Explanatory Note to amendment sheet 7587

Carbon Farming Initiative Amendment Bill 2014
Safeguard mechanism
(Circulated by authority of Senator Xenophon)

The attached provisions set out a legislative framework for the safeguard mechanism. The safeguard mechanism requires the operators of large facilities to keep net emissions within baseline levels.

The Clean Energy Regulator will administer the safeguard mechanism, which will be part of the National Greenhouse and Energy Reporting Act 2008 (NGER Act).

Coverage

- The safeguard mechanism commences on 1 July 2016 [Clause 2].
- The safeguard mechanism applies to the person with operational control (the operator) of a large facility (known as a ‘designated large facility’) [Item 12, ss22XJ and 22XH].
  - These facilities will be determined by applying a direct emissions threshold. This threshold will be specified in the ‘safeguard rules’ [Item 12, s22XJ].
  - The safeguard mechanism only applies to direct emissions (scope 1) because electricity generators will be responsible for the direct emissions from electricity production [Item 12, s22XI].
  - For the purpose of the safeguard mechanism, operators may be constitutional corporations or other persons. This extends the existing NGER Act coverage for the purpose of the safeguard mechanism to include facilities operated by persons that are not constitutional corporations, such as a governing body or a trust. Extending coverage to persons other than constitutional corporations helps ensure competitive neutrality between facility operators [Item 12, s11C].
- Operators have a duty to keep their net emissions within their baseline emissions in each relevant ‘monitoring period’ [Item 12, s22XF]. This is assessed on the 1 March following the end of each monitoring period and a breach of the obligation continues until net emissions for the period are brought back to the baseline by the surrender of eligible carbon units.
- Failure to meet the obligation is a civil penalty enforceable by the Regulator in court, with the maximum amount to be set in regulations [Item 12, s22XF(1)].
  - In setting this amount, the Minister must consider the financial advantage a responsible emitter could reasonably be expected to derive from continuing to breach their safeguard obligation. [Item 12, s22XF(3)]
- The Clean Energy Regulator may also seek an injunction to require a responsible emitter to surrender eligible carbon units to bring net emissions back to baseline levels [Item 51A, section 49].
- Baseline emissions will be calculated in accordance with safeguard rules [Item 14, s22XL]. The Regulator will be empowered to make determinations relating to baselines under the rules where baselines need to be set for facilities with significant expansions or without a history of reporting.
under the NGER Act. Any such determinations are reviewable in the Administrative Appeals Tribunal.

Compliance Arrangements

- Most operators are already registered and report their emissions under the current NGER Act. They will not need to provide any further reporting.
- Operators of large facilities not already registered must register on the National Greenhouse and Energy Register and then may need to report their emissions each financial year if they are not already included in an existing NGER report [Item 9, s15B; item 10, s18AA; item 11; item 12, ss22XB and 22XC].
- Direct emissions can be ‘netted’ (translated into net emissions) by:
  - subtracting offsets surrendered [Item 12, ss22XXK(2) and 22XN];
  - adjusting for Australian carbon credit units (ACCUs) issued to Emissions Reduction Fund (ERF) projects at the facility to avoid double-counting the emissions reductions [Item 12, s22XXK(4)]; and
    - The ERF can support emissions reductions for safeguard facilities, but these emissions reductions are counted only once. There is potential for double counting the abatement because for each tonne that the facility reduces its actual emissions, it would also be credited with an ACCU that it could surrender under the safeguard to further reduce its net emissions. The legislation ensures that abatement from a safeguard facility is only counted once by increasing net emissions by the number of ACCUs generated at the facility [Item 12, s22XXK(4)]. ACCUs sold to the Government through a carbon abatement contract by a safeguard facility are deemed to be surrendered [item 12, s22XN(6)].
  - averaging emissions over multiple years [Item 12, s22XG].
    - By default, monitoring periods are single financial years. However, the safeguard rules may allow the operators to apply for an extension to the monitoring period (a ‘declared multi-year period’). This allows for multi-year averaging – where net emissions must stay below the baseline in aggregate over the multi-year period. This helps accommodate cyclical or abnormal variations in emissions.
- Offsets are Australian carbon credit units (ACCUs). The safeguard rules can also specify other types of carbon units [Item 12, s22XM]]).
- If operators surrender more carbon units than are needed for a facility’s net emissions to stay below its baseline, the safeguard rules may specify that the excess surrendered units can be counted against net emissions in future years [Item 12, s22XXK(3)].
- A narrow set of exceptions to the obligation may be provided in the safeguard rules where an excess is a direct result of a natural disaster, criminal activity or similar exceptional event. When deciding whether or not to make an exception, the Regulator will consider whether reasonable steps were taken to mitigate the risk of excess emissions arising from the exceptional event [Item 12, s22XE(2)-(4)].
Safeguard rules

- The Minister can make safeguard rules, which will be a disallowable legislative instrument [Item 12, s22XS].
- The safeguard rules can specify, among other things, how baselines are to be calculated, coverage thresholds and carbon units that can be used as offsets [Item 14, ss22XL, 22XJ and 22XM].
- The safeguard rules can’t impose a tax; create an offence or civil penalty; provide powers of entry, search and seizure; or amend the legislative framework set out in the attached provisions [Item 12, s22XS(2)].
- The Minister must publish a statement on the Department of the Environment’s website explaining how the rules achieve the safeguard’s objective of ensuring net emissions from safeguard facilities do not exceed their baseline [Item 61, Clause 2].
- To provide certainty to stakeholders, the Minister must take all reasonable steps to ensure the safeguard rules essential for the operation of the scheme are made before 1 October 2015 [Item 61, Clause 1].

Consequential amendments

- The amendments include a number of consequential amendments to the NGER Act. These are largely to ensure that existing provisions and powers operate for persons who are not constitutional corporations [Item 12A to 59]. They also ensure administrative decisions by the Regulator are reviewable in the Administrative Appeals Tribunal.