporate	Under-reporting of emissions will seriously undermine the environmental integrity of the Scheme. A more substantial deterrent is needed to ensure accurate reporting and record-keeping. The penalty is same as civil penalties for the most serious breaches of the Scheme.
Item 181, Schedule 1,	New offence - reporting and record-keeping by holders of	Not included in exposure	2,000 penalty units (\$220,000) for individuals	The penalties align with those applied to

Consequential Amendments Bill  (introducing new proposed sections 22C to 22F, NGER Act)	obligation transfer numbers and fuel suppliers.	draft.	10,000 (\$1,100,000) for bodies corporate	liable entities (see above).
Item 181A, Schedule 1, Consequential Amendments Bill  (amending s.23(1), NGR Act)	Unlawful disclosure of information by government officials.	Not included in exposure draft.	120 penalty units (\$13,200), in addition to the existing maximum penalty of 2 years' imprisonment.	Aligns the bill with the penalties for similar offences in the Australian Climate Change Authority Bill 2009.
Item 187A , Schedule 1, Consequential Amendments Bill  (amending s.30(2), NGER Act)	Failure to comply with requirement for an external audit	Not included in exposure draft	A daily penalty of 100 penalty units (\$11,000) for continuing contraventions, instead of the current daily penalty of 10 penalty units (\$1,100)	A more substantial deterrent is needed to ensure compliance with directions concerning external audits.
Item 188, Schedule 1, Consequential Amendments Bill  (amending section 30,	Registration requirements for liable entities, OTN holders who are not liable entities and fuel suppliers who are not liable entities.  Reporting requirements for OTN holders who are not	Not included in exposure draft.	A daily penalty of 20 penalty units (\$2,200) for individuals in relation to continuing contraventions  100 penalty units (\$11,000) for bodies	Aligns with daily penalties in the Exposure Draft for a breach of reporting requirements by liable entities.

NGER Act)	liable entities and fuel suppliers who are not liable entities.		corporate	
Item 193A, Schedule 1, Consequential Amendments Bill  (amending s.61(3), NGER Act)	Failure to answer questions or produce documents to an authorised officer who has entered premises under the authority of a warrant.  (Note: an individual is excused from complying if the answer to the question or the production of the document might tend to incriminate the individual or expose the individual to a penalty).	Not included in exposure draft.	Imprisonment for 6 months or 30 penalty units (\$3,300), or both – instead of the current penalty of 10 penalty units (\$1,100)	A more substantial deterrent is needed to ensure that these investigative powers can be exercised effectively.
Item 193B, Schedule 1, Consequential Amendments Bill	Failure to provide all reasonable facilities and assistance for the effective exercise of powers by authorised officers entering premises under the authority of a warrant.	Not included in exposure draft.	30 penalty units (\$3,300), instead of the current penalty of 10 penalty units (\$1,100)	A more substantial deterrent is needed to ensure that these investigative powers can be exercised effectively.