

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869

Issued August 2009

© Lovegrove & Lord 2009



The Carbon Pollution Reduction Scheme Bill - A synopsis

THE BILL AND ITS CORE OBLIGATIONS

The Carbon Pollution Reduction Scheme Bill ("the Bill") aims to reduce Australia's greenhouse gas emissions to between 5% and 15% below 2000 levels by 2020. The scheme proposed by the Bill begins in 2011 and sets out the following core obligations to liable entities:

- (1) Liable entities are required to report the emissions to an Authority called the Australian Climate Change Regulatory Authority ("the Authority") once every year; and
- (2) Liable entities must surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the gas.

The Government remains committed to meeting its long-term target of a 60 per cent reduction in greenhouse gas emissions from 2000 levels by 2050.¹

The intended timeline for the above scheme is as follows:

- **2009**
 - **May**
 - Bills to enact Scheme introduced into Parliament
 - **June**
 - Government aims to achieve passage of the Bill through parliament
 - **June to October**
 - Central provisions of the Act establishing Carbon Pollution Reduction Scheme in force 28 days after Royal Assent
 - The Scheme Regulator is formally established
 - Stage 1 regulations and legislative instruments made and tabled in Parliament following passage of Bill
 - **November or December**
 - United Nations Climate change Conference in Copenhagen, Denmark
 - **Note:**
 - The Government has allocated up to \$200 million to the Climate Change Action Fund in 2009-10 to support businesses and community organisations that do not receive EITE assistance, but do have significant energy costs, to take action to reduce carbon pollution through energy efficiency before the scheme starts.
 - The \$200 million tranche of the Climate Change Action Fund for 2009-10 will include:

- \$20 million for a business information package to provide advice to businesses on how the CPRS will work and what impacts and opportunities may arise
- up to \$100 million for Early Action Energy Efficiency Strategies for Business, including energy audits and capital investment
- \$80 million for capital investment grants for businesses and community organisations

- **2010**

- The government announces:
 - Scheme caps for the first five years of the scheme;
 - Up to 10 years of scheme gateways;
 - Its approach for expanding the cap to accommodate increase in coverage; and
 - Further regulations and legislative instruments in relation to the scheme are tabled.
- Reforestation credits can be generated

- **2011**

- \$10 fixed price period commences
 - A one year fixed price phase will apply between 1 July 2011 and 30 June 2012. During the fixed price phase, each carbon pollution permit will cost \$10. From 1 July 2012, businesses covered by the scheme will need to purchase permits at the prevailing market price.
 - This initiative was undertaken by the Rudd government to help Australian companies manage the impact of the global recession.

- **2012**

- Full flexible price trading commences

HOW DOES IT WORK

The Government has introduced a Carbon Pollution Reduction Scheme based on a cap and trade scheme. A cap and trade scheme is a way of limiting greenhouse gas pollution, giving individuals and businesses incentives to reduce their emissions.

The Scheme works as follows:²

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

– STEP 1:

- The Government sets a total carbon cap for the Australian company.
- Emitters of greenhouse gases of over 25,000 tonnes need to acquire a carbon pollution permit for every tonne of greenhouse gas emitted.

– STEP 2:

- The quantity of emissions produced by firms will be monitored and audited by the Authority.

– STEP 3:

- At the end of each year, each liable firm/entity would need to surrender a carbon pollution permit for every tonne of emissions they produced in that year.
- The number of carbon pollution permits issued by the government in each year will be limited to the total carbon cap for the Australian economy.

– STEP 4:

- Firms compete to purchase the number of carbon pollution permits that they require. Firms that value carbon permits most highly will be prepared to pay most for them in auction. For other firms, it would be cheaper to reduce emissions than to buy permits.

PART 1 – OBJECTIVES

Part 1 of the Bill provides a simplified outline of the proposed Act and sets out the objects of the Act.

