Clean Energy Regulator Bill 2011

Moira Coombs
Law and Bills Digest Section

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Clean Energy Regulator Bill 2011

Date introduced: 13 September 2011
House: House of Representatives
Portfolio: Climate Change and Energy Efficiency

Commencement: Sections 1 and 2 commence on Royal Assent. Sections 3 to 57 commence at the same time as section 3 of the Clean Energy Act 2011. Section 3 of that Act will commence on a day fixed by Proclamation.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Clean Energy Regulator Bill 2011 (the Regulator Bill) sets up the Clean Energy Regulator, a statutory authority, to administer the carbon pricing mechanism and to enforce compliance with the law. This Bill deals with the governance matters concerning the Regulator and how the Regulator will operate.

The Clean Energy Regulator Bill 2011 is one of a number of Bills in the Clean Energy Legislation package introduced into the House of Representatives on 13 September 2011. The Clean Energy Bill 2011 is the primary Bill in this package. The Clean Energy Regulator Bill sets up the Clean Energy Regulator (the Regulator) as a statutory authority with powers ‘very similar to those given to other business regulatory agencies’1, such as the Australian Securities and Investment Commission.

Basis of policy commitment

Multi-Party Climate Change Committee

The Multi-Party Climate Change Committee was established on 27 September 2010 by the Prime Minister, Julia Gillard, MP. At its first meeting on 7 October 2010, the Committee members ‘formally affirmed the terms of reference, and reiterated their commitment to work co-operatively across

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party lines in considering all the options for a price on carbon.\textsuperscript{2} The terms of reference for the Committee state that it was established to:

Consult, negotiate and report to the Cabinet, through the Minister for Climate Change and Energy Efficiency, on agreed options for the implementation of a carbon price in Australia; and

Provide advice on, and participate in, building community consensus for action on climate change.\textsuperscript{3}

The Committee was advised by a panel of independent experts:

- Professor Ross Garnaut
- Professor Will Steffen
- Mr Rod Sims and
- Ms Patricia Faulkner.

On 10 July 2011, the Committee released the Clean Energy Agreement. In the agreement, the plan for an independent Regulator is set out which is consistent with the Bill.\textsuperscript{4}

Securing a clean energy future

On the same date, the Government released its plan \textit{Securing a clean energy future: the Australian Government’s Climate Change Plan}.\textsuperscript{5} The Plan explains the policy basis of the carbon pricing mechanism and how it will operate. Detail on the carbon pricing mechanism and how it will operate can be found in the Clean Energy Bill 2011 – Bills Digest.\textsuperscript{6}

\begin{itemize}
\item J Gillard (Prime Minister), \textit{Multi-party climate change committee communiqué}, media release, 7 October 2010, viewed 29 September 2011, \url{http://www.pm.gov.au/press-office/multi-party-climate-change-committee-communique}
\item Australian Government, Multi-party Climate Change Committee, ‘Clean energy agreement’, Department of Climate Change and Energy Efficiency website, undated, viewed 7 October 2011, \url{http://www.climatechange.gov.au/government/initiatives/mpccc/resources/clean-energy-agreement.aspx}
\item Clean Energy Bill will be published on the Bills Homepage shortly and can be found at the following address: \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2Fr4653%22}
\end{itemize}

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Clean Energy Regulator

Issues

The Regulator will be set up as a body corporate with the ability to acquire, hold and dispose of real and personal property and may sue or be sued in its corporate name. The body will be headed by a Chair and have at least two members and not more than four members. Staff of the Regulator will be engaged under the Public Service Act 1999. The Regulator will comply with the Financial Management and Accountability Act 1997 (FMA Act). The Department of Finance’s Governance Arrangements for Australian Government Bodies states:

An FMA agency will typically be legally part of the Commonwealth. However, there may be instances where a body requires a separate legal identity to the Commonwealth. This will generally arise where, for example, there is a need for the body to have the power to sue and be sued in its corporate name (as opposed to a single office holder requiring that capacity such as the Federal Commissioner of Taxation). Corporate identity may also arise where a group of people need to exercise decision-making in the performance of their statutory functions, including a regulatory or enforcement role. In these cases, it may be appropriate for a body corporate to be created by the Parliament.

