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1. Emissions-intensive trade-exposed assistance program - explanatory memorandum

Part 8 of the Carbon Pollution Reduction Scheme Bill 2009 (*CPRS Bill*) provides for the establishment of an emissions-intensive trade-exposed assistance program under which free Australian emissions units are to be issued in respect of emissions-intensive trade-exposed activities. The provision of this assistance is intended to reduce the cost impact of the carbon pollution reduction scheme on those activities and thereby minimise the impact of the scheme on their international competitiveness. However, while the CPRS Bill sets out some basic mechanical provisions for the program (eg. unit relinquishment, reporting and record-keeping requirements, compliance provisions and information gathering powers), it leaves the nature and operation of the program to be set out in regulations.

The purpose of the proposed amendments is to include in the CPRS Bill the essential features of the emissions-intensive trade-exposed assistance program. This is appropriate given the importance of the program to Australia's emissions-intensive trade-exposed industries. The proposed amendments reflect existing Government policy as set out in the White Paper, the Government's February 2009 guidance paper and the draft Carbon Pollution Reduction Scheme Regulations 2009 (together the accompanying explanatory paper), except in the following respects:

- coal mining is required to be treated as an emissions-intensive trade-exposed activity (and so eligible for free Australian emissions units under the program) providing it satisfies the trade share and emissions intensity thresholds that apply to all other activities – this is achieved by the requirement to treat an activity as emissions-intensive trade-exposed where it meets those criteria (cl.167A(1));
- unlike other activities, the assistance for coal mining is calculated using a direct emissions allocation baseline that is specific to the mine (cl.167A(9)(f)) – this means that less gassy mines receive correspondingly less assistance;
- unlike other activities, where a direct emissions allocation baseline for a coal mine cannot properly be determined on the basis of emissions data for the 2006/7 and 2007/8 financial years (ie. because the mine was not operating for more than half of that period or, for some other reason, that data is not representative of the mine's normal operations), that baseline is required to be determined by reference to the direct emissions of comparable Australian coal mines during that period (rather than by reference to international best practice) (cl.167A(7)(f)(ii));
- the assistance rates for emissions-intensive trade-exposed activities do not decay at the rate of 1.3% per annum over the period 2012/13 to 2020/21 but remain unchanged (at 94.5% for highly emissions-intensive activities, and 66% for moderately emissions-intensive activities, during the period 2011/12 to 2015/16 and at 90% for highly emissions-intensive activities, and 60% for moderately emissions-intensive activities, thereafter) until 80% of global emissions incur comparable incremental costs to those they would incur under the carbon pollution reduction scheme in the absence of the emissions-intensive trade-exposed assistance program (cl.167A(7)(c));and

- assistance under the program is calculated on the basis of estimated production for a financial year, with a "true-up" for the difference between estimated and actual production in previous financial years (cl.167A(7)(d)) – the reason for this is that calculating assistance on the basis of the previous financial year's production results in a possible time value of money loss.

New clause 167(2) requires the emission-intensive trade-exposed assistance program that is to be formulated by the regulations to comply with the requirements set out in new clause 167A.

New clause 167A sets out the essential features of the emission-intensive trade-exposed assistance program.

An activity must be taken to be an emissions-intensive trade-exposed activity if it satisfies two criteria.

The first criterion is a trade share requirement that may be satisfied on the basis of either a quantitative test (a trade share in excess of 10%) or a qualitative test (the capacity to pass through additional costs is constrained by the potential for international competition) (cl.167A(1)(a), (5)(a)).

The second criterion is an emissions intensity requirement that may be satisfied where the emissions per \$ million of revenue exceeds 1,000 t CO₂-e/\$m or where the emissions per \$ million of value-added exceeds 3,000 t CO₂-e/\$m (cl.167A(1)(b), (5)(b), (c), (d)).

Clause 167A(2) sets out the manner in which the assistance for an emissions-intensive trade-exposed activity (in the form of free Australian emissions units) is to be calculated. This calculation is based on:

- the assistance rates for emissions-intensive trade-exposed activities do not decay at the rate of 1.3% per annum over the period 2012/13 to 2020/21 but remain unchanged (at 94.5% for highly emissions-intensive activities, and 66% for moderately emissions-intensive activities, during the period 2011/12 to 2015/16 and at 90% for highly emissions-intensive activities, and 60% for moderately emissions-intensive activities, thereafter) until 80% of global emissions incur comparable incremental costs to those they would incur under the carbon pollution reduction scheme in the absence of the emissions-intensive trade-exposed assistance program (cl.167A(7)(c));
- the estimated volume or amount of the product produced by the activity for the relevant financial year, together with an adjustment for past deviations between actual and estimated production (cl.167A(2)(b), (7)(d));
- a direct emissions baseline (including emissions associated with steam produced for use in the activity) (cl.167A(2)(c), (6), (7)(e)) – as described above, special provisions are included to allow for coal mine specific direct-emissions baselines (cl.167A(7)(f));
- a baseline level of per unit electricity use and an electricity allocation factor – the allocation factor is generally 1tCO₂-e/MWh except where a different factor is justified because of the amount of electricity consumed and the contractual arrangements governing the supply of that electricity (eg. as where the electricity user is very large and its electricity supply arrangements provide for a pass through of all electricity cost increases) (cl.167A(2)(d), (7)(e), (h)); and

- a baseline level of per unit natural gas feedstock use and a natural gas allocation factor – the allocation factor may vary having regard to factors such as location of use, consumption and associated contractual arrangements (cl.167A(2)(e), (7)(e), (i)).

Clause 167A(3) requires that five years' notice must generally be given of changes to the program that would reduce the aggregate number of Australian emissions units that would otherwise be provided under the program. The exception is where the Minister certifies that it is necessary for changes to be introduced earlier to enable Australia to comply with its international trade obligations (cl.167A(3)(b)(ii), (c)).

Clause 167A(4) reproduces existing clause 167(2), which has simply been relocated to clause 167A.

Clause 167A(8) provides for the issue of guidelines relating to the calculation of the trade share, emissions to revenue ratio, emissions to value-added ratio and baseline levels. This is in acknowledgement of the fact that significant complexity is entailed in calculating these items.

Minor consequential amendments are made to clauses 168(1) and 171(1).

2. Emissions-intensive trade-exposed assistance program – legislative drafting

2.1 Division 2 – Formulation of the emissions-intensive trade-exposed assistance program

2.1.1 167 Emissions-intensive trade-exposed assistance program

- (1) The regulations may formulate a program (to be known as the ***emissions-intensive trade-exposed assistance program***) for the issue of free Australian emissions units in respect of activities that:
 - (a) under the program, are taken to be emissions-intensive trade-exposed activities; and
 - (b) are, or are to be, carried on in Australia during an eligible financial year [^].
- (2) The emissions-intensive trade-exposed assistance program must comply with the requirements set out in section 167A.
- (3) The Minister must take all reasonable steps to ensure that regulations are made for the purposes of subsection (1) before 1 July 2010.

2.1.2 167A Requirements for emissions-intensive trade-exposed assistance program [*new section*]

- (1) An activity must be taken to be an emissions-intensive trade-exposed activity for the purposes of the emissions-intensive trade-exposed assistance program where, in respect of a product produced by that activity:
 - (a) either:
 - (i) the trade share for that product in any of the financial years commencing on 1 July 2004, 1 July 2005, 1 July 2006 or 1 July 2007 is greater than 0.10; or

- (ii) the Minister is satisfied that the potential for international competition constrains the capacity to pass through increased costs associated with the production of the product; and
- (b) either:
 - (i) the emissions to revenue ratio for that product is greater than 1,000; or
 - (ii) the emissions to value-added ratio for that product is greater than 3,000.

