EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 181

Issued by the Authority of the Minister for Climate Change and Energy Efficiency

Clean Energy Act 2011

Clean Energy Amendment Regulation 2012 (No. 5)

Section 312 of the Clean Energy Act 2011 (the Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act, together with the other Acts in the Clean Energy Legislative Package, establishes the carbon pricing mechanism as part of the Government’s climate change plan, as set out in the document Securing a Clean Energy Future: the Australian Government’s Climate Change Plan.

The Clean Energy Amendment Regulation 2012 (No. 5) amends the Clean Energy Regulations 2011 (the Principal Regulations) to:

- change the definition of ‘withdrawal’ of natural gas to ensure owners and operators of natural gas supply pipelines do not incur a liability under the carbon pricing mechanism for emissions embodied in gas that they transport on behalf of others (Schedule 1 to the Regulation); and

- include the production of coke oven coke and the production of hydrogen peroxide as eligible emissions-intensive, trade-exposed (EITE) activities under the Jobs and Competitiveness Program (the Program) and outline the baselines in Part 4 for these activities for determining the amount of assistance in the form of free carbon units that each applicant would be eligible for in relation to the activities (Schedule 2 to the Regulation).

One of the objects of the Act is to put a price on greenhouse gas emissions in a way that supports jobs and competitiveness in the economy. Part 7 of the Act provides for the establishment of the Jobs and Competitiveness Program (the Program) to support jobs and protect the competitiveness of EITE industries from risks that those industries will be located in, or relocated to, foreign countries as a result of different climate change policies applying in Australia compared to foreign countries. The Program also provides support for industry, local communities and workers to have a smooth transition to a clean energy future.

Section 145 of the Act provides that the Regulations may formulate the details of the Program for the annual issue of free carbon units in relation to EITE activities as defined by the Program. EITE activities are industrial activities that produce a lot of carbon pollution but where the capacity of entities undertaking those activities to pass through costs is constrained where prices are set by global markets. The Program was first established in amendments to the Principal Regulations on 24 February 2012.

Subsection 145(5) of the Act provides that in making a recommendation to the
Governor-General about regulations that amend regulations made for the purposes of subsection 145(1) of the Act, the Minister must have regard to the following matters:

- the aim and objects of this Part 7 of the Act;
- the most recent report given to the Productivity Minister by the Productivity Commission in relation to an inquiry mentioned in section 155 of the Act;
- the principle that changes that will have a negative effect on recipients of assistance under the Program should not take effect before the later of the following
  - 1 July 2017; and
  - the end of the 3-year period that begins when the reduction is announced;
- such other matters (if any) as the Minister considers relevant.

There are currently no relevant reports from the Productivity Commission.

A summary of the key amendments made by the Regulation is provided at Attachment A.

A Human Rights Statement in respect of the Regulation is included at Attachment B.

Details of the Regulation are set out in Attachment C.

The Act does not specify conditions that need to be satisfied before the power to make the Regulation may be exercised in addition to the consideration of the matters in subsection 145(5) of the Act.

The Regulation is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Schedule 1 to the Regulation (dealing with the definition of ‘withdrawal’) is taken to have commenced on 1 July 2012. Schedule 2 to the Regulation (dealing with the inclusion of certain activities in the Jobs and Competitiveness Program) commences on the day after it is registered on the Federal Register of Legislative Instruments.

Consultation

Definition of withdrawal

The Department of Climate Change and Energy Efficiency undertook extensive consultation to develop policy for the carbon pricing mechanism coverage of natural gas and the details for the legislative implementation of that policy in 2011 and 2012, including through a technical working group containing natural gas industry participants.

The amendment to the definition of ‘withdrawal’ was requested by stakeholders to address an unintended potential interpretation of the Act that might lead to pipeline owners or operators being considered liable entities under the carbon pricing mechanism as ‘suppliers’ of natural gas in situations where they merely transport the gas. Targeted consultation was held with industry members in July 2012, including provision of a draft of the amendment to the natural gas technical working group and additional selected gas users. Seven submissions were
received on the draft, and these were considered in finalising the Regulation.

