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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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AUSTRALIAN NATIONAL REGISTRY OF EMISSIONS UNITS BILL 2011

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REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Climate Change and Energy Efficiency,  
the Hon Greg Combet AM MP)

THIS MEMORANDUM REPLACES THE EXPLANATORY MEMORANDUM  
PRESENTED TO THE HOUSE OF REPRESENTATIVES ON 24 MARCH 2011



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# Glossary

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Administrator	Carbon Credits Administrator
ACCU	Australian carbon credit unit
CDM	Clean Development Mechanism
CFI	Carbon Farming Initiative
Consequential Amendments bill	Carbon Credits (Consequential Amendments) Bill 2011
JI	Joint Implementation
ITL	International Transaction Log
Main bill	Carbon Credits (Carbon Farming Initiative) Bill 2011
NGER Act	<i>National Greenhouse and Energy Reporting Act 2007</i>
Bill	Australian National Registry of Emissions Units Bill 2011
Registry	Australian National Registry of Emissions Units



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# ***General outline and financial impact***

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## **Rationale for the Australian National Registry of Emissions Units**

The Australian National Registry of Emissions Units (the Registry) is an electronic system which is used to ensure accurate accounting of the issuance, holding, transfer, acquisition, cancellation, retirement and carry-over of emissions units under the Kyoto Protocol.

The Registry was established under the Commonwealth's executive power to meet one of Australia's commitments under the Kyoto Protocol and does not currently have a legislative basis.

Since the Registry was opened in September 2009, organisations and individuals have been able to apply to open accounts and participate in the domestic and international trade of Kyoto units.

The Government intends to modify the Registry so that it can be used to track the location and ownership of units issued under the Carbon Farming Initiative (CFI), as well as meet ongoing obligations under the Kyoto Protocol. The Registry would be maintained by the Carbon Credits Administrator (the Administrator) of the CFI.

The main advantages of combining Kyoto Protocol and CFI functions in one registry are that it will avoid duplication in account opening and operating procedures, and keep implementation and transaction costs down. For example, CFI project proponents will be able to receive Australian carbon credit units (ACCUs), apply to have these exchanged for Kyoto units if eligible, and transfer the Kyoto units to an offshore purchaser through a single registry account, dealing with a single Administrator.

**Date of effect:** Sections 3 to 97 will come into effect at the same time as section 3 of the proposed Carbon Credits (Carbon Farming Initiative) Bill 2011. Sections 1 and 2 and any other sections will come into effect on the date that the bill receives the Royal Assent.

**Proposal announced:** The Department of Climate Change and Energy Efficiency (the Department) consulted with stakeholders on options for the CFI design from October 2010 to early February 2011.

The consultation process involved individual meetings and workshops in Canberra, Sydney, Adelaide, Melbourne, Perth, Brisbane, Darwin and some regional centres, as well as a period for formal submissions. Over 350 individuals attended meetings with the Department, representing almost 250 organisations.

A consultation paper on the proposed design of the scheme was released for public comment on 22 November 2010. The consultation paper included the proposal to adapt the existing registry to meet the needs of the CFI.

Approximately 280 submissions were received from a diverse range of stakeholders, including farmers, regional bodies and scientific organisations. Stakeholder feedback on registry proposals was broadly positive.

**Financial impact:** The total cost of the CFI is capped at \$45.6 million over four years, with the following profile: \$4.4 million in 2010-11, \$16.1 million in 2011-12, \$13.1 million in 2012-13 and \$11.9 million in 2013-14. This includes \$4 million to provide information about the scheme to land managers via Landcare.



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# **Chapter 1**

## ***Australian National Registry of Emissions Units***

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### **Outline of chapter**

1.1 This chapter outlines the purposes and functions of the Australian National Registry of Emissions Units (the Registry), the rules for opening and closing accounts in the Registry, and the different types of Registry accounts. The chapter also outlines the circumstances in which an entry in the Registry may be corrected or rectified and outlines general rules in relation to the Registry contained in Part 2 of the bill.

### **Context**

1.2 Efficient electronic registries are essential for the implementation of offsets schemes and the tracking of units which may be issued to and traded by a range of businesses and individuals.

1.3 Registries have been established for this purpose under the Kyoto Protocol Clean Development Mechanism (CDM), the NSW/ACT Greenhouse Gas Reduction Scheme, and the offsets module of the CO<sub>2</sub> Allowance Tracking System in the Regional Greenhouse Gas Initiative of the North-East and Mid-Atlantic States of the United States.

1.4 The Commonwealth Greenhouse Friendly initiative did not have an electronic registry, offset credits were tracked through records that were maintained manually and abatement providers were required to inform the administrator whenever they transferred their credits to a third party.

1.5 Australia established the Registry in order to meet its obligations under the Kyoto Protocol. In December 2008, the Registry was linked to the international Kyoto registry system, a network including other national registries and the CDM registry. Under the bill, this Registry will serve as:

- a registry for Australian carbon credit units (ACCUs) under the Carbon Credits (Carbon Farming Initiative) Bill 2011 (the main bill); and
- Australia's national registry for Kyoto units.

## Detailed explanation of new law

### Registry

1.6 A simplified outline of the Registry provisions is provided at the beginning of Part 2 [*Part 2, Division 1, clause 8*].

1.7 The Registry will have a dual function: to act as a registry for ACCUs and Australia's national registry for Kyoto units [*Part 2, Division 2, clause 9*].

1.8 The Registry must be maintained by electronic means by the Administrator. An electronic registry provides an efficient, reliable and low-cost method for tracking a large number of units held and traded by a large number of scheme participants. This requirement is also consistent with Kyoto rules, which require that a Party's national registry be in the form of a 'standardized electronic database which contains, inter alia, common data elements relevant to the issuance, holding, transfer, acquisition, cancellation and retirement of Kyoto units' [*Part 2, Division 2, clause 9(2) and (3)*].

### Registry accounts

1.9 The rules in relation to Registry accounts are contained in Division 3 of Part 2 of the bill. A person must have a Registry account in order to hold ACCUs, Kyoto units, or non-Kyoto international emission units, as these units only exist within the electronic registry system.

#### *General rules*

1.10 The Administrator will open registry accounts in the name of a particular person [*Part 2, Division 3, clause 10(2)*].

1.11 Each Registry account will be identified by a unique number, known as the 'account number' of the Registry account [*Part 2, Division 3, clause 10(4)*].

1.12 A person may have more than one Registry account [*Part 2, Division 3, clause 10(5)*].

1.13 Entries in registry accounts must be made in accordance with the main bill (for ACCUs) [*Part 2, Division 4, clause 17(1)*] or this bill (for Kyoto units and non-Kyoto international emissions units) [*Part 2, Division 4, clause 17(2) and (3)*].

#### *Opening accounts — general*

1.14 The specific process for opening registry accounts will be detailed in the regulations. The regulations may make provisions for:

- the form of a request to open an account;
- any information that should accompany this request including how the information should be verified;

- any applicable fee; and
- procedures to enable the Administrator to require further information before proceeding with consideration of the request.

*[Part 2, Division 3, clause 10(6)]*

1.15 Regulations for registry accounts may provide for the Administrator to require a person who requests a new Registry account to provide further information relating to their application *[Part 2, Division 3, clause 10(6)(f)(i)]*.

1.16 The regulations may also provide that if the person fails to provide this information, the Administrator may refuse to consider the request or take any action to open the account *[Part 2, Division 3, clause 10(6)(f)(ii)]*.

1.17 Safeguards against the unreasonable exercise of the power to require information are described in chapter 6 of this explanatory memorandum.

#### ***Closure of accounts — voluntary closure***

- 1.18 The Administrator must close a person’s Registry account if:
- the person requests the Administrator to close the account; and
  - there are no entries for any ACCUs, Kyoto units and non-Kyoto international emissions units in the account.

*[Part 2, Division 3, clause 15]*

1.19 Unilateral closure of accounts by the Administrator in response to contraventions of Registry requirements is covered in chapter 5 of this explanatory memorandum.

#### ***Change of a person’s name***

1.20 If a Registry account holder changes their name, they can apply in writing to the Administrator to have their name changed in the Registry *[Part 2, Division 5, clause 18]*.

#### ***Opening Commonwealth Registry accounts***

1.21 This section outlines Australia’s obligations under the Kyoto rules regarding the opening of Commonwealth Registry accounts. The rules do not apply to companies or individuals.

