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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CLEAN ENERGY (UNIT SHORTFALL CHARGE – GENERAL) BILL 2011
CLEAN ENERGY (UNIT ISSUE CHARGE – FIXED CHARGE) BILL 2011
CLEAN ENERGY (UNIT ISSUE CHARGE – AUCTIONS) BILL 2011
CLEAN ENERGY (CHARGES – CUSTOMS) BILL 2011
CLEAN ENERGY (CHARGES – EXCISE) BILL 2011
CLEAN ENERGY (INTERNATIONAL UNIT SURRENDER CHARGE) BILL 2011

EXPLANATORY MEMORANDUM

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

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Glossary

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

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
Authority	Climate Change Authority
Carbon pricing mechanism	The carbon pricing mechanism set up by the Clean Energy Bill 2011
CFI	<i>The Carbon Credits (Carbon Farming Initiative) Act 2011 and the Carbon Credits (Consequential Amendments) Act 2011</i> which were passed by Parliament in August 2011
Main bill	Clean Energy Bill 2011
NGERS	National Greenhouse and Energy Reporting System
Regulator	Clean Energy Regulator

General outline and financial impact

The 2011 Clean Energy Legislation Package

The:

- Clean Energy (Unit Shortfall Charge—General) Bill 2011;
- Clean Energy (Unit Issue Charge—Fixed Charge) Bill 2011;
- Clean Energy (Unit Issue Charge—Auctions) Bill 2011;
- Clean Energy (Charges – Customs) Bill 2011;
- Clean Energy (Charges—Excise) Bill 2011; and
- Clean Energy (International Unit Surrender Charge) Bill 2011

(collectively the charges bills) are part of the Clean Energy Legislation Package, which sets up the carbon pricing mechanism (the mechanism) as part of the Government’s climate change plan, as set out in *Securing a clean energy future: the Australian Government’s climate change plan*.

The full policy context and background to the mechanism is set out in the explanatory memorandum for the Clean Energy Bill 2011. A description of the bills which will introduce the mechanism is set out below.

Table I: The Clean Energy Bill 2011 and related bills

Main bill	<p>The Clean Energy Bill 2011 creates the mechanism. It sets out the structure of the mechanism and process for its introduction. These include:</p> <ul style="list-style-type: none">• entities and emissions that are covered by the mechanism;• entities’ obligations to surrender eligible emissions units;• limits on the number of eligible emissions units that will be issued;• the nature of carbon units;• the allocation of carbon units, including by auction and the issue of free units;• mechanisms to contain costs, including the fixed charge period and price floors and ceilings;• linking to other emissions trading schemes;• assistance for emissions-intensive trade-exposed activities and coal-fired electricity generators;• monitoring, investigation, enforcement and penalties;• administrative review of decisions; and• reviews of aspects of the mechanism over time.
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<p>Statutory bodies</p>	<p>The Clean Energy Regulator Bill 2011 sets up the Regulator, which is a statutory authority that will administer the mechanism and enforce the law.</p> <p>The responsibilities of the Regulator include:</p> <ul style="list-style-type: none"> • providing education on the mechanism, particularly about the administrative arrangements of the mechanism; • assessing emissions data to determine each entity’s liability; • operating the Australian National Registry of Emissions Units (the Registry); • monitoring, facilitating and enforcing compliance with the mechanism; • allocating units including freely allocated units, fixed charge units and auctioned units; • applying legislative rules to determine if a particular entity is eligible for assistance in the form of units to be allocated administratively, and the number of other units to be allocated; • administering the National Greenhouse and Energy Reporting System (NGERS), the Renewable Energy Target (RET) and the Carbon Farming Initiative (CFI); and • accrediting auditors for the CFI and NGERS. <hr/> <p>The Climate Change Authority Bill 2011 sets up the Authority, which will be an independent body that provides the Government with expert advice on key aspects of the mechanism and the Government’s climate change mitigation initiatives.</p> <p>The Government will remain responsible for carbon pricing policy decisions.</p> <p>This Bill also sets up the Land Sector Carbon and Biodiversity Board which will advise on key initiatives in the land sector.</p>
<p>Consequential amendments</p>	<p>The Clean Energy (Consequential Amendments) Bill 2011 makes consequential amendments to ensure:</p> <ul style="list-style-type: none"> • NGERS supports the mechanism; • the Registry covers the mechanism and the CFI; • the Regulator covers the mechanism, CFI, the Renewable Energy Target and NGERS; • the Regulator and Authority are set up as statutory agencies and regulated by public accountability and financial management rules; • that emissions units and their trading are covered by laws on financial services; • that activities related to emissions trading are covered by laws on money laundering and fraud; • synthetic greenhouse gases are subject to an equivalent

