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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CARBON CREDITS (CARBON FARMING INITIATIVE) BILL 2011

EXPLANATORY MEMORANDUM

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

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
Administrator	Carbon Credits Administrator
Australian carbon credit units (ACCUs)	A unit issued under clause 138 of the bill. May be either a Kyoto Australian carbon credit unit or a non-Kyoto Australian carbon credit unit, depending whether the sequestration or emissions avoidance meets Australia's commitments under the Kyoto Rules.
bill	Carbon Credits (Carbon Farming Initiative) Bill 2011
CFI	Carbon Farming Initiative
Consequential amendments bill	Carbon Credits (Carbon Farming Initiative) (Consequential Amendments) Bill 2011
DOIC	Domestic Offsets Integrity Committee
Department	Department of Climate Change and Energy Efficiency
Kyoto units	An assigned amount unit, a certified emission reduction, an emission reduction unit, a removal unit or a prescribed unit issued in accordance with the Kyoto rules
Kyoto rules	This term is defined in clause 4 of the Registry bill. In brief, it includes the Kyoto Protocol, decisions of the Meeting of the Kyoto Parties, certain standards adopted by such a meeting and prescribed instruments
NCOS	National Carbon Offset Standard
NGGI	National Greenhouse Gas Inventory
Non-Kyoto international emissions units	A prescribed unit issued in accordance with an international agreement (other than the Kyoto Protocol) or a prescribed unit issued outside Australia under a law of a foreign country

Registry	Australian National Registry of Emissions Units
Registry bill	Australian National Registry of Emissions Units Bill 2011

General outline and financial impact

Objectives of the Carbon Farming Initiative

The Carbon Credits (Carbon Farming Initiative) Bill 2011 fulfils the Australian Government's commitment to develop legislation to give farmers, forest growers and landholders access to domestic voluntary and international carbon markets. This will begin to unlock the abatement opportunities in the land sector which currently makes up 23 percent of Australia's emissions.

This commitment is reflected in the objects of the bill.

The first objective in clause 3(2) is to help Australia meet its international obligations, under the United Nations Convention on Climate Change and the Kyoto Protocol, to reduce its emissions of greenhouse gases.

The second is to create incentives for people to undertake land sector abatement projects. The ability to generate saleable carbon credits provides an investment incentive, thereby helping to channel carbon finance into land sector abatement.

A further objective is to achieve carbon abatement in a manner that is consistent with the protection of Australia's natural environment and improves resilience to the impacts of climate change. This recognises the important contribution that this scheme can make towards environmental objectives such as improving water quality, reducing salinity and erosion, protecting and promoting biodiversity, regenerating landscapes and improving the productivity of agricultural soils.

Climate Change and Australia's mitigation policy

Scientific evidence confirms that human activities, such as burning fossil fuels (coal, oil and natural gas), agriculture and land clearing, have increased the concentration of greenhouse gases (such as carbon dioxide, methane and nitrous oxide) in the atmosphere. As a consequence, the earth's average temperature is rising and weather patterns are changing. This is affecting rainfall patterns, water availability, sea levels, storm activity, droughts and bushfire frequency, putting at risk Australian coastal communities, health outcomes, agriculture, tourism, heritage and biodiversity for current and future generations¹.

¹ Intergovernmental Panel on Climate Change, *Fourth assessment report, Synthesis report*, 2007

Unmitigated climate change threatens to challenge and transform regional and rural Australia for the worse. Notwithstanding the development of advanced farming techniques, climate change threatens to do great harm to our grain, pastoral and livestock industries. At the same time our agricultural sector, forests and soils present Australia important opportunities to reduce our greenhouse gas emissions. The Australian Government's mitigation strategy is based upon taking action to support renewable energy, improve energy efficiency and introduce a price on carbon.

On 24 February 2011 the Prime Minister announced the framework of a carbon pricing mechanism to place an explicit price on emissions from stationary energy, transport, fugitives, industrial processes and non-legacy waste. That framework also recognises the importance of abatement outside of those sectors and this bill is an essential step in creating a regime which will measure, verify and credit abatement actions in sectors which will not have direct liability under the proposed carbon pricing mechanism. The Government is currently consulting with the community on this framework and the role that credits created under this bill will have in the scheme.

The international community has long recognised the need to act to reduce greenhouse gas emissions and countries around the world are already taking significant action both to reduce greenhouse gas emissions and enhance carbon sinks such as forests and soils.

The United Nations Framework Convention on Climate Change was ratified by Australia on 30 December 1992. The Convention is aimed at stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. It includes an obligation on Australia to 'adopt national policies and take corresponding measures on the mitigation of climate change, by limiting anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs' (Article 4.2(a)). It provides an overall framework for intergovernmental efforts on climate change.

Under the Kyoto Protocol, Australia is committed to restraining its national emissions to an average of 108 per cent of 1990 levels over the first commitment period (2008 to 2012). While Australia's emissions projections released on 9 February 2011 demonstrate that Australia is on track to meet this target, without additional policy action our emissions are projected to be 24 per cent above 2000 levels by 2020 and 44 percent above 2000 levels by 2030. As the highest per capita emitter in the developed world and one of the 20 largest emitters on an absolute basis, Australia must take action.

Australia submitted its current 2020 target range to the Copenhagen Accord in January 2010 and in December 2010 the pledges under that

Accord were incorporated into the UN process through the Cancun Agreements. The pledges incorporated are from countries representing more than 80 per cent of global emissions, including China, the United States, the European Union, India and Japan. If Australia does not begin to decouple its growth in emissions from the growth of its economy, it risks being left behind and forgoing the opportunities our natural resources, landscape and ingenuity present if we embrace a clean energy future.

Abatement activities

The Carbon Farming Initiative (the scheme) will enable crediting of land sector greenhouse gas abatement, whether or not it is recognised towards Australia's Kyoto Protocol target. Abatement may be achieved by:

- Reducing or avoiding emissions, for example, through capture and destruction of methane emissions from landfill or livestock manure; or
- Removing carbon from the atmosphere and storing it in soil or trees, for example, by growing a forest, or farming in a way that increases soil carbon.

These activities will be undertaken as offsets projects. Carbon credits represent abatement of greenhouse gases achieved as a result of offsets projects.

Carbon credits are usually purchased and used by individuals or companies to cancel out or 'offset' the emissions they generate during their day-to-day life or normal course of business, for example, by consuming electricity or catching a plane.

Carbon credits can be used to offset emissions voluntarily or to meet regulatory requirements.

Scheme processes

There are a number of steps involved in establishing and operating an offsets project. These are illustrated in the diagram below.

The project manager needs to become a recognised offsets entity.

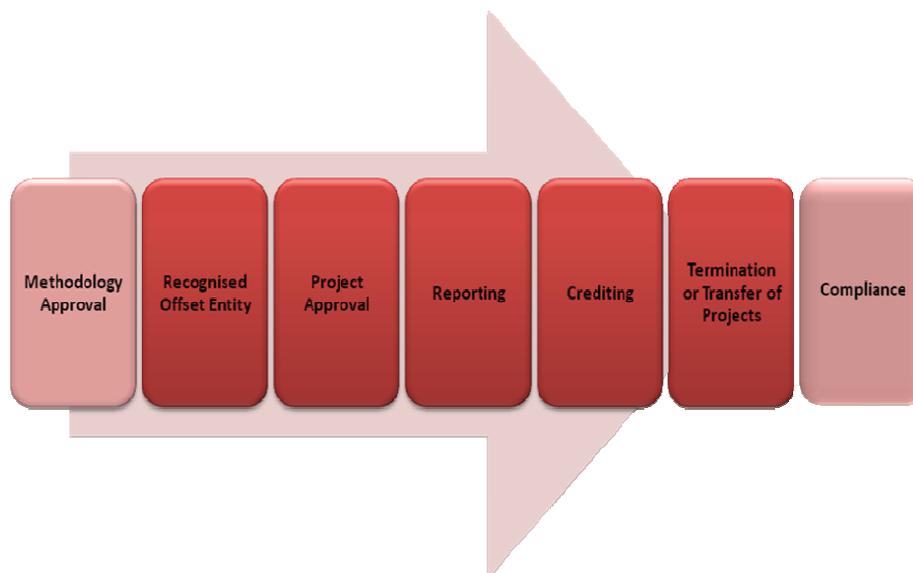
There needs to be an approved methodology for the type of project.

The project must be undertaken in accordance with the methodology and comply with other scheme eligibility requirements.

The project proponent reports on their project and the Administrator issues Australian carbon credit units (ACCU) into their Australian National Registry of Emissions Unit account.

Projects can be transferred or terminated. The scheme includes enforcement provisions.

The processes of the scheme



Offset methodologies

Offsets projects established under the scheme will need to use approved methodologies. These will contain the detailed rules for implementing and monitoring specific abatement activities under the scheme.

Methodologies can be developed and proposed by private proponents, as well as government agencies. The Government is working with stakeholders to develop methodologies that can be used by anyone undertaking a similar project. A public call for methodologies was issued on 11 March 2011, and methodologies are expected to be rolled out progressively from April 2011.

An independent expert committee, the Domestic Offsets Integrity Committee (DOIC), has been established to assess proposed methodologies and make recommendations to the Minister for Climate Change and Energy Efficiency on their approval. The DOIC will ensure that methodologies are rigorous and lead to real and verifiable abatement.

Environmental integrity requirements

The paramount consideration in the design of the scheme is ensuring that offsets recognised under the scheme are genuine.

ACCUs would only be issued for additional abatement, which means that ACCUs would not be available for abatement practices and activities that are already widely used by farmers or other land holders. This

requirement will not prevent crediting of activities that improve agricultural productivity or have biodiversity and other co-benefits.

Sequestration projects will be subject to additional requirements, including a requirement to hand back ACCUs if the project is terminated or carbon stores are deliberately destroyed. Landholders will not be required to hand back ACCUs if carbon stores are lost as a result of drought, bushfire or other factors outside their control. These losses will be managed by withholding a proportion of ACCUs from sequestration projects (a risk of reversal buffer). Landholders will, however, be required to re-establish carbon stores and will not receive further ACCUs until this occurs.

Other elements of the design of the scheme to ensure the integrity of ACCUs include: issuance of ACCUs after the sequestration or emissions reductions have actually occurred and following the submission of a project report, registration of ACCUs in a central national registry, transparency provisions including the publication of a wide range of information about approved projects, and appropriate enforcement provisions to address non-compliance.

Optimising community and environmental benefits

To ensure that abatement projects do not have perverse or unintended impacts, offsets projects will need to comply with all state, Commonwealth and local government water, planning and environment requirements. Project proponents will also be required to take account of regional natural resource management plans. These provide a mechanism for local communities to have their say about the type and location of abatement projects.

Project proponents will be able to include environmental and community co-benefits on the Register of offsets projects. The Government will develop a co-benefits index to provide a low-cost, credible standard for co-benefits, which can be recognised easily within the carbon market. This will assist project proponents to obtain a premium for ACCUs from these projects in the voluntary market.

The Government will monitor the implications of the scheme for regional communities and introduce further restrictions on abatement projects as necessary, if there is evidence that projects are likely to have a material and adverse impact on the allocation of prime agricultural land, water availability or biodiversity.

Interaction with carbon markets

The scheme establishes the institutional framework for a market-based approach to reducing emissions in the land sector. The credits created by the scheme will be able to be sold into a variety of markets.

In Australia, any company or person wishing to offset their emissions and achieve carbon neutrality for goods or services can do so under the National Carbon Offset Standard. Once the scheme commences companies will be able to surrender ACCUs generated under this scheme to offset their emissions. To ensure that such action is a genuinely additional reduction of greenhouse gases to that already committed by the Government, the Government will ensure that this abatement is not counted towards Australia's Kyoto target or any subsequent international obligation. Such voluntary action is thus guaranteed to be of additional benefit to combating climate change beyond the mitigation driven by other policies and programs.

The scheme also allows for Kyoto-consistent credits issued under the Carbon Farming Initiative to be exchanged for Kyoto-consistent credits and exported overseas. Similarly these units will not then be used to meet Australia's international obligations.

The price of credits is likely to vary and these markets often differentiate carbon abatement from different sources and place a premium on credits from projects that have co-benefits such as protecting biodiversity.

A market will allow abatement suppliers and companies who seek credits to work together in mutually supporting ways and underpin investments with long term contractual arrangements. The Government does not need to pick winners out of these processes and the ingenuity of buyers and sellers will work to unlock the lowest cost options to store or reduce emissions. Moreover, the ability to use Kyoto credits in a future carbon price mechanism would significantly increase their value.

To facilitate the development of the carbon market, the Government will assist with market information, and is providing support for scientific research, methodology development and the provision of information to farmers and landholders about the scheme.

Stakeholder Consultation

The Department of Climate Change and Energy Efficiency (the Department) consulted with stakeholders on options for scheme design from October 2010 to early February 2011.

The consultation process involved individual meetings and workshops in Canberra, Sydney, Adelaide, Melbourne, Perth, Brisbane, Darwin and some regional centres, as well as formal submissions. Over 350 individuals attended meetings with the Department, representing almost 250 organisations.

A consultation paper on the proposed design of the scheme was released for public comment on 22 November 2010.

Approximately 280 submissions were received from a diverse range of stakeholders, including farmers, regional bodies and scientific organisations.

Stakeholder feedback was broadly positive. Several stakeholders noted that scheme incentives would depend on linking to a carbon price mechanism.

The standard crediting period has been increased to 7 years with provision to specify longer crediting periods for activities such as reforestation in the regulations.

Concerns about the protection of native forests and the potential for adverse impacts from scheme projects have been addressed through requiring that avoided deforestation projects are only for native forests, and creating the potential for the regulations to contain a 'negative list' of abatement activities ineligible for ACCUs because they have a high potential for perverse outcomes.

Other amendments addressed concerns by the waste sector on the coverage of waste diversion activities and include a more generous definition of "legacy waste".

Streamlining

Some groups considered the scheme overly complex, with high administrative costs, and were concerned that additionality rules will limit scheme opportunities.

Concerns were addressed by removing the project-level additionality test, including references to financial additionality. Instead, abatement activities that are not common practice within an industry or region would be included on a 'positive list' and recognised as additional.

Administrative and compliance costs have been reduced through removing reporting requirements for sequestration projects that have reached maturity and are no longer generating ACCUs and allowing project proponents to choose a reporting period between 12 months and 5 years. There is also the capacity for regulations to reduce audit requirements for less complex projects.

Date of effect: Clauses 1 and 2 and other parts of the bill will come into effect on the day the bill receives Royal Assent. Clauses 3 to 307 will come into effect on a date fixed by proclamation, not later than six months and a day, after the *Australian National Registry of Emissions Units Bill 2011* and the *Carbon Credits (Consequential Amendments) Bill 2011* have received Royal Assent.

Financial impact: The total cost of the Carbon Farming Initiative is capped at \$45.6 million over four years, with the following profile: \$4.4 million in 2010-11, \$16.1 million in 2011-12, \$13.1 million in 2012-13

and \$11.9 million in 2013-14. This includes \$4 million to provide information about the scheme to land managers via Landcare.

Chapter 1

Coverage

Outline of chapter

- 1.1 This chapter describes the different types of abatement projects that will be eligible for Australian carbon credit units (ACCUs) under this scheme.
- 1.2 The relevant provisions are contained in Parts 1 and 3 of the bill.

Context

- 1.3 The scheme covers land sector abatement meaning that any land management practices or activities that enhance biosequestration (sequestration) or reduce agricultural emissions could be eligible for ACCUs. The scheme also covers reductions in some waste emissions.
- 1.4 The Carbon Farming Initiative is a stand-alone scheme but would be complementary to a carbon pricing mechanism, which the Government has announced would exempt agricultural emissions.
- 1.5 Notwithstanding the coverage of the scheme, the Minister may exclude projects that could have significant adverse impacts on water availability, food production and the local communities, conservation of biodiversity or employment.
- 1.6 Emissions avoidance projects and sequestration offsets projects are separately identified because permanence provisions, including the risk of reversal buffer, are applicable to sequestration projects only.
- 1.7 Kyoto and non-Kyoto abatement projects are also separately identified, as are the ACCUs issued for such projects. This is to assist buyers because, under the Kyoto Protocol, not all land sector abatement is internationally recognised. Kyoto and non-Kyoto ACCUs are likely to be traded in different markets and at different prices.

Explanation of new law

Coverage

Sequestration Projects

- 1.8 This scheme covers biosequestration (sequestration). The plain English meaning of ‘sequestration’ is ‘storage’.

1.9 Sequestration offsets projects are defined as projects to store carbon dioxide, which has been removed from the atmosphere, in living biomass such as forests, dead organic matter such as leaf litter or in soil [Part 3, Division 12, clause 54]. The scheme does not cover geosequestration (commonly referred to as carbon capture and storage).

1.10 Sequestration projects can involve activities to maintain carbon stores (avoiding emissions from existing carbon stores) as well as activities to increase sequestration [Part 3, Division 12, clause 54(b)].

1.11 Examples of sequestration projects might include a project which involves avoiding clear-felling an area of native forest, or a soil carbon project which involves management practices that are designed to reduce expected losses of soil carbon as well as increasing soil carbon sequestration.

1.12 Any project that involves maintaining or increasing carbon stores is a sequestration project and is subject to permanence obligations (see chapter 6 of this explanatory memorandum). This is because there is a risk that the carbon which is maintained or stored through carrying out the sequestration offsets project will be re-released into the atmosphere, for example, if a protected native forest is subsequently cleared, or if a bushfire occurs in the project area of a reforestation project. Permanence obligations address this risk through a number of mechanisms, for example by requiring a project proponent to re-establish carbon stores if carbon is lost through natural disturbance or deliberate action.

1.13 Land management practices that may enhance sequestration and are covered by the scheme include, but are not limited to:

- Reforestation
- Revegetation
- Native forest protection
- Avoided de-vegetation
- Improved management of forests
- Reduced forest degradation
- Forest restoration
- Rangeland restoration
- Improved vegetation management
- Enhanced or managed regrowth
- Enhanced soil carbon

1.14 While biosequestration from a wide range of activities could be credited under the scheme, not all will be internationally recognised. For example, improved forest management, revegetation and activities that

enhance carbon in agricultural soils are not recognised under the current international framework and would receive non-Kyoto ACCUs.

Native forest protection projects

1.15 The scheme will cover projects to protect native forests from clearing or clear felling.

1.16 Projects may not involve the clearing of native forests or using material obtained as a result of the clearing or harvesting of native forests [Part 3, Division 2, clause 27(4)(j)]. This would prevent clearing of low-density native forest to establish a higher-density carbon sink plantation, or biochar projects that make use of materials from native forests.

Emissions avoidance projects

1.17 The scheme covers reductions in emissions from savannah burning and agricultural production [Part 3, Division 12, clause 53(1)(a)]. These emissions are recognised under the Kyoto Protocol [Part 3, Division 12, clause 55(1)(a)]. The primary sources of agricultural emissions are livestock production and fertiliser use.

1.18 The scheme covers reductions in emissions from feral animals that are not managed within an agricultural system [Part 3, Division 12, clause 53(1)(c)]. These emissions are not internationally recognised [Part 3, Division 12, clause 55].

1.19 The scheme also covers reductions in emissions from legacy waste deposited in landfill facilities - these emissions are internationally recognised [Part 3, Division 12, clause 53(1)(b) and clause 55(1)(b)]. 'Legacy' waste includes waste deposited prior to the introduction of a carbon price. Incentives to reduce emissions from new waste may be provided via a carbon pricing mechanism.

1.20 The Government has indicated that it intends to commence carbon pricing on 1 July 2012, subject to the ability to pass legislation this year. As legislation has not yet passed, the Minister may make a legislative instrument that specifies the date from which waste deposits would be subject to a carbon price and would no longer be eligible to generate ACCUs [Part 1, clause 5, definition of 'landfill legacy emissions avoidance project']. It is intended that this date will be the date the carbon price commences.