1.22 The Kyoto rules stipulate that each Party’s registry must contain several specific types of accounts to facilitate the tracking of units and registry transactions by the International Transaction Log (ITL). The mandatory account types for each national registry are:

- holding account(s): each registry must contain at least one account for holding the Party's Kyoto Protocol units. If, like Australia has, the Party has authorised legal entities to participate in the Kyoto mechanisms, then the registry must also contain a separate holding account for each legal entity;
- a retirement account into which the Party must transfer units that it intends to use to meet its Kyoto target;
- cancellation accounts: each registry must contain four distinct types of cancellation accounts:
  - a net source cancellation account that is reserved for units that the Party cancels to account for net emissions for forestry activities under Articles 3.3 and 3.4 of the Kyoto Protocol;
  - a non-compliance cancellation account reserved for transfer of units when the Compliance Committee determines that the Party is in non-compliance with its Article 3.1 commitment under the Kyoto Protocol;
  - a voluntary cancellation account for voluntary cancellation of units not required by the Kyoto Protocol rules; and
  - a mandatory cancellation account for cancellation of invalid units.
- replacement accounts: each registry must also contain at least four replacement accounts:
  - a temporary certified emission reduction replacement account to receive units used to replace expired temporary certified emission reductions;
  - a long-term certified emission reduction replacement account to receive units used to replace expired long-term certified emission reductions;
  - a long-term certified emission reduction replacement account to receive units used to account for emissions where a long-term certified emission reduction has been subject to a reversal of storage; and
  - a long-term certified emission reduction replacement account to receive units used to replace long-term certified emission reductions for which a required certification report has not been submitted.

1.23 It is anticipated that the regulations will provide for Commonwealth Registry accounts with designations for each of the mandatory accounts. In the event that the Kyoto rules require a further

mandatory account at some point in the future, the regulations may provide for it [*Part 2, Division 3, clause 12*].

1.24 If the regulations provide for it, new Commonwealth Registry accounts can be opened at the direction of the Minister [*Part 2, Division 3, clause 13*].

1.25 Kyoto units that have been transferred to a retirement account, a cancellation account, or a replacement account cannot be transferred further. For example, a Party could only transfer a Kyoto unit to the retirement account if it intended to use that unit to meet its Kyoto target. It would undermine the compliance regime of the Kyoto Protocol if Kyoto units that had been retired could then be transferred for an additional use. Similarly, Kyoto units transferred to a cancellation account are, for all intents and purposes, cancelled, and therefore cannot be transferred to a further account. Consistent with this, it is anticipated that the regulations will provide that Kyoto units in Commonwealth accounts designated as a retirement account, cancellation account, or replacement account, cannot be transferred [*Part 2, Division 3, clause 14*].

### **Continuation of existing Registry and accounts**

1.26 The bill provides for a smooth transition of the Registry from a non-legislative to legislative basis, ensuring minimal disruption for existing account holders.

1.27 The Registry established under the Commonwealth's executive power before the commencement of the legislation will continue in existence after commencement of the legislation [*Part 2, Division 2, clause 9*].

1.28 Registry accounts that exist immediately before commencement of the bill will be preserved following commencement. A person's Registry account and the units contained in it will be recognised under the bill when it commences. (See Item 19, Part 2, Schedule 1 of the Carbon Credits (Consequential Amendments) Bill (the Consequential Amendments bill).)

### **Correction of Registry**

#### *Clerical errors / obvious defects*

1.29 The Administrator may alter an entry in the Registry for the purposes of correcting a clerical error or obvious defect [*Part 2, Division 6, clause 19(1)(a)*]. Examples of clerical errors or obvious defects include a typographical error or an entry which is clearly incorrect *prima facie*. The purpose of the provision is to allow the Administrator to make a correction of an uncontroversial nature.

1.30 Correction of unauthorised entries in the Registry is covered by the chapter 5 of this explanatory memorandum.

***Kyoto units and non-Kyoto international emissions units***

1.31 The Administrator may also make such alterations to the Registry as the Administrator considers appropriate for the purposes of ensuring that the relevant provisions of the Kyoto rules or the relevant provisions of an international agreement, to the extent that the agreement relates to a non-Kyoto international emissions unit, are complied with *[Part 2, Division 6, clauses 20 and 21]*.

1.32 The Administrator may make the alterations as a result of a request by a person to alter the Registry, or on the Administrator's own initiative *[Part 2, Division 6, clause 20(2); Part 2, Division 6, clause 21(2)]*.

1.33 Where the Administrator alters the Registry under these provisions, the Administrator must publish a notice on the Administrator's website setting out the details of the alteration *[Part 2, Division 6, clause 20(3); Part 2, Division 6, clause 21(3)]*.

**Operation of the registry**

1.34 Many actions in relation to the Registry, such as the transfer of units, may be done through electronic means only. An electronic notice transmitted to the Administrator is defined in the bill *[Part 1, clause 5]*. Regulations may prescribe requirements in relation to the security and authenticity of notices transmitted to the Administrator, including identification checking processes and encryption of those processes *[Part 1, clause 5(2)]*. This is to give the Administrator the power to determine the level of encryption and identification checking required for different actions in order to maintain the integrity of the Registry.

1.35 If an electronic notice is transmitted to the Administrator it is taken to have been transmitted on the day on which the electronic communication is sent *[Part 1, clause 5(5)]*. For example, an email sent to the Administrator at 6:45 pm on Friday that waits on the server and is not downloaded until Monday morning will be taken as being received at 6:45 pm on Friday. This will provide certainty for the sender.

**Application and transitional provisions**

1.36 Transitional provisions relating to Commonwealth Registry accounts are included in Part 2 of Schedule 1 of the Consequential Amendments bill.

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## **Chapter 2**

### ***International units***

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#### **Outline of chapter**

2.1 This chapter outlines procedures and requirements relating to Kyoto units and non-Kyoto international units in the Australian National Registry of Emissions Units (the Registry).

#### **Context**

2.2 The Australian Government currently authorises legal entities to transfer and acquire Kyoto units using the existing Registry. This enables businesses and individuals to participate in trading of Kyoto Protocol units. In March 2011, over 40 accounts had been opened.

2.3 Internationally recognised emissions units can be used to link carbon offsets and carbon trading schemes by providing a common ‘currency’ of exchange. For example, project proponents under the Carbon Farming Initiative (CFI) will be able to exchange certain Australian carbon credit units (ACCU) for Kyoto units (assigned amount units and removal units) held in the Australian Government’s Registry account, and these in turn may be sold to purchasers in overseas carbon markets where there is demand for these units.

2.4 Provision for non-Kyoto international emissions units under the bill will make it possible to recognise units of another country or region, or units that may be established under an international agreement other than the Kyoto Protocol. This would provide additional opportunities for linking the CFI with other schemes.

#### **Detailed explanation of new law**

##### **Kyoto units**

2.5 The bill provides for the recognition in Australian legislation of the emissions units created under the Kyoto Protocol, and sets out how these units can be issued and transferred [*Part 3*]. The provisions relating to Kyoto units have been drafted to ensure the Australian legislation is consistent with the Kyoto Protocol rules.

##### ***The Kyoto rules***

2.6 The bill defines the Kyoto rules, in summary, to mean:

- the Kyoto Protocol;
- a decision of the Meeting of the Kyoto Parties;
- a standard or other instrument adopted by the Meeting of the Kyoto Parties for a purpose relating to:
  - the Kyoto Protocol; or
  - a decision of the Meeting of the Kyoto Parties; or
- a prescribed instrument that relates to:
  - the Kyoto Protocol; or
  - a decision of the Meeting of the Kyoto Parties.

*[Part 1, clause 4, definitions of 'Kyoto rules', 'Kyoto Protocol' and 'decision of the Meeting of the Kyoto Parties']*

2.7 Defining the Kyoto rules in this way allows for all the relevant elements of the Kyoto Protocol framework to be adopted for various purposes in the bill. The Kyoto Protocol provides the overarching framework, and relevant decisions made by the Meeting of the Kyoto Parties provide the detail. The bill defines the Kyoto rules to include the decisions made by the Meeting of the Kyoto Parties. For some purposes the Meeting of the Kyoto Parties has adopted a standard or other instrument which governs the implementation of the Kyoto Protocol. For example, the data exchange standards contain the technical specifications for the operation of the International Transaction Log (ITL) and Kyoto registries. Therefore, the definition of Kyoto rules also includes any such standards or instruments. The definition also allows for regulations to identify any other instruments that relate to the Kyoto Protocol or a decision of the Meeting of the Kyoto Parties to be considered part of the Kyoto rules.