	<p>carbon price applied through existing regulation of those substances;</p> <ul style="list-style-type: none"> • the Regulator can work with other regulatory bodies, including the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Transaction Reporting and Analysis Centre (Austrac); • the taxation treatment of emissions units for the purposes of GST and income tax is clear; and • the Conservation Tillage Refundable Tax Offset is established.
Procedural bills	<p>Those elements of the mechanism which oblige a person to pay money are implemented through separate bills that comply with the requirements of section 55 of the <i>Constitution</i>.</p> <p>These bills are the Clean Energy (Unit Shortfall Charge—General) Bill 2011, the Clean Energy (Unit Issue Charge – Fixed Charge) Bill 2011, the Clean Energy (Unit Issue Charge – Auctions) Bill 2011, the Clean Energy (Charges—Excise) Bill 2011, the Clean Energy (Charges—Customs) Bill 2011, the Clean Energy (International Unit Surrender Charge) Bill 2011, the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2011 and the Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 2011.</p>
Related bills	<p>Other elements of the Government’s Climate Change Plan are being implemented through other legislation. These are:</p> <ul style="list-style-type: none"> • the Clean Energy (Excise Tariff Legislation Amendment) Bill 2011 and the Clean Energy (Customs Tariff Amendment) Bill 2011, which imposes an effective carbon price on aviation and non-transport gaseous fuels through excise and customs tariffs; • the Clean Energy (Fuel Tax Legislation Amendment) Bill 2011, which reduces the business fuel tax credit entitlement of non-exempted industries for their use of liquid and gaseous transport fuels, in order to provide an effective carbon price on business through the fuel tax system; and • the Clean Energy (Household Assistance Amendments) Bill 2011, Clean Energy (Tax Laws Amendments) Bill 2011 and the Clean Energy (Income Tax Rates Amendments) Bill 2011, which will implement the household assistance measures announced by the Government on 10 July 2011. These bills amend relevant legislation to provide payment increases for pensioners, allowees and family payment recipients and provide income tax cuts and establish new supplements for low- and middle-income households.

The bills need to be read in the context, in particular, of the Clean Energy Bill 2011.

General Outline

The charges bills ensure compliance with section 55 of the Constitution. Section 55 requires that laws imposing taxation deal only with imposition of taxation and deal only with one subject of taxation. In addition, it requires that laws that impose duties of customs and excise (themselves laws imposing taxation) deal only with customs or excise.

A number of charges are payable as part of the mechanism. The charges are imposed by a number of separate bills to ensure that any of the charges which might be duties of customs or duties of excise or other taxation are imposed separately from provisions not imposing taxation, that none of the bills deals with more than one subject of taxation and that laws imposing duties of customs or excise deal only with customs or excise.

The charges bills ensure that, even where the Commonwealth considers that no separate bill is necessary, there can be no argument that there has not been compliance with section 55.

Structure of this explanatory memorandum

This explanatory memorandum covers all six charges bills. It deals with the common provisions of each together, and deals separately with any specific issues.

Date of effect and application

The charges bills will commence when section 3 of the Clean Energy Bill 2011 commences (that is, when the mechanism commences).

Proposal announced

The measures are based on the Government's announcement of its Clean Energy Future Plan on 10 July 2011 as set out in *Securing Australia's clean energy future: the Australian Government's climate change plan*.