[Note: This provision requires an activity to be treated as an EITE activity if it meets the thresholds above. Accordingly, the mining of black coal will be an EITE activity if it meets these thresholds. Brown coal mining will not be an EITE activity because it will not satisfy the trade share test. However note that:

- **the thresholds are based on industry averages so coal mining will not qualify for EITE assistance if the industry averages are below these thresholds – however, if the industry average data for coal mining is such that it qualifies for EITE assistance, that assistance will be calculated on the basis of mine-specific allocation baselines for direct emissions (see section 167A(7)(f)); and**
- **because these thresholds only take into account emissions of a kind covered by the CPRS (see section 167A(6)) coal mining will not qualify for EITE assistance if the Fugitive Emissions Exclusion Option (at the end of this document) is adopted – but equally it will not incur liability for such fugitive emissions.]**

- (2) The number of free Australian emissions units issued under the emissions-intensive trade-exposed assistance program for an eligible financial year in respect of a product produced by an emissions-intensive trade-exposed activity must be calculated as the product of:
 - (a) the assistance rate for that eligible financial year for that product; and
 - (b) the applicable volume or amount of the product produced by that activity, multiplied by the sum of:
 - (c) a baseline level comprising direct greenhouse gas emissions that are produced by the activity in the production of one unit of the product and direct greenhouse gas emissions that are produced in the production of steam that is used by the activity in the production of one unit of the product;
 - (d) the product of:
 - (i) a baseline level of electricity used by the activity to produce one unit of the product; and
 - (ii) an electricity allocation factor; and
 - (e) the product of:

- (i) a baseline level of natural gas (or of the components of natural gas) used by the activity in the form of feedstock to produce one unit of the product; and
 - (ii) a natural gas allocation factor.
- (3) Changes must not be made to the emissions-intensive trade-exposed assistance program where those changes would reduce the aggregate number of free Australian emissions units that would otherwise be provided under that program in respect of emissions-intensive trade-exposed activities for any eligible financial year unless:
 - (a) notice of the changes has been published in the Commonwealth Government Gazette; and
 - (b) either:
 - (i) that notice was published at least 5 years prior to those changes coming into effect; or
 - (ii) that notice was published less than 5 years prior to those changes coming into effect and the Minister gives a certificate stating that it is necessary for the changes to come into effect at this earlier time so as to enable Australia to comply with its international trade obligations; and
 - (c) where paragraph (b)(ii) applies, those changes are limited to such changes as are necessary to enable Australia to comply with its international trade obligations.
- (4) The emissions-intensive trade-exposed assistance program must provide that free Australian emissions units must not be issued to a person in accordance with the program unless the person:
 - (a) meets such requirements, not being inconsistent with the other requirements set out in this section, as are specified in the program; and
 - (b) has a Registry account.

[Subsection (4) reproduces previous section 167(2) but with paragraph (a) modified]

- (5) For the purposes of subsection (1):
 - (a) the trade share for a product in a financial year is the value of imports and exports of the product into or out of Australia during that financial year divided by the value of the product that is produced in Australia during that financial year;
 - (b) the emissions to revenue ratio for a product produced by an activity is:
 - (i) the emissions intensity of that product,
 divided by:
 - (ii) the average revenue attributable to the production of one unit of the product in Australia by that activity,
 where:

- (iii) the revenue attributable to the production of the product in Australia by that activity, and the amount or volume of the product produced in Australia by that activity, are calculated using data for one or more of the financial years (or half financial years) that occur during the period commencing on 1 July 2004 and ending on 31 December 2008; and
 - (iv) revenue is calculated in units of one million dollars;
- (c) the emissions to value-added ratio for a product produced by an activity is:
- (i) the emissions intensity of that product,
- divided by:
- (ii) the average value-added attributable to the production of one unit of the product in Australia by that activity,
- where:
- (iii) the value-added attributable to the production of the product in Australia by that activity, and the amount or volume of the product produced in Australia by that activity, are calculated using data for one or more of the financial years (or half financial years) that occur during the period commencing on 1 July 2004 and ending on 31 December 2008; and
 - (iv) value-added is calculated in units of one million dollars; and
- (d) the emissions intensity of a product produced by an activity, as referred to in paragraphs (b) and (c), is the carbon dioxide equivalence of the total number of tonnes of:
- (i) direct greenhouse gas emissions produced by carrying on the activity in Australia, and producing steam for use by that activity, during each of the financial years commencing on 1 July 2006 and 1 July 2007; and
 - (ii) greenhouse gas emissions attributable to the production of electricity for use by that activity during each of the financial years commencing on 1 July 2006 and 1 July 2007; and
 - (iii) greenhouse gas emissions attributable to the production of natural gas (or of the components of natural gas) used by that activity in the form of feedstock during each of the financial years commencing on 1 July 2006 and 1 July 2007,
- divided by the total amount or volume of the product produced by that activity in Australia during each of the financial years commencing on 1 July 2006 and 1 July 2007.
- (6) The references in subsections (2)(c), (5)(d)(i) and (7)(f) to direct greenhouse gas emissions produced by an activity are references to scope 1 emissions of greenhouse gases where:

- (a) those greenhouse gases are released into the atmosphere as a direct result of the activity (including the subsistence of the activity); and
 - (b) the emission of those greenhouse gases is declared by regulations made for the purposes of paragraph 10(2A)(a) of the *National Greenhouse and Energy Reporting Act 2007* to be a scope 1 emission covered by the carbon pollution reduction scheme.
- (7) For the purposes of subsection (2):
- (a) except as provided in paragraph (c), the assistance rate for an eligible financial year for a product produced by an emissions-intensive trade-exposed activity, where that financial year commences during the period from 1 July 2011 to 30 June 2016, is:
 - (i) where the product has an emissions to revenue ratio of more than 1,000 but less than 2,000 – 0.66;
 - (ii) where the product has an emissions to value-added ratio of more than 3,000 but less than 6,000 – 0.66;
 - (iii) where the product has an emissions to revenue ratio of 2,000 or more – 0.945; and
 - (iv) where the product has an emissions to value-added ratio of 6,000 or more – 0.945;
 - (b) except as provided in paragraph (c), the assistance rate for an eligible financial year for a product produced by an emissions-intensive trade-exposed activity, where that financial year commences after 30 June 2016, is:
 - (i) where the product has an emissions to revenue ratio of more than 1,000 but less than 2,000 – 0.60;
 - (ii) where the product has an emissions to value-added ratio of more than 3,000 but less than 6,000 – 0.60;
 - (iii) where the product has an emissions to revenue ratio of 2,000 or more – 0.90; and
 - (iv) where the product has an emissions to value-added ratio of 6,000 or more – 0.90;
 - (c) subject to subsection (3), an assistance rate for an eligible financial year for a product may only be reduced if the Minister gives a certificate stating that 80% of all greenhouse gas emissions produced anywhere in the world incur an incremental increase in cost that is comparable to that which would be incurred under the carbon pollution reduction scheme in the absence of the emissions-intensive trade-exposed assistance program and had those emissions occurred in Australia;
 - (d) the volume or amount of the product referred to in paragraph (2)(b) must:
 - (i) be the volume or amount of the product which it is estimated will be produced by the relevant activity during the eligible financial year, taking into account (among other things) historical

production and expected increases or decreases in production during that eligible financial year; and

- (ii) include an adjustment to account for any difference between actual and estimated production in previous financial years to the extent that estimated production has been used for the purpose of calculating the number of free Australian emissions units issued in respect of that product;
- (e) subject to paragraph (f), the baseline levels referred to in subsection (2) must be determined by reference to relevant Australian industry-average data for the financial years commencing on 1 July 2006 and 1 July 2007 or, where the use of such data is not sufficiently representative or is not otherwise appropriate in the circumstances, by reference to international best practice;
- (f) where the activity is the mining of black coal or brown coal, the baseline level referred to in paragraph (2)(c) must be determined as a separate baseline level for each mine at which that activity is undertaken, with the baseline level for a mine being determined:
 - (i) by reference to the direct greenhouse gas emissions that were produced by undertaking the activity at that mine for the financial years commencing on 1 July 2006 and 1 July 2007; or
 - (ii) where the mine was not operating for more than half of the period commencing on 1 July 2006 and ending on 30 June 2008 or the data referred to in subparagraph (i) is not sufficiently representative of the direct greenhouse gas emissions that are produced by undertaking the activity at that mine on a normal operational basis – by reference to the direct greenhouse gas emissions that were produced during the financial years commencing on 1 July 2006 and 1 July 2007 from the mining of coal at mines in Australia that are comparable to that mine (taking into account matters such as the composition of the coal, the nature of the mine, the location and nature of the coal deposit, and the mining technology and techniques used at the mine);

Note: Paragraph (f) only relates to the determination of the 'direct emissions' baseline level for coal mines (see paragraph (2)(c)). In addition it will be necessary to determine and apply baseline levels of electricity and natural gas for any emissions-intensive trade-exposed activity that entails the mining of coal. Unlike the 'direct emissions' baseline for coal mines, these baseline levels are not mine-specific but are to be determined in accordance with paragraphs (2)(d), (e) and (7)(e).