One of the benefits of being an FMA agency according to the Department of Finance’s Governance Arrangements is that as a separate body it receives its own appropriation from the Appropriation Acts. There are, however, a number of reporting and accountability obligations under the FMA Act that arise from this financial autonomy.

Functions of the new Regulator

The Regulator Bill, clause 3 simplified outline, states that the Regulator has such functions as are conferred by:

- the Clean Energy Bill 2011
- the Carbon Credits (Carbon Farming Initiative) Act 2011
- the National Greenhouse and Energy Reporting Act 2007
- the Renewable Energy (Electricity) Act 2000 and
- the Australian National Registry of Emissions Units Act 2011.

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10. Ibid., p. 20.

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Compliance and enforcement powers of the Regulator

Compliance and enforcement powers are conferred by the Clean Energy Bill 2011.

The Regulator is responsible for administering the mechanism. It has investigation and enforcement powers to enforce the rules governing the mechanism’s operation to ensure compliance by those covered by it. These powers give it a range of proportionate tools to use when administering the mechanism, which are similar to those available to other regulators under Commonwealth laws.12

The parts of the Clean Energy Bill relating to the compliance and enforcement powers of the Regulator are:

Part 3 Liable entities
Part 10 Fraudulent conduct
Part 11 Relinquishment of carbon units
Part 13 Information-gathering powers
Part 14 Record-keeping requirements
Part 15 Monitoring powers
Part 16 Liability of executive officers of bodies corporate
Part 17 Civil penalty orders
Part 18 Infringement notices
Part 19 Offences relating to unit shortfall charge and administrative penalties
Part 20 Enforceable undertakings (a person may give the Regulator an enforceable undertaking concerning compliance with the Clean Energy Bill)
Part 21 Review of decisions (certain decisions of delegates of the Regulator and the Regulator may be reviewed by the AAT).

See the Bills Digest for the Clean Energy Bill 2011 for more detailed information on these powers.13

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13. Clean Energy Bill will be published on the Bills Homepage shortly and can be found at the following address: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fbillhome%2F4653%22
The Regulator will have the role of administering carbon pricing mechanism included in the Clean Energy Plan, the Renewable Energy Target, National Greenhouse and Energy Reporting System, the Carbon Farming Initiative and the Australian National Registry of Emissions Units.

**Renewable Energy Target**

The Regulator will be responsible for the Renewable Energy Target scheme which is designed to deliver on the Government’s commitment to ensure that 20 per cent of Australia’s electricity supply will come from renewable sources by 2020. This scheme was implemented in 2009.\(^{14}\)

This scheme follows on from the Commonwealth Government’s Mandatory Renewable Energy Target (MRET) which planned the generation of 9500 GWh of extra renewable electricity per year by 2010. This scheme commenced in 2001 under the *Renewable Energy (Electricity) Act 2000*.\(^{15}\)

As a result of the conferral of these functions on the new Regulator, the Office of the Renewable Energy Regulator and the Greenhouse and Energy Data Officer will be abolished.\(^{16}\) Clause 12 of the Regulator Bill states that apart from other functions, the Regulator has such functions as are conferred by a climate change law. The Explanatory Memorandum sets out in Table 1.1 a summary of the functions conferred on the Regulator by climate change laws.\(^{17}\)

**National Greenhouse and Energy Reporting Scheme**

The Regulator will now be responsible for the administration of this scheme. The *National Greenhouse and Energy Reporting Act 2007* introduced a national framework for the reporting and dissemination of information about greenhouse gas emissions, greenhouse gas projects and energy use and production of corporations. The objects of the legislation are set out in section 3:

- underpin the introduction of an emissions trading scheme in the future
- inform government policy formulation and the Australian public
- meet Australia’s international reporting obligations
- assist Commonwealth, state and territory government programs and activities and
- avoid the duplication of similar reporting requirements in the states and territories.\(^{18}\)

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16. Ibid., p. 7.


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Carbon Farming Initiative

The Department of Agriculture, Fisheries and Forestry website summarises the initiative as follows:

The Carbon Farming Initiative is an Australian Government initiative to help farmers, forest growers and landholders earn income from reducing emissions like nitrous oxide and methane through changes to agricultural and land management practices. The initiative will achieve this by:

- establishing a carbon crediting scheme
- developing methodologies for offset projects
- providing information and tools to help farmers and landholders benefit from carbon markets
- investing in a Biochar Capacity Building Program.19

For more detailed information and policy background see the Bills Digest on the Carbon Credits (Carbon Farming Initiative) Bill 2011.