2.8 The various elements of the definition of Kyoto rules are also intended to accommodate new and amended decisions, standards and instruments, as well as amendments to the Kyoto Protocol as in force for Australia. This is intended to allow the flexibility for the legislative framework to accommodate new changes to the Kyoto rules without necessarily requiring an amendment to the Act.

#### ***Kyoto units in the Australian Registry***

2.9 All Kyoto units are able to be held and transferred in the Australian Registry.

2.10 A Kyoto unit is defined for the purposes of the bill to mean 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 *[Part 1, clause 4, definition of 'Kyoto unit']*. The term 'certified emissions reduction' includes temporary certified emissions reduction and long-term certified emissions reduction units, which are



issued for forestry projects carried out in developing countries. Prescribing units in regulations allows for the recognition of a new type of Kyoto unit that could be adopted in the future without an amendment to the Act.

2.11 Each type of Kyoto unit is also defined in clause 4 (Definitions).

2.12 Assigned amount units are issued by an Annex I Party (a developed country with a target) to the Kyoto Protocol on the basis of its assigned amount pursuant to Articles 3.7 and 3.8 of the Kyoto Protocol. Australia has issued 2,957,579,143 assigned amount units, equivalent to its target of 108 per cent of 1990 emissions over the 5 year period 2008 to 2012.

2.13 Certified emission reductions are generated from Clean Development Mechanism (CDM) projects under Article 12 of the Kyoto Protocol. The CDM allows Annex I Parties such as Australia to implement emission reduction projects in developing countries to receive certified emission reductions and use these towards meeting their Kyoto target.

2.14 Unlike emission reductions from other types of clean development mechanism projects, those arising from afforestation or reforestation activities receive either temporary certified emission reductions or long-term certified emission reductions. These units have a limited life: fewer than two commitment periods for temporary certified emission reductions and between 20 and 60 years for long-term certified emission reductions.

2.15 Removal units are issued by an Annex I Party on the basis of land use, land-use change and forestry activities under Articles 3.3 and 3.4 of the Kyoto Protocol.

2.16 Emission reduction units are generated by Joint Implementation (JI) projects under Article 6 of the Kyoto Protocol, where an Annex I Party like Australia implements a project in the territory of another Annex I Party and counts the resulting emission reduction units towards meeting its own Kyoto target. Emission reduction units can be generated either in another Annex I Party or in Australia.

2.17 Definitions of the various Kyoto units that may be issued in developed countries (assigned amount units, removal units and emission reduction units) indicate that it is immaterial whether the unit was issued in or outside of Australia [*Part 1, clause 4, definition of 'assigned amount unit'; Part 1, clause 4, definition of 'removal unit'; Part 1, clause 4, definition of 'emission reduction unit'*]. This is included in the definition to clarify that the general rule in section 21(1)(b) of the *Acts Interpretation Act 1901* does not apply. That rule is that 'references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth...'

2.18 Kyoto units only exist within the international electronic registry system established by the Kyoto rules. Each Kyoto unit has a unique serial number within that electronic registry system that provides the relevant detail of the unit such as its type, commitment period, country of origin and its sequence number. The serial number allows for the unit to be tracked throughout the registry system. Consistent with the Kyoto rules, the entry for a Kyoto unit in a Registry account consists of its serial number [*Part 3, clause 30*].

## **Issue of units**

### ***Issue of Australia's assigned amount units***

2.19 Under the Kyoto rules, Australia must issue a quantity of assigned amount units equivalent to its initial assigned amount in its national registry, before any transaction takes place for the relevant commitment period.

2.20 The bill provides for the issue of Australia's assigned amount units for a commitment period. Under this provision, the Minister may direct the Administrator to issue to the Commonwealth, in accordance with the Kyoto rules, a specified number of assigned amount units for a specified commitment period. The Administrator must comply where such a direction is given and will issue an assigned amount unit by making an entry for the unit in the Commonwealth holding account for the relevant commitment period in the Registry [*Part 3, clause 31*].

2.21 Australia's assigned amount units for the first commitment period have been issued under the Commonwealth's executive power before the passing of the legislation. The bill states explicitly that it does not affect the validity of the issue of any such units [*Part 3, clause 31(5)*].

### ***Issue of Australia's removal units***

2.22 Under the Kyoto rules, removal units are issued in relation to net removals of greenhouse gases by afforestation, reforestation and deforestation activities. Australia has elected to report and publish annual estimates of emissions and removals from activities identified under Article 3.3 of the Kyoto Protocol. This decision is fixed for the first commitment period and means that Australia must issue or cancel units (as appropriate) for the relevant activities on an annual basis. If net removals do occur, it is expected that Australia will issue a quantity of removal units in its national registry equivalent to those removals.

2.23 The bill provides for the issue of Australia's removal units in the Registry [*Part 3, clause 32*]. Under this provision, the Minister may direct the Administrator to issue to the Commonwealth, in accordance with the Kyoto rules, a specified number of removal units. The Administrator must comply with any such direction. The Administrator will issue a removal

unit by making an entry for the unit in the Commonwealth holding account for the relevant commitment period in the Registry.

### ***Issue of Australia's emission reduction units***

2.24 JI allows Annex I Parties under the Kyoto Protocol to implement greenhouse gas reduction or removal projects in other Annex I Parties in order to generate emission reduction units. Emission reduction units are issued by converting specified assigned amount units or removal units into emission reduction units within the national registry of the host Party.

2.25 Through their National Authorities, Annex I Parties may approve private entities' participation in JI projects. Rules for the approval of JI projects will be the responsibility of Australia's National Authority (the Authority) for the CDM and JI. The Authority for the CDM and JI already exists, although its role is currently limited to the approval of Australian entities' participation in CDM and JI projects abroad.

2.26 With the implementation of the CFI under the Carbon Credits (Carbon Farming Initiative) Bill 2011 (the main bill), the Authority for the CDM and JI will also consider CFI projects for approval under the 'Track 1' JI procedure. If a CFI project has received the Authority's approval as a JI project, it will be eligible to generate and receive emission reduction units.

2.27 The intention is that CFI projects will be eligible for determination as a Track 1 JI project, subject to any requirements imposed by the Kyoto rules. For example, proponents would need to provide documentary evidence of approval of the project from another Annex I Party before emission reduction units could be created.

2.28 Once a project has been approved as a Track 1 project, a proponent could request conversion of either Kyoto ACCUs, assigned amount units or removal units for emission reduction units [*Part 3, clause 38*] (see also Part 11, Division 2, clause 157(1)(b)(iii) of the main bill). The specific process for converting Kyoto ACCUs, assigned amount units or removal units will be detailed in the regulations and will give effect to any applicable Kyoto rules. This will include technical specifications to ensure that conversions of Kyoto units that occur within the Australian registry comply with the data exchange standards required by the ITL.

## **Transfers of units**

### ***Transfers of Kyoto units***

2.29 The Kyoto rules allow for Kyoto units to be transferred within the international electronic registry system. The electronic registry system comprises: the various national registries of Kyoto Parties; the CDM registry in which certified emission reductions are issued; and the ITL that allows for inter-country transfers of units. Kyoto units can also be transferred between different accounts within national registries.

2.30 The bill defines the meaning of ‘transfer’ in relation to different types of transfers of Kyoto units [*Part 3, clause 33*]. The different types of transfers are described below. In each case a transfer of a Kyoto unit will consist of the removal of the entry of the unit from the initial account and an entry for the unit in the receiving account.

2.31 The bill provides for four different types of transfers between any of the account types in the national Registry (chapter 1 of this explanatory memorandum discusses the different types of Registry accounts). For example, a transfer can be: between holding accounts, including a Commonwealth holding account; between a holding account and a Commonwealth cancellation account; and between a Commonwealth holding account and a Commonwealth retirement account.

2.32 The Commonwealth will need to transfer Kyoto units between the Commonwealth accounts and the same transfer arrangements will apply. In this case the bill provides for the Minister to give a transfer instruction to the Administrator [*Part 3, clauses 34(5) and 35(7)*].

2.33 Regulations can be made for, or in relation to, giving effect to the Kyoto rules so far as the Kyoto rules relate to the issue of Kyoto units or the transfer of a Kyoto unit: from a Registry account to a foreign account; from a foreign account to a Registry account; or from a Registry account to a Commonwealth Registry account [*Part 3, clause 39(1)*]. This is intended to give full effect to the relevant Kyoto rules (as they exist from time to time), with regulations providing 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 [*Part 3, clause 39(2)*].