- (g) the product referred to in paragraph (2)(b) must be of the same general type as, but otherwise may have different characteristics to, the corresponding product in respect of which the trade share, emissions to revenue ratio, emissions to value-added ratio, emissions intensity and

baseline levels referred to in subsections (2), (5) and (7)(e) and (f) are determined.

- (h) the electricity allocation factor referred to in paragraph (2)(d) must be 1tCO₂-e/MWh except to the extent a different electricity allocation factor is justified in particular circumstances by reason of:
- (i) the amount of electricity used by the activity at a particular location; and
 - (ii) the contractual arrangements under which the electricity is supplied; and
- (i) the natural gas allocation factor referred to in paragraph (2)(e) must reflect the expected effect of the carbon price on the price of natural gas and may vary depending on factors such as:
- (i) the place where the relevant product is produced;
 - (ii) the amount of natural gas used by the activity as a feedstock at a particular location; and
 - (iii) the contractual arrangements under which the natural gas is supplied.
- (8) The Minister, or such other person or persons as the Minister may appoint for that purpose, may issue guidelines that specify the manner in which the trade share, emissions to revenue ratio, emissions to value-added ratio and baseline levels for a product must be calculated.

2.1.3 168 Relinquishment Requirement

- (1) Subject to section 167A, the emissions-intensive trade-exposed assistance program may...
...

2.1.4 171 Other Matters

- (2) Subject to section 167A, the emissions-intensive trade-exposed assistance program may...

3. Fugitive emissions exclusion option – explanatory memorandum

New clause 24A precludes fugitive emissions from coal mining from being covered by the carbon pollution reduction scheme until three preconditions are satisfied.

The first precondition is that eight years have passed since the commencement of the carbon pollution reduction scheme, this being necessary to enable the measurement methods referred to below to be developed (3 years) and implemented (5 years).

The second precondition is that the Minister certifies that:

- practical and cost-effective methods are available to measure such fugitive emissions, and any abatement of them, to an acceptable degree of accuracy; and

- at least 80% of such fugitive emissions in all other developed countries incur a comparable incremental cost to the average price of Australian units at that time.

The third precondition is that liable entities are permitted to use the fugitive emissions measurement methods referred to in the Minister's certificate for the purposes of determining their carbon pollution reduction scheme liabilities.

4. Fugitive emissions exclusion option – legislative drafting

4.1 24A Fugitive emissions from coal mining [new section]

The regulations referred to in section 24 must not declare that emissions of greenhouse gas that are released during the extraction, processing or delivery of black coal or brown coal are scope 1 emissions covered by the carbon pollution reduction scheme unless and until:

- (a) the eighth anniversary of the commencement of the first eligible financial year has passed; and

Note: This 8 year period is intended to allow 3 years for the development of the methods referred to in paragraph (b)(i) and a subsequent 5 years for their implementation.

- (b) the Minister gives a certificate stating that:
- (i) practical and cost-effective methods are available to measure such emissions, and to account for their abatement, to an acceptable degree of accuracy; and
 - (ii) at least 80% of all such emissions as occur in other developed countries incur an incremental increase in cost that is comparable to the average price at which Australian emissions units are then traded; and
- (c) liable entities are permitted, under the *National Greenhouse and Energy Reporting Act 2007*, to use the methods referred to in subparagraph (b)(i) to measure those emissions for the purpose of the carbon pollution reduction scheme.

5. Low emissions technology assistance program – explanatory memorandum

New Division 2A of Part 8 of the Carbon Pollution Reduction Scheme Bill 2009 (*CPRS Bill*) provides for the establishment of a program, as an adjunct to the emissions-intensive trade-exposed assistance program, under which free Australian emissions units may be issued for projects that undertake a trade-exposed emissions-intensive activity, but do so by utilising a new lower emissions technology. This program, which is called the low emissions technology assistance program, is intended to assist in the deployment of such technologies where their deployment might otherwise be impeded because of their exposure to liability under the carbon pollution reduction scheme during the early years of their establishment.

While much of the detail of the program will be included in regulations that the Minister is required to take all reasonable steps to have made before 1 July 2010 (cl.172A(1), (3)), new clause 172B sets out the essential features of the program (cl.172A(2)). The free Australian emissions units that are to be issued under the program are to be drawn from a reserved pool of Australian emissions units, with the Minister specifying the number of units available for

issue each financial year at least three months before the commencement of that year (cl.172A(4)).

Clause 172B(1) empowers the Minister to declare a project to be a reduced emissions project, and therefore eligible for assistance under the program, where the Minister is satisfied that:

- the project uses, or will use, technology that is not then generally used to produce the relevant product;
- the technology, when fully commissioned and operating as intended, is reasonably expected to enable the product to be produced in such a way that the greenhouse gases associated with the production of one unit of the product are less than those associated with the production of a unit of that product in accordance with then-current international best practice; and
- the activity that produces the product is an emissions-intensive trade-exposed activity under the emissions-intensive trade-exposed assistance program.

Clause 172B(2) empowers the Minister to attach conditions to the issue of free Australian emissions units in respect of the project and to specify events or circumstances in which the issue of such units will cease. Clause 172B(4) imposes a specific condition relating to the continued issue of free Australian emissions units – namely, the provision to the Minister of a "mid term" independent expert report that assesses the project against preset Ministerially-determined criteria for the project (see also cl.172B(3)).

Clauses 172B(5) and (6) specify the manner in which the amount of free Australian emissions units to be issued under the program in respect of a reduced emissions project is to be determined (this methodology will be supplemented by guidelines: cl.172B(7)). The number of free Australian emissions units issued in respect of a project for an eligible financial year is the amount by which the project's direct (scope 1) and indirect (scope 2: electricity and natural gas feedstock) carbon dioxide equivalent emissions exceed the number of free Australian emissions units issued under the emissions-intensive trade-exposed assistance program in respect of that project for that financial year (cl.172B(5)), with that amount to be pro-rated down if the total number of Australian emissions units that would otherwise be issued under the program for a financial year exceeds the number specified by the Minister as being available for that financial year (cl.172B(6)). Provision is also made for a true up where estimated (as opposed to actual) emissions form the basis for the assistance calculation (cl.172B(10)).

Clause 172B(8) precludes further free Australian emissions units being issued under the program in respect of a project where a condition, event or circumstance identified in the Minister's declaration is not complied with or occurs, or where the Minister determines (having regard to the "mid-term" independent expert report) that a further issue of free Australian emissions units is not justified. However, in these circumstances, the Minister has an alternative discretion to merely reduce the number of free Australian emissions units (in which case further units will be issued in accordance with the Minister's determination) (cl.172B(9)). In any event, free Australian emissions units cannot be issued under the program in respect of a project for more than five years (cl.172B(8)(c)).

Clauses 172C to 172G mirror the corresponding provisions of the emissions-intensive trade-exposed assistance program relating to relinquishment of free Australian emissions units, reporting, record-keeping, other matters and ancillary or incidental provisions.

The amendments referred to in items 1 to 4 and 6 to 7 are minor consequential amendments.

6. Low emissions technology assistance program – legislative drafting

1. Insert the following new definition in clause 5:

low emissions technology assistance program means the program under subsection 172A(1).