A Clean Energy Future fact sheet noted:

The Carbon Farming Initiative (CFI) is a carbon offsets scheme that will provide new economic opportunities for farmers, forest growers and land managers while also helping the environment by reducing carbon pollution. Farmers and land managers will be able to generate credits that can then be sold to other businesses wanting to offset their own carbon pollution.20

Australian National Registry of Emissions Units

The Australian National Registry of Emissions Units meets one of the Australia’s commitments under the Kyoto Protocol. According to the Department’s website, the Protocol requires each country with an emission reduction target to establish a national registry to ensure accurate accounting of the issuance, transfer and acquisition between registries.21

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Committee consideration

Joint Select Committee on Australia’s Clean Energy Future Legislation

The Joint Select Committee on Australia’s Clean Energy Future Legislation was established under a resolution of appointment passed by the House of Representatives on 14 September 2011 and the Senate on 15 September 2011 to inquire into and report on the provisions of the Bills contained in the Clean Energy Legislation package. The Committee’s membership consists of six Australian Labor Party members, four Liberal members, one Nationals member, two Australian Greens and one independent.

The Committee tabled its report out of session on 7 October 2011.

Senate Selection of Bills Committee

The Senate Selection of Bills Committee met on 21 September 2011 and considered proposals to refer the provisions of the Clean Energy Legislative package of Bills to ‘each of the Senate legislation committees but was unable to reach agreement on whether the Bills should be referred’. 22

Senate Standing Committee for the Scrutiny of Bills

In the Alert Digest, the Committee draws attention to the reversal of onus of proof in Part 3 of the Bill dealing with secrecy provisions. Exceptions are provided to the offence provisions in subclauses 43(2), 49(7) and 50(7). The notes to these provisions state that a defendant bears an evidential burden in relation to the matters stated in the provisions and refers to subsection 13.3(3) of the Criminal Code Act 1995. The evidential burden of proof on the defendant is not based on the criminal standard of beyond reasonable doubt but is based on the balance of probabilities. The Committee in the Alert Digest notes the justification provided in the Explanatory Memorandum at paragraph 1.66 for the Evidential Burden:

In any prosecution, the defendant will have the evidential burden with respect to the exceptions outlined above. [Part 3, clause 43(2)] This is justified because in many cases it is peculiarly within the defendant’s knowledge as to which of the exceptions, if any, apply. The effect is that the defendant must adduce or point to evidence that suggests a reasonable possibility that one of the exceptions applies. Once this is done, the prosecution must refute this beyond reasonable doubt to obtain a conviction. 23


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The Committee, in the Alert Digest, stated that it “leaves the question of the appropriateness of these provisions to the consideration of the Senate as a whole”.24

**Policy position of non-government parties/independents**

The primary Bills Digest will cover the positions of the non-government parties and independents generally. The comments contained here relate primarily to the Clean Energy Regulator.

The Opposition Leader, Mr Tony Abbott, referred to the new Regulator as a carbon cop and that it would be a ‘draconian new police force’ able to demand information from company records.25 The Shadow Treasurer Joe Hockey, MP, referred to the Regulator as ‘a clean energy Regulator policed by “carbon cops” [which] will only create another layer of wasteful bureaucracy’.26

In response to the label of ‘draconian’, the Prime Minister, Julia Gillard, MP, said:

> It was “remarkable” that Mr Abbott would criticise powers “to make sure Australian families don’t get ripped off”.

> “The penalties are absolutely right, no one should do the wrong thing and if people do the wrong thing then they should feel the full force of the law, including high fines and penalties, that’s appropriate if people try any rip-offs”.27

A Coalition Government would likely scrap the Department of Climate Change, as noted in a media report.28 The report further notes:

> Mr Hockey told the ABC the department would be ‘pretty high up the list for very close scrutiny’, as it sought to make cuts to the public service.29

In a media release in August 2011, the Australian Greens asked how it was possible that ‘direct action’ could work without a Climate Change Department or a Regulator. Senator Christine Milne noted:

> Tony Abbott has some serious questions to answer as to how he proposes to take any climate action at all without a Department of Climate Change, a regulatory body or a Clean Energy Finance Corporation...