Essentially, the Act sets out that:

- (1) The Carbon Pollution Reduction Scheme (“the Scheme”) is to be administered by the Australian Climate Change Regulatory Authority;
- (2) Liable entities must report the emissions to the Authority once every year and also surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the gas;
- (3) Each of the following are eligible emissions units:
 - (a) Australian emissions units issued under the Act;
 - (b) certain Kyoto units;
 - (c) certain non-Kyoto international emissions units
- (4) Australian emissions units will be issued as the result of an auction, for a fixed charge, or for free;
- (5) A national scheme cap limits the total number of auctioned Australian emissions units;
- (6) Australian emissions units are transferable.

PART 2 – THE NATIONAL SCHEME CAP AND NATIONAL SCHEME GATEWAY

The regulations may declare that a quantity of greenhouse gas that has a carbon dioxide equivalence of a specified number of tonnes is the National Scheme Cap for the financial year.

The National Scheme Cap will:

- limit the amount of greenhouse gases that may be emitted by covered facilities in a financial year; and
- limit the total number of auctioned Australian emissions units.

The Cap must not be more than the upper bound of the National Scheme Gateway and must not be lower than the lower bound of the National Scheme Gateway. The upper and lower bounds of the National Scheme Gateway will be set by regulation.

The Government will announce the Caps to the end of five years or to the end of any existing international commitment period.

The Government will also announce up to 10 years of gateways beyond the minimum five years of announced Scheme Caps.

PART 3 – LIABLE ENTITIES AND OBLIGATION TRANSFER NUMBERS

Liable Entities

In this Act, a “person” is defined as an individual, a body corporate, a trust, a corporation sole, a body politic, or a local governing body.

Generally, liable entities are persons or facilities that:

- are responsible for the direct emission of greenhouse gases that exceed 25,000 tonnes of carbon dioxide equivalence;
- import or manufacture synthetic greenhouse gases that exceed 25,000 tonnes of carbon dioxide equivalence;
- import, produce or supply fuels which result in the emission of greenhouse gas;
- apply the fuel for its own use which result in the

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

emission of greenhouse gas.

A person can be responsible for greenhouse gas emitted from the operation of a facility because:

- (a) the person is a controlling corporation of a group, and a member of the group has operational control of the facility; or
- (b) the person is not a member of a controlling corporation's group, but has operational control of the facility; or
- (c) the person is the holder of a Liability Transfer Certificate in relation to the facility.

The definition of and the requirements for a Liability Transfer Certificate are set out in Sections 69 to 81 of this Part. Essentially, Liability Transfer Certificates will allow liability for a particular facility to be transferred from a controlling corporation to one of its subsidiaries, or from the entity with operational control over a facility to the entity with financial control over a facility.

Landfill Facilities

Landfill facilities are also liable entities unless the facility is within a prescribed distance of another landfill facility which accepts similar classifications of waste, in which case the landfill facility will escape liability only if it releases less than 10,000 tonnes of carbon dioxide equivalence a year.

Covered Emissions and Measurement of Emissions

The Scheme includes all greenhouse gases included under the Kyoto Protocol (eg carbon dioxide, methane, nitrous oxide, sulphur hexafluoride, hydrofluorocarbons, perfluorocarbons). Emissions from industrial processes, stationary energy, transport, waste, and fugitive emissions will also be covered under the Scheme.

Section 25 sets out how greenhouse gas emitted from the operation of a facility is to be measured.

Obligation Transfer Number

An Obligation Transfer Number (OTN) is a mechanism designed to manage Scheme obligations between upstream fuel suppliers and direct emitters to avoid double-counting of emissions.

A supplier of fuel who quotes the recipient's OTN will not be liable for the emission of carbon dioxide equivalence of

that supply.

An OTN holder who quotes its OTN in relation to a supply may be a liable entity.

Division 5 of Part 3 sets out administrative issues in relation to the OTN, including that an OTN is not transferable, how an OTN is issued, and how it may be surrendered or cancelled.

Sections 67 and 68 state that misusing an OTN or quoting a bogus OTN are subject to civil penalty provisions (which include pecuniary penalties).

PART 4 – EMISSIONS UNITS

Part 4 sets out that the Authority may issue Australian emissions unit as the result of an auction although some Australian emissions units may be issued free of charge or for a fixed charge.

Australian emissions units are deemed as personal property and are transmissible by assignment, will, and by devolution by operation of law.