#### ***Domestic transfers of Kyoto units***

2.34 A holder of a Kyoto unit may instruct the Administrator to transfer the unit within the Australian Registry - this is considered a domestic transfer. The instruction to transfer will be by electronic notice and will set out the account number of the account where the Kyoto unit is held, the account number of the Registry account to which the unit is being transferred, and other information as specified in regulations. The regulations may specify additional information consistent with the administrative requirements of the Registry [*Part 3, clause 34*].

2.35 The Administrator must give effect to the transfer instruction unless doing so would breach any regulations made to give effect to the Kyoto rules or the management of the commitment period reserve or

regulations restricting transfers to Commonwealth Registry accounts [Part 3, clauses 34(3), 39, 41 and 44].

2.36 Unlike ACCUs, the bill does not generally confer the status of ‘personal property’ on Kyoto units. Nonetheless, Kyoto units held in the Australian Registry are to be treated as personal property for the limited purposes of *Bankruptcy Act 1966*, Chapter 5 of the *Corporations Act 2001* which deals with external administration, the law relating to wills, intestacy and deceased estates and any other prescribed purpose. This is in order to facilitate the transmission or disposition of Kyoto units by operation of law in situations of bankruptcy, external administration and death. In these situations the transmission procedures are the same as for ACCUs [Part 3, clauses 45, 46, and 47].

#### ***International transfers of Kyoto units***

2.37 Under the Kyoto rules, Australia must satisfy a set of eligibility requirements in order to participate in international emissions trading. If Australia does not satisfy the set of eligibility requirements, no transfers of Kyoto units will be allowed between the Australian Registry and a foreign registry, and the ITL will block any such transfers. Therefore, the ability to transfer Kyoto units from a foreign registry to an account within the Australian Registry and the ability to transfer Kyoto units from the Australian Registry to a foreign registry are dependent on Australia satisfying the eligibility requirements.

2.38 Under the bill, if satisfied that Australia is in compliance with those eligibility requirements, the Minister must make a written declaration to that effect [Part 3, clause 37(1)]. The Minister must, in writing, revoke such declaration if the Minister is no longer satisfied that Australia is in compliance with the requirements [Part 3, clause 37(2)]. Neither the instrument of declaration nor revocation is a legislative instrument [Part 3, clause 37(3)]. The policy reason for this is that the Minister does not have discretion as to whether Australia is eligible or not, so the declaration should not be subject to potential disallowance. The enforcement branch of the Compliance Committee under the Kyoto Protocol framework is responsible for determining whether or not an Annex I Party is in compliance with the eligibility requirements. In practice, the United Nations Climate Change Convention secretariat maintains a list of Parties that meet the eligibility requirements and of those Parties that have been suspended on its website.

2.39 Kyoto units can be transferred from an account in the Australian Registry to a foreign registry, referred to as an outgoing international transfer [Part 3, clause 35]. A transfer is only possible where there is a declaration in force that Australia has met the emissions trading eligibility requirements discussed above [Part 3, clauses 35(1) and 37].

2.40 A holder of a Kyoto unit can initiate an outgoing international transfer by instructing the Administrator by electronic notification to

transfer the Kyoto unit from the holder's Registry account to either a foreign account kept by another person or a foreign account kept by the holder [Part 3, clause 35(1)]. Similar to domestic transfers, the notification will need to specify the account number from which the units are to be transferred and any other information as specified in regulations.

2.41 The specific process for administering outgoing international transfers will be detailed in the regulations made to give effect to the Kyoto rules. For example, the regulations may require the Administrator to remove the entry for the unit from the relevant Registry account [Part 3, clause 35(4)]. This would be consistent with the normal process of the international registry system which is designed to ensure that units can be appropriately transferred and tracked between different accounts and national registries.

2.42 As noted above, the Administrator will not give effect to an outgoing international transfer if the transfer would breach regulations made for the purposes of the Kyoto rules [Part 3, clauses 39 and 35(3)(a)(i)].

2.43 Similarly, the Administrator will not give effect to an outgoing international transfer if the transfer would breach regulations made to manage the commitment period reserve [Part 3, clauses 41 and 35(3)(a)(ii)]. In order to address concerns that Annex I Parties could oversell units and subsequently be unable to meet their own Kyoto target, each Kyoto Party is required to hold a minimum level of Kyoto units in its national registry. This minimum level is called the 'commitment period reserve'. If the transfer of a Kyoto unit from the Registry would result in an infringement of the commitment period reserve, the ITL will reject the entire transfer and direct the Administrator to terminate the transfer. It is intended that regulations will outline the procedures and measures to manage Australia's commitment period reserve.

2.44 Kyoto units can be transferred from a foreign registry to an account in the Australian Registry, referred to as an incoming international transfer [Part 3, clause 36]. A transfer is only possible where there is a declaration in force that Australia has met the emissions trading eligibility requirements [Part 3, clauses 36(1) and 37].

2.45 In practice, an incoming international transfer will be initiated by a foreign registry. The foreign registry will notify the ITL, which will verify the transaction. The ITL will then notify the Administrator of the proposed incoming transfer [Part 3, clause 36(1)(b)]. This process is described in the bill as happening according to Kyoto rules to enable flexibility should the mechanism change in the future due to changes in the Kyoto rules.

2.46 An incoming international transfer will only be allowed where the Kyoto unit is not specified in the regulations as a unit that cannot be transferred to a Registry account [Part 3, clause 36(1)(c)]. In accordance with section 13(3) of the *Legislative Instruments Act 2003*, the ability to

‘specify’ a Kyoto unit allows regulations to be made which identify a class or classes of Kyoto units. This means that regulations can exclude certain types of Kyoto units from being transferred into the Registry. These regulations will not affect units already in the Registry.

2.47 This gives effect to the Government’s policy position that it would retain the right to exclude any type of Kyoto unit from being transferred into the Registry. Currently there is no specific class of Kyoto unit that has been identified for exclusion by regulation. The regulation-making power provides flexibility to respond to future circumstances without the need for an amendment.

2.48 An incoming international transfer will also only be allowed where the transfer would not breach regulations made to give effect to the Kyoto rules (discussed above) or regulations restricting transfers to Commonwealth Registry accounts [*Part 3, clauses 36(1), 39 and 44*].

2.49 Provided these requirements are met, the Administrator must make an entry for the Kyoto unit being transferred in the receiving Registry account. However, the Administrator may refuse to make an entry if it has reasonable grounds to suspect that the instruction forwarded from the ITL is fraudulent [*Part 3, clause 36(2)*].

#### ***Carry-over restrictions***

2.50 Under the Kyoto Protocol, an Annex I Party may carry over to a subsequent commitment period (that is, it may bank) certain Kyoto units that have not been retired for that commitment period (used for compliance with a Kyoto target), cancelled or transferred to a Commonwealth replacement account. Under the current Kyoto rules, the extent to which a Party can carry over units differs depending on the kind of units involved:

- emission reduction units (not converted from removal units) can be carried over up to a maximum of 2.5 per cent of the Party’s initial assigned amount;
- certified emission reductions can be carried over up to a maximum of 2.5 per cent of the Party’s initial assigned amount;
- assigned amount units can be carried over without restriction; and
- removal units, emission reduction units converted from removal units, temporary certified emission reductions and long-term certified emission reductions cannot be carried over.

2.51 Any Kyoto units that are not carried over must be transferred to the mandatory cancellation account. This is a strict requirement of the

Kyoto rules and cannot be disregarded by Australia. All Kyoto Parties and holders of Kyoto units are subject to the same carry-over restrictions.

2.52 The bill provides for regulations to be made detailing arrangements for the carry-over of Kyoto units [*Part 3, clause 40*]. It is intended that the regulations will:

- identify the units that can be carried over and any limits or restrictions that are specified;
- identify the Kyoto units that cannot be carried over; and
- set out the procedures for the carry-over.

2.53 The regulations will also provide for the Administrator to transfer to the mandatory cancellation account those Kyoto units that are not carried over.

***Temporary certified emission reductions and long-term certified emission reductions***

2.54 As discussed above, temporary certified emission reductions and long-term emission reductions generated from forestry-based CDM projects have a limited life after which they expire. Hence these units are non-permanent.

2.55 Temporary certified emission reductions expire at the end of the commitment period after the one in which they were issued, while long-term certified emission reductions expire at the end of the crediting period of the project. Account holders may transfer and hold these units within the Australian Registry.