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29. Ibid.

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UK Tory Prime Minister David Cameron, recently wrote to Prime Minister Gillard strongly supporting the agreement from the Multi-Party Climate Change Committee.

New Zealand Prime Minister, John Key, has already opened discussions about how to link Australia’s price on pollution with New Zealand’s emissions trading scheme - a scheme which has already begun cutting pollution and driving investment in renewable energy while becoming increasingly popular in the business sector and the broader community.  

**Position of major interest groups**

The Climate Change Institute considers that the law needs amending to limit the power to waive fees on companies that fail to meet their carbon liability. They consider the exemption is too broad. It is also different to the scheme under the renewable energy target. Under the new law companies can also challenge the decision of the Regulator. The Institute considers that:

> This poses a large invitation to major polluters to dispute their obligations and lobby the regulator to have them waived.  

Chris Berg, a Research Fellow with the Institute of Public Affairs, considers that the powers which the Gillard Government intends to give the new Regulator are unquestionably illiberal. He further notes that the Regulator will be able to enter and search workplaces and compel people to provide self-incriminating evidence. In his view it is a clear breach of the basic right to silence. However, in Australia’s current regulatory state, he says that the powers are not surprising or unusual. Comparisons are made with the powers of the Australian Securities and Investments Commission. He states:

> It’s a feature of Australia’s regulatory state that government regulators are granted extraordinary powers - often more substantial powers than the police hold.  

Rio Tinto has criticised the tough new powers of the Regulator to ‘audit, monitor and demand information from companies’. Rio Tinto comments:

> The government is urged to consider the information provision mechanisms and requirements that apply... with a view to streamlining them, or at least to keep them under review to ensure that, in practice, they are not being administered or implemented in a way that imposes unduly onerous burdens on business in complying with them.  

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34. Ibid.

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Financial implications

The financial impact is dealt with in the Explanatory Memorandum to the Clean Energy Bill 2011.35

Key provisions

Part 2—Clean Energy Regulator

Division 1—Regulator’s establishment, functions, powers and liabilities

Clause 11 establishes the Clean Energy Regulator as a statutory authority.

Functions of the Regulator

Clause 12 provides that the Regulator will have the functions conferred by climate change law (paragraph 12(a)).36 Climate change law is defined in clause 4 which lists the pieces of legislation coming within the definition. Paragraph 12(b) provides that the Regulator will have such functions as are conferred by any other law of the Commonwealth. Paragraph 12(c) provides that the Regulator can do anything incidental to or conducive to the performance of any of these functions.

Powers

Clause 13 deals with the powers of the Regulator. Subclause 13(1) states that the Regulator has power to do all things necessary or convenient in connection with the performance of all its functions. The powers include, but are not limited to:

• entering into contracts (subclause 13(2))
• contracts are entered into on behalf of the Commonwealth (subclause 13(3))
• real or personal property is held on behalf of the Commonwealth (subclause 13(4))
• money received is received for and on behalf of the Commonwealth (subclause 13(5)) and
• real or personal property cannot be held on trust for a person other than the Commonwealth (subclause 13(6)).

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Division 2—Constitution and membership of the Regulator

Constitution of the Regulator

Clause 16 deals with the Constitution of the Regulator. Subclause 16(1) provides that the Regulator is a body corporate with perpetual succession; must have a seal and may acquire, hold and dispose of real and personal property. The Regulator may sue or be sued in its corporate name.

Comment

_Perpetual succession_ is defined as ‘that characteristic of a company which makes it a continuing entity in law with its own identity regardless of changes in its membership. It demonstrates the ability of a company as an independent entity, to live forever until deregistered’.

Appointment of Members

Clause 17 provides that the membership of the Regulator consists of a Chair, with at least two and not more than four members.

Comment

In comparison, ASIC has six commissioners comprising a Chair, a Deputy Chair and four commissioners.

Clause 18 deals with the appointment of members to the Regulator. Subclause 18(1) provides that each member of the Regulator is appointed by the Minister by written instrument. A note to the subclause refers to the _Acts Interpretation Act 1901_, in particular section 33(4A) which states that ‘in any Act, appoint includes re-appoint’.