Sections 83 to 103 set out the maximum number of Australian emissions units that may be issued along with how those units may be issued, identified, transferred, and auctioned.

Section 89 provides a table setting out the cost of a unit. The cost begins at \$40.00 per unit for the financial year 2010 – 2011, and will rise by 5% each year.

To own units, a person must have an account in the National Registry (which is a Registry established to track the transactions relating to the units). A unit cannot be issued to a person if the person does not have a Registry account.

The following units may also be issued to persons and entered into Registry accounts:

- (a) Kyoto units [see sections 104 to 116]; and
- (b) non-Kyoto international emissions units [see sections 117 to 123].

Kyoto units and non-Kyoto international emissions units are also transferable.

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

PART 5 – EMISSIONS NUMBER

If a person is a liable entity for an eligible financial year, the person will be prescribed a “Provisional Emissions Number” which will set out the total amount of units that a person may emit.

The person’s emissions number will increase if the person failed to surrender sufficient units for the previous financial year.

The person’s emissions number will be reduced if the person surrendered an excess number of eligible emissions units for the previous financial year.

The Authority may make and amend an advisory assessment of a person’s emissions number for a financial year.

PART 6 – SURRENDER OF ELIGIBLE EMISSIONS UNITS

If a person is the registered holder of one or more eligible emissions units, the person may, by electronic notice transmitted to the Authority, surrender any or all of those units at the end of 15 December of every year.

If a person surrenders none of its units, or surrenders units that are less than the units issued to the person, the person will have a Unit Shortfall for the financial year.

An administrative penalty is payable if a person has a Unit Shortfall for a financial year. The penalty is calculated in accordance with a formula set out in Section 133. Payment must be made at the end of 31 January in each year, failing which interest of 20% per annum or an interest rate prescribed in the regulations will be payable on the amount due.

The penalty may be refunded by the Commonwealth if the amount was overpaid. The amount may also be set-off by the Commonwealth if the Commonwealth owes an amount to the person.

If the person surrenders an excess number of eligible emissions units, the excess will reduce the person’s liability

for the next financial year.

* An Australian Emissions Units must not be surrendered in relation to an eligible financial year unless that eligible financial year is:

- (a) the vintage year of that unit;
- (b) an eligible financial year later than the vintage year of that unit; or
- (c) an eligible financial year immediately preceding the vintage year of that unit.

PART 7 – THE NATIONAL REGISTRY OF EMISSIONS UNITS

A National Registry of Emissions Units will be established to track the issuance, holding, transfer, surrender, cancellation, and retirement of emissions units under the Scheme. The Registry must contain the total of Australian emissions units in each account.

A person may apply to the Authority to open a Registry account in that person’s name. Having a Registry account will enable the person to own and surrender units.

A person may have two or more Registry accounts and may apply to the Authority to amend or close any of those accounts.

The Commonwealth may also have a Registry account.

The Registry may be rectified by either the Authority, or the Federal Court on the application of a person.

Sections 160 to 161 set out criminal penalties for:

- (a) making a false entry in the Registry. The penalty for this is 7 years imprisonment or 2,000 penalty units, or both; and
- (b) producing and tendering in evidence a document that purports to be a copy of or extract from an Entry in the Registry. The penalty for this is imprisonment for 12 months or 60 penalty units, or both.

Section 163 states that information in the Registry must not be used nor disclosed. Using or disclosing information, or aiding or procuring the use and disclosure of that information are subject to civil penalty provisions.



CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869

PART 8 – EMISSIONS-INTENSIVE TRADE-EXPOSED ASSISTANCE PROGRAM

The regulations may formulate a program to be known as the Emissions-Intensive Trade-Exposed Assistance Program (“EITE Assistance Program”) for the issue of free Australian emissions units in respect of activities that are taken to be emissions-intensive trade-exposed activities.

The EITE Assistance Program must provide that free Australian emissions units must not be issued to a person unless the person meets the requirements specified in the program and has a Registry account.

The EITE Assistance Program may also require a recipient of free Australian emissions units to:

- (a) relinquish units; and
- (b) comply with reporting or record-keeping requirements.

Failure to relinquish units will be subject to an administrative penalty.