1.21 Emissions from landfill facilities can be avoided by capturing and destroying the emissions at the landfill facility or by diverting waste to prevent it from reaching the landfill. It is intended that waste diversion and alternative waste treatment activities, together with abatement activities at the landfill facility, be eligible for crediting under the scheme.

1.22 The scheme does not cover reductions in emissions from electricity or transport, even if these emissions are the result of agricultural production or directly associated with an abatement project.

Electricity and transport emissions may be covered by the carbon pricing mechanism, which would create incentives to reduce emissions from these sources.

1.23 The bill provides for other kinds of emissions avoidance projects to be specified in the regulations [*Part 3, Division 12, clause 53(1)(d)*]. This provision will enable coverage of additional activities. No expansion is currently envisaged.

1.24 In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that regulations may specify a particular kind of project as an emissions avoidance project, the regulations may identify more than one particular kind or class of project [*Part 3, Division 12, clause 53(2)*].

Excluded projects

1.25 The Minister may recommend that regulations are made to exclude certain types of sequestration or emissions avoidance projects that would otherwise be eligible for ACCUs under the scheme [*Part 3, Division 12, clause 56*]. This is known as a ‘negative list’.

1.26 In making these recommendations, the Minister must consider whether there is a significant risk that in the areas where the projects are likely to be undertaken, they will have a significant adverse impact on:

- the availability of water;
- biodiversity conservation;
- employment; or
- the local community [*Part 3, Division 12, clause 56(2)*].

1.27 These impacts may be in, or in the vicinity of, the project area, or any of the project areas, for that kind of project [*Part 3, Division 12, clause 56(2)*]. The intention is that vicinity may be interpreted broadly, including water resource availability in associated catchments.

1.28 The Government has committed to monitoring the impact of the scheme on the environment and on rural communities, and to taking steps to prevent perverse impacts if state, local and existing Commonwealth planning, water and environmental frameworks are inadequate. This provision will enable the Minister to address quickly any risks of perverse impacts.

1.29 The Government intends to include on the negative list projects that involve the complete cessation of harvesting in plantations established for harvest; that is, converting harvest plantations into permanent carbon sinks.

1.30 Some harvest plantations established in response to incentives provided through Managed Investment Schemes may not be commercially viable. Converting such plantations into carbon sinks may have perverse

environmental consequences and pose a risk to the integrity of the scheme. Plantations are designed to be harvested and may become sources of emissions if maintained over long periods. If converted into permanent sinks, such plantations could have relatively high fire risk. The costs of managing plantations designed for harvest could therefore increase over time, posing a growing risk of reversal. For these reasons, projects to protect forests from clearing or clear-felling for harvest can only involve native forests.

1.31 This would not prevent the replacement of unprofitable harvest plantations with permanent environmental plantings.

1.32 The Government will also include on the list reforestation projects established on land that has not been legally cleared or on land that has been cleared since 31 December 2009. This is to remove any perverse incentive to clear existing forests to establish new carbon sequestration projects.

1.33 If there are types of projects that have an adverse impact on the availability of surface or ground water, the Government will include these on the list of excluded projects. These impacts may be downstream of the project or elsewhere in the catchment. This will help ensure that sequestration projects are established on appropriate sites in the landscape and that water is available to sustain plantings in the long term.

1.34 The bill clarifies that, in accordance with the *Legislative Instruments Act 2003*, where the bill indicates that regulations may specify a particular kind of project to be excluded from the scheme, the regulations may identify more than one particular kind or class of project [*Part 3, Division 12, clause 56(3)*].

Kyoto and non-Kyoto

1.35 The bill distinguishes between Kyoto offsets projects and non-Kyoto offsets projects [*Part 3, Division 12, clause 55*].

1.36 The regulations will specify which sequestration offsets projects are considered to be Kyoto projects [*Part 3, Division 12, clause 55(1)(c)*]. In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that the regulations may specify a particular kind of offsets project to be a Kyoto offsets project, the regulations may identify more than one particular kind or class of project [*Part 3, Division 12, clause 55(4)*].

1.37 Kyoto and non-Kyoto projects (or parts of projects) are differentiated, according to international accounting rules, and are eligible for Kyoto ACCUs and non-Kyoto ACCUs respectively. The relevant Kyoto accounting rules will be reflected in the regulations.

1.38 As indicated above, some emissions reductions projects and some sequestration projects are internationally recognised under the Kyoto Protocol, and some are not.

1.39 The only non-Kyoto emissions reduction projects would be those involving feral animal management. All other emissions avoidance projects (as defined in this bill), which are covered by the scheme, are internationally recognised.

1.40 Distinguishing between Kyoto and non-Kyoto emissions sequestration is difficult because international recognition depends on:

- the type of sequestration activity (for example, Australia counts reforestation (as defined under the Kyoto rules) but not revegetation towards its Kyoto targets); and
- the eligibility of the land on which the activity occurs (reforestation is only counted if it occurs on land cleared prior to 1990).

1.41 This means that some projects are likely to involve both Kyoto and non-Kyoto sequestration.

1.42 Further, increases in soil carbon as a result of reforestation may not be internationally recognised. This means that there can be both Kyoto and non-Kyoto sequestration on a single area of land.

1.43 The Government will publish indicative Kyoto land eligibility maps to assist project proponents to identify areas of their project that would be counted towards Australia's Kyoto target. Proponents could use these maps, in conjunction with the Kyoto accounting rules reflected in the regulations to identify the Kyoto and non-Kyoto components of their projects. As Kyoto and non-Kyoto ACCUs are likely to have different market values, this will assist project proponents to assess the potential returns on their project.

1.44 Project proponents may prefer to divide their activity into its Kyoto and non-Kyoto components, and to seek approval and report on these separately.

1.45 Even with the assistance of indicative Kyoto land eligibility maps, project proponents may find it difficult to separately manage and report on Kyoto and non-Kyoto components of a sequestration activity, such as reforestation or managed regrowth. For this reason, project proponents have the option of developing and reporting on Kyoto and non-Kyoto sequestration as part of the one project.

1.46 If a project proponent chooses to do this, the Administrator will split the project application into separate applications and treat the Kyoto and non-Kyoto components as separate projects in their own right [*Part 3, Division 2, clause 26*], [*Part 3, Division 12, clause 55(6)*].

1.47 This enables the Administrator to issue Kyoto ACCUs for the Kyoto component of the project and to issue non-Kyoto ACCUs for the non-Kyoto component.

1.48 Projects may be split even if they relate to the same area of land, for example, projects could relate to different carbon pools on the same area of land [*Part 3, Division 12, clause 55(6)*].

1.49 For example

Kristin wants to enhance regrowth on her Queensland property. The land eligibility maps indicate that regrowth would only be Kyoto-eligible on some parts of her property. Kristin decides it would be easier to seek approval and report on her enhanced regrowth as a single project.

Kristin submits a single report and is issued with Kyoto and non-Kyoto units for the different components of her project.

Structure of projects

1.50 A project can cover multiple land areas or facilities. However, for sequestration projects, the project proponent must hold the carbon sequestration right over all the project areas.

1.51 This means that a project aggregator would need to purchase the carbon sequestration rights from individual land holders in order to become the project proponent.

1.52 Alternatively, companies could act as service providers to proponents of small projects. The service provider would act as the agent for the land manager, obtaining project approvals and reporting on the project. The land manager, as project proponent, would receive the credits and would still be responsible for complying with scheme obligations.

1.53 For example:

Ben Kello's Carbon Trading Company is developing a project that aggregates small areas of revegetation across multiple properties.

Ben approaches landholders in the region, including the Green Sheep Co, seeking to buy their carbon rights. Some landholders agree.

Ben pays these landholders for their carbon rights upfront and then manages every aspect of the revegetation project on their land.

The Green Sheep Co is not interested in selling their carbon rights to Ben. The company director wants to plant trees on a portion of each of his six properties, retain his carbon rights and use the ACCUs he receives for the project to market Green Sheep wool as carbon neutral.

The Green Sheep Co becomes the project proponent and pays Ben a fee to develop, manage and report on the company's reforestation project.

1.54 There can only be one methodology determination for a project. This means that land managers wishing to undertake a combination of abatement activities will need to treat each activity as a separate project.

1.55 For example:

Northern Cattlegrower's Inc wants to undertake a project to increase their herd efficiency thereby reducing the emissions intensity of their beef production. The company is also interested in undertaking revegetation on part of the land previously used for beef production.

The company submits two applications: one for a livestock project and one for a revegetation project. Both are approved.

Permanence obligations would apply to the revegetation project only.

Chapter 2

Recognised offsets entities

Outline of chapter

- 2.1 This chapter sets out the requirements for recognition as an offsets entity.
- 2.2 The term ‘recognised offsets entity’ is used to refer to a person that meets the ‘fit and proper person’ test and can therefore participate in this scheme.
- 2.3 The relevant provisions are contained in Parts 4, 10, 24 and 28 of the bill.

Context

- 2.4 A person may become a recognised offsets entity only if they are ‘fit and proper to participate in the scheme’. For example, people who have been convicted under an offence relating to the conduct of a business or dishonest conduct will be excluded from the scheme.
- 2.5 This requirement is one of a number of features in the scheme which are designed to reduce the risk of fraud, deceptive or unfair conduct, and non-compliance.

Explanation of new law

Recognised offsets entities

- 2.6 A person must be a ‘recognised offsets entity’ to receive Australian carbon credit units (ACCUs) for an eligible offsets project.

Application process

- 2.7 A person (including an individual, a body corporate or a body politic such as a state or a territory) may apply to the Administrator to become a recognised offsets entity [*Part 4, clause 60(1)*]. A body politic includes the crown.

- 2.8 A person is not entitled to make an application before the 28th day after the commencement of this section [*Part 4, clause 60(2)*]. This is to prevent the Administrator from having to assess and recognise offsets entities before commencement of the scheme. A person does not have to

be a recognised offsets entity to apply for endorsement of a draft methodology by the Domestic Offsets Integrity Committee (DOIC).

2.9 The regulations may specify any information or documents that must accompany an application [Part 4, clause 61(1)(c) and (d)]. The information may include, for example, proof of identity documents.

2.10 The Administrator may by written notice require an applicant to provide additional information that the Administrator considers necessary to enable a decision to be made on an application [Part 4, clause 62(1)]. The Administrator must ensure that the information requested is relevant to its consideration of the application and must exercise this power reasonably [Part 28, clause 288].

2.11 Where that information is not provided within the timeframe specified in the notice, the Administrator may refuse to consider, or take any further action in relation to, the application [Part 4, clause 62(2)].

2.12 The regulations may specify an application fee [Part 4, clause 61(1)(e)]. The purpose of the fee is to enable the Administrator to recover costs associated with processing the application [Part 4, clause 61(3)].

2.13 An applicant may withdraw their application at any time before the Administrator has made a decision on the application [Part 4, clause 63].

2.14 The Administrator must take all reasonable steps to ensure that a decision is made on the application within 90 days of the making of the application or, where relevant, the receipt of further information [Part 4, clause 64(5)]. This provision is not intended to result in the invalidity of a decision made after that time but imposes a duty to take all reasonable steps to make the decision within that timeframe. If the Administrator decides to refuse the application, the applicant must be given written notice of this [Part 4, clause 64(6)]. A decision to refuse recognition of the applicant as an offsets entity is reviewable [Part 24, Division 2, clause 240].

Criteria for recognition

2.15 The Administrator may recognise the applicant as an offsets entity if satisfied that, among other things, the applicant is a fit and proper person. In making this assessment the Administrator must have regard to matters that include any convictions the applicant has under a law of the Commonwealth, a state or a territory relating to dishonest conduct, breaches by the applicant of the scheme legislation or the associated provisions and any other matters the Administrator considers relevant [Part 4, clause 64(3)].

2.16 Under the ‘fit and proper person’ test, the Administrator must also have regard to any orders made against the applicant by the Australian Competition and Consumer Commission, whether the applicant has breached the *National Greenhouse and Energy Reporting Act 2007* or this bill and its associated provisions. This is intended to exclude from the

scheme anyone with a track record of breaching requirements related to offset projects and reporting, and to reinforce compliance provisions under this bill.

2.17 The Administrator must be satisfied that the applicant, where an individual, is not an insolvent under administration or, where a body corporate, is not under external administration [*Part 4, clause 64(3)(b) and (c)*].

2.18 The regulations may specify additional criteria, such as a requirement that the applicant have some other type of approval or licence under a Commonwealth, state or territory law that is relevant [*Part 4, clause 64(3)(d)*].

2.19 Recognised offsets entities will be required to maintain their eligibility for recognition while they participate in the scheme.

2.20 The Administrator will have the power to cancel a person's recognition if satisfied that the person is no longer a fit and proper person, assessed against the same criteria as for recognition [*Part 4, clause 65*]. Cancellation of recognition is a reviewable decision under Part 24 of the bill [*Part 24, Division 2, clause 240*].

2.21 A person may voluntarily surrender their recognition as an offsets entity at any time by written notice to the Administrator [*Part 4, clause 66*].

2.22 As recognition of an offsets entity is specific to that person, the entity's recognition cannot be transferred to another person [*Part 4, clause 67*].

Multiple project proponents

2.23 In some circumstances there may be more than one person who has the responsibility and the legal right to carry out a project, and hold the carbon sequestration rights. For example, a property may be owned by a married couple.

2.24 Part 10, Division 2 of the bill allows all members of a group to both share in the benefits of a project and also be joint and severally liable for responsibilities relating to the project. The objective of this is to:

- allow participation by multiple Carbon Sequestration Right holders to enable participation by a broader range of landholders; and
- ensure all applicants are recognised offsets entities in order to uphold the integrity of the scheme [*Part 10, Division 2, clause 135*].

2.25 In the case where there are multiple project proponents they may jointly nominate one of the proponents as the nominee in relation to the project [*Part 10, Division 3, clause 136*].

2.26 The nominee is the representative who can:

- make or withdraw an application;
- provide information in connection with the application;
- make a request; or
- give a notice on behalf of the multiple project proponents *[Part 10, Division 3, clause 138]*.

2.27 The nominee is also the representative of the multiple project proponents to whom any documents are served. If documents are served on the nominee, those documents are thereby taken to have been served on each of the multiple project proponents *[Part 10, Division 3, clause 137]*.

2.28 The nominee may request to open an Australian National Registry of Emissions Units account on behalf of the multiple project proponents *[Part 10, Division 3, clause 140(2)]*. Only the nominee will be able to give instructions in relation to the account *[Part 10, Division 3, clause 143(2)]*. This is the account in which the ACCUs generated by the eligible offsets project will be issued and held on behalf of the project proponents *[Part 10, Division 3, clause 141 and 142]*.

2.29 A nomination can be revoked by any member of the group *[Part 10, Division 3, clause 136(5)]*. Alternatively, the nomination will cease if the nominee is no longer part of the group *[Part 10, Division 3, clause 136(6)]*. If the project proponents decide that they would like to change the nominee, they have to jointly inform the Administrator in writing *[Part 10, Division 3, clause 136(2)]*. If a nominee changes, the Administrator is responsible for updating the account details in the Australian National Registry of Emissions Units *[Part 10, Division 3, clause 144]*.

2.30 The regulations may provide a power for the Administrator to revoke the declaration of an eligible offsets project where there are two or more project proponents, and the Administrator is not provided with a nominee within 90 days *[Part 10, Division 3, clause 139(1) and (2)]*. Before a project is revoked, the regulations must require that the Administrator consult with the multiple project proponents *[Part 10, Division 3, clause 139(3)]*.

2.31 Any obligation on the multiple project proponents is imposed on each member of the group but may be discharged by any member of the group *[Part 10, Division 3, clause 145]*. This means that the Administrator could take action against any member of the group in relation to enforcing any obligation under the bill.

Chapter 3

Projects

Outline of chapter

- 3.1 This Chapter sets out the eligibility criteria for offsets projects and the circumstances in which projects can be varied or revoked by the Administrator.
- 3.2 The relevant provisions are contained in Parts 1, 3 and 7 of the bill.

Context

- 3.3 Offsets projects must be approved by the Administrator. This is to minimise the risk of abatement projects that have adverse social or environmental impacts, and to ensure that sequestration projects are undertaken with the consent of other interest holders in the land.
- 3.4 The Administrator may revoke an offsets project if it no longer meets the eligibility criteria. This is to promote compliance with scheme obligations.

Explanation of new law

Eligible project declaration

- 3.5 The Administrator may declare that an offsets project is eligible under this scheme. This is called a declaration of an eligible offsets project.
- 3.6 Australian carbon credit units can only be issued for offsets projects that have been declared eligible.
- 3.7 The declaration will identify the name of the project, the project proponent, and identify attributes of the project as specified in the regulations [*Part 3, Division 2, clause 27(3)*].
- 3.8 The declaration will specify the project area [*Part 3, Division 2, clause 27(3)(b)*]. It is intended that the regulations specify mapping standards and that information be provided to the Administrator in an electronic format.
- 3.9 The declaration would also confirm whether an eligible offsets project is a Kyoto project or a non-Kyoto project [*Part 3, Division 2, clause*

27(2)]. This is to confirm the project's eligibility for either Kyoto or non-Kyoto ACCUs. To make such a declaration, the Administrator must be satisfied as to whether the project is a Kyoto or a non-Kyoto project [*Part 3, Division 2, clause 27(12) and (13)*].

3.10 A declaration made under this section is not a legislative instrument [*Part 3, Division 2, clause 27(20)*]. The declaration is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

Application process

3.11 A person may apply to the Administrator for the declaration of an eligible offsets project [*Part 3, Division 2, clause 22(1)*].

3.12 For the purposes of this bill, a person includes an individual, a body corporate, a trust, a corporation sole, a body politic and a local governing body [*Part 1, clause 5, definition of 'person'*].

3.13 The application must be in writing, in a form approved by the Administrator [*Part 3, Division 2, clause 23(1)(a) and (b)*].

3.14 The regulations may specify an application fee [*Part 3, Division 2, clause 23(1)(i)*]. The purpose of the fee is to enable the Administrator to recover costs associated with processing the application. [*Part 3, Division 2, clause 23(3)*].

3.15 An application can be withdrawn at any time and doing so does not prevent the applicant from making a fresh submission [*Part 3, Division 2, clause 25(1) and (2)*]. If this occurs, any fees paid in relation to the application would be refunded [*Part 3, Division 2, clause 25(3)*]. This provision recognises that it would normally be preferable for the Administrator to advise the applicant of deficiencies in their application and to allow the applicant to withdraw and re-submit an improved application without cost, rather than proceeding to reject the application.

3.16 The application must be accompanied by a statement of consistency with the relevant regional natural resource management plan [*Part 3, Division 2, clause 23(1)(g)*]. The Government recognises that, in terms of content, regional natural resources management plans vary but considers they can be an appropriate vehicle for local communities to have input on land use and planning with respect to abatement projects.

3.17 The application must be accompanied by other information or documents specified in the regulations [*Part 3, Division 2, clause 23(1)(c) and (h)*]. For example, the Administrator may require additional information relevant to whether land should be accounted for under the Kyoto Protocol.

3.18 Where appropriate, the Administrator will take a light-handed approach to documentation to reduce administrative costs for the project proponent, for example, the Administrator may provide for statements to be verified by statutory declaration *[Part 3, Division 2, clause 23(2)]*.

3.19 If the Administrator has requested further information, the Administrator can refuse to consider or take further action with respect to the application if this is not provided as requested *[Part 3, Division 2, clause 24(1)]*, *[Part 3, Division 2, clause 24(2)]*.

3.20 The regulations may provide that applications for approval of eligible offsets projects be accompanied by an audit report *[Part 3, Division 2, clause 23(1)(d)]*. In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that regulations may specify a particular kind of project to be accompanied by an audit report, the regulations may identify more than one particular kind or class of project *[Part 3, Division 2, clause 23(5)]*.

3.21 The application may be accompanied by a statement to the effect that the project should be subject to the voluntary automatic cancellation regime *[Part 3, Division 2, clause 23(4)]*. This is to enable project proponents that have already sold the potential carbon storage from their sequestration projects to participate in the scheme, without receiving double credit for their abatement (see Chapter 9 of this Explanatory Memorandum).