2.56 Where either a temporary certified emission reduction or a long-term certified emission reduction is in a person's Registry account when it expires, the Administrator must, in accordance with the regulations, transfer the temporary or long-term certified emission reduction to a mandatory cancellation account. This is required under the Kyoto rules. The mechanical procedures for such cancellation will be contained in regulations [*Part 3, clause 42*].

2.57 The Kyoto rules require replacement of long-term certified emission reductions in certain circumstances. In brief, because long-term certified emission reductions are valid for long periods, the projects that generate them must be re-certified by an independent auditor every 5 years to demonstrate that the emission removals have occurred. When a certification report indicates that the greenhouse gas removals achieved by a project have been reversed since the last certification, for example, where the trees are cut down, the Kyoto rules require replacement of the affected long-term certified emission reductions. Replacement is also required if the CDM Executive Board determines that the required certification report has not been submitted.



2.58 The bill provides for the making of regulations to specify the requirements for a person to replace long-term certified emission reductions in their Registry account. The Administrator will be required to transfer long-term certified emission reductions to a mandatory cancellation account in the event that long-term certified emission reductions are not replaced in accordance with the regulations. The meaning of ‘replacement’ of a long-term certified emission reduction is set out in the bill [Part 3, clause 43].

***Transfers to Commonwealth Registry accounts***

2.59 Regulations made pursuant to the bill may prevent, restrict or limit the transfer of Kyoto units to a Commonwealth Registry account from either an Australian Registry account or a foreign account [Part 3, clause 44].

2.60 Commonwealth Registry accounts established under the Regulations may include:

- a retirement account for each commitment period into which Australia will transfer Kyoto units to comply with its emission reduction target;
- voluntary and mandatory cancellation accounts for Kyoto units;
- replacement accounts for replacing temporary and long-term certified emission reduction; and
- a relinquished unit account [Part 2, Division 3, clause 12].

2.61 There is no need for account holders other than the Commonwealth to transfer Kyoto units to certain Commonwealth accounts. Accordingly, the regulations will prevent account holders from transferring to the wrong account and being unable to recover their units. For example, Kyoto units may not be transferred to the Commonwealth relinquished units account, as this is only for certain relinquished Australian emissions units. Kyoto units also may not be transferred to certain cancellation accounts and replacement accounts.

**Non-Kyoto international emissions units**

2.62 As discussed above, a non-Kyoto international emissions unit is defined to mean: 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 [Part 1, clause 4, definition of ‘non-Kyoto international emissions unit’]. A unit would only be prescribed as a non-Kyoto international emissions unit where the intention is to add to the types of international units that can held in the Australian Registry. That is, all non-Kyoto international emissions units

will also come within the definition of ‘eligible international emissions units’ [*Part 1, clause 4, definition of ‘eligible international emissions units’*].

2.63 As for ACCUs and Kyoto units, an entry for a non-Kyoto international emissions unit on the Registry will be identified by the serial number of the unit [*Part 4, clause 49*].

2.64 The bill provides a framework with the detailed arrangements for transfers of non-Kyoto international emissions units to be specified in regulations [*Part 4, clause 57*]. This allows the transfer arrangements of such units to be in accordance with, for example, any associated treaty or agreement.

#### ***Transfers of non-Kyoto international emissions units***

2.65 The bill provides for the meaning of ‘transfer’ in relation to different types of transfers of non-Kyoto international emissions units in the Registry [*Part 4, clause 50*]. As with other emissions units, a transfer will involve the removal of the entry of the unit from the registry account of the person initiating the transfer and the making of an entry for the unit in the receiving registry account. Several different types of transfer have been identified. The unit can be transferred from: a registry account to a registry account of another person; a registry account to another registry account owned by the same person; a registry account to an account in a foreign registry owned by the same person; or an account in a foreign registry to an account in the Australian registry.

2.66 It is possible that the Commonwealth may wish to transfer non-Kyoto international emissions units. If so, the Minister has the power to instruct the Administrator to undertake the transfer [*Part 4, clauses 51(5) and 52(7)*]. Otherwise the general provisions for transfers would apply.

2.67 A person who holds a non-Kyoto international emissions unit can instruct the Administrator to transfer the unit to an account kept by another person or to another account kept by the same person within the Registry [*Part 4, clause 51*]. The instruction will be via electronic notification and will include the account number of the originating account and the account number of the receiving account and any other information that is specified in regulations governing the administration of the registry.

2.68 The bill allows for conditions relating to domestic transfer of non-Kyoto units to be provided for in regulations. If the Administrator receives an instruction and any such conditions are satisfied then the Administrator must give effect to the transfer [*Part 4, clause 51*].

2.69 The bill makes provision for non-Kyoto international emissions units to be personal property for limited purposes to facilitate their transmission in situations of bankruptcy, external administration and death [*Part 4, clauses 54 and 56*]. The bill does not affect the creation or

enforcement of, or any dealings with (including transfers of), equitable interests in non-Kyoto international emissions units [Part 4, clause 55].

2.70 Non-Kyoto international emissions units can be transferred from an account in the Australian registry to an account in a foreign registry, referred to as an outgoing international transfer of non-Kyoto international emissions units [Part 4, clause 52]. Again the transfer could be to an account kept by another person or kept by the same person, with the instruction via electronic notification and containing the relevant account details and other information.

2.71 Regulations may make further provisions in relation to non-Kyoto international emissions units. For example, they might detail any conditions that may apply to outgoing international transfers of non-Kyoto international emissions units. The administrative arrangements for giving effect to the transfer could also be specified in regulations [Part 4, clause 57].

2.72 Non-Kyoto international emissions units can be transferred from a foreign account to an account in the Registry, referred to as an incoming international transfer of non-Kyoto international emissions unit [Part 4, clause 53]. In this case the Administrator would receive an instruction from a foreign account and, where the conditions as specified in the regulations are met, the Administrator would make an entry for the non-Kyoto international emissions unit in the nominated account in the Australian registry.

2.73 The Administrator may refuse to affect the transfer if the Administrator has reasonable grounds to suspect that the instruction is fraudulent [Part 4, clause 53(2)].

### **Voluntary cancellation of units**

2.74 Kyoto units and non-Kyoto international emissions units may be voluntarily cancelled under Part 6 of the bill. This implements the Government's policy that voluntary cancellation allows individuals and organisations to contribute to stronger national climate change mitigation by reducing the supply of eligible emissions units.

2.75 The process for applying to cancel Kyoto units and non-Kyoto international emission units under the bill is identical to the process for applying to cancel ACCUs under Part 14 of the main bill. For units that may be subject to voluntary cancellation, the registered holder of the emissions units transmits an electronic notice to the Administrator requesting the Administrator to cancel the units [Part 6, clause 65(1) and (2) and 66(1) and (2)]. The notice must specify the units to be cancelled and the person's relevant Registry account or accounts.

2.76 The action to be taken by the Authority varies depending on the type of unit.

2.77 If the request relates to a Kyoto unit then, if the Administrator is satisfied it would be in accordance with the Kyoto rules, the Administrator must transfer the Kyoto unit to a voluntary cancellation account before the end of the 'true-up period' for the relevant Kyoto commitment period [Part 6, clause 65(3)]. The 'true-up period' is the period following each Kyoto commitment period during which Kyoto units from the relevant commitment period can be transferred and acquired for the purposes of meeting Annex 1 Parties' emissions reduction targets.

2.78 The Administrator must publish information about the number of voluntarily cancelled Kyoto units on its website, including the name of the person who held the units and the total number of Kyoto units that have been cancelled [Part 6, clause 65(4)].

2.79 The voluntary cancellation provisions allow private entities to cancel Kyoto units, which means they cannot be used by Australia or another Kyoto Party for the purposes of meeting their emission reduction targets and therefore leads to additional global abatement.

2.80 If the request relates to a non-Kyoto international emissions unit, further action by the Authority is dependent on the regulations [Part 6, clause 66(3)]. The bill provides for the voluntary cancellation of non-Kyoto units but the detailed arrangements will be specified in regulations which would not be made until an international unit has actually been prescribed as a non-Kyoto international emissions unit.

2.81 The Administrator must publish information about the number of voluntarily cancelled non-Kyoto international emissions units on its website, including the name of the person who held the units and the total number of non-Kyoto international emissions units that have been cancelled [Part 6, clause 66(4)].

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## **Chapter 3**

### ***Publication of information***

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#### **Outline of chapter**

3.1 The chapter relates to the various requirements in the bill for information to be made public. It focuses on Part 5 of the bill.