Failure to comply with reporting or record-keeping requirements, or aiding or inducing the refusal to comply will be subject to civil penalties.

PART 9 – COAL-FIRED ELECTRICITY GENERATION

Assistance for Coal-fired Electricity Generation

This part sets out that free Australian emissions units may be issued to eligible coal-fired electricity generators.

A person must apply for the Authority to issue a certificate of eligibility for coal-fired generation assistance in respect of a generation asset. To obtain a certificate, the Authority must be satisfied that the generation asset or generation complex passes the Generation Asset Assistance Eligibility Test.

A “Generation Asset” is defined as a “generation complex” or a “generation complex project.”

A “Generation Complex” is defined as a “Generation Unit” or “a set of 2 or more generation units at the same location.”

A “Generation Unit” means a generator of electricity.

Windfall Gains Review

After three years of assistance, all generation assets in respect of which assistance is provided will be subject to windfall gains review. In the review, the Authority will assess whether the value of assistance delivered in respect of a given generation asset exceeds the impact of the Scheme on the value of that asset.

If a windfall gain is likely, the Authority may make a windfall gains declaration, empowering the Minister to withhold the final two years of assistance available in respect of that asset.

The making of a windfall gains declaration is subject to review by the Administrative Appeals Tribunal.

Power System Reliability Test

Assistance will not be provided to a generation asset if the generation asset does not pass the power system reliability test. The conditions that must be satisfied to pass the Power System Reliability Test are set out in Section 189(2). The test creates an incentive for generation assets to maintain their registered capacity in situations where the reduction of that capacity might cause, or compound, a breach of relevant power system reliability standards in that market.

PART 10 – REFORESTATION

Free Australian emissions units may be issued in relation to eligible reforestation projects. This assistance was created to create an incentive for reforestation.

A recognised Reforestation Entity must submit a reforestation report and apply for a Certificate of Reforestation in order to obtain free emissions units. The units will then be issued to the Reforestation Entity or to the holder of the Carbon Sequestration Right.

A Carbon Sequestration Right is defined in Section 240. Essentially, it is an exclusive legal right to benefit from the carbon in the trees for example, because they hold a lease, or own the land.

The Reforestation Entity is subject to obligations, including:
(a) the obligation to report on the project every 12 months

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

- for at least 5 years;
- (b) the obligation to relinquish units if it has been issued with too many units (eg because all or part of the forest is cleared and not re-established);
 - (c) the obligation to relinquish units because it no longer has the right to the carbon sequestered in the reforestation project (eg because the entity sold the land).

If the units are not relinquished, the Entity will become subject to a forest maintenance obligation which is an obligation to re-establish the forest if it has been cleared, or maintain an existing forest.

Forest maintenance obligations will be noted on land titles and details made publicly available to ensure that anyone who buys or deals with the land has notice of potential Scheme obligations.

Failure to comply with a forest maintenance obligation will be subject to civil penalties. The Federal Court may also, on application of the Authority, issue performance or restraining injunctions against a person to compel compliance with the obligation.

PART 11 – DESTRUCTION OF SYNTHETIC GREENHOUSE GASES

Certificate of Eligible Synthetic Greenhouse Gas Destruction

Free Australian emissions units may be issued in respect of the destruction of synthetic greenhouse gases.

A person may apply to the Authority to obtain a Certificate of Eligible Synthetic Greenhouse Gas Destruction. The Certificate may only be issued to either a:

- recognised Synthetic Greenhouse Gas Destruction Customer; or
- an operator of an approved synthetic greenhouse gas destruction facility.

The above will entitle the person to obtain free Australian emissions units for the purpose of destroying synthetic greenhouse gases.

Section 250 sets out the criteria for issuing the Certificate. The Certificate is not transferable. It must also set out the unit entitlement of the entity.

The synthetic greenhouse gas must be destroyed at an approved synthetic greenhouse gas destruction facility.

Recognition as a Synthetic Greenhouse Gas Destruction Customer

A company may apply to the Authority for recognition as a Synthetic Greenhouse Gas Destruction Customer.

Recognition will not be provided to a company unless the Authority is satisfied that the company is a fit and proper person, having regard to matters set out in section 256.