3.22 The Administrator must take all reasonable steps to decide on an application within 90 days of receiving all required information *[Part 3, Division 2, clause 27(14)]*. This provision is not intended to result in the invalidity of a decision made after that time but imposes a duty to take all reasonable steps to make the decision within that timeframe. Where information is not provided within the timeframe specified in the notice, the Administrator may refuse to consider or take any further action in relation to the application *[Part 3, Division 2, clause 24(2)]*.

3.23 If the Administrator refuses to make the declaration it must tell the applicant in writing *[Part 3, Division 2, clause 27(18)]*.

3.24 A declaration takes effect from the date it is made or, with the agreement of the applicant, at an earlier specified date that is not earlier than 1 July 2010 *[Part 3, Division 2, clause 27(15) and (16)]*. This is to enable backdating of projects that are already in existence, for example, those from the Australian Government's Greenhouse Friendly program.

3.25 The Administrator has to notify the applicant and the relevant land registration official of an offsets project as soon as practical after the declaration is made *[Part 3, Division 2, clause 27(17)]*. This is to enable a notification to be placed on the relevant land title that would alert anyone taking an interest in the project land that it is subject to obligations under this legislation.

Eligibility criteria

3.26 The Administrator must not declare an eligible offsets project unless the Administrator is satisfied that the following criteria are met:

- The project must be in Australia [*Part 3, Division 2, clause 27(4)(a)*]. This is because the Administrator does not have jurisdiction beyond Australia's borders and, therefore, cannot ensure the integrity of overseas projects.
- The project must be covered by an applicable methodology determination, and the project must be undertaken in accordance with its requirements, including for monitoring and reporting [*Part 3, Division 2, clause 27(4)(b) and (c)*]. This is to ensure that abatement estimates are measurable and verifiable.
- The project must pass the additionality test, which is designed to ensure that ACCUs represent genuine abatement [*Part 3, Division 2, clause 27(4)(d)*].
- The applicant must be the project proponent; that is the person who is responsible and has the legal right to carry out the project [*Part 3, Division 2, clause 27(4)(e)*] (see below).
- The applicant must be a recognised offsets entity; that is the Administrator must have recognised the applicant as a fit and proper person [*Part 3, Division 2, clause 27(4)(f)*].
- The project must not involve the clearing of a native forest or the using of material obtained as a result of harvesting or clearing a native forest [*Part 3, Division 2, clause 27(4)(j)*]. It is not intended that this provision preclude projects that involve harvesting bush foods or other uses of the forests that are consistent with keeping forests healthy and intact. The regulations may therefore specify permitted uses of materials obtained as a result of the clearing or harvesting of native forests.
- The Administrator must not make a declaration for a new project if it includes land which is subject to a carbon maintenance obligation [*Part 3, Division 2, clause 27(10)*]. This is to prevent a person from receiving credit for increases in sequestration on an area of land for which there is still an obligation to restore carbon stores to a benchmark level.

Permanence obligations

3.27 The Administrator must not make a declaration for a new project if it includes land that was part of a prior project for which permanence obligations were not met. Any permanence obligation would need to be met in relation to an area of land before a new project could be declared.

This means that all ACCUs issued for the prior project would have to be relinquished and any penalty and late penalty for non-relinquishment would have to be paid before a declaration for a new project could be made [Part 3, Division 2, clause 27(11)]. This is to prevent a person from receiving credit for increases in sequestration on an area of land for which there is still an obligation to relinquish ACCUs or pay penalties for non-relinquishment.

Regulatory approvals

3.28 The Administrator must be satisfied that the project proponent has obtained all regulatory approvals. This means that they must have met all Commonwealth, state and local government planning, environmental and water requirements.

3.29 If the relevant regulatory approvals have yet to be obtained, the Administrator can issue a declaration that is conditional on the project obtaining these approvals before the end of the project’s first crediting period [Part 3, Division 2, clause 28]. This is to enable project proponents to be certain that their project is approved before going to the expense of obtaining regulatory approvals. It also allows proponents additional time to obtain regulatory approvals.

3.30 Once the necessary approvals have been obtained, the project proponent will be able to apply to the Administrator to vary the declaration to remove the condition [Part 3, Division 3, clause 31(1), (2) and (3)].

Project proponent

3.31 The concept of project proponent is central to the operation of the bill because all ACCUs will be issued to the project proponent. This is to ensure that ACCUs are issued to the right person, and not to a person that might be trespassing or otherwise undertaking a project illegally.

3.32 The project proponent must be the person who:

- is responsible for the project;
- has the legal right to carry out the project; and

in the case of sequestration projects, holds the applicable carbon sequestration right in relation to the project area [Part 1, clause 5, definition of ‘project proponent’]

3.33 The bill does not create any of these rights in favour of any person – they must be obtained separately to the bill.

3.34 For emissions avoidance projects, the legal right to carry out the project may involve ownership of the site of the project or an agreement to use the site. It may also involve permission to carry out that kind of activity on the site.

3.35 For example:

- A farming lease may be sufficient to undertake an agricultural emissions avoidance project such as livestock methane reduction.
- An access agreement to a pastoral station may be necessary to undertake an introduced animal emissions avoidance project such as camel reduction.

3.36 For sequestration projects, the legal right to carry out the project will be a right sufficient to manage the carbon pool related to the project. This could be ownership of the project area, or it may involve a lesser interest in land, such as a forestry right or a carbon management right attached to a carbon sequestration right.

3.37 For example, a forest right to plant, establish, manage and maintain vegetation on land is an interest in land which may be registered under the *Victorian Climate Change Act 2010*.

Applicable carbon sequestration right

3.38 For sequestration projects, there are criteria that apply to sequestration projects only. This is because sequestration projects can be reversed and are therefore subject to permanence obligations.

3.39 For sequestration projects, the project proponent must hold the carbon sequestration right for all the relevant project area [*Part 1, clause 5, definition of 'project proponent'*]. In essence, a carbon sequestration right is the exclusive legal right to obtain the benefit of sequestration of carbon dioxide in the relevant carbon pool on the project area [*Part 3, Division 8, clause 43*].

3.40 It is important to note that different jurisdictions around Australia operate different systems to create and recognise carbon rights and that carbon rights may be separate from land ownership and forestry type rights – for example, different people may hold the freehold title, the forestry right and the carbon sequestration right over one area of land.

3.41 For these reasons, and noting that the bill does not create any carbon sequestration rights in respect of any person, clause 43 of the bill takes into account the various circumstances in different jurisdictions and sets out when a person will be recognised to hold the 'applicable carbon sequestration right' for the purposes of the bill [*Part 3, Division 8, clause 43*].

3.42 On Torrens system land, the interest including the exclusive right to obtain the benefit of carbon must be either:

- a registered interest in land;
- a registered right which is an interest in land under state or territory law; or
- a registered right which runs with the land under a state or territory law [*Part 3, Division 8, clause 43(1), (2) and (3)*].

3.43 Note that the right must also be one that runs with the land – that is, any purchaser of the land takes the land subject to that right. If the right arises from an estate or interest in the land in question, then the right will run with the land. For example, the holder of a freehold title or an exclusive possession lease will have the carbon sequestration right.

3.44 On Crown land, the interest including the exclusive right to obtain the benefit of carbon must be either:

- a legal interest in land;
- a right which is an interest in land under state or territory law; or
- a right which runs with the land under a state or territory law.

3.45 In addition, the Commonwealth or a state or territory may hold the carbon sequestration right on Crown land [*Part 3, Division 8, clause 43(7) and (8)*].

3.46 If the project is on Crown land in a state or territory that is property of the Commonwealth, the relevant Minister must certify that the applicant has the applicable carbon sequestration right [*Part 3, Division 2, clause 27(4)(h) and (i)*].

3.47 For example, a person will have the carbon sequestration right if granted a right to exploit carbon on Crown land by the state.

3.48 The bill does not recognise carbon sequestration rights on general law land – land that is neither Torrens system land nor Crown land. State and territory legislation provides for the conversion of general law land to Torrens system land.

3.49 The bill also provides for the recognition of carbon sequestration rights on native title land (see chapter 4).

Consent

3.50 Each person with an eligible interest is required to give consent to an application for a declaration of an eligible sequestration offsets project [*Part 3, Division 2, clause 27(4)(k)*] and a variation of a project declaration if specified in the regulations [*Part 3, Division 3, clause 29(3)(f)*].

3.51 The consent of eligible interest holders must be in a form approved by the Administrator. This allows the Administrator to ensure that the consent form alerts eligible interest holders to potential scheme obligations [*Part 3, Division 2, clause 27(7)*].

3.52 The consent of eligible interest holders is a precondition to the declaration of a project as an eligible offsets project because, in some limited circumstances, an area of land involved in a project can become subject to a carbon maintenance obligation (discussed in chapter 6 below).

3.53 Depending on the circumstances, that obligation may have to be satisfied by a person other than the applicant for the declaration of a project as an 'eligible offsets project'. Therefore, it is important to ensure that persons who could be subject to, or have their interests in land affected by the carbon maintenance obligation have agreed to the land being brought into the offsets scheme.

3.54 Consent may also be required from other persons specified in regulations [*Part 3, Division 2, clause 27(4)(k)*] [*Part 3, Division 9, clause 44(5) and 45(5)*]. The purpose of this regulation-making power is to ensure that consent is obtained from further categories of persons (if any) whose interests may be affected by the application of a carbon maintenance obligation.

3.55 In relation to an area of Torrens system land, all legal estate or interests registered under a Torrens system of registration are 'eligible interests'. Other 'eligible interests' are mortgages or charges over other eligible interests where those mortgages or charges are registered under the Torrens land title system [*Part 3, Division 9, clause 44(3)(b)*].

3.56 In relation to an area of Crown land that is not Torrens system land, the Crown Lands Minister of the state or territory is taken to hold an eligible interest with respect to an area of land, unless the area is exclusive possession native title land [*Part 3, Division 9, clause 45(2)*]. Provisions enabling the Minister to delegate the power to consent are explained in Chapter 14 of this explanatory memorandum.

3.57 Other eligible interests in Crown land that is not Torrens system land are legal estates or interests granted by the Crown or created under a law of the Commonwealth, a state or a territory, or other estates or interests which were derived from those estates or interests [*Part 3, Division 9, clause 45(3)*]. A mortgagee or charge of those legal estates or interests is also an 'eligible interest' [*Part 3, Division 9, clause 45(4)*].

3.58 The need to obtain the consent of eligible interest holders creates an opportunity for negotiation between the person who would obtain a direct benefit under the scheme (i.e. the carbon sequestration right holder) and those other interest holders.

3.59 For example:

Craig is a farmer who has the freehold in an area of land. Five years ago he granted a lease over the land for a certain price.

Amy, the lessee (who holds the carbon sequestration right), wants to bring an offsets project on the leased land into the offsets scheme (by having it declared to be an 'eligible offsets project').

Amy needs to obtain Craig's consent to do this. As Craig could potentially become subject to the carbon maintenance obligation, Craig might refuse to consent to this. Alternatively, Craig might give consent

in return for a fixed sum, or a proportion of any ACCUs that might be issued to Amy for the offsets project.

Variation of a project declaration

Changes to the project area

3.60 Project proponents may apply to the Administrator to add areas of land to or remove areas of land from a project [*Part 3, Division 3, clause 29(1) and (2)*].

3.61 It is intended that before adding areas to a project, the Administrator would need to be satisfied that the areas meet the same requirements as those applicable to the original project area. The regulations may therefore provide for the applicants to have obtained the consent of other interests in the project area and to provide a statement of consistency with the relevant natural resource management plan [*Part 3, Division 3, clause 29(3)(f) and (h)*].

3.62 The regulations may make provision for a person to issue a certificate of entitlement in relation to the application [*Part 3, Division 3, clause 29(3)(g)*]. For example, the Crown might be required to issue a certificate of consent for a sequestration project.

3.63 For example:

Farmer Alan has planted trees along some of his fences. His son has been studying carbon markets at university, and gets the trees approved as a sequestration projects.

Farmer Alan finds that the trees help to reduce erosion and have a positive impact on the productivity of the adjacent land. He wants to add more trees to his abatement project. He provides the Administrator with similar documentation to that provided for the original project. Amongst other things, this describes the new area, indicates that it is being undertaken in accordance with the same methodology and demonstrates that he owns the land. The Administrator approves the addition of land to his project and issues a varied project declaration to reflect this.

Farmer Alan decides to sell part of his farm to a neighbour. The neighbour wants to buy Alan's land without taking on the offsets project

Farmer Alan applies to the Administrator to reduce the project area. He buys and hands over to the Administrator the number of ACCUs issued for the part of the project he wants to get rid of. The Administrator approves the removal of land from his project and issues a varied project declaration to reflect this.

Restructure of projects

3.64 Project areas may transfer between projects. This will increase the flexibility of the scheme.

3.65 To achieve this outcome, the bill allows for the regulations to adjust the calculation of the unit entitlement, the calculation of the number of ACCUs, and the duration of the crediting period in respect of both projects involved in the transaction.

3.66 A transfer only occurs if an area is removed from one project and added to another project or turned into a new, stand-alone project [*Part 3, Division 13, clause 57*] (see also voluntary automatic cancellation regime Chapter 9 Crediting).

3.67 If the area that is being moved to another project or turned into a new, stand-alone project is subject to the voluntary automatic cancellation regime the new or receiving project must also be subject to that regime [*Part 3, Division 13, clause 58*].

3.68 A determination under 57(2) is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 3, Division 13, clause 57(8)*]. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

Changes to the project proponent

3.69 The project proponent can apply to the Administrator to change the project proponent listed in the project declaration [*Part 3, Division 3, clause 30(1) and (2)*]. This would need to occur to reflect a change in the ownership of a project.

3.70 The regulations may empower the Administrator to require the applicant to provide security to the Commonwealth to cover any potential relinquishment obligation [*Part 3, Division 3, clause 30(3)(i)*]. Security could take the form of a bank guarantee for the amount of the potential relinquishment obligation. This is to address the risk that sequestration projects could be transferred to people who might reverse the carbon stores and be unable to meet relinquishment obligations if this occurred. If this were to occur, the Administrator would not be able to recover ACCUs for lost carbon stores.

3.71 The varied project declaration applies from the time it is made or, if the applicant agrees, an earlier specified date [*Part 3, Division 3, clause 30(7)*]. This is to enable the declaration to reflect the date on which the project transfers from the original to the new project proponent.

3.72 A determination made under this section is not a legislative instrument [*Part 3, Division 3, clause 30(8)*]. The determination is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the *Legislative Instruments Act 2003* is not sought or required.

3.73 When the legislation refers to an eligible offsets project, this should be taken to mean the eligible offsets project as varied [Part 3, Division 3, clause 29(9)], [Part 3, Division 3, clause 30(10)], [Part 3, Division 3, clause 31(9)].

Revocation of a project declaration

3.74 A project proponent can request that the Administrator revoke a project declaration. This is described in Chapter 6 of this explanatory memorandum on Permanence arrangements for sequestration projects.

3.75 The Administrator will also have the power to revoke a project declaration unilaterally [Part 3, Division 4, subdivision B].

3.76 The regulations may make provision for the Administrator to revoke a project declaration in the following circumstances:

- if the declaration has been made conditional on all regulatory approvals having been obtained prior to the end of the first crediting period and this condition is not met [Part 3, Division 4, clause 34(1) and (2)].
- If the project does not meet an eligibility requirement specified for the project [Part 3, Division 4, clause 35(1) and (2)] [Part 7, Division 3, clause 89(1)(c)(i)]. This could include, for example, that the project proponent for a sequestration project no longer holds the carbon sequestration right.
- If the project proponent ceases to be an offsets entity and if, after 90 days, the person that is the project proponent is not a recognised offsets entity [Part 3, Division 4, clause 36(1) and (2)] [Part 7, Division 3, clause 89(1)(c)(ii)]. This provision gives a project proponent that ceases to be a recognised offsets entity 90 days during which to sell or otherwise transfer the project to someone who can participate in the scheme.
- If the person who was the project proponent loses the legal right to carry out the project and, if after 90 days, the new project proponent is not a recognised entity [Part 3, Division 4, clause 37(1) and (2)] [Part 7, Division 3, clause 89(1)(c)(iii)]. The effect of this provision is to allow a person that buys a project 90 days to become a recognised offsets entity.
- If false or misleading information was given to the Administrator in an application, in connection with an application, in an offsets report or in a notification [Part 3, Division 4, clause 38(1) and (2)] [Part 7, Division 3, clause 89(1)(c)(iv)].
- Where there are multiple project proponents, the project may be revoked where the Administrator is not provided with a nominee within 90 days [Part 10, Division 3, clause 139(1) and (2)] [Part 7, Division 3, clause 89(1)(c)(v)]. Before a project is revoked,

the regulations must require that the Administrator consult with the multiple project proponents [*Part 10, Division 3, clause 139(3)*].

- The Administrator must not revoke the project declaration unless it is satisfied that the conditions outlined above have, in fact, been met. In other words, the Administrator will have discretion in relation to project revocations.

3.77 The requirements for relinquishing ACCUs when a project declaration is revoked by the Administrator are described in Chapter 10 of this explanatory memorandum.

3.78 To facilitate the exercise of this discretion, the regulations made in relation to project revocations, for whatever reason, must require the Administrator to consult with the project proponent [*Part 3, Division 4, clause 34(3), 35(3), 36(3) and 38(3)*]. This is to provide the project proponent or new owner of a project the opportunity to rectify the situation and to ensure any mitigating circumstances are identified.

3.79 The regulations must provide that if a project declaration is varied the Administrator must give a copy of the variation to the project proponents and the relevant land registration official [*Part 3, Division 4, clause 34(4), 35(4), 36(4), 37(4) and 38(4)*].

Transition of offsets projects from other schemes

3.80 The bill enables permanence obligations for sequestration projects that were created under other specified offsets schemes, such as the Greenhouse Gas Reduction Scheme and Greenhouse Friendly, to be enforced through the Carbon Farming Initiative scheme, thereby removing a barrier to winding up monitoring requirements under these schemes.

3.81 An existing project under a specified offsets scheme could only be transferred into this scheme if there is an applicable methodology.

3.82 A proponent wishing to transfer an existing project into this scheme would request a determination that specifies the number of credits issued for the project under the other offsets scheme [*Part 7, Division 4, clause 92*].

3.83 This number would be added to the maximum number of credits that have to be relinquished if, for example, the project is later revoked or the carbon storage is reversed [*Part 7, Division 4, clause 95*]. This will ensure that credits issued under previous schemes will continue to represent permanent abatement.

3.84 It is intended that the Administrator would seek advice from the administrators of the other offset schemes on the number of credits issued for the transitioning project.

3.85 The Administrator will only make a determination if the Administrator is satisfied that the project areas were credited under another offset scheme [Part 7, Division 4, clause 95(3)]. Such a determination is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required [Part 7, Division 4, clause 95(6)].

3.86 The Administrator must comply with the regulations in making a determination [Part 7, Division 4, clause 95(4)].

3.87 The Administrator must provide reasons if the Administrator refuses to make a determination [Part 7, Division 4, clause 95(5)].

3.88 A request for determination can only be for two years after scheme commencement [Part 7, Division 4, clause 92(2)]. A time limit is appropriate given that these are transitional arrangements designed to facilitate the winding up of administrative and monitoring requirements for transitioning sequestration projects under other offset schemes.

3.89 The request must be in a form approved by the Administrator and be accompanied by such information and documents as specified in the regulations [Part 7, Division 4, clause 93].

3.90 The Administrator may by written notice require an applicant to provide additional information that the Administrator considers necessary to make a decision on an application [Part 7, Division 4, clause 94(1)]. Where that information is not provided as requested, the Administrator may refuse to consider or take any further action in relation to an application [Part 7, Division 4, clause 94(2)].

Chapter 4

Aboriginal and Torres Strait Islander land

Outline of chapter

- 4.1 This chapter explains how holders of Aboriginal and Torres Strait Islander land can participate in this scheme.
- 4.2 The chapter should be read in conjunction with other chapters of this explanatory memorandum, in particular chapter 3 on project declarations.
- 4.3 The relevant provisions are contained in Parts 1, 3, 4 and 10 of the bill.