Subclause 18(2) provides that a person is not eligible for appointment as a member unless the Minister is satisfied that the person has substantial experience or knowledge and significant standing in at least one of the specified areas:

- economics
- industry
- energy production and supply
- energy measurement and reporting
- greenhouse gas emissions measurement and reporting
- greenhouse gas abatement measures
- financial markets
- trading of environmental instruments
- land resource management or
- public administration.

37. Encyclopaedic Australian Legal Dictionary on LexisNexis AU.

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Subclause 18(3) provides that the Chair holds office on a full-time basis. A member may hold office on a full or part-time basis (subclause 18(4)).

Division 3—Terms and conditions for members of the Regulator

Remuneration of members

Clause 21 deals with remuneration for members of the Regulator. Subclause 21(1) provides that the remuneration of members is determined by the Remuneration Tribunal. If there is no determination, remuneration is prescribed by the regulations. A member is to be paid allowances prescribed by the regulations (subclause 21(2)). Subclause 21(3) has effect subject to the Remuneration Tribunal Act 1973.

Disclosure of interests to Minister

Clause 22 requires a member to give written notice to the Minister of all interests, pecuniary or otherwise, that conflict or could conflict in the member’s performance of his or her functions.

Disclosure of Interest to Regulator

Clause 23 deals with the disclosure of interests to the Regulator. Subclause 23(1) provides that a member must disclose an interest, pecuniary or otherwise, in a matter before the Regulator or about to come before the Regulator. The member must disclose the interest as soon as possible after the relevant facts have come to the knowledge of the member (subclause 23(2)). Subclause 23(3) states that the disclosure must be recorded in the minutes of the meeting of the Regulator. Subclause 23(4) provides that the member not be present during deliberations on the matter or take part in any decision on the matter, unless the Regulator determines otherwise. Subclause 23(5) provides that if a determination under subsection 23(4) is made, the member must not be present or take part in the making of the determination. A determination under subsection 23(4) must be recorded in the minutes of a meeting of the Regulator (subclause 23(6)).

Clause 24 deals with outside employment of members. Subclause 24(1) provides that a full-time member requires the approval of the Minister to engage in paid employment outside the duties of the office of member. Subclause 24(2) provides that a part-time member must not engage in any paid employment that conflicts or may conflict with the proper performance of the member’s duties.

Clause 27 deals with the termination of appointment of a member. Subclause 27(1) provides that the Minister may terminate the appointment of a member for misbehaviour or physical or mental incapacity. Subclause 27(2) provides that the Minister may terminate the appointment of a member if:

the member:
• becomes a bankrupt
  – applies to take the benefit of any law for the relief of bankrupt or insolvent debtors
  – compounds with his or her creditors or
  – assigns his or her remuneration for the benefit of his or her creditors

• a full-time member engages in outside paid employment without the Minister’s approval
• a part-time member engages in paid employment that conflicts or may conflict with the proper performance of his or her duties
• the member fails to comply with section 22 (disclosure of interest to the Minister) or section 23 (disclosure of interests to the Regulator) or
• a member is absent from 3 consecutive meetings of the Regulator except if on leave of absence.

Division 4—Decision-making by the Regulator

Division 4 relates to the conduct of meetings by the Regulator. Clause 29 relates to the holding of meetings. Subclause 29(1) provides that the Regulator is to hold such meetings as are necessary for the performance of its functions. The Chairs may convene a meeting at any time (subclause 29(2)).

Subclause 30(1) provides that the Chair presides at all meetings when present. Otherwise the members present appoint a member to preside (subclause 30(2)). Clause 31 provides that 2 members constitute a quorum. Clause 34 states that the Regulator must keep minutes of its meetings.

Comment

At ASIC meetings, if ASIC consists of 3 or 4 members, the quorum is 2 members or in any other case, 3 members. 38

Division 5—Delegation

Clause 35 deals with delegation by the Regulator. Subclause 35(1) provides that the Regulator may delegate any or all of its functions and powers in writing to:

• a member
• a staff member of the Regulator who is an SES or acting SES employee
• a staff member and APS employee who holds or acts in an Executive Level 2 position or equivalent
• an SES or acting SES employee of the Department assisting the Regulator under section 37 or
• an APS employee who holds or performs the duties of an Executive Level 2 or equivalent position in the Department assisting the Regulator under section 37.