*Changes to the Jobs and Competitiveness Program*

The Department of Climate Change and Energy Efficiency has also undertaken an extensive consultation process to establish the eligibility of EITE activities and develop Regulations to implement the Program.

The policy framework for determining the eligibility of EITE activities for assistance under the Program was originally developed in 2009 and has been used to establish the eligibility of activities with respect to assistance provided under the Renewable Energy Target (RET) scheme – *Renewable Energy (Electricity) Act 2000*. The process for assessing activities and defining the technical aspects of the activities, including setting assistance rates and allocative baselines, is outlined in the paper titled *Establishing the eligibility of activities under the Jobs and Competitiveness Program*.

The formal process for defining and determining the eligibility of an EITE activity involves a stakeholder workshop to formulate an appropriate activity definitions and boundary, and approval of the activity definition by the Minister for Climate Change and Energy Efficiency for the purposes of data collection. Audited data based on the approved definition is then submitted to the Government. If determined to be eligible, stakeholders in the relevant industry are consulted in regard to the drafting of the definitions to be included in the Regulations to ensure that the structure of the definitions generally reflects the conduct of the activities.

The Clean Energy Legislative Package reflects the outcomes of comprehensive consultation with the public and stakeholders. Since the passage of the Clean Energy Legislative Package, the Government has consulted extensively with those covered by the mechanism and related reforms in relation to implementation and compliance issues.

*Authority: Section 312 of the Clean Energy Act 2011*
Summary and Policy Guidance on the *Clean Energy Amendment Regulation 2012* (No. 5)

**Schedule 1**

Schedule 1 to the Regulation amends the Principal Regulations to:

- change the definition of ‘withdrawal’ of natural gas to ensure owners and operators of natural gas supply pipelines do not incur a liability under the carbon pricing mechanism as natural gas suppliers for emissions embodied in gas that they transport on behalf of others.

Liability for emissions embodied in natural gas is provided for in Part 3, Division 3 of the Act.

Section 33 of the Act provides that natural gas suppliers are liable for emissions embodied in natural gas that they supply where:

- the natural gas has been withdrawn from a natural gas supply pipeline to supply to a customer; and
- it may reasonably be expected that the customer will use all or part of the gas; and
- the customer does not quote an Obligation Transfer Number (OTN) to the supplier in relation to the supply of natural gas.

Liability for natural gas emissions generally arises for the last supply before the gas is used. Either the final supplier or the end user is liable for the emissions embodied in the supply depending on whether an OTN is quoted.

Section 5 of the Act provides that ‘withdrawal’, in relation to natural gas, has the meaning given by the regulations. Regulation 1.9 defines the term for these purposes, and sets out when the ‘withdrawal’ of natural gas is taken to have occurred.

In some circumstances, owners or operators of natural gas supply pipelines may be liable for the supply of natural gas under section 33 of the Act when they transport gas on behalf of certain customers. Liability could arise if the haulage contract gives the pipeline owner or operator title to the gas while it is being transported through the pipeline, and provides for that title to transfer directly to the end user of the gas, rather than to an intermediary (such as a natural gas retailer). The imposition of liability on either the owner or operator in these situations is not the intended policy outcome.

Schedule 1 to the Regulation amends the Principal Regulations to ensure that that pipeline owners and operators do not face liability as natural gas suppliers for the embodied emissions in the gas in these situations.

Subregulation 1.9(1B) provides that there is no ‘withdrawal’ of gas from a natural gas supply pipeline where the gas is supplied by the owner or operator of the pipeline and the supply is made under an agreement for the provision of a pipeline service. The amendment is not intended to affect the liability of pipeline owners or operators for direct emissions from pipeline facilities, or other arrangements relating to the supply of natural gas.
A definition of ‘pipeline service’ is provided in subregulation (3) based on the definition that is in the national gas law (NGL) (the National Gas (South Australia) Act 2008 (SA)). The use of the definition from the NGL is intended to clearly prescribe the situations in which subregulation 1.9(1B) applies. The industry is familiar with this definition, which has a commonly understood meaning.

The amendments made by Schedule 1 to the Regulation are taken to have commenced on 1 July 2012. This is to ensure that owners and operators of pipelines do not face liability for supplies of gas made under agreements for the provision of a pipeline service between 1 July 2012 and the date of commencement of the Regulation.