#### **Context**

3.2 A range of information relating to the Registry will be published to ensure a high level of transparency in the operation of the Carbon Farming Initiative (CFI), to provide information relevant to carbon market participants, and to meet specific international obligations applying to registry functions under the Kyoto Protocol.

3.3 Further requirements for publication of information and secrecy are contained in Parts 12 and 27 of the main bill.

3.4 Part 5 of the bill includes a simplified outline [*Part 5, clause 58*].

#### **Detailed explanation of new law**

##### **Information about holders of Registry accounts**

3.5 Information will be made publicly available regarding holders of Registry accounts and regarding Kyoto units and non-Kyoto international emissions units. Publication of information relating to Australian carbon credit units (ACCU) is addressed in the main bill.

3.6 The Administrator must publish on its website and keep up-to-date the name of each person with a Registry account and the person's address last known to the Administrator [*Part 5, clause 59*].

3.7 The regulations may also require the Administrator to publish:

- information required to be published under the Kyoto rules [*Part 5, clause 60(1)*];
- the total number of specified Kyoto units in Registry accounts [*Part 5, clause 60(2)*]; and
- when Kyoto units and non-Kyoto international emissions units are voluntarily cancelled, the name of the person and the total number of units cancelled [*Part 5, clauses 62 and 63*].

3.8 The Administrator will be required to publish statements setting out concise descriptions of the characteristics of prescribed eligible international emissions units and prescribed non-Kyoto international emissions units within specified time limits [*Part 5, clause 61*].

3.9 These statements will assist in providing information to retail investors about emissions units. No product disclosure statement or prospectus would be issued by the Commonwealth under the relevant provisions of the *Corporations Act 2001* in relation to emissions units. This will therefore reduce the compliance burden under the CFI.

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# Chapter 4

## Review of decisions

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### Outline of chapter

4.1 This chapter addresses provisions in Part 8 of the bill, which provide for merits review of decisions.

### Context

4.2 The Government has committed to sound appeals processes for decisions under the Carbon Farming Initiative (CFI), including judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and merits review.

4.3 The objective of the review provisions in the bill is to ensure that decisions are correct and preferable according to the facts on which a decision was based, that all persons affected by a decision are treated fairly, and to encourage quality, consistency, openness and accountability in decisions made by the Administrator.

### Detailed explanation of new law

#### Decisions which are subject to merits review

4.4 Certain decisions of the Administrator are subject to merits review [*Part 8, clause 82*].

4.5 Decisions that are not subject to merits review are those where the Administrator has no discretion. This includes, for example, a decision to transfer temporary certified emission reductions or long-term certified emission reductions to a mandatory cancellation account in accordance with the regulations [*Part 3, clause 42(2)*].

4.6 A declaration by the responsible Minister that Australia is in compliance with eligibility requirements in order to participate in international emissions trading or the revocation of such a declaration is also not subject to merits review [*Part 3, clause 37(1) and (2)*]. Neither the instrument of declaration nor revocation is a legislative instrument [*Part 3, clause 37(3)*]. The reason for this is that the Minister does not have discretion as to whether Australia is eligible or not, so the declaration should not be subject to potential disallowance. The enforcement branch of the Compliance Committee under the Kyoto Protocol framework is

responsible for determining whether an Annex I Party is not in compliance with the eligibility requirements. In practice, the United Nations Climate Change Convention secretariat maintains a list of Parties that meet the eligibility requirements and of those Parties that have been suspended on its website.

4.7 These exceptions to merits review are consistent with Government policy on administrative review and the Commonwealth Administrative Review Council's publication *What Decisions should be Subject to Merit Review?*

4.8 The bill provides for two avenues of merit review: internal reconsideration by the Administrator and external review by the Administrative Appeals Tribunal.

### **Internal reconsideration**

4.9 Where the decision is made by a delegate of the Administrator, the person affected by the decision must first apply for internal reconsideration by the Administrator [*Part 8, clause 83*]. This arrangement provides an opportunity for the affected person to put their case directly to the Administrator through a process that will generally be less costly and time consuming than external review.

4.10 An application for internal reconsideration must be made within 28 days after being informed of the decision or, if the Administrator extends the deadline, within the extended deadline [*Part 8, clause 83(4)*].

4.11 The Administrator must make a decision on the application within 90 days of receiving it [*Part 8, clause 85*].

4.12 That decision may be to affirm, vary or revoke the decision and a written statement of reasons must be provided to the applicant within 28 days after making the reconsidered decision [*Part 8, clause 84*].

### **Application to the Administrative Appeals Tribunal**

4.13 If the person affected is not satisfied with the outcome of internal reconsideration of a decision, he or she may apply to the Administrative Appeals Tribunal to review the decision. If the original decision was not made by a delegate of the Administrator, and was made by the Administrator, the person affected may apply directly to the Tribunal without going through internal reconsideration [*Part 8, clause 86*].



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# Chapter 5

## Compliance and enforcement

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### Outline of chapter

5.1 The bill contains a number of measures designed to maintain the integrity of the Registry through preventing or rectifying non-compliance with registry requirements, including:

- identity checks before a Registry account can be opened [*Part 2, Division 3, clause 11*];
- criminal penalties for fraudulent or dishonest conduct [*Part 2, Division 7, clauses 23 and 24*];
- civil penalties for use and disclosure of information obtained from the Registry [*Part 2, Division 7, clause 26; Part 7*] and failing to comply with prescribed requirements in relation to the registry or requirements to notify [*Part 2, Division 7, clause 27; Part 7*];
- powers to suspend Registry operations temporarily, to address threats to the system [*Part 2, Division 7, clause 28*];
- powers to close the accounts of any persons who breach their Registry obligations [*Part 2, Division 3, clause 16*];
- powers for the Administrator [*Part 2, Division 6, clause 19*] or a court [*Division 6, clause 22(3)*] to rectify the Registry; and
- discretion not to transfer units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent [*Part 3, clause 36(2); Part 4, clause 53(2)*].

5.2 These complement measures in the Carbon Credits (Carbon Farming Initiative Bill) 2011 (the main bill) and the Carbon Credits (Consequential Amendments) Bill 2011 (the Consequential Amendments bill), which provide additional legislative safeguards against fraudulent activities.

### Context

5.3 Effective security and anti-fraud measures are required to safeguard the integrity of the Registry. Misuse of the Registry could undermine public and stakeholder confidence and could result in financial

losses to businesses that rely on a secure system to meet legislative and contractual obligations.

5.4 The main bill contains a number of measures designed to prevent fraudulent activities, including:

- a rigorous ‘fit and proper’ person test before project proponents are eligible to put forward offsets projects in Part 4;
- relinquishment requirements to claw back falsely obtained Australian carbon credit units (ACCUs) in Division 2 of Part 7, and Part 13; and
- criminal penalties for engaging in avoidance schemes in Part 22.

5.5 In addition, the Consequential Amendments bill contains amendments to other Commonwealth legislation to provide safeguards against fraud and other criminal activities, including:

- brokers will be required to report suspicious transactions involving ACCUs and Kyoto units as part of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; and
- ACCUs and international emissions units will be treated as financial products under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* which will enable investigation and prosecution of manipulation in the carbon market.

5.6 The current Registry has rigorous technical architecture in line with Defence Signals Directorate IT security requirements and United Nations Framework Convention on Climate Change standards. Hosting arrangements, system password and logon procedures also accord with the Australian Government Protective Security Policy Framework. A proof of identity regime, consistent with the Anti-Money Laundering and Counter-Terrorism Financing guidelines, must be passed before users obtain system access credentials.

## **Detailed explanation of new law**

### **Identity checks**

5.7 Applicants who wish to open an account in the Registry will be required to undergo identification procedures to be prescribed in regulations [*Part 2, Division 3, clause 11*]. This requirement, along with other measures such as early detection of suspicious transactions, will effectively mitigate the risk of fraud and other criminal activities.

5.8 The bill allows for the regulations to provide for transaction limits to be placed on registry accounts, depending on the stringency of the procedure used to verify the identity of the applicant. This is a streamlining feature of the Carbon Farming Initiative (CFI), which is intended to reduce account costs and administrative hurdles for low transaction and low risk account holders, while enabling stringent proof of identity to be applied to other account holders [Part 2, Division 3, clause 11].

### **Criminal offences for improper use of the Registry**

5.9 A person commits an offence if the person makes, causes or concurs in the making of an entry in the Registry which the person knows is false [Part 2, Division 7, clause 23]. It is also an offence to tender in evidence a document which falsely purports to be a copy or extract from an entry in the Registry or of an instrument given to the Administrator under Part 2 [Part 2, Division 7, clause 24].