The recognition is not transferable, and may be cancelled or surrendered.

PART 12 – PUBLICATION OF INFORMATION

The Authority must keep a Liable Entities Public Information Database which must contain the following information:

- (a) names of liable entities;
- (b) emissions numbers of liable entities;
- (c) unit shortfalls (if any) of liable entities;
- (d) unpaid administrative penalties;
- (e) number of surrendered eligible emissions units;
- (f) number of voluntarily cancelled units;
- (g) information about auction results, including total auction proceeds and number of units issued as a result of auctions;
- (h) information about issue of free Australian emissions units

The Authority must publish on its website the free emissions units issued under the following programs:

- (a) the EITE Assistance Program;
- (b) the Coal-Fired Electricity Generation program;
- (c) Reforestation;
- (d) Destruction of Synthetic Greenhouse Gases.

The Authority must also publish on its website the following:

- (a) quarterly reports about the issue of free Australian emissions units;
- (b) information relating to the surrender of borrowed and banked eligible emissions units;
- (c) anything that is required under the Kyoto rules to be published;

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

(d) total emissions numbers and unit shortfalls.

PART 13 – FRAUDULENT CONDUCT

If a court convicts a person of an offence relating to fraudulent conduct and the issue of Australian emissions units is attributable to the commission of the offence, the court may order the person to relinquish a specified number of Australian emissions units.

The person is required to relinquish the units even if the person does not hold any Australian emissions units or is not the registered holder of the Australian emissions units required to be relinquished.

If the person does not relinquish the units, the person will be subject to an administrative penalty under section 287.

PART 14 – VOLUNTARY CANCELLATION OF EMISSIONS UNITS

If a person is the registered holder of Australian emissions units, Kyoto units, or non-Kyoto international emissions units, that person may by electronic notice, request the Authority to cancel any or all of those units.

PART 15 – RELINQUISHMENT OF AUSTRALIAN EMISSIONS UNITS

If a person is the registered holder of Australian emissions units, the person may, by electronic notice transmitted to the Authority, relinquish any or all of those units.

An administrative penalty is payable for non-compliance with a relinquishment requirement. The penalty is to be calculated in accordance with the formula in section 287(2). Payment must be made at the end of 30 days after the compliance deadline, failing which interest of 20% per annum or an interest rate prescribed in the regulations will be payable on the amount due.

The penalty may be refunded by the Commonwealth if the amount was overpaid. The amount may also be set-off by the Commonwealth if the Commonwealth owes an amount to the person.

The penalty will be treated as a debt due to the Commonwealth and may be recovered by the Authority by action in a court of competent jurisdiction.

PART 16 – NOTIFICATION OF SIGNIFICANT HOLDING OF AUSTRALIAN EMISSIONS UNITS

A controlling corporation of a group, or a non-group entity, must notify the Authority if it has a significant holding of Australian emissions units.

“Significant holding” is defined in section 293(7) and is essentially a percentage that is 5% or more calculated according to the following formula:

$$\left[\frac{\text{Total no. of Australian Emissions Units Held}}{\text{National Scheme Cap No. for the Vintage Year}} \right] \times 100$$

Once the entity becomes aware that it has a significant holding of Australian emissions units, the entity must, within 5 business days, give the Authority a written notice setting out the event and other additional information.

Failure to notify the Authority, or aiding or inducing the failure to notify the Authority are subject to civil penalties.

PART 17 – INFORMATION-GATHERING POWERS

The Authority may obtain information or documents from a person if the Authority believes on reasonable grounds that the person has information or documents relevant to the operation of this Act or the associated provisions.

The person must surrender the information or documents if required by the Authority, and failing to do so is subject to a civil penalty.

The Authority may also copy and retain possession of documents taken from a person.

A person is not excused from giving information or producing a document on the grounds that the information/document might incriminate the person or expose the person to a penalty. However, in the case of an individual, the information or document produced is not admissible in evidence against the individual in civil proceedings for the recovery of penalties not covered in this Act, or in criminal

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

proceedings other than proceedings for an offence against sections 137.1 or 137.2 of the *Criminal Code*.