Retrospective application of the amendments is not prevented by s 12(2) of the Legislative Instruments Act 2003 (LI Act) as no rights of any person (other than the Commonwealth) as at the date of registration are affected so as to disadvantage any person, and no liabilities are imposed on a person (other than the Commonwealth) in respect of anything done or omitted to be done before registration.

In particular, the effect of the amendments is to remove the pipeline owner’s or operator’s liability under section 33 of the Act as a supplier of natural gas. This does not disadvantage the pipeline owner or operator or impose any liability on it in respect of anything done before the date of registration.

The end user of the gas supplied by the pipeline owner or operator (i.e. the person in receipt of the supply) is also not disadvantaged by the amendments or otherwise made liable for anything done or omitted to be done before registration of the Regulation. If the end user is a large gas consuming facility (section 55A of the Act), then it would have been required to quote an OTN in respect of the supply of the gas and assume direct liability for the potential emissions embodied in the supply (section 55B of the Act). With the amendment, it will not be required to quote an OTN but will instead be liable for the emissions embodied in the supply as a direct emitter of covered emissions in accordance with Division 2 of Part 3 of the Act. In either case, the end user’s liability in respect of the supplied gas is the same.

If the end user is not a large gas consuming facility, then it would not have been required to quote an OTN and assume direct liability for the potential emissions embodied in the supply of the gas. This position is unchanged by the amendment. As a small facility, it also would not have been liable as a direct emitter of covered emissions (as it would not have passed the threshold test in section 20 of the Act). Again, this position is unchanged by the amendment.

Schedule 2

Schedule 2 to the Regulation amends Schedule 1 of the Clean Energy Regulations 2011 to:

- prescribe the production of coke oven coke and the production of hydrogen peroxide as additional eligible EITE activities under Part 3 by providing the details and specifications of each activity, including the rate of assistance that applies to the activity and the relevant product produced in undertaking the activity which forms the basis of the issue of free carbon units; and

- outline the baselines in Part 4 for the new eligible EITE activities that are to be used in determining the amount of assistance for each applicant in relation to the emissions, electricity and natural gas used as a feedstock for the EITE activity.
In accordance with subsection 145(5) of the Act, the Minister for Climate Change and Energy Efficiency has given regard to the aim and objects of Part 7 of the Act and the principle that changes that will have a negative effect on recipients of assistance under the Program should not take effect before the later of 1 July 2017, or the end of the three-year period that begins when the reduction is announced.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Clean Energy Amendment Regulation 2012 (No. 5)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Clean Energy Amendment Regulation 2012 (No. 5)

The Regulation is designed to change the definition of ‘withdrawal’ of natural gas for the purposes of the Clean Energy Act 2011 to ensure natural gas pipeline owners and operators do not incur a liability under the carbon pricing mechanism as natural gas suppliers for emissions embodied in gas that they transport on behalf of others.

The Regulation is also designed to include additional activities as eligible under the Jobs and Competitiveness Program (the Program). The Program is a key component of the carbon pricing mechanism targeted at supporting industries that produce a lot of carbon pollution but are constrained in their capacity to pass through costs in global markets.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Greg Combet

Minister for Climate Change and Energy Efficiency
Details of the Clean Energy Amendment Regulation 2012 (No. 5)

PART 1 - PRELIMINARY

Section 1 – Name of Regulation

Section 1 provides that the title of the Regulation is the Clean Energy Amendment Regulation 2012 (No. 5) (the Regulation).

Section 2 – Commencement

Section 2 provides that Schedule 1 to the Regulation is taken to have commenced on 1 July 2012.

Section 2 also provides for Schedule 2 to the Regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Amendment of Clean Energy Regulations 2011

Section 3 provides that the Regulation amends the Clean Energy Regulations 2011 (the Principal Regulations) in the manner set out by Schedules 1 and 2.