5.10 The purpose of these offences is to maintain the integrity of the Registry and to ensure that it accurately reflects unit holdings and transactions.

#### ***Nature of the offences***

5.11 Making a false entry in the Registry [Part 2, Division 7, clause 23] includes hacking into the registry and moving ACCUs from account to account, or making entries for non-existent units. It could involve the creation of counterfeit ACCUs (which could be sold to innocent purchasers) or to the unauthorised transfer of units from one account to another. It could have a significant impact on specific account holders and on the functional integrity and reputation of the CFI. For these reasons, the maximum penalty is 7 years or 2,000 penalty units, or both. The phrase ‘penalty unit’ is defined in clause 4 by reference to its meaning in section 4AA of the *Crimes Act 1914* [Part 1, clause 4, definition of ‘penalty unit’].

5.12 An offender may make a substantial profit out of undertaking this conduct and the penalty therefore needs to take this into account.

5.13 Section 4B of the *Crimes Act 1914* provides that the standard penalty/imprisonment ratio is 5 penalty units to 1 month imprisonment. For example, 60 penalty units would equate to 12 months imprisonment. This ratio should be followed unless there are cogent reasons to depart from it, for example, in the case of corporate crimes a departure may be warranted to counter potential financial gains from the commission of an offence.

5.14 Penalties proposed in clause 23 of the bill depart from this ratio as 7 years imprisonment would normally equate to 420 penalty units. The reason for this departure is that the financial gain which could be made from tampering with the Registry would amount to several lifetimes’

worth of imprisonment on the standard ratio. The level of financial penalty that would discourage an individual from making a false entry needs to be set with reference to the potential gains from that conduct.

5.15 Tendering a document as evidence which falsely purports to be a copy or extract from an entry in the Registry or of an instrument given to the Administrator under Part 2 is also a criminal offence. Conduct of this type impacts upon the integrity of the registry and the reliance third parties may place upon it [*Part 2, Division 7, clause 24*]. It could involve the creation of a document which purports to show that the perpetrator has a substantial holding of ACCUs. This could then be used for other misleading behaviour, for example through obtaining bank loans on the basis of the purported unit holdings.

5.16 The standing of the registry as an accurate source of information about unit holdings and transfers and the like is recognised elsewhere in the bill. For example, the Administrator may supply a copy of or extract from the Registry or any instrument lodged with the Administrator under Part 2, certified by an official of the Administrator, which will be admissible in all courts and proceedings without further proof of the original. This facilitates proceedings by avoiding the need to produce an original [*Part 2, Division 7, clause 25*].

5.17 A criminal offence for tendering a false document as evidence of an entry from the Registry could therefore have a significant impact on the functional integrity and reputation of the CFI.

## **Civil penalties**

### ***Which provisions are civil penalty provisions?***

5.18 The bill contains civil penalty provisions including ancillary contraventions, such as aiding a contravention.

### ***List of civil penalty provisions:***

26 Use and disclosure of information obtained from the Registry

27 Regulations about the Registry

5.19 A person must not use or disclose information obtained from the Registry about another person to contact or send material to them, unless the information is relevant to the holding, or rights associated with the holding of, ACCUs, Kyoto units or non-Kyoto international emissions units recorded in the Registry. This is a civil penalty provision and is analogous to the limitation on the use of share registry data and is included to prevent the use of Registry data for purposes such as advertising [*Part 2, Division 7, clause 26; Part 7*].

5.20 Additional provisions in relation to the Registry may be made in the regulations [*Part 2, Division 7, clause 27*]. For example, it is expected that

regulations will be required to set out detailed rules for the use of accounts and the registry. Failure to comply with the regulations may lead to the imposition of a civil penalty [Part 2, Division 7, clause 27(6); Part 7].

5.21 The reason for making these civil penalty provisions and not criminal penalty provisions is that contravention of these provisions does not involve conduct of such serious moral culpability that criminal prosecution is warranted.

5.22 Part 7 of the bill provides for the pecuniary penalties that are payable for contraventions of civil penalty provisions.

***Civil penalty orders — jurisdiction and amount***

5.23 The Federal Court and competent state and territory courts can make civil penalty orders [Part 7, clause 68].

5.24 It is for the court to determine whether a person has contravened a civil penalty provision and to order the person to pay a penalty [Part 7, clause 69].

5.25 The maximum amount of the pecuniary penalty is specified, as are the matters which the court may have regard to in determining the amount of the penalty [Part 7, clause 69(3), (4) and (5)].

5.26 The maximum amount of the penalty depends on the person committing the offence and the nature of the offence. A natural person who illegally discloses information obtained from the Registry (i.e. ‘spam’ offences) [Part 2, Division 7, clause 26(1), (2) or (5)] may be subject to a maximum penalty of 100 penalty units [Part 7, clause 70(5)(a)]. The maximum penalty for a corporation for the same offences is 500 penalty units [Part 7, clause 70(4)(a)].

5.27 For all other offences, the maximum penalty for a natural person is 2,000 penalty units [Part 7, clause 70(5)(b)]. For a corporation, all other offences carry a maximum penalty of 10,000 penalty units [Part 7, clause 70(4)(b)].

5.28 Matters which the court may have regard to in determining the amount of the penalty include the nature and extent of the contravention, previous contraventions, and, in the case of a body corporate, whether it has exercised due diligence to avoid the contravention [Part 7, clause 69(3)]. These factors reflect the approach indicated in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. They follow the *Australian Law Reform Commission Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*.

***Evidential burden***

5.29 There are two civil penalty provisions which are framed in such a way as to alter the usual evidential burden.

5.30 The first provision is clause 26 which addresses misuse of information obtained from the Registry. It is framed as a broad prohibition with exceptions to restrict the uses to which this information can be put [*Part 2, Division 7, clause 26*].

5.31 The second provision is clause 78 which relates to a mistake of fact. In general terms, clause 78 provides that a person is not liable to have a civil penalty order made against him for a contravention 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. A person who wishes to rely on the relevant subsections bears an evidential burden in relation to that matter [*Part 7, clause 78*].

5.32 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.

#### ***Continuing contraventions***

5.33 A person may contravene the civil penalty provision for failure to comply with the requirements of the regulations relating to the Registry [*Part 2, Division 7, clause 27(4)*]. Where that contravention relates to a requirement for the holder of a Registry account to notify a matter to the Administrator [*Part 2, Division 7, clause 27(2)*], the holder of that account commits a separate contravention on each of the days on which it fails to comply [*Part 7, clause 80(2)*].

5.34 The penalty is limited to 5 per cent per day of the penalty for the initial contravention.

#### ***Other provisions about civil penalties***

5.35 While the Crown in each of its capacities is bound by the Act, the Crown is not 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 6*].

5.36 Other aspects of the civil penalty regime are also addressed in Part 7. Of particular significance are:

- only the Administrator may apply for a civil penalty order [*Part 7, clause 70*]; and
- a requirement that the rules of evidence and procedure for civil matters be applied when hearing proceedings for a civil penalty order [*Part 7, clause 73*].

5.37 Other provisions address the grouping of proceedings [*Part 7, clause 71*] include a 6 year time limit on initiating civil penalty proceedings [*Part 7, clause 72*] and the relationship between civil and criminal

proceedings initiated with respect to the conduct which is substantially the same [*Part 7, clauses 74 to 77*].

5.38 Special provision is made for the state of mind of a person who does not comply with a requirement of the Administrator under clause 79, for example, to give the Administrator particular information [*Part 7, clause 79*]. In proceedings for a civil penalty order against a person, it will not be necessary to prove that person's state of mind, that is, the person's intention, knowledge, recklessness, negligence, or any other state of mind. The reason for this provision is that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention.

### **Suspension of operation of the registry**

5.39 There may be times when the Administrator will need to temporarily suspend the operation of the Registry to ensure its integrity. The Administrator may need to suspend the operation of the Registry to prevent, mitigate or minimise the effect of abuse or criminal activity relating to the Registry [*Part 2, Division 7, clause 28(1)(b)*]. For example, the Administrator may need to suspend the operation of the Registry if the Administrator believes that a person has hacked into the registry and is in the process of transferring units from another person's account into their own. If this happens, the Administrator will need to be able to stop any subsequent transactions (for example, the transfer of units to an overseas account) until such time as the criminal activity has ceased. The bill also provides that the Administrator may defer taking action until the suspension ends [*Part 2, Division 7, clause 28(3)*].