Context

- 4.4 Aboriginal and Torres Strait Islander land is often held communally and differently to other forms of land tenure.
- 4.5 This could mean, without special provision, that opportunities for participation by Aboriginal and Torres Strait Islander people would be more limited than for other land holders.
- 4.6 The Government is committed to facilitating Aboriginal and Torres Strait Islander participation in carbon markets and the bill contains a number of provisions to give effect to this objective.

Explanation of new law

- 4.7 Aboriginal and Torres Strait Islander held land is classified as land rights land or native title land.
- 4.8 Land rights land is defined according to the usual definition which covers land granted or vested under Aboriginal and Torres Strait Islander specific legislation or held or reserved expressly for Aboriginal and Torres Strait Islander people [*Part 1, clause 5*].
- 4.9 In general, land rights land is a legal interest in land, may be registered on title systems, and is managed by a single legal entity. This means that land rights land holders will generally be able to participate in a similar manner to other interest holders. Therefore no specific provisions are made for land rights land with respect to project proponents or carbon sequestration rights. However, because of the way land rights

land is administered, some provisions have been made with respect to holding eligible interests as detailed below.

4.10 Native title land is defined according to entries on the National Native Title Register specifying that native title exists in relation to the area [*Part 1, clause 5*]. This means there must be a determination of native title before native title holders could undertake a project on their land. Native title and native title holder have the same meaning as in the *Native Title Act 1993* [*Part 1, clause 5*]. This means that native title holder means the registered native title body corporate where the native title is held on trust. In this explanatory memorandum, the term ‘common law holders’ is used, similar to the *Native Title Act 1993*, to indicate the Aboriginal and Torres Strait Islander holders of native title where appropriate.

4.11 The following explanations on project proponent, carbon sequestration rights and eligible interests principally relate to native title land.

Project proponent

4.12 One of the scheme design principles is that the project proponent must hold the relevant rights in the land. While an agent can fulfil reporting obligations, the project proponent must hold the legal right to carry out the project and, in the case of sequestration projects, the carbon sequestration right [*Part 3, Division 2, clause 27(4)(e)*] [*Part 1, clause 5, definition of ‘project proponent’*].

4.13 This creates a problem where common law holders have not nominated a prescribed body corporate to hold the native title on trust. In this case, the common law holders will continue to hold the rights in land and would need to be the project proponent under the scheme, notwithstanding they have an agent registered native title body corporate.

4.14 It would not be practical for a group of common law holders to participate in the scheme as project proponents for two reasons.

4.15 First, to ensure the integrity of the scheme, every project proponent must be a ‘recognised offsets entity’. The main criterion for recognition is applying the ‘fit and proper person’ test to each member of an applicant group [*Part 4, clause 64(3)*] [*Part 10, Division 2, clause 135(1)*]. Applying this test to a large, imprecise, and changing group of common law holders would not be feasible for either the common law holders or the Administrator.

4.16 Second, because the project proponent is responsible for fulfilling all obligations under the scheme, the common law holders would be responsible jointly and severally for any penalties and compliance action. Even though provisions for ‘nominees’ for multiple project proponents could ease scheme administration issues, compliance action

for the scheme Administrator would be more complex and common law holders could be individually subject to penalties under this bill.

4.17 To address these difficulties, the bill ensures that where projects are undertaken by native title holders, the relevant participant in the scheme must be the registered native title body corporate. The scheme achieves this by providing that the registered native title body corporate will be taken to be the project proponent, regardless of whether the native title is held on trust or not [*Part 3, Division 10, clause 46*].

Right to carry out the project and carbon sequestration

4.18 To be eligible to apply for a project, native title holders must hold the legal right to carry out the project and, in the case of sequestration projects, the carbon sequestration right [*Part 1, clause 5*].

4.19 It is not clear whether native title could include a right to carbon sequestration. This is because native title rights are sourced from traditional laws and customs, which may not include the recently identified right to benefit from carbon stored in the land. As a result, native title holders may need to seek a court determination (or a consent determination) to confirm their carbon sequestration right before they could participate in the scheme. This is likely to be difficult, costly and time consuming and any court decision would be unlikely to have universal application to other native title holders. Demonstrating the legal right to carry out a project may present a similar hurdle.

4.20 To address this barrier, the bill will take the registered native title body corporate to be the project proponent where the project area is determined exclusive possession native title land, as long as:

- there is a registered native title body corporate for the project area; and
- no other person (except for the Crown) holds the carbon right or the legal right to carry out the project [*Part 3, Division 10, clause 46*].

4.21 This means that the registered native title body corporate would be taken to be the project proponent without the actual conferral or grant of rights (as noted above, the project proponent must have the right to carbon sequestration and the legal right to carry out the project) [*Part 1, clause 5*].

4.22 The deemed status could occur even if the exclusive possession native title is overlaid by another interest (and the non-extinguishment principle applied – see section 238 of the *Native Title Act 1993*). In this case, the registered native title body corporate would need to obtain the consent of the other interest holder before any project could proceed.

4.23 Because no rights are actually conferred, and thus there is no effect on the native title rights, this approach is not a future act under the

Native Title Act 1993 and means no further process is required to ‘deem’ project proponent status on the registered native title body corporate.

4.24 Consistent with the objective of treating Aboriginal and Torres Strait Islander land similar to freehold where appropriate, the bill also removes the need for the Crown to provide their consent to the project [*Part 3, Division 9, clause 45(2)*] and certify that the registered native title body corporate holds the carbon sequestration right [*Part 3, Division 2, clause 27(4)(h) and (i)*]. The Crown would normally have these functions on Crown land.

4.25 Similarly, where land rights land is equivalent to freehold, relevant Ministers will not hold an eligible interest, ensuring that land rights land holders can also undertake projects without reference to Ministers. Where these cases occur on Crown land, there is a requirement for the Administrator to notify the relevant Crown lands Minister to ensure the state or territory is aware of the project [*Part 3, Division 10, clause 47*] [*Part 3, Division 11, clause 52*].

4.26 This approach would provide holders of exclusive possession native title a clear and direct access to participate in the scheme similar to other land owners.

4.27 For example, this would provide a clear pathway for exclusive possession native title holders to undertake:

- a reforestation sequestration project without needing to show the legal right to carry out the project or the carbon sequestration right, or having to obtain a Crown consent or certification; or
- a savannah fire management emissions avoidance project without needing to show the legal right to carry out the project.

4.28 The bill does not provide any special treatment for non-exclusive native title. This is because non-exclusive native title interests, such as native title access or usage rights, would be less likely to include carbon sequestration rights, and are more akin to non-freehold interests such as an easement or a licence. Easements and licences do not confer carbon sequestration rights which would give a project proponent the basis to undertake projects.

4.29 For example

Native title is determined on Crown land, held on trust by Littletree registered native title body corporate and recorded on the National Native Title Register.

Before applying for a project, Littletree must register as a recognised offsets entity by passing the ‘fit and proper person’ test. Littletree will

be responsible for fulfilling all the scheme obligations, including reporting on the project.

Because the native title amounts to exclusive possession, Littletree can apply for a reforestation sequestration project without having to show the legal right to carry out the project or the carbon sequestration right.

The Crown Minister does not hold an eligible interest and does not need to provide consent nor certify that the applicant holds the carbon right.

Littletree enters into an agreement with Greenfoot Pty Ltd to manage the reforestation project.

Any scheme units will be issued to Littletree and held on trust for the benefit of the common law holders.

Littletree must maintain the project for 100 years. If not, because the project is cancelled, for example, due to false or misleading information provided in a report, a carbon maintenance obligation may be placed on the land. This will prevent the common law holders from reducing the amount of carbon stored in the land.

Right to carry out project and carbon a part of native title

4.30 Separate to the deeming provision above, a native title holder may still hold the carbon sequestration right and the legal right to carry out the project as part of native title, for example, because this right is recognised in a consent determination [*Part 3, Division 8, clause 43(9)*]. This may apply to exclusive possession native title or non-exclusive native title.

4.31 In this situation, as explained above, the registered native title body corporate would be taken to be the project proponent for any project application. This approach would meet the dual purposes of:

- recognising a pathway for participation by native title holders as of right; and
- ensuring scheme administration requirements can be met by utilising the registered native title bodies corporate.

Indigenous land use agreements

4.32 State legislation generally allows for carbon rights to be transferred between parties separate to the land title.

4.33 Native title cannot be transferred, but to provide flexibility, the bill recognises the situation where a carbon right may be exercised by another party under an indigenous land use agreement [*Part 3, Division 8, clause 43(10)*]. This recognition would allow a company or other people to undertake a project on native title land.

Special native title account

4.34 Where the registered native title body corporate is taken to be the project proponent, the bill requires that any units issued to this kind of projects must be held in a special native title account on trust for the common law holders. This will ensure that the benefits of any project accrue for the common law holders.

4.35 Specifically, whenever a registered native title body corporate is taken to be the project proponent:

- the registered native title body corporate may request the Administrator to open an account in the name of the registered native title body corporate but designated as a special native title account [*Part 3, Division 10, clause 48*];
- the Administrator may only issue units to a registered native title body corporate into a special native title account [*Part 3, Division 10, clause 49*];
- any units in a special native title account are held in trust for the common law holders [*Part 3, Division 10, clause 50*].

4.36 Under this mechanism, a registered native title body corporate would undertake the project and receive the ACCUs, but the ACCUs would be held on trust for the native title holders. If the project does not have a special native title account, the Administrator could not issue ACCUs for the project.

Project decisions

4.37 It is intended that the common law holders will be able to direct projects decisions, in the same way as under the *Native Title Act 1993*.

4.38 The bill provides that the regulations may allow for a registered native title body corporate to consult, and act in accordance with the directions of, the common law holders in relation to anything done by the registered native title body corporate under the bill [*Part 3, Division 10, clause 51*]. This mirrors section 58 of the *Native Title Act 1993*.

4.39 It is proposed that the regulations would follow the same standard as contained in the *Native Title (Prescribed Body Corporate) Regulations 1999*, made pursuant to section 58 of the *Native Title Act 1993*, that all affected common law holders must consent to any decisions by the registered native title body corporate affecting native title.

4.40 Ensuring this standard applies to project decisions will mean that common law holders will remain in control of projects and any possible conflict between the ‘deemed’ status and rights held under native title will be mediated by reference to the common law holders.

Beneficial nature of provisions

4.41 The Government considers that the approach outlined in relation to project proponents and carbon and project rights is beneficial for the following reasons:

- all native title holders may participate in the scheme;
- exclusive possession native title holders do not have to establish that native title includes rights to carry out projects and carbon;
- common law holders do not have to undergo the ‘fit and proper person’ test for scheme registration;
- common law holders would not be individually responsible for any liabilities under the scheme; and
- any ACCUs are protected on trust for common law holders.

Eligible interests

4.42 Rather than undertaking projects, interest holders can also participate in the scheme by providing their consent to sequestration projects undertaken by others. This option is usually available to interests which do not include the rights to carry out the project or carbon sequestration. This creates an opportunity for negotiation between the project proponent, who would obtain direct benefit, and other interest holders.

4.43 The consent of relevant interest holders is required because an area of project land can become subject to a carbon maintenance obligation (explained in chapter 6 of the explanatory memorandum). These scheme obligations may affect interests in the land, and therefore, it is important to ensure that all persons whose interests may be affected have agreed to the land being brought into the scheme.

4.44 The bill requires that each person with an ‘eligible interest’ must give consent to an application for a sequestration project [*Part 3, Division 2, clause 27(4)(k)*]. Eligible interest holders on Torrens system land include, for example, registered interests, mortgagees, easement holders and owners of leased land, but would not include unregistered interests (eg a licence) [*Part 3, Division 9, clause 44*]. On Crown land legal interests or estates derived from the Crown are recognised as eligible interests [*Part 3, Division 9, clause 45(3)*].

Land Rights Land

4.45 Interests in land rights land will be an eligible interest similar to other land interests. Therefore, the holders of land rights land will generally need to consent to projects on their land where others are undertaking projects.

4.46 In addition, where the land rights land is less than a freehold, the Minister responsible for that land rights land will also hold an eligible interest. It is appropriate that the responsible Minister has a say in long term decisions where the interest is less than a freehold. Specifically, where the land rights land is a lease, or is held by the Commonwealth or a Commonwealth statutory authority, the Minister who administers the relevant legislation is taken to hold an eligible interest and must provide their consent [Part 3, Division 9, clause 44(6)] [Part 3, Division 9, clause 45(6)]. If the interest is less than freehold and is held under state or territory legislation, the relevant Crown lands Minister will hold an eligible interest [Part 3, Division 9, clause 44(7)] [Part 3, Division 9, clause 45(7)].

4.47 For example

Bigtree Land Trust was created under land rights legislation. Before applying for a project, Bigtree must register as a recognised offsets entity by passing the ‘fit and proper person’ test. Bigtree will be responsible for fulfilling all the scheme obligations including reporting on the project.

Bigtree applies for a native forest protection project. As the land interest is a freehold, neither the Minister administering the land rights legislation nor the Crown lands Minister hold an eligible interest and do not therefore need to consent to or certify the project.

Bigtree appoints Greenfoot Pty Ltd to implement and manage the project and act as agent to fulfil reporting requirements. Any ACCUs for avoiding native forest conversion or increasing the sequestration will be issued to Bigtree on behalf of the Aboriginal landowners.

The project must maintain scheme obligations for 100 years. If this does not occur, for example, because Greenfoot harvests the forest, a carbon maintenance obligation may be placed on the land. This will prevent the Bigtree landowners from reducing the amount of carbon stored in the land.

Native Title

4.48 The situation regarding native title is complex.

4.49 Native title covers a wide spectrum of interests, including exclusive possession, use and access rights and claimed rights. When these interests are affected by ‘future acts’, the *Native Title Act 1993* sets out which procedural rights, if any, apply. Future acts are only valid if the steps in the *Native Title Act 1993* are followed.

4.50 Projects under the scheme are unlikely to be future acts, because projects must be based on existing rights, unless a carbon maintenance obligation is applied, as the obligation would operate to restrict activities which would reduce the level of carbon stored in the land.

4.51 Given the practical and legal complexity of the interaction of the scheme with native title, the Government intends to undertake further

consultation with a broad range of stakeholders and complete detailed legal analysis before reflecting a considered approach in amendments to the bill.

4.52 The approach to native title is intended to be consistent with the *Native Title Act 1993* and the *Racial Discrimination Act 1975*. To reflect this intention, and to ensure that native title continues to be protected, the scheme contains statements that the operation of the *Native Title Act 1993* and *Racial Discrimination Act 1975* are not affected [*Part 28, clause 301 and 302*].

4.53 The regulations may make provision for a registered native title body corporate to act as agent for the common law holders in relation to eligible interests [*Part 3, Division 10, clause 51(2)*]. This is necessary if the common law holders, rather than the registered native title body corporate, hold eligible interests under amendments to the bill.

4.54 If common law holders do provide a consent to a project in an indigenous land use agreement, the details of the agreement must not be removed from the Register of Indigenous Land Use Agreements under the *Native Title Act 1993* without the written consent of the Administrator [*Part 3, Division 2, clause 27(19)*] [*Part 3, Division 2, clause 29(6)*]. If an agreement is removed from the Register, this may undermine the basis of the consent provided. An alternative arrangement may need to be in place before the Administrator could provide written consent to the removal.

Chapter 5

Methodology Determinations

Outline of chapter

- 5.1 This chapter sets out the characteristics of methodology determinations and the integrity standards that methodology determinations must meet.
- 5.2 This chapter also describes how methodology determinations are made and varied.
- 5.3 The relevant provisions are contained in Parts 1, 3, 6, 9 and 17 of the bill.

Context

- 5.4 Offsets project methodologies establish procedures for estimating abatement (emissions reductions and sequestration) and project specific rules for monitoring, record keeping and reporting on abatement.
- 5.5 In designing this scheme, the Government has drawn on the experience of other international offsets schemes including the Clean Development Mechanism under the Kyoto Protocol, the Voluntary Carbon Standard, the Chicago Climate Exchange and built on Australia's decade-long practical experience in implementing offsets programs such as the Greenhouse Friendly and the New South Wales and Australian Capital Territory Greenhouse Gas Reduction Scheme.
- 5.6 The scheme is thus focused on crediting genuine and verifiable abatement which is permanent and additional to business as usual or regulatory requirements. This is given effect by requiring methodology determinations to meet internationally consistent integrity standards.
- 5.7 The bill provides for the assessment of proposals for methodology determinations by an independent expert panel. The process for making methodology determinations is transparent and promotes public accountability.
- 5.8 Offsets methodologies will be issued as determinations issued by the Minister as legislative instruments.

Explanation of new law

Assessment of methodologies

5.9 A methodology determination is made by the Minister. The determination is a legislative instrument [*Part 9, Division 2, clause 106(1)*]. This provision is included to assist readers, as the instrument is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*, and therefore the procedures in that Act, for example, parliamentary disallowance, will apply.

5.10 The methodology determination may be expressed to apply to a specified class of offsets projects [*Part 9, Division 2, clause 106(1)(a)*]. In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that the Minister may specify that a methodology determination applies to a particular kind of project, the Minister may identify more than one particular kind or class of project [*Part 9, Division 2, clause 106(7)*].

5.11 The Minister must not make a methodology determination unless a methodology is assessed and endorsed by the Domestic Offsets Integrity Committee (DOIC) [*Part 9, Division 2, clause 106(4)(b)*]. Further information on the establishment, structure and functions of the DOIC is contained in chapter 11 of this explanatory memorandum.

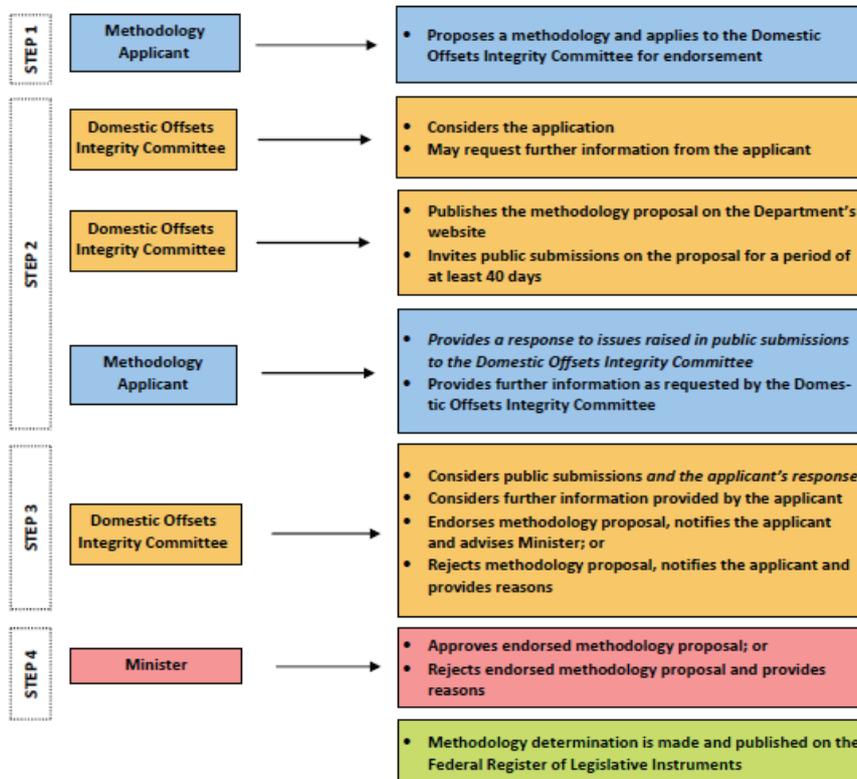
5.12 The Minister can also seek advice about methodologies from other people or organisations, such as the Department of Climate Change and Energy Efficiency [*Part 9, Division 2, clause 106(6)*].

5.13 The Minister must not make a methodology determination unless it has the specified characteristics and meets the integrity standards contained in the bill (see below) [*Part 9, Division 2, clause 106(4)(c)*].