Financial impact

The financial impact statement is included in the explanatory memorandum for the Clean Energy Bill 2011.

Regulation impact statement

The Regulation Impact Statement (RIS) for the mechanism, entitled *Australia's plan for a clean energy future*, is available at <http://ris.finance.gov.au>. The RIS was prepared by the Department of Climate Change and Energy Efficiency and has been assessed as adequate by the Office of Best Practice Regulation.

Chapter 1

Charges bills

Outline of chapter

- 1.1 This chapter explains the:
- Clean Energy (Unit Shortfall Charge—General) Bill 2011;
 - Clean Energy (Unit Issue Charge—Fixed Charge) Bill 2011;
 - Clean Energy (Unit Issue Charge—Auctions) Bill 2011;
 - Clean Energy (Charges—Customs) Bill 2011;
 - Clean Energy (Charges—Excise) Bill 2011; and
 - Clean Energy (International Unit Surrender Charge) Bill 2011.

Context and summary of new law

- 1.2 The mechanism includes a number of charges payable by liable entities to meet their liabilities for emissions. The charges bills ensure compliance with section 55 of the Constitution.

Detailed explanation of new law

Imposition of charges

Unit Shortfall Charge

- 1.3 The Clean Energy (Unit Shortfall Charge—General) Bill 2011 imposes unit shortfall charge as a tax so far as it is not a duty of customs nor a duty of excise. *[Clause 8]*

- 1.4 The unit shortfall charge will encourage liable entities to surrender units instead of paying the charge. There will be no compulsion to surrender units but the unit shortfall charge will be payable if insufficient units are surrendered.

Unit Issue Charge

- 1.5 The Clean Energy (Unit Issue Charge—Fixed Charge) Bill 2011 and the Clean Energy (Unit Issue Charge—Auctions) Bill 2011 impose as a tax the charges for issue of carbon units (whether fixed fee or auctioned)

so far as the charges are taxation, but not duties of customs or duties of excise, within the meaning of section 55 of the Constitution. *[Clause 8]*

1.6 The Commonwealth does not consider that the issue charges are taxation because taxation is necessarily compulsory and it will not be compulsory to surrender units.

1.7 However, a separate bill imposes those charges so far as they are taxation to ensure that there can be no argument that there has not been compliance with section 55. So far as the issue charges are not taxation, they will be payable under clauses 100 and 111 of the main bill.

1.8 The Commonwealth does not consider that, if the issue charges are taxation, a law imposing both the fixed charge and the auction charge would deal with more than one subject of taxation. However, separate bills impose the different charges to ensure that there can be no argument that there has not been compliance with section 55.

Customs and Excise

1.9 The Clean Energy (Charges—Customs) Bill 2011 imposes the unit shortfall charge and the issue charges so far as they are duties of customs. *[Clauses 8, 9]* The Clean Energy (Charges—Excise) Bill 2011 imposes the unit shortfall charge and the issue charges so far as they are duties of excise. *[Clauses 8, 9]*

1.10 It is not clear that the unit shortfall or issue charges would be duties of customs or duties of excise. Imposition of the charges by a separate bill so far as they are duties of customs or duties of excise ensures that there can be no argument that there has not been compliance with section 55 of the Constitution.

International Unit Surrender Charge

1.11 The Clean Energy (International Unit Surrender Charge) Bill 2011 imposes as a tax the charge for surrender of an eligible international emissions unit during the eligible financial years beginning on 1 July 2015, 2016 and 2017. *[Clause 8]*

Rate of charges

Unit Shortfall Charge

1.12 The Clean Energy (Unit Shortfall Charge—General) Bill 2011 imposes charge on a unit shortfall for a financial year, so far as it is not a duty of customs nor a duty of excise, at the following rates:

- If the year is a fixed charge year, the charge is 130 per cent of the fixed charge for that year. *[Clause 8]*
- If the year is a flexible charge year, the charge is 200 per cent of the benchmark average auction charge for the previous year or, if another amount is specified in regulations, the

other amount. The other amount cannot be more than 200 per cent of the benchmark average auction charge for the previous year. *[Clause 8]*