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Subclause 35(2) provides that a delegate must comply with any written directions of the Regulator. Subclause 35(3) provides that powers or functions delegated under subclause 35(1) do not apply to the power to make, vary or revoke a legislative instrument.

Division 6—Staff of the Regulator et cetera.

Subclause 36(1) provides that staff of the Regulator will be employed under the Public Service Act 1999. Subclause 36(2) states that for the purposes of the Public Service Act 1999, the Chair and the staff of the Regulator constitute the Statutory Agency and the Chair is the head of the Agency.

Comment

This is consistent with the situation in ASIC. The Department of Finance Governance Arrangements state:

A governing board is not readily accommodated under the FMA Act. However, an FMA Act agency may encompass a number of statutory office holders, comprising a commission, who make collective regulatory decisions, with relevant levels of statutory independence.39

Clause 37 provides that the Regulator may be assisted by:

• officers and employees within the meaning of the Public Service Act 1999
• officers and employees of authorities of the Commonwealth
• officers and employees of a state or territory or
• officers and employees of authorities of a state or territory;

whose services are made available to assist the Regulator with the performance of any of its functions.

Division 7—Planning and reporting obligations

Corporate Plan

Clause 39 relates to the corporate plan. Subclause 39(1) provides that the Regulator must prepare a corporate plan at least once each 3-year period and submit it to the Minister. The plan must cover a 3 year period (subclause 39(2)). Subclause 39(3) states that the plan must include:

• the objectives of the Regulator
• the strategies and policies to be used in achieving those objectives and


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• such other matters as the Minister requires.

Subclause 39(4) states that the Chair must keep the Minister informed about any changes to the plan and matters that may significantly affect the achievement of the objectives set out in the plan (subclause 39(5)).

Annual report

Subclause 40(1) states that the Regulator must prepare an annual report as soon as practicable after the end of the financial year to give the Minister who may then present it to Parliament. It must report on the operations of the Regulator during that year. Subclause 40(4) provides that, in addition to the annual report, a report is required under section 105 of the Renewable Energy (Electricity) Act 2000.

Division 8—Other matters

Directions by the Minister

Clause 41 deals with the directions which the Minister may give to the Regulator. Subclause 41(1) provides that the Minister may give directions to the Regulator that relate to the performance of its functions and the exercise of its powers. Although the directions are legislative instruments, they are not subject to the disallowance or sunsetting provisions of the Legislative Instruments Act 2003. This means they are not subject to parliamentary scrutiny nor do they cease after 10 years.

A direction by the Minister must be of a general nature only (subclause 41(2)). The Regulator must comply with the direction issued by the Minister under subclause 41(1) (subclause 41(4)).

Part 3—Secrecy

Offence

Clause 43 deals with secrecy. Subclause 43(1) creates an offence for a person who is or has been an official of the Regulator and in that capacity has obtained protected information and discloses the information to another person or uses the information. The penalty is two years imprisonment or 120 penalty units ($13 200) or both.

40. Part 6 of the Legislative Instruments Act 2003 relates to the sunsetting regime which means that all legislative instruments automatically cease after 10 years for all non-exempt legislative instruments.

41. Section 4AA of the Crimes Act 1914 defines a penalty unit. One penalty unit means $110.

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Exceptions

Subclause 43(2) provides that it is an exception if the disclosure or use of protected information is authorised by a provision in Part 3. It is also an exception if it complies with a requirement in a law of the Commonwealth or a prescribed law of a state or territory.

Note to subclause 43(2) states that the defendant bears an evidential burden in relation to a matter in subsection (2). See subsection 13.3(3) of the Criminal Code.42

Subclause 43(3) provides that an official of the Regulator is not required to produce a document containing protected information or disclose protected information to a court or tribunal except to give effect to a climate change law.

Disclosure or use for purposes of climate change law

Clause 44 deals with disclosure or use of protected information for the purposes of a climate change law. An official of the Regulator may disclose or use protected information if it is:

- for the purposes of a climate change law
- for the purposes of the performance of functions of the Regulator under a climate change law and
- in the course of employment or service of the official of the Regulator.

Disclosure to Ministers

Clause 45 relates to disclosure of protected information to Ministers. An official of the Regulator may disclose protected information to:

- the Minister (subclause 45(1))
- a Minister, who administers a program or collects statistics, relating to:
  - greenhouse gas emissions
  - energy consumption and
  - energy production

all within the meaning of the National Greenhouse and Energy Reporting Act 2007 (subclause 45(2)).