SCHEDULE 1 – Amendments taken to have commenced on 1 July 2012

Item [1] – After subregulation 1.9 (1A)

This item adds new subregulation 1.9(1B) which provides that there is no withdrawal of natural gas from a natural gas supply pipeline if the gas is supplied by a person who is the owner or operator of the pipeline and the supply is made under an agreement for the provision of a pipeline service. The amendment is intended to ensure that an owner or operator of a pipeline who is merely transporting the gas will not face a carbon pricing mechanism liability for the emissions embodied in the gas as a supplier of natural gas under Part 3, Division 3 of the Act.

Item [2] – After subregulation 1.9 (2)

This item adds new subregulation 1.9(3) which defines ‘pipeline service’ for the purposes of subregulation 1.9(1B) based on the definition that is in the national gas law (NGL) (the National Gas (South Australia) Act 2008 (SA)). The use of the definition from the NGL is intended to clearly prescribe the situations in which subregulation 1.9(1B) applies. The industry is familiar with the definition of pipeline service in the NGL, which has a commonly understood meaning.

However, the reference to ‘processable gas’ in the NGL pipeline service definition is not included, as consideration of unprocessed gas is not relevant for current purposes. In addition, references to ‘form haulage, interruptible haulage, spot haulage, and backhaul’ in the NGL definition are not included as these would require further definition. Instead, reference is made to the general NGL definition of ‘haulage’.
SCHEDULE 2 – Amendments commencing on day after registration

Item [3] – Schedule 1, subclause 320(8)

This item replaces the description of the basis of issue for free carbon units in relation to the integrated iron and steel manufacturing activity to clarify that a tonne of coke oven coke that is produced as part of the integrated activity is not also able to be used as relevant product for the basis of the allocation of assistance under the stand-alone coke oven coke activity. This amendment is intended to prevent the same amount of production of coke oven coke being used to as the basis for assistance under two different eligible activities. The amendment is not intended to change the process of coke oven coke production that is part of the integrated iron and steel manufacturing activity (as described in paragraph 320(1)(b) of Schedule 1).

Item [4] – Schedule 1, Part 3, after Division 44

Division 45 Production of coke oven coke

Clause 345

Clause 345 provides that the production of coke oven coke is the physical and chemical transformation of coal into coke oven coke, which proceeds at a temperature above 900°C, and where at least 80 per cent of the coke oven coke exhibits a Coke Strength after Reaction (CSR) value above 50 per cent and a Coke Reactivity Index (CRI) value of less than 40 per cent.

Production of coke oven coke is an emissions-intensive, trade-exposed (EITE) activity eligible for assistance at the highly emissions-intensive rate.

The activity as conducted during the period used to assess the eligibility of the activity involved the onsite crushing, grinding, conditioning, charging, heating and quenching of coal to produce coke oven coke.

The inputs of the activity have been defined to include coal. The output of this activity is saleable coke oven coke which exhibits a CSR value above 50 per cent and a CRI value of less than 40 per cent produced by the carrying on of the activity.

The activity does not include the upstream mining and extraction of coal.

Subclause 345(4) outlines that the basis of issue is per tonne of dry weight saleable coke oven coke where at least 80 per cent of production exhibits a CSR value above 50 per cent and a CRI value of less than 40 per cent. The measurement of the relevant coke oven coke should be measured according to the accepted industry practice for production that conforms to:

- AS 1038.4-2006 Coal and coke - Analysis and testing - Coke - Proximate analysis;
- AS 4264.2-1996 Coal and coke - Sampling - Coke - Sampling procedures;
- ASTM D5341 - 99(2010)e1 Standard Test Method for Measuring Coke Reactivity Index (CRI) and Coke Strength After Reaction (CSR);
- AS 1038.2-2006 Coal and coke - Analysis and testing - Coke - Total moisture;
- AS 1038.13-1990 Coal and coke - Analysis and testing - Tests specific to coke;
- AS 1038.5-1998 Coal and coke - Analysis and testing - Gross calorific value;
- AS 1038.6.1-1997 Coal and coke - Analysis and testing - Higher rank coal and coke - Ultimate analysis - Carbon and hydrogen;
- or the above referenced standards as updated from time to time.

The coke oven coke produced in this activity is not a relevant product for the emissions-intensive trade-exposed activity of integrated iron and steel manufacturing. As such, the coke oven coke produced in this activity is not eligible for assistance under the integrated iron and steel activity.