PART 18 – RECORD-KEEPING REQUIREMENTS

The regulations may require a person to make a record of information and retain the record or a copy of the record for 5 years after the making of the record.

The person must comply with the requirement. Failure to comply with the requirement, or aiding and inducing contravention of the requirement are subject to civil penalties.

Relevant information that must be recorded include:

- quotation of Obligation Transfer Numbers by recipients of fuel; and
- rejection of quotation of Obligation Transfer Numbers.

PART 19 – MONITORING POWERS

The Authority may appoint an inspector who will be empowered to enter premises for the purpose of:

- (a) determining whether this Act or the associated provisions have been complied with; and
- (b) substantiating information provided under this Act or the associated provisions.

Entry must be with consent of the occupier of the premises or under a monitoring warrant. This consent may be withdrawn by the occupier.

The inspector may be assisted by other persons if that assistance is necessary and reasonable.

The inspector's powers include the following:

- the power to inspect the premises and any object in the premises;
- the power to retain equipment for up to 24 hours;
- the power to ask questions and seek production of documents.

If a person fails to answer the questions and produce the documents required by the inspector, the person commits an offence and faces a penalty of imprisonment for 12 months.

PART 20 – LIABILITY OF EXECUTIVE OFFICERS OF BODIES CORPORATE

If a body corporate contravenes a civil penalty provision; and

- (a) an executive officer of the body corporate knew that, or was reckless or negligent as to whether, the contravention would occur; and
- (b) the officer was in a position to influence the conduct of the body corporate in relation to the contravention; and
- (c) the officer failed to take all reasonable steps to prevent the contravention; then

the officer contravenes this section and is liable to a civil penalty.

Section 325 sets out what the Federal Court may have regard to in determining whether the executive officer failed to take reasonable steps to prevent the contravention.

PART 21 – CIVIL PENALTY ORDERS

Overview

Part 21 sets out that pecuniary penalties are payable for contraventions of the Act which include the following:

- quoting a bogus Obligation Transfer Number;
- using and disclosing information from the Registry;
- failing to comply with reporting or record-keeping obligations under the Act;
- failure to notify the Authority of a significant holding of Australian emissions units, etc.

The Federal Court may order a person to pay a pecuniary penalty (known as a Civil Penalty Order) under the Act if satisfied that the person contravened a civil penalty provision. The penalty is a civil debt payable to the Commonwealth which may therefore be enforced as if it were an order made in civil proceedings against a person to recover a debt.

Part 21 provides the matters that the Federal Court must have regard to in determining the pecuniary penalty. It also sets out the maximum number of penalty units for certain contraventions.

Time Limit

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

Proceedings for a civil penalty order may be started no later than 6 years after the contravention.

Proceedings

Section 332 to 333 state that, if a person has been criminally convicted of an offence that involves conduct which is substantially the same as the conduct constituting the contravention of a civil penalty provisions:

- the Federal Court must not make a Civil Penalty Order against that person for contravention of a civil penalty provision; and
- if proceedings for a Civil Penalty Order have been commenced against a person, those proceedings are stayed. The proceedings for the Order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the Order are dismissed.

Although civil proceedings cannot be commenced when a criminal proceeding is on foot against a person, the flipside applies – i.e. criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person.

PART 22 – OFFENCES RELATING TO ADMINISTRATIVE PENALTIES

If a body corporate or trust has an existing liability to pay an administrative penalty, section 340 makes it an offence for a person to enter into a scheme with the intention, knowledge, or belief that doing so will enable the body corporate or trust to avoid paying the existing liability.

Section 341 makes it an offence for a person to enter into a scheme with the intention, knowledge, or belief that doing so will enable the body corporate or trust to avoid paying a future liability under the Act.

The penalties for both contraventions are 10 years imprisonment or 10,000 penalty units, or both.

The following contraventions will result in liabilities by the body corporate or trust to pay administrative penalties under the Act:

- having a unit shortfall;
- failing to relinquish a number of Australian emissions

units under the Emissions-Intensive Trade-Exposed Assistance Program.

PART 23 – ENFORCEABLE UNDERTAKINGS

A person may give the Authority an enforceable undertaking to do the following:

- take specified action in order to comply with the Act or its associated provisions;
- refrain from taking specified action;
- take specified action directed towards ensuring that the person does not contravene this Act, or is unlikely to contravene this Act or the associated provisions, in the future.