Unit Issue Charge

1.13 The Clean Energy (Unit Issue Charge—Fixed Charge) Bill 2011 and the Clean Energy (Unit Issue Charge—Auctions) Bill 2011 impose charge on the issue of carbon units, so far as the charges are taxation and not duties of customs or excise, at the following rates: *[Clause 8]*

- The fixed charge is the amount for which the unit is issued as set out in clause 100 of the main bill.
- The auction charge is the amount the buyer was willing to pay for the unit at the auction, which was accepted by the Regulator to form a contract for purchase of the unit. This is subject to a possible price floor. For units with a vintage year beginning on 1 July 2015, 2016 and 2017, the price floor is set at \$15, \$16 or \$17.05 respectively, subject to regulations setting a greater amount. However, this price floor will apply only if regulations are in force under the Clean Energy (International Unit Surrender Charge) Bill 2011 setting a charge for surrender of an eligible international emissions unit during the relevant financial years. In the absence of these regulations, and for other vintage years, a reserve charge may be set by regulations.

Customs and Excise

1.14 The Clean Energy (Charges—Customs) Bill 2011 imposes charge on a unit shortfall and on the issue of carbon units so far as the charges are duties of customs. The Clean Energy (Charges—Excise) Bill 2011 imposes charge on a unit shortfall and on the issue of carbon units so far as the charges are duties of excise. The charges are the same as the equivalent charges which are not duties of customs or excise. *[Clauses 8 and 9]*

International Unit Surrender Charge

1.15 The Clean Energy (International Unit Surrender Charge) Bill 2011 imposes charge for surrender of an eligible international emissions unit during the eligible financial years beginning on 1 July 2015, 2016 and 2017.

1.16 The charge will be the amount ascertained in accordance with regulations made under the bill. The amount cannot exceed \$15, \$16 or \$17.05 for a surrender in the years beginning 1 July 2015, 2016 or 2017 respectively. *[Clause 8]* The regulations can provide for exemptions from the charge in circumstances ascertained in accordance with the regulations. *[Clause 9]*

Common provisions

1.17 Each bill provides for its short title, that is the title stated above and by which the Acts will generally be identified. *[Clause 1]*

1.18 The formal provisions of each bill will commence on the day on which the bill receives the Royal Assent. The substantive provisions of each bill will commence at the same time as the substantive provisions of the main bill commence (see clause 2 of the main bill). *[Clause 2]*

1.19 Each bill contains definitions of terms used in the bill. Most of the terms are defined to have the same meaning as in the main bill. *[Clause 3]*

1.20 Each bill binds the Crown in right of each of the States, the ACT, the Northern Territory and Norfolk Island. However, the bills do not bind the Crown in right of the Commonwealth. *[Clause 4]* The Commonwealth cannot impose a tax on itself. However, it is intended that the Commonwealth be made notionally liable for any liabilities it incurs under the mechanism (see clause 306 of the main bill).

1.21 Consistently with the main bill, each bill extends to every external Territory *[Clause 5]*, and to Australia's exclusive economic zone, the continental shelf and the Joint Petroleum Development Area. *[Clauses 6 and 7]* The terms 'exclusive economic zone' and 'continental shelf' will have the meanings given by the *Acts Interpretation Act 1901* as amended by the *Acts Interpretation Amendment Act 2011* (which is expected to commence prior to the charges bills).

1.22 Each bill will have no effect to the extent, if any, to which it imposes a tax on property of any kind belonging to a State (where 'property of any kind belonging to the State' has the same meaning as in section 114 of the Constitution). *[Clean Energy (Charges—Customs) Bill 2011, Clean Energy (Charges—Excise) Bill 2011, clause 10]* *[Other bills, clause 9]*

1.23 Each bill gives the Governor-General power to make regulations prescribing matters required or permitted by the bill to be prescribed. *[Clean Energy (Charges—Customs) Bill 2011, Clean Energy (Charges—Excise) Bill 2011, clause 11]* *[Other bills, clause 10]*