5.14 If the Minister decides not to approve a methodology which has been endorsed by the DOIC, the Minister must give the methodology applicant reasons for the decision [*Part 9, Division 2, clause 106(5)*].

5.15 The methodology determination may apply, adopt, or incorporate with or without modification, a matter contained in another instrument as it exists from time to time, despite subsection 14(2) of the *Legislative Instruments Act 2003*. The instrument referred to must be published on the Administrator's website unless this would infringe copyright [*Part 9, Division 2, clause 106(8), (9) and (10)*].

Diagram 1.1 Methodology assessment process



Application process

5.16 A person may apply to the DOIC for the endorsement of a proposal for a methodology determination [Part 9, Division 2, clause 108]. The person does not have to be a recognised offset entity. For the purposes of this bill, a person includes an individual, a body corporate, a trust, a corporation sole, a body politic and a local governing body [Part 1, clause 5, definition of 'person'].

5.17 In order for the draft methodology to be assessed, an applicant will have to propose their methodology in the required form, along with any other required documents and information [Part 9, Division 2, clause 109(1)(a) to (e)].

5.18 Applications for assessment of draft methodologies will need to include supporting evidence to enable the DOIC to assess whether the proposed methodology is consistent with the offsets integrity standards set out in clause 133 and any other requirements specified in the methodology guidelines. The Department has published on its website interim

guidelines for submitting a methodology proposal and provided a template for this.

5.19 Where appropriate, the Administrator will take a light-handed approach to documentation to reduce administrative costs for the project proponent, for example, the Administrator may provide for statements to be verified by statutory declaration [*Part 9, Division 2, clause 109(2)*].

5.20 The regulations may specify an application fee [*Part 9, Division 2, clause 109(1)(f)*]. The purpose of the fee is to enable the Administrator to recover costs associated with processing the application [*Part 9, Division 2, clause 109(3)*].

5.21 The DOIC may be able to request further information from the applicant if it has any questions on the draft methodology [*Part 9, Division 2, clause 110(1)*]. The DOIC can refuse to take further action to assess the application if this information is not provided as requested [*Part 9, Division 2, clause 110(2)*].

5.22 An application can be withdrawn at any time before the DOIC makes a decision and doing so does not prevent the applicant from making a fresh submission [*Part 9, Division 2, clause 111(1) and (2)*]. If this occurs, any fees paid in relation to the application would be refunded [*Part 9, Division 2, clause 111(3)*]. This provision recognises that it would normally be preferable for the DOIC to advise the applicant of deficiencies in their application and to allow the applicant to withdraw and re-submit an improved application without cost, rather than proceeding to reject the application.

5.23 The DOIC will consider the application and then issue a written statement indicating whether or not it endorses the proposal [*Part 9, Division 2, clause 112(2)*]. If the DOIC endorses the proposal, it will advise the Minister of this as soon as practical [*Part 9, Division 2, clause 113*].

5.24 An endorsement of a proposal is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 9, Division 2, clause 112(15)*]. The provision is included to indicate that an exemption from the *Legislative Instruments Act* is not sought or required.

5.25 The DOIC must not endorse the application unless it is satisfied that the methodology has the requisite characteristics and meets the integrity standards described below.

5.26 Prior to endorsing a methodology, the DOIC must undertake public consultation on the draft methodology, including supporting evidence. The application and supporting evidence will be published on the Department of Climate Change and Energy Efficiency website and public comments invited for a minimum period of 40 days [*Part 9, Division 2, clause 112(4), (5) and (6)*].

5.27 The applicant can request that the DOIC not publish some or all of the supporting information to a methodology [Part 9, Division 2, clause 112(7)]. For example, applicants may wish to keep commercially sensitive information out of the public domain.

5.28 The request must be in writing in an approved form [Part 9, Division 2, clause 112(8)].

5.29 The DOIC will not be able to undertake a full assessment of a methodology if the methodology applicant seeks to prevent or unduly restrict public dissemination or use. For this reason, the DOIC must not endorse the methodology if the applicant refuses to allow information to be published, and the DOIC considers that this information is necessary to allow the public to make well informed submissions on the methodology proposal [Part 9, Division 2, clause 112(4) and (9)].

5.30 Submissions on draft methodologies will also be published on the Department of Climate Change and Energy Efficiency website and provided to the applicant. This will occur unless the person making the submission requests otherwise, for example, because the submission contains commercially sensitive information [Part 9, Division 2, clause 112(10) and (11)]. The request must be in writing and in the approved form [Part 9, Division 2, clause 112(12)].

5.31 As soon as practical after making a decision, the DOIC will advise the methodology applicant and provide reasons if it decides not to endorse a methodology [Part 9, Division 2, clause 112(13)].

5.32 Approved methodologies will be made into methodology determinations and will be legislative instruments. They will be published on the Federal Register of Legislative Instruments and must be tabled before Parliament. They are subject to Parliamentary disallowance.

Characteristics of a methodology determination

5.33 Methodology determinations contain project-specific rules and eligibility requirements [Part 9, Division 2, clause 106(1)(a) and (b)].

5.34 Methodology determinations must apply to specified kinds of offsets projects [Part 9, Division 2, clause 106(1)(a)]. This will ensure that methodologies can be applied by other project proponents in comparable circumstances. Ensuring that methodologies can be used by anyone with a similar project will reduce participation costs. Further, the scheme will be less complex and costly to run if it involves the administration of fewer, more generic methodologies.

5.35 The type of project cannot be defined by reference to a state or part of a state [Part 9, Division 2, clause 106(4)(d)]. This is because the Australian Constitution does not allow Commonwealth legislation to discriminate between states.

5.36 Methodology determinations for projects other than native forest protection projects will contain methods for estimating project abatement over the reporting period [*Part 9, Division 2, clause 106(1)(c)*]. The Administrator would normally issue ACCUs equivalent to the reported abatement.

5.37 Methodologies for projects to protect native forests will contain methods for estimating the total amount of carbon stored in the forest [*Part 9, Division 2, clause 106(1)(d)*]. Projects to protect existing native forest differ from most other types of abatement activity in that the abatement occurs once – at the time the forest is protected rather than cleared or clear felled. Issuing ACCUs for the total carbon storage at the end of the first reporting period risks flooding the carbon market and reducing the price of carbon. For this reason, ACCUs will be issued on a pro rata basis over 20 years. This approach will also reduce the risks that forests will be cleared after all the ACCUs have been issued, and would provide a revenue stream to fund ongoing management of the forest.

5.38 Estimation methods will need to include a baseline calculation for the project [*Part 9, Division 2, clause 107*]. This is because reductions in emissions or increases in sequestration must be estimated relative to a baseline that represents the emissions that would have occurred in the absence of the project. This provision is not intended to prevent methodologies from including standardised baselines that apply generically to projects within an industry or particular environmental conditions. More information about baselines and baseline setting is provided in the Methodology Guidelines, which is available on the Department of Climate Change and Energy Efficiency website.

5.39 Methodology determinations may refer to standards or procedures contained in other legislation, for example, standards contained in the National Greenhouse and Energy Reporting (Measurement) Determination 2008, made under the *National Greenhouse and Energy Reporting Act 2007* [*Part 9, Division 2, clause 106(8)*]. The DOIC would need to ensure that any such auxiliary rules or procedures can be located easily by publishing them on their website, unless this would infringe copyright [*Part 9, Division 2, clause 106(10) and (11)*].

5.40 Methodology determinations may specify project-specific requirements for:

- reporting [*Part 6, Division 2, clause 76(7)*] [*Part 9, Division 2, clause 106(3)(a)*];
- notification [*Part 6, Division 3, clause 80*] [*Part 9, Division 2, clause 106(3)(b)*];
- record-keeping [*Part 17, Division 2, clause 193*] [*Part 9, Division 2, clause 106(3)(c)*]; and

- monitoring [Part 17, Division 3, clause 194] [Part 9, Division 2, clause 106(3)(d)].

5.41 Project proponents will need to comply with the above requirements, in addition to the general reporting, notification and record-keeping requirements contained in the legislation.

5.42 The regulations may specify any additional requirements that methodology determinations must meet [Part 9, Division 2, clause 106(4)(e)].

Integrity standards

Additionality

5.43 Methodology determinations must relate to the kinds of projects that pass the additionality test [Part 9, Division 3, clause 133(1)(a)]. The purpose of the additionality test is to ensure that credits are only issued for abatement that would not normally have occurred and, therefore, provides a genuine environmental benefit.

5.44 The Government's intention is that this test will enable crediting of activities that improve agricultural productivity or have environmental co-benefits, but which have not been widely adopted.

5.45 An offsets project is taken to pass the additionality test if it relates to an activity or kind of project that is listed in the regulations [Part 3, Division 6, clause 41(1)(a)] and is not required to be carried out under state or territory law [Part 3, Division 6, clause 41(1)(b)]. In other words, the regulations will list activities or types of projects which are additional. This is referred to as a 'positive list'.

5.46 In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that the regulations may specify an activity or kind of project, the regulations may identify more than one particular kind or class of project [Part 3, Division 6, clause 41(4)].

5.47 The Minister must obtain the advice of the DOIC as to whether a particular kind of project should, or should not, be included on the positive list [Part 3, Division 6, clause 41(2)].

5.48 The Minister must consider whether carrying out the project is beyond common practice in the relevant industry or part of an industry, or in the environment in which the project is to be carried out [Part 3, Division 6, clause 41(3)(a)]. The Minister may also consider other matters the Minister considers relevant [Part 3, Division 6, clause 41(3)(e)].

5.49 The common practice test is intended to provide a streamlined way of identifying activities that would not normally have occurred in the absence of this scheme and are therefore genuinely additional.

5.50 In assessing whether a project is common practice, the Minister will factor out the impact of the scheme [Part 3, Division 6, clause 41(3)(b)].

This is to clarify that activities that are common because of the scheme should not fail the additionality test.

5.51 Common practice is not defined in the legislation. This is to allow for the application of expert judgement as to what constitutes common practice in different environments and industry circumstances. The Government will consult with stakeholders on approaches to identifying common practice and provide further guidance.

Measurable and verifiable

5.52 To ensure the credibility of abatement estimates, the legislation requires that abatement estimates are measurable and capable of being verified [*Part 9, Division 3, clause 133(1)(b)*].

5.53 The requirement that abatement is measurable precludes methodology determinations that calculate upfront or simply deem an amount of abatement for a given activity.

5.54 The requirement that abatement estimates are verifiable means that the estimation methods, reporting and record-keeping requirements contained in methodology determinations must be sufficiently detailed and comprehensive to enable an auditor to ascertain how an abatement estimate has been obtained and to assure the credibility of the estimate.

Leakage

5.55 Methodologies must provide for increases in emissions which are the result of carrying out the project to be deducted from abatement estimates [*Part 9, Division 3, clause 133(1)(e)*]. The methodology must specify how increases in emissions, if any, are to be estimated.

5.56 This integrity standard is designed to ensure that abatement is not offsets by increases in emissions as a result of the project.

5.57 Increases in emissions can be the direct result of carrying out the project and within the control of the project proponent. For example, soil carbon can be enhanced by increasing use of nitrogen fertiliser, but there could be increased emissions of nitrous oxide associated with this activity. The methodology guidelines indicate that such increases should be accounted for as part of the project.

5.58 Increases in emissions can also occur as an indirect result of carrying out the project. For example, de-stocking beef cattle on one property is likely to lead to increases in stock numbers on other properties if demand for beef remains unchanged. These increases are termed 'leakage' in the methodology guidelines.

5.59 The Government recognises that measuring indirect leakage can be very difficult. The Department of Climate Change and Energy Efficiency is working with stakeholders to identify streamlined ways to account for leakage. Streamlined accounting treatments developed

through this process would be incorporated into the relevant methodology determinations.

Internationally consistent

5.60 It is important that estimation methodologies meet internationally recognised accounting standards. This will enable abatement to be counted towards Australia’s Kyoto target. To give effect to this, the legislation stipulates that methods should not be inconsistent with methods applied in compiling the National Inventory Report [*Part 9, Division 3, clause 133(1)(c)*].

5.61 The member of the committee from the Department of Climate Change and Energy Efficiency will advise whether proposed methodologies allow abatement to be counted towards Australia’s international climate change targets in the National Inventory Report, which are compiled by the Department.

5.62 The intention is not to preclude methodologies that are different to those currently used to develop Australia’s National Greenhouse Gas Inventory (NGGI), provided that the resulting data is of a kind and standard that allows it to be incorporated into the national accounts.

5.63 The Kyoto Protocol covers the major greenhouse gases that are produced by human activity. These are the only greenhouse gases that are included in the National Inventory Report and that can be included in methodology determinations [*Part 1, clause 5, definition of ‘Greenhouse Gas’*] [*Part 9, Division 3, clause 133(1)(c)*]. This will help to ensure that abatement that is credited under this scheme can be counted towards Australia’s Kyoto target.

5.64 Estimation methods must provide for these gases to be translated into their carbon dioxide equivalents [*Part 9, Division 2, clause 106(1)(c) and (d)*].

Supported by peer-reviewed science

5.65 The environmental integrity of Australian carbon credit units (ACCUs) will depend on whether they have scientific credibility.

5.66 Estimation methods must be supported by relevant science that has been published in peer-reviewed literature and generally accepted by the scientific community [*Part 9, Division 3, clause 133(1)(d)*]. This will preclude methodologies that would not be recognised as having scientific credibility.

5.67 It is not the intention that estimation methods should be published in peer-reviewed literature. Rather, methodologies will incorporate or apply peer-reviewed methods, models or data.

5.68 It is intended that the DOIC will use expert judgement to assess whether peer-reviewed science, methods or models have been correctly

and appropriately be applied. In making this assessment, the DOIC may seek the advice of technical specialists.

5.69 To avoid doubt, the methods determined under the *National Greenhouse and Energy Reporting Act 2007*, which are used to compile the NGGI, are taken to be consistent with peer-reviewed science. This is because these methods are subject to international peer review under the *United Nations Framework Convention on Climate Change*. Like scientific peer-review, this process tests the scientific rigor and ensures the credibility of estimation methods [*Part 9, Division 3, clause 133(6)*].

Accounting for cyclical variability

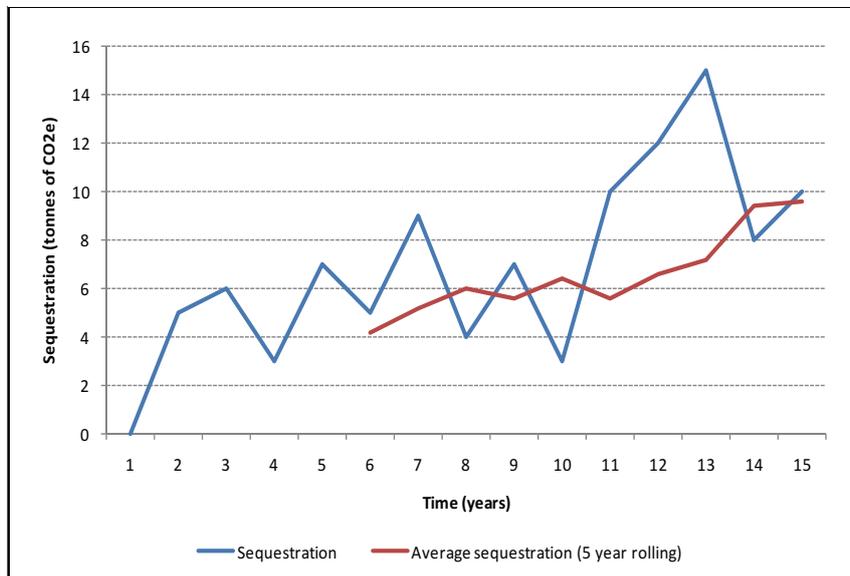
5.70 Carbon stored in agricultural soils and some forms of vegetation is likely to be susceptible to significant cyclical variations, largely driven by fluctuations in annual average rainfall. These variations can make it difficult to isolate the impact of changes in management practices on carbon stocks.

5.71 For this reason, estimation methods for sequestration projects must provide for estimates to be adjusted to account for significant variations in carbon stocks that are likely to occur as a result of climatic cycles [*Part 9, Division 3, clause 133(1)(f)*].

5.72 The purpose of such adjustments is to ensure that reported abatement (and hence crediting) provides an accurate reflection of the impact of changes in management practices on carbon stocks, as opposed to the impacts of climatic cycles on those stocks. Unless such adjustments are made, ACCUs could be issued for temporary increases in carbon storage, for example, as a result of higher than average rainfall. By the same token, such adjustments can avoid the need to hand back ACCUs if carbon stocks are temporarily reduced.

5.73 Methods of adjustment typically involve some form of averaging or statistical smoothing. Adjustments can be made to abatement estimates ex-post. It may also be possible to develop estimation models that ‘factor out’ natural variability.

Diagram 1.2 Estimating changes in carbon storage



5.74 Carbon stores in environmental plantings and permanent carbon sink forests are unlikely to lose carbon as a result of annual variations in rainfall, though they may be subject to natural disturbances such as prolonged drought. Methodologies for these activities are not expected to include averaging for climatic variations.

5.75 To provide certainty for project proponents, types of sequestration projects for which adjustments do not need to be made may be specified in the regulations [Part 9, Division 3, clause 133(2)].

5.76 In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that the regulations may specify types of project that do not need to make adjustments for significant cyclical variation [Part 9, Division 3, clause 133(2)], the regulations may identify more than one particular type or class of project [Part 9, Division 3, clause 133(3)].

Variations of methodologies

5.77 Methodology determinations may be varied, for example, because there is new scientific evidence to support refinements to carbon estimation models [Part 9, Division 2, clause 114(1)]. For example, research is currently underway into the effects of different management practices on the growth of environmental plantings. Over time, it is envisaged that this evidence will be incorporated into some reforestation methodologies.

5.78 However, a new methodology would be required for different abatement technologies or management practices.

- 5.79 Any person may apply to the DOIC for endorsement of a proposal to vary an existing methodology [Part 9, Division 2, clause 116(1)].
- 5.80 This allows someone other than the methodology applicant to propose changes to methodologies. Note that project proponents can continue to apply the original methodology for the duration of the crediting period or can apply the varied methodology.
- 5.81 The application process for varying a methodology determination, including the form of application, requests for further information and withdrawal of the application, is the same as that for applying for a methodology determination (see above) [Part 9, Division 2, clause 116] [Part 9, Division 2, clause 117] [Part 9, Division 2, clause 118] [Part 9, Division 2, clause 119].
- 5.82 An endorsement of a variation by the DOIC is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [Part 9, Division 2, clause 120(14)]. The provision is included to indicate that an exemption from the *Legislative Instruments Act* is not sought or required.
- 5.83 A methodology determination is varied by the Minister through legislative instrument [Part 9, Division 2, clause 114]. Before making an instrument to vary a methodology determination, the Minister must have received advice from the DOIC indicating that it endorses the variation [Part 9, Division 2, clause 114(2)(b) and clause 120(2)]. The DOIC must provide this advice to the Minister as soon as practicable after endorsing the proposal [Part 9, Division 2, clause 121].
- 5.84 Clause 114(5) clarifies that the making of a legislative instrument to vary a methodology determination does not limit the application of 33(3) of the *Acts Interpretation Act 1901*, to other instruments under this Act [Part 9, Division 2, clause 114(5)].
- 5.85 The Minister may seek additional advice from the DOIC or any other person or body in relation to variation of a methodology [Part 9, Division 2, clause 114(4)]. For example, the Minister may seek advice on whether to make a new methodology determination rather than modify an existing methodology determination.
- 5.86 The Minister must, as soon as practical after making a decision about variation of a methodology determination, notify the applicant of the decision and the reasons for the decision [Part 9, Division 2, clause 114(3)]. It is also expected that the Administrator will notify project proponents applying the original methodology determination.
- 5.87 A variation of a methodology comes into effect on the day that the Minister makes the instrument varying the methodology or, on a later day if specified in the instrument [Part 9, Division 2, clause 115].