2. In the heading to Part 8, delete the word "program".
3. Insert "and the low emissions technology assistance program" after the words "emissions-intensive trade-exposed assistance program" in the note to clause 13, the simplified outline in clause 82, the heading of Division 3 of Part 8, the heading before clause 273(1), the heading before clause 382(7), and clauses 93(1)(b) and 274(a).
4. Insert "or the low emissions technology assistance program" after the words "emissions-intensive trade-exposed assistance program" in clauses 88(c), 101(1)(a)(i), 103A(1)(a)(i), 103B(1)(a)(i), 129(5A)(a)(i), 173(1), 173(2), 267A(2), 267B(1)(b), 267C(1)(b), 273(1), 274(c), 278D(1)(a), 278E(1)(a), 278F(1)(a), 285 (including Note 2), 286(2)(b), 286(5)(a), 287(1), 287(2)(a) (definition of "prescribed amount for the financial year in which the compliance deadline occurs"), 287(3)(a) (definition of "prescribed amount for the financial year in which the compliance deadline occurs"), 287(5) and item 27 in clause 346.
5. Insert the following new division after Division 2 of Part 8:

6.1 Division 2A – Assistance for low emissions technology projects

6.1.1 172A Low emissions technology assistance program

- (1) The regulations may formulate a program (to be known as the ***low emissions technology assistance program***) for the issue of free Australian emissions units in respect of projects that:
 - (a) under the program, are taken to be reduced emissions projects; and
 - (b) are, or are to be, carried on in Australia during an eligible financial year.
- (2) The low emissions technology assistance program must comply with the requirements set out in section 172B.
- (3) The Minister must take all reasonable steps to ensure that regulations are made for the purposes of subsection (1) before 1 July 2010.
- (4) Not later than three months before the commencement of each eligible financial year, the Minister must specify the number of free Australian emissions units that are to be available for issue for that eligible financial year under the low emissions technology assistance program.

Note: The Minister may therefore specify the number of Australian emissions units that are to be available for issue under the low emissions technology assistance program for one financial year at a time or for a number of future financial years.

6.1.2 172B Requirements for low emissions technology assistance program

- (1) The Minister may declare a project to be a reduced emissions project for the purposes of the low emissions technology assistance program where the Minister is satisfied that:
 - (a) the project entails, or will entail, the production of a product using technology that:
 - (i) is not then generally used to produce that product; and
 - (ii) when fully commissioned and operating as intended, is reasonably expected to enable the product to be produced in such a way that the greenhouse gas emissions associated with the production of a unit of that product are less than those associated with the production of a unit of that product in accordance with then-current international best practice; and
 - (b) the activity that produces the product is an emissions-intensive trade-exposed activity for the purposes of the emissions-intensive trade-exposed assistance program.
- (2) The Minister may specify in a declaration made under subsection (1):
 - (a) conditions that must be complied with for a project to continue to be a reduced emissions project or for a person to be issued free Australian emissions units in respect of a reduced emissions project; and

Note: for example, such conditions could require that the project is commenced at a certain time or that the person has a Registry account.
 - (b) events or circumstances the occurrence of which will result in the project ceasing to be a reduced emissions project or in a person who would otherwise be issued free Australian emissions units in respect of that project ceasing to be entitled to receive free Australian emissions units in respect of that project.

Note: for example, such events or circumstances could be that the project achieves specified production levels or performance criteria.
- (3) The Minister must specify in a declaration made under subsection (1) the criteria against which a reduced emissions project is to be assessed in the independent expert report referred to in subsection (4).
- (4) It is a condition for a person to be issued further free Australian emissions units in respect of a reduced emissions project that:
 - (a) not earlier than three months after the first anniversary of the end of the financial year for which Australian emissions units were first issued with respect to that project under the low emissions technology assistance program; and

- (b) not later than three months before the second anniversary of the financial year for which Australian emissions units were first issued with respect to that project under the low emissions technology assistance program;

the Minister is provided with an independent expert report that assesses the project against the criteria referred to in subsection (3).

- (5) Subject to subsection (6), the number of free Australian emissions units issued under the low emissions technology assistance program for an eligible financial year in respect of a reduced emissions project must be calculated as the amount by which:

- (a) the number of Australian emissions units that equate to the carbon dioxide equivalence of the total number of tonnes of:
 - (i) direct greenhouse gas emissions produced in the production of the relevant product by the project, and in the production of steam for use in the production of the product by the project, during that eligible financial year;
 - (ii) greenhouse gas emissions attributable to the production of electricity for use in the production of that product by the project during that eligible financial year; and
 - (iii) greenhouse gas emissions attributable to the production of natural gas (or of the components of natural gas) used in the production of that product by the project during that eligible financial year;

exceeds

- (b) the number of free Australian emissions units that is issued for that eligible financial year under the emissions-intensive trade-exposed assistance program in respect of the production of that product by the project, ignoring any Australian emissions units that are relinquished under section 168.
- (6) If the aggregate number of free Australian emissions units that would be required, under subsection (5), to be issued for an eligible financial year in respect of all reduced emissions projects is greater than the number of free Australian emissions units that is specified by the Minister, under subsection 172A(4), as being available for issue for that eligible financial year, then the number of free Australian emissions units issued under the low emissions technology assistance program for that eligible financial year in respect of each such project must be a proportion of the number calculated under subsection (5), being a proportion that is determined so that:
 - (a) the deficiency is borne on an equitable basis as between all reduced emissions projects; and
 - (b) the total number of free Australian emissions units issued under the low emissions technology assistance program for that eligible financial year in respect of all reduced emissions projects equals the number of free Australian emissions units that is specified by the Minister, under

subsection 172A(4), as being available for issue for that eligible financial year.

- (7) For the purposes of subsection (5):
- (a) direct greenhouse gas emissions has the same meaning as in subsection 167A(6); and
 - (b) the Minister, or such other person or persons as the Minister may appoint for that purpose, may issue guidelines that specify the manner in which the greenhouse gas emissions referred to in subsection (5) must be calculated.
- (8) Subject to subsections (9) and (10), further free Australian emissions units must not be issued under the low emissions technology assistance program for an eligible financial year in respect of a reduced emissions project where:
- (a) a condition referred to in subsection (2)(a) or (4) is not complied with; or
 - (b) an event or circumstance referred to in subsection (2)(b) occurs; or
 - (c) the eligible financial year commences after the fourth anniversary of the end of the financial year for which free Australian emissions units were first issued with respect to that project under the low emissions technology assistance program; or
 - (d) the Minister determines, having regard to the report referred to in subsection (4), that the failure of the project to meet the criteria referred to in subsection (3) justifies no further free Australian emissions units being issued in respect of the project under the low emissions technology assistance program.
- (9) The Minister may determine that a failure to comply with a condition referred to in subsection (2)(a) or (4), the occurrence of an event or circumstance referred to in subsection (2)(b) or the failure of a project to meet the criteria referred to in subsection (3) should only result in the number of free Australian emissions units that would otherwise be issued in respect of the project under the low emissions technology assistance program being reduced for an eligible financial year, rather than not issued at all, in which case the number of free Australian emissions units issued for that eligible year in respect of that project under the low emissions technology assistance program must be the number determined by the Minister.
- (10) Nothing in subsection (8) precludes the issue of free Australian emissions units under the low emissions technology assistance fund for an eligible financial year in respect of a reduced emissions project where that issue is necessary by reason of the number referred to in subsection (5)(a) being incorrect because it was based on an estimated, and not actual, amount of greenhouse gas emissions.

6.1.3 172C Relinquishment requirement

- (1) Subject to section 172B, the low emissions technology assistance program may provide that, if:

- (a) a number of free Australian emissions units have been issued to a person in accordance with the program; and
- (b) any of the following subparagraphs applies:
 - (i) a specified event happens;
 - (ii) a specified circumstance comes into existence;
 - (iii) the Minister or the Authority is satisfied about a specified matter;

the person is required to relinquish a number of Australian emissions units ascertained in accordance with the program.

Note: An administrative penalty is payable under section 287 for non-compliance with a relinquishment requirement under the low emissions technology assistance program.

- (2) The number of Australian emissions units required to be relinquished by the person must not exceed the number of units mentioned in paragraph (1)(a).