- a person employed under section 13 or 20 of the Members of Parliament (Staff) Act 1984, a member of staff of a Minister referred in subclauses (1) or (2).

42. Evidential burden is defined in section 13.3 of the Criminal Code. It means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

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Disclosure to Secretaries

Clause 46 relates to disclosure to Secretaries. Subclause 46(1) provides that an official of the Regulator may disclose protected information to:

- the Secretary of the Department
- an officer of the Department authorised by the Secretary in writing

for the purposes of:

- advising the Minister
- facilitating the monitoring of Australia’s compliance with its obligations under an international climate change agreement or
- facilitating the development of an international agreement relating to climate change.

Subclause 46(2) relates to a Minister responsible for programs set out in subclause 45(2). The official of the Regulator may disclose protected information to the Secretary of the Department administered by that Minister or an officer of the Department authorised by the Secretary for the purposes of:

- advising the Minister or
- administering that program or collecting those statistics.

Disclosure or use for development of methodology determinations

Clause 47 deals with the disclosure or use of protected information for purposes of development of methodology determinations. Subclause 47(1) provides that the Regulator may disclose or use protected information that relates to a particular offsets project if:

- under section 27 (application for declaration of eligible offsets project) under the Carbon Credits (Carbon Farming Initiative) Act 2011, the Regulator has declared the offsets project to be an eligible offsets project
- more than 7 years has passed since the application was made under that Act and
- the information was contained in the application or in connection with it or in associated reports.

The purpose of disclosure or use of the protected information is to facilitate the development of one or more methodology determinations or proposals for methodology determinations.

Similarly, subclause 47(2) provides that protected information may be disclosed or used which is contained in an application under section 108 (application for endorsement of proposal for methodology determination) of the same Act as above. It also applies to an application under section 116 (application for endorsement of a proposal for the variation of a methodology determination) or given in connection with an application under this subclause. The purpose of disclosure or use is the same as in subclause 47(1). Subclause 47(3) provides that subclauses (1) and
(2) do not apply to personal information contained in the applications within the meaning of the Privacy Act 1988.

Disclosure to a Royal Commission

Clause 48 relates to disclosure to a Royal Commission. Subclause 48(1) provides that the Regulator may disclose protected information to a Royal Commission, however the Chair may, in writing, impose conditions in relation to the protected information disclosed (subclause 48(2)). Such an instrument is not a legislative instrument (subclause 48(3)).

Disclosure to certain agencies, bodies and persons

Subclause 49(1) provides that this section applies if the Chair of the Regulator is satisfied that disclosure of the particular protected information will assist any of the agencies, bodies or persons listed in subclause 49(1) to perform or exercise any of their powers or functions. Subclause 49(2) provides that an official of the Regulator, authorised by the Chair in writing, may disclose protected information to an agency, body or person. Conditions may be imposed on the disclosure by the Chair in writing (subclause 49(3)).

Offences

Subclause 49(4) creates an offence for a person subject to a condition under subclause 49(3) and the person breaches the condition. The penalty is imprisonment for two years or 120 penalty units ($13,200), or both.

Subclause 49(6) creates an offence for a person who is a prescribed professional disciplinary body or a member of that body to whom protected information has been disclosed and the person discloses the information to another person or uses the information. The penalty is imprisonment for two years or 120 penalty units, or both. Subclause 49(7) provides an exception to subclause (6). Subclause 49(6) does not apply if the Chair consented to the disclosure or use of the information and it is for the purpose of deciding whether or not to take disciplinary or other action or taking that action.

Disclosure to certain financial bodies

Subclause 50(1) provides that this clause applies if the Chair of the Regulator is satisfied that the protected information will assist a body corporate that:

- conducts or supervises a financial market

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• holds an Australian CS facility licence\(^{43}\) and
• is specified in the regulations to monitor compliance with, enforce or perform functions or exercise powers under the Corporations Act 2001 or the business law of a state or territory or of a foreign country; or the operating rules of the body corporate.

**Subclause 50(2)** provides that an official of the Regulator may disclose the protected information to the body corporate if authorised by the Chair. **Subclause 50(3)** provides that the Chair may impose conditions in writing on the body corporate and its officers, employees and agents in relation to the protected information under subclause 50(2). An instrument under subclause 50(2) is not a legislative instrument (subclause 50(5)).