Duration of methodology determinations

5.88 A methodology determination takes effect from the time that it is made or if a later day is specified in the determination – on that later day [Part 9, Division 2, clause 122(1)(a)]. In other words, methodologies will apply prospectively.

5.89 However, methodologies that are made before 30 June 2012 may be backdated to 1 July 2010. This is to enable projects that apply these methodologies to be backdated to 1 July 2010.

5.90 This transitional arrangement is to allow crediting of existing reforestation and waste projects, such as those approved under the Australian Government’s Greenhouse Friendly program, to be backdated to 1 July 2010.

5.91 Unless revoked, the methodology determination will remain in place until the time specified in the methodology determination or the legislative instrument lapses [Part 9, Division 2, clause 122(1)(b)]. This creates a trigger for the Government to review whether the legislative instrument remains relevant or requires amendment. Legislative instruments lapse automatically after 10 years.

5.92 The Minister may renew the methodology determination, without change, if it expires [Part 9, Division 2, clause 122(4)]. Provided that the methodology is still relevant and useful, and if there are no practical or scientific grounds for amending the methodology, it is anticipated that methodology determinations would be renewed when they expire.

Revocation of methodologies

5.93 The Minister may make a legislative instrument that revokes a methodology determination [Part 9, Division 2, clause 123(1)]. Before doing so, the Minister must first request the advice of the DOIC about whether to do so [Part 9, Division 2, clause 123(2)].

5.94 In deciding to revoke a determination, the Minister must consider any advice given by the DOIC, whether the determination complies with the offsets integrity standards and any other matters that the Minister considers relevant [Part 9, Division 2, clause 123(3)].

5.95 The Minister’s power to revoke a methodology determination does not affect the application of 33(3) of the *Acts Interpretation Act 1901* [Part 9, Division 2, clause 123(4)]. This provision is simply to assist readers, as this power is not intended to limit the application of the *Acts Interpretation Act 1901*.

5.96 There are limited circumstances in which it is envisaged that a methodology determination might be revoked. One circumstance would be if there is new scientific evidence that brings into serious question the credibility of the estimation method or abatement technology.

5.97 If the Minister revokes a methodology, a copy of the DOIC's advice will be published on the Department of Climate Change and Energy Efficiency website [*Part 9, Division 2, clause 123(5)*].

Application of a methodology determination

5.98 There can be only one methodology (the declared methodology) used to estimate abatement over a reporting period [*Part 9, Division 2, clause 124*].

5.99 Unless the Administrator approves otherwise, the methodology determination that has been declared for the project will apply until the end of the project's crediting period. This is the case even if the original methodology determination is varied, expires or is revoked [*Part 9, Division 2, clause 125, 126 and 127*].

5.100 The project proponent may request that the Administrator to approve the application of a methodology other than the original methodology determination [*Part 9, Division 2, clause 128(1)*]. For example, the project proponent may want to apply a varied methodology if it results in more accurate and higher abatement estimates. Project proponents may apply the Government's default reforestation methodology to begin with but apply to use a new 'species-specific' methodology when one becomes available.

5.101 The Administrator may seek further information from an applicant [*Part 9, Division 2, clause 129(1)*]. If the applicant does not provide this information as requested, the Administrator may refuse to consider or take any further action in relation to the application [*Part 9, Division 2, clause 129(2)*].

5.102 Once the application of a methodology other than the original methodology determination has been approved, this will apply from the end of the previous reporting period (or the start of the project if a report has not yet been submitted) [*Part 9, Division 2, clause 128(1)*]. Note that the project proponent chooses when to report, provided that the period between reports is not shorter than 12 months or longer than 5 years (below 6.8).

5.103 The request for the application of a methodology other than the original methodology determination must be in writing, in a form approved by the Administrator and accompanied by such documents as the Administrator requests [*Part 9, Division 2, clause 128(2)*]. The request can be made at any time.

5.104 The regulations may specify an application fee [*Part 9, Division 2, clause 128(2)(e)*]. The purpose of the fee is to enable the Administrator to recover administrative costs. [*Part 9, Division 2, clause 128(5)*].

5.105 The Administrator must not approve the request unless it is satisfied that the methodology determination applies to the project [*Part 9, Division 2, clause 130(3)*].

5.106 The Administrator must approve the request in writing [*Part 9, Division 2, clause 130(2)*]. If the Administrator decides not to approve the request it must provide the applicant with written notice of the decision [*Part 9, Division 2, clause 130(5)*].

5.107 An approval made by the Administrator is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 9, Division 2, clause 130(6)*]. The provision is included to indicate that an exemption from the *Legislative Instruments Act* is not sought or required.

Application and transitional provisions

Transitional provisions

5.108 Prior to the bill commencing, an interim Domestic Offsets Integrity Committee (interim DOIC) was established for the purpose of assessing methodologies. The bill outlines the transitional arrangements for methodologies which were submitted to the interim DOIC for assessment [*Part 9, Division 2, clause 131 and 132*]. The purpose of these arrangements is to streamline the transition between the interim DOIC and the legislative DOIC for the methodology process.

5.109 An application for the endorsement of a proposal which was submitted to the interim DOIC may be considered an application under clause 108 for the endorsement of a methodology by the legislative DOIC [*Part 9, Division 2, clause 131(3)*]. This means a person would not have to re-submit their application if the interim DOIC has not made a decision on the proposal, to either endorse or refuse to endorse it, at the time the legislated DOIC commences. When the scheme commences, a proposal would continue through the process of assessment. The legislative DOIC may make an assessment and recommendation on the proposal [*Part 9, Division 2, clause 131*].

5.110 An application that has been endorsed by the interim DOIC, but not approved by the Minister, may be treated as if it were an application under clause 108, and not be resubmitted and assessed [*Part 9, Division 2, clause 132(3), (4)*]. This clause means the endorsement of the interim DOIC would be treated as a decision by the legislative DOIC, providing that all the conditions of endorsement of a proposal in clauses 107 and 108 have been met and the Minister has been advised of the endorsement [*Part 9, Division 2, clause 132(2)*].

5.111 As noted in above, reforestation, legacy waste and other types of projects for which methodologies are approved prior to 1 July 2012 may

be backdated to 1 July 2010. This transitional arrangement is to allow backdating of existing projects, such as projects under the Australian Government's Greenhouse Friendly program.

Chapter 6

Permanence arrangements for sequestration projects

Outline of chapter

- 6.1 This chapter describes the permanence arrangements that apply to sequestration projects. Permanence arrangements include relinquishment requirements and carbon maintenance obligations.
- 6.2 The relevant provisions are contained in Parts 2, 3, 7, 8 and 15 of the bill.

Context

- 6.3 Carbon that has been removed from the atmosphere and stored in plants and soils can be released back to the atmosphere. In order to be genuinely equivalent to emissions (and therefore suitable offsets), sequestration must be permanent.
- 6.4 Sequestration is generally regarded as permanent if it is maintained on a net basis for around 100 years.
- 6.5 Over this period, land on which sequestration projects occur will likely be transferred to new owners. Landholders may also wish to cancel projects and convert to alternative land uses. Provisions are needed to cover these eventualities.
- 6.6 There is also a risk that carbon that has been stored will be released back into the atmosphere. For example, deliberate clear-felling of trees could re-release carbon stored in trees, or natural disturbance such as drought may cause carbon to be released from soil. The bill needs to address this risk.
- 6.7 The demand for sequestration Australian carbon credit units (ACCUs) depends on having credible arrangements to ensure that ACCUs represent permanent abatement.

Explanation of new law

Overview

6.8 The basic permanence obligation is to maintain carbon stores for which ACCUs have been issued or to hand the credits received for the project back to the Administrator.

6.9 Credits do not have to be handed back if carbon stores are lost for reasons that are beyond the control of the project proponent, for example as a result of natural or deliberately lit fires. Instead, the project proponent will be required to enable carbon stocks to recover.

6.10 The risk of reversal buffer is to insure the scheme against temporary losses of carbon whilst carbon stores are recovering, and losses as a result of wrong doing by the project proponent that cannot be remedied, for example if the project proponent leaves the country.

6.11 The purpose of a carbon maintenance obligation is to protect carbon stores in circumstances where the project proponent has not or is unlikely to hand back credits as required. A carbon maintenance obligation ‘runs with the land’ and will therefore apply to future land owners.

Relinquishment to ensure permanence

6.12 The bill outlines circumstances in which project proponents must hand back or relinquish Australian carbon credit units (ACCUs) to the Administrator and provides mechanisms to provide for this (see chapter 10).

6.13 Relinquishment requirements that are especially relevant to permanence are:

- where a project is voluntarily terminated;
- where the project has been revoked by the Administrator;
- where carbon stores have not been restored following a natural disturbance; and
- where there has been deliberate reversal of the carbon stores

6.14 These situations are explored in more detail below. The requirement to relinquish for providing false or misleading information and the mechanisms generally for ensuring relinquishment are outlined in chapter 10.

Voluntary termination of a project

6.15 Farmers and landholders will be able to terminate projects if, for instance, the financial return for alternative land uses means it is cost effective to buy and hand back ACCUs.

6.16 A person could cancel their sequestration project and withdraw from the scheme at any time by applying for revocation of the eligible project declaration [*Part 3, Division 4, clause 32(1) and 33(1)*]. Regulations may be made regarding the form of the application [*Part 3, Division 4, clause 32(3) and 33(3)*].

6.17 Before the Administrator can revoke a declaration, the project proponent would have to hand back the same number of ACCUs that were issued (and not previously relinquished) for the project [*Part 3, Division 4, clause 32(2)*]. This number is referred to as the net total number of ACCUs issued in relation to an eligible offsets project [*Part 3, Division 7, clause 42*].

6.18 The project proponent would have to hand back the same kind of units that had been issued for a project; that is, Kyoto or non-Kyoto ACCUs as relevant [*Part 3, Division 4, clause 32(2)(c)*].

6.19 For example:

Jane owns land on the outskirts of Brisbane. There is a project on the land that involves management of Kyoto-compliant forest regrowth. She has received 1500 Kyoto ACCUs for her project and sold them to Big Power for \$15.00 each.

A property developer, Houses 'r' Us approaches her to buy the land for \$1.5 million to create a new housing estate.

Jane buys Kyoto ACCUs from Carbon Forests Australia for \$20 each and relinquishes them to the Administrator. Jane sells the land to Houses r Us free of any obligations under the scheme after applying for revocation of the eligible project declaration.

6.20 Landholders undertaking reforestation or revegetation projects for environmental reasons, such as to preserve biodiversity, may wish to place a conservation covenant over the land to prevent termination of the project.

Revocation of project by Administrator

6.21 The Administrator may revoke a project declaration in some circumstances. Chapter 3 outlines how a project declaration can be revoked.

6.22 A person will have to hand back any ACCUs received for the project if the project was a sequestration offsets project, and the project proponent has received ACCUs for the project, and the project was revoked (see Chapter 3 above).

6.23 This is because the project proponent is not meeting scheme obligations and there is a risk that carbon stores will be reversed without an equivalent number of units being handed back to the Administrator. The Administrator may also apply carbon maintenance obligation in these circumstances.

6.24 The amount of ACCUs to be relinquished would be all ACCUs issued to the person in connection with the project, not just the amount of ACCUs the person currently has in their Registry account.

6.25 The Administrator would specify the number of ACCUs that would have to be handed back. The number could not exceed the total number of ACCUs that had been issued for the project, less any ACCUs that had previously been handed back to the Administrator [*Part 7, Division 3, clause 89(2) and (3)*].

6.26 The project proponent has 90 days to comply with the relinquishment requirement [*Part 7, Division 3, clause 89(4)*].

6.27 This requirement will continue to apply for 100 years after the first ACCUs were issued for the project or for 100 years after a new project area was added to the project, unless the regulations specify otherwise [*Part 7, Division 3, clause 89(1)(d) and (e)*][*Part 7, Division 1, clause 87*]. This latter provision prevents avoidance of permanence obligations by adding project areas to an existing project rather than commencing a new project. As noted above, carbon stores are generally considered permanent if they are maintained for around 100 years.

6.28 If the project proponent does not comply with the relinquishment requirement within 90 days, an administrative penalty applies. This penalty is outlined in chapter 10.

Failure to re-establishment carbon stores after bushfire and drought

6.29 Australia is subject to frequent natural disturbances, such as drought, bushfire and pest attacks, many of which will be beyond the control of individual project proponents.

6.30 Project proponents will not be required to hand back ACCUs that have been issued for the project if carbon stores are lost because of

- bushfire, drought or pest attack;
- reasonable actions to reduce bushfire risks, such as establishing fire breaks; or
- vandalism or other actions that are outside the control of the project proponent [*Part 7, Division 3, clause 90(1)(e)*].

6.31 Project proponents must take reasonable steps to ensure that carbon stores are re-established [*Part 7, Division 3, clause 91(1)(f)*]. In many cases, carbon stores may recover naturally after drought or bushfire with only modest intervention by the project proponent. In some cases, active re-establishment may be necessary.

6.32 Project proponents would have to hand back ACCUs if there was a significant reversal and reasonable steps are not taken to re-establish the carbon stores [*Part 7, Division 3, clause 91(1)(d)*]. The regulations will define what would be considered a significant reversal.

6.33 The Administrator would specify the number of ACCUs that would have to be handed back. This number could not exceed the total number of ACCUs that had been issued for the project, less any ACCUs that had previously been handed back to the Administrator [*Part 7, Division 3, clause 90(2) and (3)*].

6.34 The project proponent has 90 days to comply with the relinquishment requirement [*Part 7, Division 3, clause 90(4)*].

6.35 This requirement will continue to apply for 100 years after the first ACCUs were issued for the project or for 100 years after a new project area was added to the project [*Part 7, Division 3, clause 90(1)(f) and (g)*]. This latter provision prevents avoidance of permanence obligations by adding project areas to an existing project rather than commencing a new project. As noted above, carbon stores are generally considered permanent if they are maintained for around 100 years.

Deliberate reversal of carbon stores

6.36 Project proponents would have to hand back ACCUs if they cause significant reversals in carbon stores, for example, by clearing a forest or vegetation [*Part 7, Division 3, clause 90(1) and (2)*]. The regulations will define what would be considered a significant reversal.

6.37 The project proponent would have to hand back the same kind of units that had been issued for a project; that is, Kyoto or non-Kyoto ACCUs as relevant [*Part 7, Division 3, clause 90(2)*].

6.38 The Administrator would specify the number of ACCUs that would have to be handed back. The number could not exceed the total number of ACCUs that had been issued for the project, less any ACCUs that had previously been handed back to the Administrator [*Part 7, Division 3, clause 90(2) and (3)*].

6.39 The project proponent has 90 days to comply with the requirement [*Part 7, Division 3, clause 90(4)*].

6.40 This requirement will continue to apply for 100 years after ACCUs were first issued or for 100 years after a new project was added to the project [*Part 7, Division 1, clause 87*], [*Part 7, Division 3, clause 90(1)(f) and (g)*]. This latter provision prevents avoidance of permanence obligations by adding project areas to an existing project rather than commencing a new project.

Risk of reversal buffer

6.41 A risk of reversal buffer will be deducted from the ACCUs issued for sequestration projects [*Part 2, Division 3, clause 17(2)*]. The risk of reversal buffer will be 5 percent of the ACCUs issued unless another number is specified in the regulations [*Part 2, Division 3, clause 17(2)(a) and (b)*].

6.42 For example:

The Bush Trust establishes an environmental mixed species planting.

Their first project report is made 5 years after establishment of the planting. The amount of carbon sequestered during the period is 600 tonnes.

Once the risk of reversal buffer is applied, they receive 570 Kyoto ACCUs.

6.43 The 5 percent buffer under the scheme is similar to the residual buffer under the Voluntary Carbon Standard (which is not returned to project proponents). The buffer will be adjusted over time to reflect actual losses of carbon across the scheme. To provide investment certainty, adjustments to the buffer will apply to new projects and to existing projects from the commencement of the next crediting period.

6.44 The risk of reversal buffer is designed to ensure that all scheme ACCUs represent permanent abatement by insuring the scheme against:

- temporary losses of sequestration whilst carbon stores are being re-established after a fire or drought;
- losses as a result of wrongdoing by a project proponent, which cannot be remedied through the application of penalties under the scheme; or
- necessary losses as a result of fire reduction activities such as prescribed burning to establish fire breaks.

6.45 The risk of reversal buffer does not insure the project proponents against loss of income from the sale of ACCUs following fire or other natural disturbance or for the costs of re-establishing carbon stores. Private insurance products are available to cover these risks.

6.46 The risk of reversal buffer will insure the scheme against temporary losses as a result of natural disturbance and conduct by a third party that is outside the control of the project proponent, and losses as a result of wrongdoing by a project proponent that cannot be remedied.

6.47 Estimation methods for sequestration projects must provide for estimates to be adjusted to account for significant variations in carbon stores that are likely to arise as a result of climatic cycles [*Part 9, Division 3, clause 133(1)(f)*] (see Chapter 5 above).

6.48 Carbon stored in agricultural soils and some forms of vegetation are likely to be susceptible to significant cyclical variations, largely driven by fluctuations in annual rainfall. It is required that methodologies for these activities take account of these cyclical variations.

6.49 As a result of these adjustments, ACCUs would generally be issued for average increases in sequestration rather than temporary increases beyond this level (maximum sequestration).

6.50 This provision reduces the risk that ACCUs will be issued for abatement that may not be permanent. It also makes possible a risk of reversal buffer that is lower than other voluntary offsets schemes, without compromising the environmental integrity of ACCUs.

Maintaining carbon over the long term

6.51 The Administrator may declare that a carbon maintenance obligation applies with respect to an area or areas of land if there is an unmet obligation to relinquish ACCUs or if the Administrator is satisfied that the person will not comply with the requirement within 90 days [*Part 8, Division 2, clause 97(2)(a) and (b)*].

6.52 Clause 97(15) clarifies that a declaration of a carbon maintenance obligation is not a legislative instrument. A carbon maintenance obligation is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

6.53 Obligations to relinquish ACCUs would be triggered if a project declaration is revoked, for example, if a project is not properly transferred, if carbon stores are deliberately reversed or not re-established following a natural disturbance or if a person provides false or misleading information to the Administrator.

6.54 If the Administrator makes a carbon maintenance obligation declaration it must take all reasonable steps to ensure that a copy of the declaration is given to the project proponent, each person who holds an interest in the area, the relevant land registration official and any person specified in the regulations [*Part 8, Division 2, clause 97(6)*]. Failure to comply with this requirement does not affect the validity of the order [*Part 8, Division 2, clause 97(7)*].

6.55 A carbon maintenance obligation will come into force when a copy of the declaration is issued to the project proponent [*Part 8, Division 2, clause 97(13)*].

6.56 A carbon maintenance obligation prevents a person from engaging in conduct that results or is likely to result in a reduction in carbon stores below the benchmark sequestration level, unless the conduct relates to an activity that has been expressly permitted in the declaration [*Part 8, Division 2, clause 97(2)(b) and (9)*].

6.57 The benchmark sequestration level is the amount of carbon sequestered in the relevant pool on the area or areas at the time that the carbon maintenance declaration was made [*Part 8, Division 2, clause 97(8)*].

6.58 This provision means that a person who becomes subject to a carbon maintenance obligation who may not have benefited from the project does not have to restore lost carbon stores. Note that the risk of

reversal buffer is intended to cover losses of carbon as a result of unmet relinquishment obligations.

6.59 If the carbon stores fall below the benchmark sequestration level, for example, because of bushfire, drought or an action by a neighbour or other third party, the owner or the occupier of the land must take all reasonable steps to ensure that carbon stores recover to the benchmark level. In many cases, this would mean allowing vegetation to regrow. In some cases the owner or occupier may need to take more active steps to re-establish carbon stores.

6.60 Permitted activities may be specified in the carbon maintenance obligation declaration with reference to the manner, time, place, persons or time period during which the activity is carried out. This provision is intended to enable areas that are subject to a carbon maintenance obligation to be used for productive purposes such as for cropping, grazing or producing wood products. Such activities may result in variations in carbon stocks, including temporary reductions below the benchmark sequestration level.