6.1.4 172D Reporting requirement

Scope

- (1) This section applies to a person if free Australian emissions units have been issued to the person in accordance with the low emissions technology assistance program.

Requirement

- (2) The low emissions technology assistance program may make provision for and in relation to requiring the person to give one or more written reports to the Minister or the Authority.

6.1.5 172E Record-keeping requirement

Scope

- (1) This section applies to a person if free Australian emissions units have been issued to the person in accordance with the low emissions technology assistance program.

Requirement

- (2) The low emissions technology assistance program may make provision for and in relation to requiring the person to:
 - (a) make records of information specified in the program; and
 - (b) retain such a record, or a copy, for 5 years after the record was made.

6.1.6 172F Other matters

- (1) Subject to section 172B, the low emissions technology assistance program may make provision for and in relation to the following matters:
 - (a) applications for free Australian emissions units;
 - (b) the approval by the Minister or the Authority of a form for such an application;

- (c) information that must accompany such an application;
 - (d) documents that must accompany such an application;
 - (e) the method of calculating the number of free Australian emissions units to be issued to a person in accordance with the program.
- (2) The low emissions technology assistance program may provide that an application for free Australian emissions units must be accompanied by a prescribed report.
- (3) The low emissions technology assistance program may provide for verification by statutory declaration of statements in applications for free Australian emissions units.

6.1.7 172G Ancillary or incidental provisions

The low emissions technology assistance program may contain ancillary or incidental provisions.

6. Insert the following new paragraph after clause 274(b):

- (ba) for all projects that, under the low emissions technology assistance program, are taken to be reduced emissions projects – the total number of free Australian emissions units with a particular vintage issued during the quarter in respect of those projects in accordance with the program.

7. In clause 382(7), delete the words "subsection 167(1)" and insert the words "subsections 167(1) and 172A(1)".

7. Imposition of liability on subsidiary with operational control explanatory memorandum

7.1 Existing provisions

Subdivision A of Division 6 of Part 3 of the Carbon Pollution Reduction Scheme Bill 2009 (*CPRS Bill*) provides for the transfer of liability under the carbon pollution reduction scheme in respect of a facility from the controlling corporation (which is primarily liable for greenhouse gas emissions from facilities that are under the operational control of members of its group) to a subsidiary. This transfer of liability occurs where the Australian Climate Change Regulatory Authority issues a liability transfer certificate in respect of the facility to that subsidiary. Such a certificate may be issued on an application by the subsidiary which is made with the consent of the controlling corporation. The Authority will only issue the certificate if it is satisfied that the subsidiary has, and is likely to continue to have, the capacity, access to information and financial resources necessary for it to comply with the reporting and financial obligations that accompany the transfer of liability. Even then, the controlling corporation remains liable for a failure by the subsidiary to pay any unit shortfall penalty (cl.138; see also cl.133, 135).

7.2 Disadvantages of existing provisions

- These provisions have two disadvantages:
- It will often be the subsidiary that operates the facility which is the counterparty to contracts for the sale of the output of the facility. As a consequence, in order to pass through the cost of the carbon liability to the purchasers of that output, that carbon

liability will need to be transferred from the controlling corporation to this subsidiary. However, to the extent the subsidiary's contracts permit a cost passthrough of this kind, the passthrough will often be limited to costs that are incurred by the subsidiary (as the contract counterparty) "as a result of" a change in law. Where the subsidiary takes a transfer of the carbon liability under the existing liability transfer certificate provisions, the subsidiary will not be assuming that liability "as a result of" a change in law (ie. the introduction and operation of the carbon pollution reduction scheme) but "as a result of" its voluntary action in applying for the issue to it of a liability transfer certificate. In these circumstances the contractual cost passthrough provision will not entitle the subsidiary to pass through to its customers the cost of the carbon liability associated with the facility's emissions.

- Where a subsidiary is only partially owned by the controlling corporation (eg. as in the case of many incorporated joint ventures), the minority shareholder(s) may have the power to veto the assumption of liability by the subsidiary. They will have the incentive to exercise this veto power because, by doing so, all of the carbon liability associated with the emissions of the facility that is operated by the subsidiary will remain with the subsidiary's controlling corporation and will not be borne at all by the minority shareholder(s). This results in the subsidiary's controlling corporation bearing a disproportionate amount of the carbon liability related to the facility.

7.3 Proposed new provisions

New clause 72A addresses these disadvantages by requiring a subsidiary that has operational control over a facility to apply to the Authority for a liability transfer certificate in respect of the facility, unless the subsidiary's controlling corporation makes a written determination that the subsidiary must not apply for the certificate. New clause 72C requires the Authority to issue such a certificate unless the Authority is satisfied that:

- the subsidiary does not pass the category A transfer test (which is the test that currently applies in relation to liability transfer certificates that transfer liability under the carbon pollution reduction scheme within a corporate group: see cl.69);
- the facility is not under the operational control of the subsidiary; or
- the subsidiary does not have, or is not likely to continue to have, the capacity, access to information or financial resources necessary for it to comply with the reporting and financial obligations that accompany the transfer of liability.

As under the existing provisions, the subsidiary's controlling corporation will be liable for a failure by the subsidiary to pay any unit shortfall penalty (see items 9 & 10).

The start day for such a liability transfer certificate is the later of the first day of the financial year in which the certificate is issued and the day the subsidiary assumed operational control over the relevant facility (item 6). Such a liability transfer certificate can also only be surrendered with the relevant controlling corporation's agreement (item 7).

Items 1-3, new clause 72B and items 5 and 8-14 make a number of consequential amendments.

The proposed new provisions do not render redundant the existing provisions regarding the intra-group transfer of liability. A controlling corporation could make a written determination that the subsidiary which has operational control over the emitting facility need not apply for the issue of a liability transfer certificate under clause 72A, and it would then be possible for

the controlling corporation's carbon liability associated with that facility to be transferred to a different subsidiary under the existing provisions.

8. Imposition of liability on subsidiary with operational control legislative drafting

Insert the following amended definition in clause 5:

liability transfer certificate means a certificate issued under section 72, 72C or 76.

Amend clause 52(4) by inserting after 'liability certificate' the words 'issued under section 72, 72C or 76'.

Amend clause 57(9) by inserting after 'liability certificate' the words 'issued under section 72, 72C or 76'.

Insert the following new clauses after clause 72:

72A Compulsory application for liability transfer certificate

Scope

(1) This section applies if:

- (a) a company passes the category A transfer test in relation to a facility; and
- (b) that facility is under the operational control of that company.

Application

(2) The company must apply to the Authority for the issue to the company of a liability transfer certificate in relation to the facility unless the controlling corporation mentioned in section 69 makes a written determination that the company must not apply for the issue of such a liability transfer certificate.

Form of application

(3) An application must:

- (a) be in writing; and
- (b) be in a form approved, in writing, by the Authority; and
- (c) be accompanied by:
 - (i) such information as is specified in the regulations; and
 - (i) such documents (if any) as are specified in the regulations.

(4) The approved form of application may provide for verification by statutory declaration of statements in applications.

72B Further information

(1) The Authority may, by written notice given to an applicant, require the applicant to give the Authority, within the period specified in the notice, further information in connection with the application.

- (2) The applicant must comply with the requirement.

72C Issue of liability transfer certificate

Scope

- (1) This section applies if an application under section 72A has been made for a liability transfer certificate in relation to a facility.

Issue of certificate

- (2) After considering the application, the Authority must issue to the applicant a liability transfer certificate in relation to the facility unless the Authority is satisfied that:
- (a) the applicant does not pass the category A transfer test in relation to the facility; or
 - (b) the facility is not under the operational control of the applicant; or
 - (c) the applicant does not, or it is not likely to continue to have:
 - (i) the capacity; or
 - (ii) the access to information; or
 - (iii) the financial resources;necessary for it to comply with the obligations that will be imposed on the applicant by the following laws:
 - (iv) this Act;
 - (v) the regulations;
 - (vi) the *National Greenhouse and Energy Reporting Act 2007*;if the certificate is issued; or
 - (d) if the regulations specify one or more other requirements – those requirements are not met.