If a person has given an undertaking to the Authority and has breached the undertaking, the Authority may apply to the Federal Court for any or all of the following orders:

- order directing the person to comply with the undertaking;
- order directing the person to pay to the Authority an amount up to the amount of any financial benefit that the person has obtained directly or indirectly that is reasonably attributable to the breach;
- any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order the court considers appropriate.

PART 24 – REVIEW OF DECISIONS

Certain decisions of the delegates of the Authority may be reviewed internally by the Authority on the application of a person. Once the review is completed and the decision is reconsidered, the Authority must give written notice to the applicant stating its decision. If the Authority has not provided a decision within 90 days of receiving the application, the Authority is taken to have affirmed the original decision.

The Administrative Appeals Tribunal may review decisions of the Authority, including matters set out in section 346, and any decision the Authority has made affirming, revoking, or varying a decision made by its delegates.

Section 351 states that proceedings for the recovery of an administrative penalty may be stayed if

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

- the Authority notifies the applicant for reconsideration of the Authority's decision on the reconsideration; or
- the review of the Administrative Appeals Tribunal has been finalised.

PART 25 – INDEPENDENT REVIEWS

An Expert Advisory Committee is established to review the following:

- (a) the effectiveness and efficiency of the Carbon Pollution Reduction Scheme;
- (b) whether national targets relating to emissions of greenhouse gases should be changed or extended;
- (c) regulations that should be made for the national scheme cap;
- (d) regulations that should be made for the national scheme gateway;
- (e) policies and procedures that should be applied by the Authority in relation to the auctioning of Australian emissions units;
- (f) extent to which non-Australian emissions units should be able to be surrendered;
- (g) the extent to which a liable entity should be able to meet an obligation under section 132 by surrendering an Australian emissions unit;
- (h) the EITE Assistance Program;
- (i) arrangement for the governance and administration of the Carbon Pollution Reduction Scheme including functions and powers of the Authority and Minister;
- (j) such other matters that relate to the Carbon Pollution Reduction Scheme as specified by the Minister.

The first review must be completed before the end of 30 June 2014 and subsequent reviews must be completed every 5 years. Reports of the review must be provided to the Minister which may contain recommendations to the Commonwealth Government. In formulating a recommendation that the Commonwealth Government must take particular action, the Committee must assess the costs and benefits of that action.

The Minister must, in turn, cause the report to be tabled in each House of Parliament.

*For more information, please contact Kim Lovegrove
Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email:*

kiml@llcc.com.au

***This is another publication from Lovegrove & Lord
For all the latest articles please visit our eLibrary at www.lovegroveandlord.com.au***

Division 4 of this Part sets out the procedure, the criteria which must be met in appointing members of the Expert Advisory Committee, the period for appointment of each member, and procedures that must be followed in making resolutions at meetings.

Division 4 also states that the Committee may be assisted by the Authority and any other department, agency or authority of the Commonwealth.

PART 26 – MISCELLANEOUS

Section 374 sets out further functions of the Authority that has not been covered under the Act.

Section 375 allows the Minister to delegate his or her functions to a secretary or a senior executive employee in the Department.

Section 379 states that the following people are not liable to an action or other proceeding for damages if the act or omission was done in good faith and in performance or exercise of any function or power under this Act:

- the Minister or his/her delegate;
- the Authority or an official or delegate of the Authority;
- a member of the Expert Advisory Committee.

Section 382 sets out alternative constitutional bases for this Act.

Section 383 states that if the operation of this Act or regulations would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.



CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869

REFERENCES

¹*“Carbon Pollution Reduction Scheme: support in managing the impact of the global recession”* Media release by Penny Wong (4 May 2009) accessible at: <http://www.environment.gov.au/minister/wong/2009/mr20090504a.html>

²*“Carbon Pollution Reduction Scheme: Green Paper Summary”* Published by the Department of Climate Change, July 2008. Accessible at: <http://www.climatechange.gov.au/greenpaper/summary/pubs/greenpaper-summary.pdf>