To be eligible for assistance, the coke oven coke must have been produced by carrying on the activity (as defined by clause 345) to be eligible as a relevant product. For example, if imported coke oven coke is blended with product produced from the activity, only the domestically produced coke oven coke would be included in the tonnes of the relevant product.

The coke oven coke must be of saleable quality (as defined by regulation 202). In particular, the tonnes of coke oven coke which are scrapped, lost or discarded are not to be included in the tonnes of relevant product.

**Division 46 Production of hydrogen peroxide**

**Clause 346**

Clause 346 provides that the production of hydrogen peroxide is the chemical transformation of hydrogen (H) feedstocks and oxygen (O) feedstocks to produce a crude aqueous hydrogen peroxide solution where the concentration of hydrogen peroxide (H_2O_2(aq)) is equal to or greater than 39 per cent with respect to mass, and subsequent production of saleable aqueous hydrogen peroxide solutions where the concentration of hydrogen peroxide (H_2O_2(aq)) is equal to or greater than 34 per cent with respect to mass.

Production of hydrogen peroxide is an EITE activity eligible for assistance at the moderately emissions-intensive rate.

The activity as conducted during the period used to assess the eligibility of the activity involved the production of hydrogen using a natural gas steam reformer, the production of crude hydrogen peroxide using the auto oxidation process and the purification of the crude hydrogen peroxide into saleable aqueous hydrogen peroxide solution.

The inputs of the activity have been defined to include hydrogen and oxygen. The output of this activity is saleable aqueous hydrogen peroxide solution.

Subclause 346(4) outlines that the basis of issue is per tonne of 100 per cent equivalent...
hydrogen peroxide in saleable aqueous hydrogen peroxide of at least 34 per cent with respect to mass. The measurement of the relevant aqueous hydrogen peroxide solution should be measured according to the accepted industry practice for hydrogen peroxide production.

To be eligible for assistance, the aqueous hydrogen peroxide solution must have been produced by carrying on the activity (as defined by clause 346) to be eligible as a relevant product. For example, if imported saleable aqueous hydrogen peroxide solution is blended with the product produced from the activity, only the domestically produced hydrogen peroxide would be included in the tonnes of the relevant product. Saleable aqueous hydrogen peroxide solution that is purified from crude aqueous hydrogen peroxide solution that is not produced within the activity is also not eligible for assistance.

The aqueous hydrogen peroxide solution must be of saleable quality (as defined by regulation 202). In particular, the tonnes of hydrogen peroxide solution which are scrapped, lost or discarded are not to be included in the tonnes of relevant product.

**Item [5] – Schedule 1, subclause 401 (1), table, after item 1.31**

Item [5] inserts into the table in Part 4 of Schedule 1 allocative baselines for assistance that relate to the production of coke oven coke activity as prescribed by item 2, which is categorised as a highly emissions-intensive activity. The baselines are for the direct emissions and electricity use for the activity in clause 345. The baselines have been established as the weighted industry average of the emissions and electricity intensity of the activities, based on historical data submitted by the entities undertaking the activity during the base period, consistent with the principles of the Jobs and Competitiveness Program (JCP) outlined in *Establishing the eligibility of activities under the Jobs and Competitiveness Program*. The formula for calculating the number of free permits in Part 9 of Schedule 1 to the Regulations applies the baselines as outlined in the table.

**Item [6] – Schedule 1, subclause 401 (1), table, after item 2.12**

Item [6] inserts into the table in Part 4 of Schedule 1 allocative baselines for assistance that relate to the production of hydrogen peroxide activity as prescribed by item 2, which is categorised as a moderately emissions-intensive activity. The baselines are for the direct emissions and electricity use for the activity in clause 346. The baselines have been established as the weighted industry average of the emissions and electricity intensity of the activities, based on historical data submitted by the entities undertaking the activity during the base period, consistent with the principles of the JCP outlined in *Establishing the eligibility of activities under the Jobs and Competitiveness Program*. The formula for calculating the number of free permits in Part 9 of Schedule 1 to the Regulations applies the baselines as outlined in the table.