Timing

- (3) The Authority must take all reasonable steps to ensure that a decision is made on the application:
- (a) if the Authority requires the applicant to give further information under subsection 72B(1) in relation to the application – within 90 days after the applicant gave the Authority the information; or
 - (b) otherwise – within 90 days after the application was made.

Refusal

- (4) If the Authority decides to refuse to issue the liability transfer certificate, the Authority must give a written notice of the decision to the applicant.

Amend clause 77(2)(b)(i) by inserting before 'the applicant' the words 'in the case of a certificate issued under section 72 or 76 –'.

Insert the following new paragraph after clause 77(2):

- (2a) The start day for a liability transfer certificate issued under section 72C must be the later of:
 - (i) the first day of the financial year in which the certificate is issued; and
 - (ii) the day the applicant commenced to have operational control over the facility to which the liability transfer certificate relates.

Insert the following new paragraph after clause 78(4)(a):

- (ab) in the case of a certificate issued under section 72C – the controlling corporation of the group of which the person is a member has agreed to the surrender of the certificate; and.

Insert the following new paragraph after clause 79(2)(a):

- (ab) in a case where the certificate was issued under section 72C to a company – the Authority is satisfied that:
 - (i) the company does not pass the category A transfer test in relation to the facility; or
 - (ii) the company has ceased to have operational control over the facility; or
 - (iii) the controlling corporation of the group of which the company is a member has changed; or
 - (iv) an amount payable by the company under section 133 remains unpaid more than 30 days after it becomes due for payment; or
 - (v) the company has become an externally-administered body corporate (within the meaning of the *Corporations Act 2001*); or
 - (vi) if the regulations specify one or more other grounds for cancellation, at least one of those grounds is applicable to the company; or.

Amend clause 138(1)(b) by inserting at the beginning:

in the case of a liability transfer certificate issued under section 72, or 76,.

Amend clause 138(2) by inserting after 'controlling corporation' the words 'of the group of which the company is a member'.

Amend clause 142(2)(c) by inserting at the beginning:

in the case of a liability transfer certificate issued under section 72 or 76,.

Amend clause 142(2)(d) by deleting the words 'that consented under subsection 70(2) or 74(3) to the making of the application for the certificate' and substituting the words 'of the group of which the person is a member'.

Amend clause 142(2)(e) by deleting the words 'that consented under subsection 70(2) or 74(3) to the making of the application for the certificate' and substituting the words 'of the group of which the person is a member'.

Amend item 7 of the table in clause 346 by inserting ",72C" after "section 72".

9. Impositions of liability on members of unincorporated joint venture where operator has operational control – explanatory memorandum

[Note: these amendments have been drafted on the basis that the amendments regarding the imposition of liability on a subsidiary with operational control have been adopted.]

9.1 Existing provisions

Subdivision B of Division 6 of Part 3 of the Carbon Pollution Reduction Scheme Bill 2009 (*CPRS Bill*) provides for the transfer of liability under the carbon pollution reduction scheme in respect of a facility from the person (the operator) who has operational control over the facility (or the operator's controlling corporation, where there is one) to a person who has financial control over the facility (as defined in clause 81). This is in recognition of the fact that where the operation of a facility is contracted out, so that the owner of the facility does not have operational control over it (and so does not incur liability under the carbon pollution reduction scheme for the facility's emissions), it may well be the owner (rather than the operator) who is in a better position to manage the carbon liability associated with the facility.

Under the existing provisions, the financial controller can apply to the Australian Climate Change Regulatory Authority for the issue of a liability transfer certificate to transfer to it the carbon liability associated with the facility where that person is neither an individual nor a foreign person. Such a transfer requires the consent of both the operator (or its controlling corporation, if any) and the financial controller's controlling corporation (if any). The Authority must only issue the certificate if it is satisfied that the financial controller is eligible to assume the liability (ie. if the category B transfer test is satisfied) and that the financial controller has, and is likely to continue to have, the capacity, access to information and financial resources necessary for it to comply with the reporting and financial obligations that accompany the transfer of liability. The financial controller's controlling corporation (if any) gives a statutory guarantee of the financial controller's liability to pay any unit shortfall penalty (cl.138; see also cl.133, 135).

9.2 Disadvantage of existing provisions

The disadvantage of these provisions is that, where the operator operates a facility for an unincorporated joint venture, they only permit the carbon liability associated with the facility to be transferred to one of the joint venture participants. However, as each joint venture participant will have an interest in the joint venture that is less than 100%, no participant will have an incentive to agree to that liability transfer, thereby leaving the operator (which has no financial control over the facility) exposed to that liability.

9.3 Proposed new provisions

New Subdivision C of Division 6 of Part 3 addresses this disadvantage. It does this by introducing a new transfer of liability test, the category C transfer test (cl.76A). A person (the operator) passes this test where:

- the facility is under the operator's operational control;
- the operator operates facility on behalf of an unincorporated joint venture; and
- none of the joint venturers is an individual (note that the restriction on a person with financial control not being a foreign person has not been replicated in this context).

If these requirements are met, the operator may (but is not required to) apply to the Authority for liability transfer certificates to be issued to each of the joint venturers (cl.76B). If it has a controlling corporation, the operator must obtain its controlling corporation's consent to that application (cl.76B(3)). The application must specify the percentage interest of each joint venturer in the joint venture, with the total of these percentage interests being 100% (cl.76B(4)(c)). Importantly, it is for the operator to initiate the transfer of its carbon pollution reduction scheme liability to the joint venturers and it is for the operator to specify the joint venture interests of each joint venturer (these percentage interests are the basis upon which the operator's liability is apportioned between the joint venturers). If the joint venturers wish to constrain the operator in the exercise of these rights, then they will need to do so by contract.

Clause 76D empowers the Authority to issue the requested liability transfer certificates to the joint venturers, with each certificate setting out the "emissions percentage" that represents the certificate holder's proportion of the operator's liability (this percentage is the same as the percentage interest of that holder in the joint venture as notified to the Authority by the operator) (cl.76D(3)). Even if the category C transfer test is satisfied, there are three constraints on the Authority issuing the requested certificates:

- the Authority must be satisfied that each joint venturer has the capacity, access to information and financial resources necessary for it to comply with the reporting and financial obligations that accompany the transfer of liability (cl.76D(4)(b));
- the Authority must issue a liability transfer certificate to each joint venturer, and the aggregate of the emissions percentages as set out in those certificates must be 100% (cl.76D(5)); and
- the Authority must not issue the liability transfer certificates where the liability is the subject of a pre-existing liability transfer certificate that has been issued under another of the liability transfer certificate provisions (cl.76D(6)).

These restrictions are designed to ensure that all of the operator's liability in relation to the facility is apportioned to the joint venturers. This objective is further secured by providing for the start day of each such liability transfer certificate to be the same (item 6, new cl.77(2b)).

Because joint venture interests may change over time, new clause 80A requires the operator to notify the Authority of such changes (cl.80A(1), (2)). On receiving such notification:

- if there has only been a readjustment of interests as between the joint venturers, then the Authority must amend the emissions percentage in each issued liability transfer certificate to reflect the changed joint venture interests (cl.80A(5), (6)); and
- if a new joint venturer has been introduced, the Authority must not only amend the emissions percentages in the liability transfer certificates of the existing joint venturers, but (providing the requirements that would otherwise need to be met on an application for such a certificate are satisfied) must also issue a liability transfer certificate with the appropriate emissions percentage to the new joint venturer (cl.80A(7)–(9)); see also item 6, new cl.77(2c)).

In each case the Authority can only take the requisite action if the aggregate of the emissions percentages is 100% (cl.80A(5)(b), (7)(b)). If at any time the requirement for the aggregate of the emissions percentages to be 100% ceases to be satisfied, the Authority must cancel all of

the liability transfer certificates in respect of the facility, with the result that liability for the facility's emissions (as from the commencement of the then-current financial year) reverts to the operator (item 8, cl.79(2)(c)(iii), (3)).