6.61 A person must not assist, induce, conspire with others or be involved in contravening a carbon maintenance obligation [*Part 8, Division 2, clause 97(11)*]. This is to prevent persons other than the land owner from reversing carbon stores. It is also to prevent the land owner or occupier from evading their carbon maintenance obligation by encouraging someone else to reverse carbon stores.

6.62 Civil penalties will apply if carbon maintenance obligations are breached [*Part 8, Division 2, clause 97(12)*].

6.63 The carbon maintenance obligation will continue to apply for 100 years after the first ACCUs were issued for the project or for 100 years after a new project area was added to the project [*Part 7, Division 1, clause 87*] [*Part 8, Division 2, clause 97(14)*]. This latter provision prevents avoidance of permanence obligations by adding project areas to an existing project rather than commencing a new project

6.64 A carbon maintenance obligation can be revoked once any outstanding relinquishment obligation or penalties payable in relation to the project have been paid in full [*Part 8, Division 2, clause 97(14)(a) and (b)*]. This means that carbon maintenance obligations cannot be avoided by transferring the project to another person.

Variation or revocation of a carbon maintenance obligation

6.65 A person may apply to the Administrator to vary or revoke the carbon maintenance obligation declaration. The Administrator may vary or revoke the carbon maintenance obligation declaration on its own initiative or in response to such an application [*Part 8, Division 2, clause 98*].

6.66 If the Administrator revokes or varies the carbon maintenance obligation declaration it must take all reasonable steps to ensure that a copy of the declaration is given to the project proponent, each person who holds an interest in the area, the relevant land registration official and any person specified in the regulations [Part 8, Division 2, clause 98(6)]. Failure to comply with this requirement does not affect the validity of the order [Part 8, Division 2, clause 98(7)].

6.67 It should be noted that the cessation of the carbon maintenance obligation will not mean that the carbon can be dealt with contrary to any other obligations or requirements that may apply under other legislative regimes, such as, for example, state or territory planning or vegetation-related laws.

6.68 A carbon maintenance obligation declaration must be revoked if a person applies to the Administrator and relinquishes any remaining ACCUs that have been issued for the projects and not previously relinquished [Part 8, Division 2, clause 99(1) and (2)].

6.69 The ACCUs must be of the same type – Kyoto or non-Kyoto ACCUs – as those issued for the project [Part 8, Division 2, clause 99(1)(e) and (f)].

6.70 The application to revoke the carbon maintenance obligation declaration must be in an approved form and in writing [Part 8, Division 2, clause 99(3)].

6.71 Clause 98(9) and 99(7) clarify that a variation or revocation of a carbon maintenance obligation is not a legislative instrument. A variation or revocation is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

Injunctions

6.72 The bill includes a power for the Administrator to apply for an injunction if a carbon maintenance obligation is not being fulfilled. The Administrator may apply for a:

- performance injunction if a person is failing to take any action [Part 8, Division 3, clause 100(1)]; or
- restraining injunction if a person is taking action against the obligation [Part 8, Division 3, clause 100(2)].

6.73 The Federal Court's power to issue an injunction is not limited by the Court's view of the person's future intent or the person's past actions in relation to the injunction being considered [Part 8, Division 3, clause 103]. The Administrator may also apply for an interim injunction if he or she considers the matter urgent; the Administrator is not required to

give any undertaking as to damages for an interim injunction [*Part 8, Division 3, clause 101*]. The Court may discharge or vary an injunction [*Part 8, Division 3, clause 102*]. The powers in the bill are in addition to any other powers of the Court [*Part 8, Division 3, clause 104*].

Entries in title registers

6.74 The Government will work with state and territory governments to note the existence on relevant land titles of permanence obligations under this bill.

6.75 The legislation notes that the relevant land registration official may take appropriate action to bring to people's attention the existence of an offsets project, that obligations may arise in relation to the project and if there is a carbon maintenance obligation that applies to an area of land [*Part 3, Division 5, clause 39 and 40*].

6.76 These provisions are for information and make clear that actions in relation to land title registers are at the discretion of the relevant state government official, who cannot be directed by the Commonwealth Government.

Chapter 7

Reporting

Outline of chapter

- 7.1 This chapter sets the reporting requirements for an offsets project as well as the information that must be notified to the Administrator.
- 7.2 The relevant provisions are in Part 6 of the bill.

Context

- 7.3 A robust reporting framework underpins scheme integrity and will provide buyers with confidence that Australian carbon credit units (ACCUs) represent genuine abatement.
- 7.4 The reporting and notification requirements, together with the audit framework, are designed to ensure that the Administrator receives accurate and timely information about projects and abatement. The Administrator will use this information to issue credits and for compliance purposes.

Explanation of new law

Reporting requirements

Reporting periods

- 7.5 The first reporting period for an eligible offsets project begins when the project is declared eligible by the Administrator [*Part 6, Division 2, clause 76(1)(b)*].
- 7.6 Project proponents can choose when to report on their project, provided that the reporting period is not shorter than 12 months or longer than 5 years [*Part 6, Division 2, clause 76(1)(c) and (d)*]. This flexibility will enable project proponents to decide when it is cost effective to submit a report and claim ACCUs. This will depend in part on the nature of the project and timing of emissions reductions or sequestration.
- 7.7 For example, reforestation projects sequester relatively small amounts of carbon in the first few years following their establishment. Proponents of reforestation projects may choose to delay their first report

until five years after forest establishment but then report annually while the forest is in its maximum growth phase.

7.8 The project proponent would nominate an end date for the reporting period. The project proponent must submit an offsets report within three months of the nominated end date [Part 6, Division 2, clause 76(4)(e)]. This provides a reasonable amount of time to finalise offsets reports and have them audited after the end of the nominated reporting period.

7.9 Each subsequent reporting period begins immediately after the previous reporting period [Part 6, Division 2, clause 76(2)].

Offset reports

7.10 Project proponents are required to submit an offsets report at to the Administrator in the form and containing (or attaching) an audit report by a registered greenhouse gas and energy auditor and the information prescribed in the regulations or the applicable methodology determination [Part 6, Division 2, clause 76(3) and (4)].

7.11 The methodology applicable to an eligible offsets project may also set out requirements for reporting on the project to the Administrator. This information will also need to be included in the offsets report [Part 6, Division 2, clause 76(7)]. For example, project proponents using the Government's reforestation methodology may have to include in their report information about management actions or natural disturbances to the forest.

7.12 The regulations may exempt some types of projects from the requirement to submit an audit report with the offsets report [Part 6, Division 2, clause 76(5)]. This is to reduce compliance costs for small projects, which present minimal risk to the overall integrity of the scheme.

7.13 The regulations can exempt certain kinds of offsets projects from having to have their offsets reports audited [Part 6, Division 2, clause 76(5)]. This clarifies that, in accordance with the *Legislative Instruments Act 2003*, where the bill indicates that regulations may specify a particular kind of project to be exempt from providing an audit report, the regulations may identify more than one particular kind or class of project [Part 6, Division 2, clause 76(6)].

7.14 If the Administrator has split a project, which includes both Kyoto and non-Kyoto abatement, into a Kyoto project and a non-Kyoto project, the proponent for these projects can provide a single offsets report for both projects [Part 6, Division 2, clause 76(8)]. This will reduce compliance costs because it means that the project proponent will not need to distinguish and report separately on their Kyoto and non-Kyoto abatement. This could be very difficult for the project proponents, for example, if a reforestation project occurs on both Kyoto eligible and ineligible land.

7.15 Offsets reports are the primary mechanism used by the Administrator to, among other things:

- determine whether or not to issue ACCUs for an eligible project [*Part 2, Division 3*];
- take action to vary [*Part 3, Division 3*] or revoke a project [*Part 3, Division 4*]; or
- in the case of sequestration projects, to quantify the amount of carbon that must be maintained in a project area, if the Administrator issues a carbon maintenance obligation [*Part 8, Division 2*].

7.16 Failure to provide an offsets report or taking action to avoid submitting an offsets report to the Administrator is an offence that may attract a civil penalty [*Part 6, Division 2, clause 76(11)*].

Reporting obligations during the maintenance phase

7.17 Regulations may empower the Administrator to allow proponents to stop providing offsets reports where the project has reached its maximum carbon sequestration capacity and sufficient information is available to support this conclusion [*Part 6, Division 2, clause 77(1) and (2)*].

7.18 This arrangement is intended to reduce compliance costs for proponents once projects have reached maximum levels of carbon sequestration. After this time credits would no longer be issued for the project and it would move into a maintenance phase. This provision only applies to sequestration projects because only sequestration projects continue after ACCUs are no longer being issued.

7.19 During the project maintenance phase, proponents will still be required to notify the Administrator of relevant changes to a project (see Chapter 8). This will assist the Administrator to monitor ongoing compliance with scheme obligations.

7.20 The declaration would take effect on the day it is made or on a later specified date [*Part 6, Division 2, clause 77(6)*].

7.21 The form of the application and the information, documents and fees (if any) that must accompany such applications will be set out in the regulations [*Part 6, Division 2, clause 77(3)(b), (c), (d) and (f)*]. The purpose of the fee is to enable the Administrator to recover costs associated with processing the application. The fee cannot be in a form that would amount to a tax [*Part 6, Division 2, clause 77(5)*].

7.22 Where appropriate, the Administrator will take a light-handed approach to documentation to reduce administrative costs for the project proponent, for example, the Administrator may provide for statements to be verified by statutory declaration [*Part 6, Division 2, clause 77(3)(e)*].

7.23 The regulations may provide for the application to be withdrawn at any time [*Part 6, Division 2, clause 77(3)(g)*].

7.24 The Administrator may seek further information from an applicant [*Part 6, Division 2, clause 77(3)(h)(i)*]. If the applicant does not provide this information as requested, the Administrator may refuse to consider or take any further action in relation to the application [*Part 6, Division 2, clause 77(3)(h)(ii)*].

Notification requirements

7.25 To help maintain the integrity of the scheme, project proponents must notify the Administrator if there has been a change in their circumstances or certain events occur, such as fire. Up to date information can assist the Administrator determine the need to vary the project or undertake compliance action such as a declaring a carbon maintenance obligation. It also ensures the Australian National Registry of Emissions Units is accurate and enables reliable public reporting by the Administrator on the operation of the scheme.

7.26 The following circumstances trigger a requirement to notify the Administrator:

- where a person stops being the proponent for an eligible offsets project for reasons other than death such as selling their interest in a project [*Part 6, Division 3, clause 78*];
- where a proponent for an eligible offsets project dies, in which case their legal representative must notify the Administrator [*Part 6, Division 3, clause 79*];
- where the methodology that applies to an eligible offsets project requires the proponent to notify the Administrator on a matter [*Part 6, Division 3, clause 80*]. For example, they have decided to undertake extensive thinning of their reforestation project, changing the planting density from the original approved project proposal;
- where there is a significant reversal of carbon stored in an eligible sequestration project due to a natural disturbance such as fire or flood [*Part 6, Division 3, clause 81*]. Proponents have up to 60 days to notify the Administrator, giving the proponent time to respond to the emergency;
- where there is, or likely to be, a significant reversal of carbon stored in an eligible sequestration project due to the conduct of a person other than the project proponent, which is outside of the control of the proponent [*Part 6, Division 3, clause 82*]. Proponents have 60 days to notify the Administrator;
- where a project changes so that it is no longer consistent with the regional natural resource management plan [*Part 6, Division*

3, *clause 83*). For example, a reforestation project that includes the removal of small areas of remnant vegetation that act as a wildlife corridor;

- where a recognised offsets entity of an eligible offsets project is convicted of an offence relating to dishonest conduct under Commonwealth, state or territory legislation or becomes insolvent [*Part 6, Division 3, clause 84(1)*];
- where the regulations impose a notification requirement [*Part 6, Division 3, clause 85*].

7.27 Failure to notify the Administrator in writing within the specified time or otherwise 90 days, or taking action to avoid notifying the Administrator of the (above) prescribed circumstances is an offence that may attract a penalty [*Part 6, Division 3, clause 78 to 84*]. This is to encourage project proponents to take reporting obligations seriously.

7.28 In accordance with the *Acts Interpretation Act 1901*, where the bill indicates that the regulations can specify different notification requirements for different project proponents or offset entities, the regulations may specify only some project proponents or entities, or deal with proponents or entities, or classes of proponents or entities, differently [*Part 6, Division 3, clause 85(3)*].

Chapter 8

Audit

Outline of chapter

- 8.1 This chapter describes the framework for auditing offset reports. In this context, an audit is assessment of information that is designed to evaluate its accuracy.
- 8.2 The relevant provisions are contained in Parts 2, 3, 6 and 19 of the bill.

Context

- 8.3 An audit report will verify the information, including the details of abatement calculations, presented in the offsets report.
- 8.4 A robust audit framework provides buyers with confidence that offsets represent genuine abatement.
- 8.5 The scheme relies on the existing audit framework established under the *National Greenhouse and Energy Reporting Act 2007*. This audit framework has been developed in consultation with the audit community and is well tested. The framework can be easily adapted for the purposes of the scheme.

Explanation of new law

Audits for project approval purposes

- 8.6 The regulations may require applications for approval of certain kinds of projects to be accompanied by an audit report [*Part 3, Division 2, clause 23(1)(d)*]. This is to assist the Administrator to assess complex projects, and most proposed projects are not expected to be audited under this provision. The scope of such audits may also be limited to matters that require particular attention or which are beyond the expertise of the Administrator to assess.

Audits required prior to crediting

- 8.7 Generally, offsets reports must be accompanied by a prescribed audit report prepared by a registered greenhouse and energy auditor [*Part 6, Division 2, clause 76(4)(c)*].

8.8 The regulations may provide that for certain kinds of projects, no audit report is required when applying for a certificate of entitlement [Part 2, Division 3, clause 13(2)] [Part 6, Division 2, clause 76(5)]. This is intended to allow the Administrator to operate an alternative audit program to reduce auditing costs for small projects.

8.9 The regulations may also empower the Administrator to declare that reporting and auditing obligations do not apply to sequestration offsets projects that have reached their maximum carbon sequestration capacity [Part 6, Division 2, clause 76(5)]. This is intended to reduce auditing costs for sequestration projects which are in the maintenance phase.

8.10 An offsets report and the accompanying audit report must be submitted with an application for a certificate of entitlement before ACCUs are issued [Part 2, Division 3, clause 12(1)(e)]. This is to demonstrate that real reductions in greenhouse emissions or increases in carbon sequestration have occurred prior to issuing any ACCUs.

Compliance and other audits

8.11 If the Administrator has reasonable grounds to suspect a person of contravening (or proposing to contravene) the Act, the Administrator can issue a notice requiring the person to commission an audit [Part 19, Division 2, clause 214(1) and (2)]. These audits are known as ‘compliance audits’.

8.12 The notice must specify the type of audit, matters to be covered by the audit, the form of the audit report and the kinds of details it is to contain [Part 19, Division 2, clause 214(3)]. The person suspected of contravening the Act may appoint a registered greenhouse and energy auditor of their own choice, or the Administrator may choose to specify one or more auditors who can undertake the audit [Part 19, Division 2, clause 214(2)(a)].

8.13 The Administrator can require that a written report of the audit results be provided to the person and the Administrator [Part 19, Division 2, clause 214(2)(c) and (d)].

8.14 If an audit under this section does not reveal any evidence of non compliance, the person required to commission it can apply to have their costs reimbursed. The Administrator may reimburse reasonable costs if satisfied that the person would suffer financial hardship if they were not reimbursed [Part 19, Division 2, clause 214(8)]. This is intended to prevent undue impacts on small projects, where the costs of undertaking the audit could be significant relative to the scale of the project. Reimbursements under this section must be made from money appropriated by the Parliament, and can be debited against an Agency’s annual appropriation. The process for approving a spending proposal would be available through Regulation 8 of the Financial Management and Accountability Regulations and section 44 of the *Financial Management and*

Accountability Act 1997 and the process of making the reimbursement would involve a drawing right under section 26 of the FMA Act.

8.15 The Administrator can also appoint an auditor directly [*Part 19, Division 2, clause 215*]. In doing so, the Administrator must notify the subject of the audit in writing at a reasonable time before the audit takes place. The notice must specify the audit team leader, the time frame in which the audit will take place, the type of audit and the matters to be covered [*Part 19, Division 2, clause 215(2)*]. These audits are intended to be used for routine monitoring of compliance and may be based on the Administrator's assessments of compliance, risks, statistical sampling of projects, and other approaches.

8.16 For both compliance and other audits, a person must provide the audit team leader and people assisting the team leader with all reasonable facilities and assistance needed to complete the audit [*Part 19, Division 2, clause 214(4) and 215(3)*].

8.17 A person must not try to stop someone from complying with these parts of the Act [*Part 19, Division 2, clause 214(6) and 215(4)*].

Greenhouse and energy auditors

8.18 All audits required by the bill must be undertaken by greenhouse and energy auditors registered under the *National Greenhouse and Energy Reporting Act 2007*. Using the pre-existing register will increase administrative efficiency and reduce duplication, for example, by maintaining a single register for qualified assurance auditors. It will also reduce the risk of inconsistencies arising in the audit arrangements, which would increase complexity for auditors and proponents, many of whom will operate under both the bill and the *National Greenhouse and Energy Reporting Act 2007*.

8.19 The Greenhouse and Energy Data Officer will have powers to register, review registration of, inspect, suspend or deregister auditors who conduct audits of offsets projects. The bill provides for the Administrator to share information with the Greenhouse and Energy Data Officer [*Part 27, clause 276(1)(a) and (2)*]. This will enable the Administrator to provide, among other things, information relating to the performance of auditors undertaking audits of offsets projects, including where the Administrator suspects an auditor has contravened requirements under the Bill.

Consequential amendments

8.20 The *National Greenhouse and Energy Reporting Act 2007* will be amended to enable the Greenhouse and Energy Data Officer to regulate auditors undertaking audits of offsets projects.

8.21 Further amendments to the National Greenhouse and Energy Reporting Regulations and the National Greenhouse and Energy Reporting (Audit) Determination will allow for the creation of a special category of auditors. Auditors in this category will have qualifications, experience and knowledge relevant to scheme projects. This will ensure that there are more auditors available with appropriate qualifications and thereby reduce the costs associated with auditing.

Chapter 9

Crediting

Outline of chapter

- 9.1 This Chapter describes the different types of Australian carbon credit units (ACCUs), explains how credits are issued and exchanged for international credits and discusses crediting periods.
- 9.2 The relevant provisions are contained in parts 2, 3, 11, 12 and 14 of the bill.

Context

- 9.3 Carbon credits generated under this scheme can be sold to companies or individuals, in Australia or overseas.
- 9.4 Project proponents will be able to exchange ACCUs that represent abatement that is counted towards its international targets for Kyoto units held in the Australian Government's Kyoto registry account. These Kyoto units can be sold into international markets that recognise these units. Internationally recognised emissions units, such as Kyoto units, are used to link carbon offsets and carbon trading schemes by providing a common 'currency' of exchange.
- 9.5 Credits may be voluntarily cancelled and, if so, the Government is required to ensure that this abatement is not counted towards Australia's Kyoto target. This allows individuals and organisations to contribute to stronger national climate change mitigation by reducing the supply of eligible emissions units.

Explanation of new law

Issue of units

- 9.6 The Administrator must issue ACCUs to a person who has a certificate of entitlement and a registry account [*Part 2, Division 2, clause 11(1), (5) and (6)*].
- 9.7 The Administrator must issue ACCUs according to the number on the certificate of entitlement and designated as Kyoto or non-Kyoto ACCUs depending on whether the project is a Kyoto or non-Kyoto project [*Part 2, Division 2, clause 11(2) and (3)*]. If the reporting period finishes after the Kyoto abatement deadline (currently set at 12 June 2012) then the

Administrator must issue non-Kyoto ACCUs [*Part 2, Division 2, clause 11*] [*Part 1, clause 5, definition of 'Kyoto abatement deadline'*].