5.40 Suspension of the operation of the Registry may also be necessary to allow the Administrator to carry out maintenance [*Part 2, Division 7, clause 28(1)(a)*].

5.41 Notice of the suspension must be published on the Administrator's website [*Part 2, Division 7, clause 28(3)*]. This will help Registry account holders to make arrangements to minimise disruption or inconvenience during suspension of the Registry.

### **Closure of accounts**

5.42 To allow the Administrator to respond to security breaches in the Registry, the regulations may give the Administrator the power to close an account without the account holder's consent [*Part 2, Division 3, clause 16*].

5.43 The Administrator may only close an account if the account holder has contravened or is contravening Part 2 of the bill or the Regulations [*Part 2, Division 3, clause 16(2)(a)*]. The Administrator must also give the account holder 30 days notice prior to closing the account [*Part 2, Division 3, clause 16(2)(b)*].

5.44 If the Administrator closes an account holder's account for this reason, then the regulations may provide that all the units in the account are cancelled or transferred to cancellation accounts, depending on the nature of the unit [*Part 2, Division 3, clause 16(3), (4) and (5)*].

5.45 If the Administrator has closed a person's account for these reasons, the Administrator must also refuse to open another Registry account for that person [*Part 2, Division 3, clause 16(6)*].

5.46 This allows the Administrator to take action to stop account holders who have breached registry requirements from operating Registry accounts.

5.47 To ensure that the Administrator is accountable for these actions, closures of accounts and cancellations of units must be recorded in the Registry [*Part 2, Division 3, clause 16(7)*]. A decision to close an account or cancel units is subject to merits review [*Part 8, clause 82*].

## **Rectification of the Registry**

### ***Unauthorised use***

5.48 The Administrator has a power to correct errors in the Registry resulting from unauthorised actions. The Administrator may alter the Registry to correct entries made without sufficient cause, wrongly existing, or wrongly removed [*Part 2, Division 6, clause 19(1)(b), (c) and (d)*].

5.49 Surveillance of the Registry by the Administrator should alert the Administrator immediately to any unauthorised entries to the Registry. These provisions will allow the Administrator to immediately respond to, and correct, entries made by persons who have hacked into the Registry to change their own, or other, accounts for their own benefit. As the power to maintain the Registry inherently involves correction of errors to ensure that the Registry properly records the interests of account holders, this is an exercise of an administrative power conferred on the Administrator.

5.50 A decision of the Administrator to correct an entry in the Registry, or to refuse to do so, is a reviewable decision [*Part 8, clause 82*].

### ***Rectification by the court***

5.51 The courts historically have had a role in making decisions in relation to the content of registers that record title to property.

5.52 A person aggrieved by one of the following matters may make an application for rectification of the Registry to the Federal Court (the Court) in respect of:

- the omission of an entry;
- an entry made without sufficient cause;
- an entry wrongly existing;



- an error or defect in an entry; or
- an entry wrongly removed [*Part 2, Division 6, clause 22(1)*].

5.53 The Administrator may also apply to the Court for a rectification order if the Administrator is concerned about any of those matters [*Part 2, Division 6, clause 22(2)*].

5.54 There may be some circumstances where errors appear in the Registry but the cause of the error is not clear. The Administrator may prefer the Court to determine the cause of the error, for example, where there is a potential error in the Registry but there are ongoing disputes between the beneficiaries of the estate of the account holder.

5.55 The Administrator must comply with an order of the Court directing rectification of the Registry [*Part 2, Division 6, clause 22(8)*].

### **Discretion not to transfer units**

5.56 The Administrator also has the discretion not to transfer units where the Administrator has reasonable grounds to suspect that the transaction is fraudulent [*Part 3, clause 36(2); Part 4, clause 53(2)*].

For example:

The Administrator receives an application to transfer non-Kyoto international units from a foreign account to an account held by a person under the Registry. However, standard procedures undertaken by the Authority, including checking the transaction with the relevant foreign registry, indicate that the transfer may be fraudulent. Although the Administrator is normally required to act on an application for an incoming transfer of units where it meets legislated criteria, the Administrator exercises his or her discretion not to transfer the units while further investigations are undertaken.



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## **Chapter 6**

### **Miscellaneous**

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#### **Outline of chapter**

6.1 This chapter addresses the miscellaneous provisions (other than transitional provisions) in Part 1 (Preliminary) and (Miscellaneous) of the bill, which are not addressed in other chapters of this explanatory memorandum. These provisions include functions of the Administrator, concurrent operation of state and territory law, delegation by the Minister, and commencement.

#### **Context**

6.2 The bill includes a simplified outline of the Act [*Part 1, clause 3*]. Parts 1 to 8 also have their own simplified outline

#### **Detailed explanation of new law**

##### **Commencement**

6.3 The substantive provisions of the Registry bill (clauses 3 to 97) will commence at the same time as clause 3 of the Carbon Credits (Carbon Farming Initiative) Bill 2011 (the main bill), which will be on a day fixed by Proclamation [*Part 1, clause 2*]. As the Registry is crucial for implementation of the Carbon Farming Initiative (CFI), the main bill cannot commence before this bill receives the Royal Assent.

##### **Computerised decision-making**

6.4 The Administrator will have the capacity to make use of computer programs for the purposes of decision making [*Part 9, clause 87*]. This provision will enable the Administrator to automate decision making where the criteria for decisions are precisely defined, for example in giving effect to instructions in electronic notices from Registry account holders to transfer units from one account to another.

##### **Administrator's power to require further information**

6.5 Where the regulations allow the Administrator to request further information following the receipt of an application, such as an application to open a Registry account, the Administrator must exercise the power to request further information in a reasonable way, and may only request

information that is relevant to the person's request [*Part 9, clause 88*]. This provision will provide confidence to applicants that their applications will be processed by the Administrator exercising his or her powers within reasonable limits.

### **Delegation by the Minister**

6.6 The responsible Minister will be able to delegate any or all of his or her functions or powers under the Act or regulations to the Secretary or a Senior Executive Service (SES), or acting SES, employee in the Department of Climate Change and Energy Efficiency (the Department). This power does not extend to making, varying or revoking legislative instruments. The delegate must comply with any direction given by the Minister [*Part 9, clause 89*].

### **Delegation by the Secretary**

6.7 The Secretary will also be able to delegate any or all of his or her functions or power under the Act to a SES or acting SES employee in the Department, for example, the power to direct the Administrator to issue a specified number of removal units to the Commonwealth under clause 32(2) of the bill. The delegate must comply with any direction given by the Secretary [*Part 9, clause 90*].

### **Liability for damages**

6.8 Certain specified persons are not liable to an action for damages in relation to acts or omissions done in good faith in the performance of their functions or powers under the Act or the associated provisions. The provision includes where such acts or omissions are done in the purported performance of functions or powers. 'Specified persons' includes those with functions or powers under the bill, including the Minister, the Minister's delegates, the Secretary, the Secretary's delegates, the Administrator and delegates of the Administrator [*Part 9, clause 91*]. This type of provision is common in Commonwealth legislation and enables persons with statutory functions to perform their functions in good faith without fear of legal action being taken against them.

### **Executive power**

6.9 The bill does not, by implication, limit the executive power of the Commonwealth [*Part 9, clause 92*].

6.10 This is to make 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**

6.11 The Crown, in each of its capacities, will be bound by the bill. While the bill does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence, this protection does not apply to an administrative penalty or late payment penalty under the Act [*Part 1, clause 6*].

6.12 To accommodate this, by ensuring such amounts are notionally payable by the Commonwealth, provision is made for the Minister for Finance to give written directions relating to, among other things, transfer of amounts within or between accounts operated by the Commonwealth [*Part 9, clause 93*].

### **Compensation for acquisition of property**

6.13 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. Provision is included 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(xxxi) of the Constitution [*Part 9, clause 94*].

### **Regulations**

6.14 The bill includes a general regulation-making power [*Part 9, clause 97*].

6.15 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 Administrator’s website unless this would infringe copyright [*Part 9, clause 95*]. For example, regulations could apply parts of a standard published by the International Organization for Standardization, as in force from time to time. By incorporating such standards, or other lengthy or technical documents, by reference, and requiring their publication on the Administrator’s website, the bill provides guidance to the Administrator and users of the scheme while avoiding unnecessary length and complexity.

6.16 In addition, the regulations may confer a power to make a decision of an administrative character on the Administrator [*Part 9, clause 96*].



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