**Offences**

**Subclause 50(4)** creates an offence for a person if the person is subject to a condition under subclause (3) and their conduct breaches the condition. The penalty is imprisonment for two years or 120 penalty units, or both.

**Subclause 50(6)** creates an offence for a person who is a body corporate or an officer, employee or agent of the body corporate to whom protected information has been disclosed under subclause (2) and who discloses the information to another person or uses the information. The penalty is imprisonment for two years or 120 penalty units, or both.

**Exceptions**

**Subclause 50(7)** provides exceptions to subclause (6). The first exception is if the Chair consented to the disclosure or use of the protected information. The second exception is if the disclosure or use is for the purpose of monitoring compliance with, enforcing or performing functions or exercising powers under the:

• Corporations Act 2001
• business law of a state or territory
• business law of a foreign country or
• operating rules of the body corporate.

**Disclosure with consent**

**Clause 51** provides that an official of the Regulator may disclose protected information that relates to the affairs of a person if the person consents and the disclosure accords with that consent.

\(^{43}\) Section 761A of the Corporations Act 2001 defines Australian CS facility licence to mean a licence under section 824B that authorises a person to operate a clearing and settlement facility.

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Disclosure to reduce threat to life or health

Clause 52 provides that an official of the Regulator may disclose protected information if the official believes on reasonable grounds that it is necessary to prevent or lessen a serious and imminent threat to the life or health of an individual and disclosure is to prevent or lessen that threat.

Disclosure of publicly available information

Clause 53 provides that an official of the Regulator may disclose protected information if it has already been lawfully made public.

Disclosure of summaries or statistics

Clause 54 provides that an official of the Regulator may provide summaries or statistics from protected information as long as it does not enable identification of a person.

Disclosure for purposes of law enforcement

Clause 55 applies if the Chair of the Regulator is satisfied that disclosure of protected information is reasonably necessary to:

- enforce the criminal law
- enforce a law imposing a pecuniary penalty or
- protect the public revenue.

Subclause 55(2) provides that the Chair may disclose the protected information to a department, agency or authority of the Commonwealth, a state or territory, or an Australian police force for the purpose of enforcement or protection. Subclause 55(3) provides that an official of the Regulator, if authorised by the Chair, may disclose information to organisations as specified in subclause (2).

Subclause 55(4) creates an offence for a person who is or has been an employee or officer of a Department, agency or an Australian police force and protected information has been disclosed under subclauses (2) or (3) and the person discloses the information to another person or uses the information. The penalty is imprisonment for two years or 120 penalty units, or both. Subclause 55(4) doesn’t apply if the Chair consented to the disclosure or use to:

- enforce the criminal law
- enforce a law imposing a pecuniary penalty or
- protect the public revenue (subclause 55(5)).

Subclause 55(6) provides that the Chair of the Regulator may, by writing, impose conditions on the protected information disclosed under subclauses (2) or (3). An instrument under subclause 55(6) is not a legislative instrument (subclause 55(8)).

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Subclause 55(7) creates an offence for a person who is subject to a condition under subclause (6) and then breaches the condition. The penalty is imprisonment for two years or 120 penalty units, or both.

**Delegation**

Subclause 56(1) provides that the Chair of the Regulator may, by writing, delegate any or all of his or her functions and powers under Part 3 to a member of the Regulator. A delegate must comply with all written directions of the Chair (subclause 56(2)).

**Part 4—Miscellaneous**

Clause 57 provides that the Governor-General may make regulations prescribing matters for carrying out and giving effect to the Act.

**Concluding comments**

Major discussion has centred round the compliance and enforcement powers of the Regulator. However, as the Explanatory Memorandum to the Clean Energy Bill states, the Regulator’s powers are based on those of similar existing Commonwealth regulatory bodies with similar functions.

The Government’s intention is to set up an independent Regulator to administer the mechanism within a limited and legislatively prescribed discretion. Such an arrangement is expected to reduce the risk that the Regulator’s decisions are based on factors other than the mechanism’s objectives, and should also contribute to efficient and effective administration...

A new Regulator is proposed because no single existing Regulator has the capabilities needed to administer the range of functions required under climate change laws. 44

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