Equally importantly, the controlling corporation (if any) of each joint venturer guarantees the relevant joint venturer's liability to pay any unit shortfall penalty (see also item 8, cl.79(2)(c)).

A liability transfer certificate issued in accordance with these provisions can only be surrendered with the agreement of the operator (or its controlling corporation, if any) (item 7).

New clause 22AA specifies the carbon liability of the operator which is to be apportioned between the joint venturers. This liability is determined for an eligible financial year as if the operator were a non-group entity, and is apportioned between the joint venturers on the basis of their emissions percentages (as set out in the liability transfer certificates) as at the end of that financial year. As a consequence it is left to joint venturers who change their joint venture interests during the financial year to contractually adjust their transferred carbon liabilities, ie. this is not a matter that is of concern to the Authority.

Items 1, 2, 3, 10 and 11, and new clause 76C, are consequential amendments.

10. Imposition of liability on members of unincorporated joint venture where operator has operational control - legislative drafting

Insert the following new and amended definitions in clause 5:

category C transfer test has the meaning given by section 76A.

liability transfer certificate means a certificate issued under section 72, 72C, 76, 76D or 80A(7)(d).

Insert the following new paragraph after clause 19(1):

- (1a) This section does not apply where the liability transfer certificate is issued under section 76D or subsection 80A(7)(d).

Insert the following new paragraph after clause 22(1):

- (1a) This section does not apply where the liability transfer certificate is issued under section 76D or subsection 80A(7)(d).

Insert the following new subdivision after Subdivision B of Division 2 of Part 3:

Subdivision BAA – Liability transfer certificates relating to the activities of joint ventures

22AA Liability entity – holder of a liability transfer certificate

Scope

- (1) This section applies if a person was the holder of a liability transfer certificate issued under section 76D or subsection 80A(7)(d) in relation to a facility at any time during an eligible financial year.

Provisional emissions number

- (2) For the purposes of this Act, a **provisional emissions number** of the person for the eligible financial year is the emissions percentage set out in the liability transfer certificate as at the

end of that eligible financial year, multiplied by the number of tonnes of carbon dioxide equivalence that would have been the provisional emissions number of the operator determined as if:

- (a) the operator were a non-group entity that had operational control over the facility throughout the period during the eligible financial year for which any person was the holder of a liability transfer certificate issued under section 76D or subsection 80A(7)(d) in relation to that facility; and
- (b) section 18 or 21, as the case may be, applied accordingly.

Liable entity

- (3) For the purposes of this Act, the person is a **liable entity** for the eligible financial year.

Insert the following new subdivision after Subdivision B of Division 6 of Part 3:

Subdivision C – Transfer of liability to joint participants

76A Category C transfer test

A person passes the **category C transfer test** in relation to a facility if:

- (a) the facility is under the operational control of that person; and
- (b) the person operates the facility on behalf of two or more other persons who are each participants in a joint venture relating to the facility; and
- (c) none of the participants in the joint venture is an individual.

76B Application for liability transfer certificates

Scope

- (1) This section applies if a person (the **operator**) passes the category C transfer test in relation to a facility.

Application

- (2) The operator may apply to the Authority for the issue to each of the participants in the joint venture of a liability transfer certificate in relation to the facility.
- (3) The operator is not entitled to make an application unless the operator has the written consent of the controlling corporation (if any) of the group of which the operator is a member.

Form of application

- (4) An application must:
 - (a) be in writing; and
 - (b) be in a form approved, in writing, by the Authority; and
 - (c) specify the percentage interest of each participant in the joint venture such that the total of those percentage interests is 100%; and
 - (d) be accompanied by:

- (i) any consent required under subsection (3); and
 - (ii) such information as is specified in the regulations; and
 - (iii) such documents (if any) as are specified in the regulations.
- (5) The approved form of application may provide for verification by statutory declaration of statements in applications.

76C Further information

- (1) The Authority may, by written notice given to an applicant, require the applicant to give the Authority, within the period specified in the notice, further information in connection with the application.
- (2) If the applicant breaches the requirement, the Authority may, by written notice given to the applicant:
- (a) refuse to consider the application; or
 - (b) refuse to take any action, or any further action, in relation to the application.

76D Issue of liability transfer certificates

Scope

- (1) This section applies if an application under section 76B has been made by an operator for the issue of liability transfer certificates in relation to a facility to the participants in a joint venture relating to the facility.

Issue of certificates

- (2) After considering the application, the Authority may issue to each participant a liability transfer certificate in relation to the facility.
- (3) A liability transfer certificate issued to a participant under subsection (2) must set out the emissions percentage in relation to the facility for the holder of that liability transfer certificate, being a percentage that is equal to the percentage interest of that participant in the joint venture as specified in the application made under subsection 76B(4).

Criteria for issue of certificates

- (4) The Authority must not issue a liability transfer certificate to a participant unless the Authority is satisfied that:
- (a) the operator passes the category C transfer test in relation to the facility; and
 - (b) the participant has, and is likely to continue to have:
 - (i) the capacity; and
 - (ii) the access to information; and
 - (iii) the financial resources;

necessary for it to comply with obligations that will be imposed on it by the following laws:

(iv) this Act;

(v) the regulations;

(vi) the *National Greenhouse and Energy Reporting Act 2007*;

if the certificate is issued; and

(c) if the regulations specify one or more other requirements – those requirements are met.

(5) The Authority must not issue a liability transfer certificate to a participant unless:

(a) it issues to each other participant in the joint venture a liability transfer certificate; and

(b) the aggregate of the emissions percentages in relation to the facility, as set out in the liability transfer certificate issued to the participant and the liability transfer certificates issued to the other participants, is 100%.

(6) The Authority must not issue a liability transfer certificate in relation to a facility to a participant if a liability transfer certificate in relation to the facility has been issued under section 72, 72C or 76 and that liability transfer certificate has not been surrendered or cancelled before the issue of the liability transfer certificate to the participant.

Timing

(7) The Authority must take all reasonable steps to ensure that a decision is made on the application:

(a) if the Authority requires the operator to give further information under subsection 76C(1) in relation to the application – within 90 days after the operator gave the Authority the information; or

(b) otherwise – within 90 days after the application was made.

Refusal

(8) If the Authority decides to refuse to issue the liability transfer certificates, the Authority must give written notice of the decision to the operator.

Insert the following new paragraphs after clause 77(2a):

(2b) The start day for a liability transfer certificate issued under section 76D must be the same for each such certificate that is issued in relation to the same facility.

(2c) The start day for a liability transfer certificate issued under subsection 80A(7)(d) is the same day as the Authority, pursuant to subsection 80A(7)(c), amends the emissions percentages in relation to the facility as set out in existing liability transfer certificates that relate to the facility.

Insert the following new paragraph after clause 78(4)(c):

- (ca) in the case of a certificate issued under section 76D or subsection 80A(7)(d) – the person who has operational control over the facility or, if that person is a member of a group and is not the controlling corporation of that group, the controlling corporation of that group, has agreed to the surrender of the certificate; and.

Insert the following new paragraph and subsection after clause 79(2)(b):

- (c) in a case where the certificate was issued under section 76D or subsection 80A(7)(d) to a person – the Authority is satisfied that:
 - (i) an amount payable by the person under section 133 remains unpaid more than 30 days after it became due for payment; or
 - (ii) the person has become an externally-administered body corporate (within the meaning of the *Corporations Act 2001*); or
 - (iii) the aggregate of the emissions percentages in relation to the facility, as set out in all of the liability transfer certificates issued in relation to the facility, is not 100%; or
 - (iv) if the regulations specify one or more other grounds for cancellation – at least one of those grounds is applicable to the person.
- (3) If the Authority cancels all of the certificates in relation to a facility that are issued under section 76D and subsection 80A(7)(d), this Act has effect as if those certificates had been cancelled as at the commencement of the eligible financial year in which they were actually cancelled.

Insert the following new clause after clause 80:

80A Amendment and issue of joint venture liability transfer certificates

Scope

- (1) This section applies if a participant in a joint venture relating to a facility is the holder of a liability transfer certificate issued under section 76D in relation to that facility and the percentage interest of that participant in the joint venture changes.

Notification

- (2) The person who operates the facility on behalf of the participant (the **operator**) must give the Authority notice of the percentage interest of each participant in the joint venture.

Form of notification

- (3) A notification must:
 - (a) be in writing; and
 - (b) be in a form approved, in writing, by the Authority; and
 - (c) be accompanied by:
 - (i) such information as is specified in the regulations; and

- (ii) such documents (if any) as are specified in the regulations.
- (4) The approved form of notification may provide for verification by statutory declaration of statements in notifications.

Amendment of liability transfer certificates

- (5) If:
 - (a) the participants in the joint venture all hold liability transfer certificates issued under section 76D or this section 80A in relation to the facility; and
 - (b) the aggregate of the percentage interests as notified to the Authority under subsection (2) is 100%;

the Authority must amend the liability transfer certificate of each participant whose percentage interest as notified to the Authority under subsection (2) differs from the emissions percentage in relation to the facility set out in that liability transfer certificate by substituting an emissions percentage that is equal to the percentage interest of that participant in the joint venture as notified to the Authority under subsection (2).

- (6) If, as a result of the application of subsection (5), a person holds a liability transfer certificate that sets out an emissions percentage in relation to the facility of zero, the Authority must cancel that liability transfer certificate.

Issue of liability transfer certificate

- (7) If:
 - (a) the participants in the joint venture do not all hold liability transfer certificates issued under section 76D or this section 80A in relation to the facility; and
 - (b) the aggregate of the percentage interests as notified to the Authority under subsection (2) is 100%;

the Authority must:

- (c) in the case of a participant who holds such a liability transfer certificate – amend the liability transfer certificate by substituting for the emissions percentage in relation to the facility that is set out in that certificate an emissions percentage that is equal to the percentage interest of that participant in the joint venture as notified to the Authority under subsection (2); and
 - (d) in the case of a participant who does not hold such a liability transfer certificate – issue a liability transfer certificate in relation to that facility to that participant which sets out an emissions percentage in relation to that facility that is equal to the percentage interest of that participant in the joint venture as notified to the Authority under subsection (2).
- (8) If, as a result of the application of subsection (7)(c), a person holds a liability transfer certificate that sets out an emissions

percentage in relation to the facility of zero, the Authority must cancel that liability transfer certificate.

- (9) The Authority must not issue a liability transfer certificate under subsection (7)(d) if it would not be permitted to issue that certificate by virtue of the application of subsection 76D(4) or (6) had the issue of the certificate been the subject of an application under section 76B. To avoid doubt, subsection 76D(5) does not apply in relation to the issue of such a certificate.
- (10) If the Authority decides to refuse to issue a liability transfer certificate under subsection (7)(d), the Authority must:
 - (a) cancel all liability transfer certificates issued under section 76D or subsection (7)(d) in relation to the facility; and
 - (b) give written notice of the decision to the operator.

Amend item 7 of the table in clause 346 by deleting 'or 76' and substituting ',76, 76D or 80A(7)(d)'.

Amend item 9 of the table in clause 346 by inserting at the end 'or 80A(10)'.

11. EXPORTED FOSSIL FUELS – EXPLANATORY MEMORANDUM

Division 4 of Part 3 of the Carbon Pollution Reduction Scheme Bill 2009 (*CPRS Bill*) sets out the circumstances in which the importers, producers and suppliers of fossil fuels are liable for the greenhouse gases embodied in those fuels (even though such fuels are not combusted by those importers, producers or suppliers). In the case of liquid petroleum fuel, it is provided that this liability does not attach to such of that fuel as is exported (cl.31(5), 32(5)). This is in recognition of the fact that exported liquid petroleum fuel will not be combusted in Australia and will therefore not emit greenhouse gases in Australia.

Liability for the greenhouse gases embodied in fossil fuels is imposed on:

- importers and producers of untransformed solid and gaseous fossil fuel where they supply that fuel to another person who does not quote an obligation transfer number ("OTN") (cl.33(1));
- suppliers of transformed fossil fuel where they supply that fuel to another person who does not quote an OTN (cl.35(1)); and
- re-suppliers of fossil fuel where the re-supplier acquired the fuel under an OTN and re-supplies the fuel to a person who does not quote an OTN (cl.33(1)).

Where the fuel is supplied to a person for use overseas, that person will not be able to purchase that fuel using an OTN.

In each of these cases liability does not attach to fuel where that fuel is supplied by the importer, producer, supplier or re-supplier to a person who then exports the fuel (cl.33(4)(a), (b), 35(4)(a), (b), 37(4)(a), (b)).

However, this exception does not apply where the importer, producer, supplier or re-supplier itself exports the fossil fuel. This is an issue because, where a person exports fuel:

- that supply can still occur in Australia (and so attract liability under the carbon pollution reduction scheme) eg. property in the fuel can still pass in Australia (cl.6(2)); but
- that person (as opposed to the person who has taken the supply) can still be the exporter of the fuel - this is because the exporter is the person who arranges for the shipment of the fuel, and this may well be the importer, producer, supplier or re-supplier (see *Henty v Bainbridge Hawker* (1963) 36 ALJR 354, at p.356; *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority* (1996) 141 ALR 297).

As a consequence, depending on the contractual arrangements for supply that a fossil fuel producer (such as a coal miner) has with its export customers, it is conceivable that an exporting fossil fuel producer will be liable under the carbon pollution reduction scheme for the greenhouse gases embodied in that fuel, even though the fuel is combusted overseas.

The amendments to clauses 33(4), 35(4) and 37(4) extend the existing liability exemptions to cover importers, producers, suppliers and re-suppliers who directly export their fossil fuel.

12. Exported fossil fuels – legislative drafting

Section 33(4) is amended as follows:

(4) For the purposes of this section, if:

(a) either:

(i) the supplier exported an amount of eligible upstream fuel during the eligible financial year; or

(ii) during the eligible financial year, the supplier supplied an amount of eligible upstream fuel to another person (the **recipient**) and, after the supply to the recipient, the recipient exported the fuel; and

(b) the fuel has been entered for export (within the meaning of section 113 of the *Customs Act 1901*); and

(c) the supplier has prescribed documentary evidence to show that the fuel was exported; and

(d) the potential greenhouse gas emissions embodied in the amount mentioned in paragraph (a) have a carbon dioxide equivalence of a particular number of tonnes;

that number is a **netted-out number** of the supplier for the eligible financial year.

Section 35(4) is amended as follows:

(4) For the purposes of this section, if:

(a) either:

- (i) the supplier exported an amount of eligible upstream fuel during the eligible financial year; or
 - (ii) during the eligible financial year, the supplier supplied an amount of eligible upstream fuel to another person (the **recipient**) and, after the supply to the recipient, the recipient exported the fuel; and
 - (b) the fuel has been entered for export (within the meaning of section 113 of the *Customs Act 1901*); and
 - (c) the supplier has prescribed documentary evidence to show that the fuel was exported; and
 - (d) the potential greenhouse gas emissions embodied in the amount mentioned in paragraph (a) have a carbon dioxide equivalence of a particular number of tonnes;
- that number is a **netted-out number** of the supplier for the eligible financial year.

Section 37(4) is amended as follows:

(4) For the purposes of this section, if:

- (a) either:

 - (i) the OTN holder exported an amount of eligible upstream fuel during the eligible financial year; or
 - (ii) during the eligible financial year in which the re-supply mentioned in paragraph (1)(b) occurs, the OTN holder supplied an amount of eligible upstream fuel to another person (the **recipient**) and, after the supply to the recipient, the recipient exported the fuel; and
- (b) the fuel has been entered for export (within the meaning of section 113 of the *Customs Act 1901*); and
- (c) the OTN holder has prescribed documentary evidence to show that the fuel was exported; and
- (d) the potential greenhouse gas emissions embodied in the amount mentioned in paragraph (a) have a carbon dioxide equivalence of a particular number of tonnes;

that number is a **netted-out number** of the OTN holder for the eligible financial year.