Certificate of entitlement

9.8 A project proponent has to apply for a 'certificate of entitlement' in order to receive ACCUs [*Part 2, Division 3, clause 12*]. The Administrator will not issue ACCUs automatically when they receive an offsets report. Project proponents will, however, be able to apply for ACCUs at the same time they submit an offsets report.

9.9 The certificate of entitlement will specify the number of ACCUs that the project proponent is entitled to receive for abatement over the reporting period [*Part 2, Division 3, clause 15(3)*].

9.10 The Administrator will apply the crediting rules set out in clauses 16, 17 and 18 to work out how many ACCUs should be issued. There are different crediting rules for sequestration projects and emissions reductions projects. This is because the risk of reversal buffer applies to sequestration projects only. There is also a different crediting rule for native forest projection projects.

9.11 A certificate of entitlement is not transferable [*Part 2, Division 3, clause 20*]. This means the project proponent has to apply for and receive the ACCUs before transferring them to someone else.

9.12 The application must be in writing, in a form approved by the Administrator and must be accompanied by a fee if any is specified in the regulations [*Part 2, Division 3, clause 13(1)(a), (b) and (h)*]. The purpose of the fee is to enable the Administrator to recover administrative costs [*Part 2, Division 3, clause 13(5)*].

9.13 The application must specify the account number into which credits are to be issued and the account number will be listed on the certificate of entitlement [*Part 2, Division 3, clause 13(1)(c)*] [*Part 2, Division 3, clause 15(4)*].

9.14 The application must be accompanied by an offsets report and any such documents or information specified in the regulations [*Part 2, Division 3, clause 13(1)(d), (f), (g)*].

9.15 Unless the project is exempt under the regulations, the application must also be accompanied by, an audit report prepared by a registered greenhouse and energy auditor [*Part 2, Division 3, clause 13(1)(e) and 13(2)*]. This is so that the Administrator can have confidence in the validity of the report.

9.16 In accordance with the *Legislative Instruments Act 2003*, where the bill indicates that the regulations may specify a kind of project that is exempt from audit requirements [*Part 2, Division 3, clause 13(2)*], the regulations may identify more than one particular kind or class of project [*Part 2, Division 3, clause 13(3)*].

9.17 To minimise compliance costs for small project proponents, the Government intends to exempt uncomplicated, low-risk offsets projects from the requirement to include an audit report with each offsets report.

9.18 Where appropriate, the Administrator will take a light-handed approach to documentation to reduce administrative costs for the project proponent, for example, the Administrator may provide for statements to be verified by statutory declaration [*Part 2, Division 3, clause 13(4)*].

9.19 The Administrator may ask the project proponent to provide further information [*Part 2, Division 3, clause 14(1)*]. The Administrator may refuse to consider or take further action on the report if the information is not provided as requested [*Part 2, Division 3, clause 14(2)*].

9.20 The Administrator must issue a certificate of entitlement if satisfied that a number of conditions are met [*Part 2, Division 3, clause 15(2)*]. These include:

- That the applicant is a recognised offsets entity [*Part 2, Division 3, clause 15(2)(a)*]. This prevents ACCUs from being issued if the projects proponent's recognition has been cancelled because they no longer meet the fit and proper person test [*Part 4, clause 64(3)*]. This creates a further incentive for compliance with the provisions of this Act.
- The applicant is the project proponent identified in the project declaration [*Part 2, Division 3, clause 15(2)(b)(ii)*]. This is to prevent credits from being issued to the wrong person.
- The reporting period is within the crediting period [*Part 2, Division 3, clause 15(2)(c)*]. This is to prevent credits from being issued for abatement that occurs after a project is no longer approved to receive ACCUs.
- All regulatory approvals have been met [*Part 2, Division 3, clause 15(2)(e)*]. This is to prevent crediting of projects that have not met regulatory approvals, for example state government environmental, planning or water requirements. This creates a further incentive to comply with scheme requirements designed to minimise the risk that projects could have perverse environmental outcomes.
- The applicant is not required to pay any penalties and does not have an outstanding obligation to relinquish credits [*Part 2, Division 3, clause 15(2)(f) and (g)*]. This provision is to promote compliance with scheme obligations and will prevent a person that has outstanding obligations in relation to one offsets project from receiving ACCUs for another offsets project.

- The applicant has met other requirements, if any, specified in the regulations [*Part 2, Division 3, clause 15(2)(h)*].

9.21 The Administrator has 90 days to decide whether or not to issue the certificate of entitlement. If the Administrator has sought additional information from the applicant, the clock stops until the applicant provides the information requested, and then starts again [*Part 2, Division 3, clause 15(5)*]. This provision is not intended to result in the invalidity of a decision made after that time but imposes a duty to take all reasonable steps to make the decision within that timeframe.

Unit entitlement

Sequestration projects

9.22 For sequestration projects, other than those that involve protecting native forests from conversion to an alternative land use, the entitlement of ACCUs (unit entitlement) will be the amount of abatement measured according to the methodology for the reporting period minus the risk of reversal buffer [*Part 2, Division 3, clause 16(1) and (2)*].

9.23 The risk of reversal buffer for sequestration projects will be 5 percent, unless another percentage is specified from the start of the crediting period [*Part 2, Division 3, clause 16(2) and 17(2)*]. As information about the risks associated with different kinds of projects becomes available, the regulations may specify different risk buffers for different classes of projects.

9.24 The risk of reversal buffer specified at the beginning of the crediting period will apply for the whole crediting period [*Part 2, Division 3, clause 16 and 17*]. In other words, the risk of reversal buffer cannot be changed part way through a crediting period. This is to provide investment certainty.

9.25 The unit entitlement must be a whole number and may be zero [*Part 2, Division 3, clause 16(3) and (4)*].

unit entitlement = carbon storage – risk of reversal buffer

Native forest protection projects

9.26 Different crediting rules will apply to projects that involve protecting native forests from being cleared for grazing or clear-felled for harvest [*Part 2, Division 3, clause 17*].

9.27 This is because such projects are likely to involve large quantities of abatement. If this abatement is credited at the start of the project (when the forest is protected from clearing or clear felling) the supply of credits could outstrip demand, significantly reducing the value of credits. This will also help to reduce risk of non-permanence by providing a stream of credits to fund the management and protection of native forests covered by these projects. For this reason, credits will be

issued over a period of 20 years (or another period if specified in the regulations) [Part 5, Division 2, clause 69(1)].

9.28 The unit entitlement for projects that involve avoiding conversion of native forests will be the total of the carbon stored in the forest less the risk of reversal buffer, multiplied by length of the reporting period over the crediting period [Part 2, Division 3, clause 17(3)].

$$\text{units} = (\text{carbon storage} - \text{risk of reversal buffer}) \times \text{length of reporting period} / \text{crediting period}$$

9.29 For example:

Ben has the rights to clear fell a native forest in Tasmania for harvest.

Ben decides to forgo this opportunity in order to protect the forest. He reports on the forest 12 months after his project is approved and receives credits for 1/20th of the total carbon storage less the risk of reversal buffer.

Family matters prevent Ben from submitting a second project report for another 4 years. When he submits his report, Ben receives credits for another 4/20th of the carbon stored in the forest less the risk of reversal buffer.

9.30 This means that if the project proponent reports every two years they will receive two times 1/20 of the total credit owing for the project less the risk of reversal buffer, each time they report. The regulations may specify an alternative risk of reversal buffer [Part 2, Division 3, clause 17(3)(b)].

9.31 This unit entitlement must be a whole number and may be zero [Part 2, Division 3, clause 17(4) and (5)].

Prescribed native forest protection projects

9.32 The regulations may prescribe circumstances in which credits for native forest conversion projects can be received at the commencement of the project instead of over 20 years [Part 1, clause 5, definition of 'prescribed native forest protection project']. It is intended that the regulations will prescribe instances where a carbon project will be managed and protected into the future, for example, where a project is also covered by an 'in perpetuity' agreement under the National Reserve System, a conservation covenanting programs or conservation trusts.

9.33 For prescribed native forest conversion projects, the unit entitlement will be total sequestration for the project minus the risk of reversal buffer [Part 2, Division 3, clause 17(2)].

Emissions avoidance projects

9.34 The unit entitlement for emissions avoidance projects is the amount of abatement for the reporting period, calculated according to the methodology [Part 2, Division 3, clause 18(1) and (2)].

Crediting periods

9.35 Under the scheme, a crediting period is the period during which the methodology determination and the risk of reversal buffer cannot be changed without the consent of the project proponent. Within the crediting period, the number of credits that may be issued for the project will not be affected by changes in regulations that might otherwise affect the additionality of the project, new data or scientific evidence, which may result in the need for variations to the methodology, or changes to the risk of reversal buffer. This provides investment certainty for investors and project proponents.

9.36 The crediting period for offset projects other than native forest protection projects is 7 years [*Part 5, Division 2, clause 69(1)(b)(i)*]. The regulations may provide a different crediting period for specified types of projects [*Part 5, Division 2, clause 69(1)(b)(ii)*]. The intention is to provide a 15 year crediting period for reforestation. A longer crediting period is justified for reforestation because estimation methods are well established, and the activity has long payback period.

9.37 To prevent the supply of credits from outstripping demand and to create incentives to manage native forests over the long term, credits for native forest protection projects will be issued over a 20 year crediting period (see chapter 10) [*Part 5, Division 2, clause 69(1)(b)(i)*]. The regulations may specify an alternative crediting period [*Part 5, Division 2, clause 69(1)(i)*]. This is to provide flexibility to allow for shorter crediting periods, which will enable project proponents to receive benefits more rapidly, provided that this would not undermine the price of ACCUs or reduce incentives to maintain and manage the forest.

9.38 In accordance with the *Acts Interpretation Act 1901*, where the bill indicates that the regulations may specify different crediting periods for different kinds of projects, the regulations may deal only with some projects, or deal with projects or classes of projects differently [*Part 5, Division 2, clause 69(2)*].

Subsequent crediting periods

9.39 A project proponent can apply for a subsequent or new crediting period 6 months prior to the end of the first crediting period [*Part 5, Division 3, clause 70(2)*]. The subsequent crediting period would be 7 years for projects other than native forest protection projects [*Part 5, Division 3, clause 70(4)(a)*]. The regulations may provide for subsequent crediting period of different lengths [*Part 5, Division 3, clause 70(4)(b)*]. In accordance with the *Acts Interpretation Act 1901*, where the bill indicates that the regulations may specify different crediting periods for different kinds of projects, the regulations may deal only with some projects, or deal with projects or classes of projects differently [*Part 5, Division 3, clause 70(5)*].

9.40 The new crediting period would start immediately after the end of the previous crediting period [*Part 5, Division 3, clause 70(4)*].

9.41 The administrator must not approve a new crediting period unless the applicant is the project proponent [*Part 5, Division 3, clause 74(3)(a)*]. Further, the project must be covered by a methodology determination and meet the requirements of the determination [*Part 5, Division 3, clause 74(3)*]. The effect of this is that, if the original methodology determination has been varied to reflect scientific advances, the project may need to be modified accordingly. If the original methodology determination has been revoked and there is no replacement methodology for the activity, it may not be possible for the Administrator to approve a subsequent crediting period.

9.42 The project would also need to pass the additionality test and must not be required under a law of the Commonwealth, a state or a territory [*Part 5, Division 3, clause 74(3)(d)*]. This is to prevent land managers from receiving credit for an activity that others in the same industry or circumstances are required to do by law.

Applying for a subsequent crediting period

9.43 The application for a subsequent crediting period must be in writing and in a form approved by the Administrator [*Part 5, Division 3, clause 71(1)(a) and (b)*]. The application must be accompanied by other information or documents specified in the regulations [*Part 5, Division 3, clause 71(1)(c) and (h)*].

9.44 The regulations may specify an application fee [*Part 5, Division 3, clause 71(1)(e)*]. The purpose of the fee is to enable the Administrator to recover costs associated with processing the application [*Part 5, Division 3, clause 71(3)*].

9.45 An application can be withdrawn at any time and in doing so does not prevent the applicant from making a fresh application [*Part 5, Division 3, clause 73(1) and (2)*]. If this occurs, any fees paid in relation to the application would be refunded [*Part 5, Division 3, clause 71(3)*]. This provision recognises that it would normally be preferable for the Administrator to advise the applicant of deficiencies in their application and to allow the applicant to withdraw and re-submit a better application, rather than rejecting the application and having the project proponent incur the cost of submitting a new application.

9.46 Where appropriate, the Administrator will take a light-handed approach to documentation to reduce administrative costs for the project proponent, for example, the Administrator may provide for statements to be verified by statutory declaration [*Part 5, Division 3, clause 71(2)*].

9.47 To assist the assessment of an application, the Administrator may request further information from the applicant [*Part 5, Division 3, clause 72(1)*]. If this is not provided, the Administrator can refuse to consider or

take further action with respect to the application [*Part 5, Division 3, clause 72(2)*].

9.48 The Administrator must notify the applicant as soon as practical after making a determination that a project will be approved for a subsequent crediting period [*Part 5, Division 3, clause 74(4)*]. Such a determination is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required [*Part 5, Division 3, clause 74(6)*].

9.49 The Administrator must notify the applicant if it decides not to vary the declaration and give reasons [*Part 5, Division 3, clause 74(5)*]. This provides the applicant with procedural fairness.

Characteristics of Australian carbon credit units

9.50 Australian carbon credit units will be issued by the Administrator on behalf of the Commonwealth [*Part 11, Division 2, clause 147*], through making an entry in the relevant person's registry account [*Part 11, Division 2, clause 148*]. The unit will thus be represented by an electronic entry in the Registry, rather than by a paper certificate. The Administrator will only be able to issue ACCUs in accordance with the certificate of entitlement issued under Part 2 of the bill [*Part 2, Division 3, clause 15*], [*Part 11, Division 2, clause 149*].

9.51 An ACCU which has been issued by the Administrator is personal property and, subject to the relevant provisions in the bill, transmissible by assignment, by will and by operation of law [*Part 11, Division 3, clause 150*]. The Government's policy intention in adopting this approach in the bill is to reduce uncertainty for holders of ACCUs, and promote market confidence in and development of the carbon market. Nonetheless, it is recognised that while an ACCU will always be equivalent to one tonne of carbon dioxide either avoided or sequestered, the value of that unit is determined by the demand for that unit in the market.

9.52 The bill does not affect the creation or enforcement of, or any dealings with (including transfers of), equitable interests in ACCUs [*Part 11, Division 3, clause 158*]. This provision has been included for the avoidance of doubt. In addition, the bill is not intended to prevent the taking of security over ACCUs.

Transfer and transmission of ACCUs

9.53 The concept of transfer of an ACCU consists of the removal of an entry for the unit from the first account and making an entry for the unit in the second account [*Part 11, Division 3, clause 151*].

9.54 There is provision for:

- The transfer of ACCUs between accounts within the Australian National Registry, in the name of the same person [*Part 11, Division 3, clause 156*];
- Transmission of ACCUs by assignment [*Part 11, Division 3, clause 152*]; and
- Transmission of ACCUs by operation of law [*Part 11, Division 3, clause 153*].

9.55 At its simplest, a transfer is initiated by an electronic instruction from the transferor transmitted to the Administrator, which then removes the entry for the unit from one account and makes an entry for that unit in another account.

9.56 Transmissions by operation of law bring additional issues. An example is transmission of a unit to a person as the trustee of a deceased person's estate. In this situation, it is the transferee who needs to establish evidence of transmission and, if necessary, open a Registry account [*Part 11, Division 3, clause 153*].

9.57 The timeframe for a person to provide the Administrator with evidence of the transmission in these circumstances is 90 days, to ensure that the new owner of the emissions units has ample time to provide the proof of that ownership. The Administrator can also extend that period [*Part 11, Division 3, clause 153(2) and (5)*].

Exchange of Australian carbon credit units for Kyoto units

9.58 The bill provides for the recognition in Australian legislation of the emissions units created under the Kyoto Protocol, and sets out how these units can be issued [*Part 11, Division 2*] and transferred [*Part 11, Division 3*]. This is to enable abatement to be exported, giving Australian abatement providers access to a larger carbon market.

9.59 The provisions relating to Kyoto units have been drafted to ensure the Australian legislation is consistent with the Kyoto Protocol rules.

9.60 Kyoto ACCUs may be exchanged within the Registry for the following Kyoto units, subject to the Kyoto rules and any conditions set out in the regulations:

- assigned amount units;
- removal units;
- emission reduction units [*Part 11, Division 3, clause 157(1)(b)*].

9.61 Assigned amount units and removal units may subsequently be converted to emission reduction units, if the project has been approved as a joint implementation project – see *Australian National Registry of*

Emissions Units Bill 2011 clause 38. Further information on Joint Implementation is set out below.

9.62 Any Kyoto ACCUs may be exchanged for an assigned amount unit [*Part 11, Division 3, clause 157(1)(b)(i)*].

9.63 Kyoto ACCUs that are issued as a result of net removals of greenhouse gases from activities under Article 3.3 of the Kyoto Protocol (afforestation, reforestation and deforestation) may be exchanged for removal units [*Part 11, Division 3, clause 157(1)(b)(ii)*].

9.64 According to its obligations under the Kyoto Protocol, Australia must issue or cancel units (as appropriate) for Article 3.3 activities, as calculated on an activity-by-activity basis. For the first commitment period, Australia has elected to do this on an annual basis. Regulations may give effect to any further Kyoto rules relating to the issuance and transfer of removal units – for example there needs to be a sufficient number of Australian removal units in the national registry before exchange can take place.

9.65 Kyoto ACCUs may be exchanged for emission reduction units if the abatement was the result of an approved Joint Implementation project [*Part 11, Division 3, clause 157(1)(b)(iii)*]. Further information on the process for approval of Joint Implementation projects is outlined below.

9.66 Non-Kyoto ACCUs will not be exchanged for Kyoto units, as this abatement will not be reflected in Australia's Kyoto accounts.

9.67 For example:

Jeremy has a project that avoids emissions from landfill. His project is eligible to generate Kyoto ACCUs. He may choose to receive these into his Registry account or he may exchange them for assigned amount units, depending on what market he wants to sell the credits into and where he is likely to receive a higher price.

Rylee has a reforestation project which is eligible to generate Kyoto ACCUs. She may choose to receive these into her Registry account or to exchange them for assigned amount units or removal units, likely depending on the highest price on the market for these different units.

9.68 The regulations may provide that when a Kyoto ACCU is exchanged for a Kyoto unit, the corresponding ACCU is removed from the Registry account and cancelled [*Part 11, Division 3, clause 157(3)*]. This will ensure that Kyoto ACCUs exchanged for Kyoto units cannot be double-counted and thus preserves the environmental integrity of the scheme.

9.69 There is a time limit on requests for exchange of Kyoto ACCUs for assigned amount units, removal units or emission reduction units. Requests may only be made before 1 July 2013 [*Part 11, Division 3, clause 157(1)(b)*].

9.70 This is because the Australian government must be able to ensure that it has sufficient Kyoto units in its registry account to match its emissions over the first Kyoto commitment period (2008-12). Any transfers of Australia's Kyoto units held in Commonwealth Registry accounts to private entities will affect this balance. Australia must have sufficient time to reconcile its Kyoto accounts before the end of the Kyoto 'true-up' period.

9.71 Kyoto units can be transferred from an account in the Australian Registry to a foreign registry, referred to as an outgoing international transfer [*Part 11, Division 3, clause 154*]. A transfer is only possible where permitted by Regulations made under clause 155 of this bill [*Part 11, Division 3, clause 155*]. Chapter 3 of the Explanatory Memorandum for the Registry bill contains a detailed explanation of the requirements for international transfers of Kyoto units and non-Kyoto eligible emissions units from Australia.

Joint Implementation

9.72 Rules for the approval of Joint Implementation (JI) projects will be the responsibility of Australia's National Authority for the Clean Development Mechanism (CDM) and JI. The National Authority for the CDM and JI is already in existence, although its role is currently limited to the approval of Australian entities' participation in CDM and JI projects abroad. Following the implementation of this Act, the National Authority for the CDM and JI will also approve scheme projects under the 'Track 1' JI procedure under the Kyoto Rules.

9.73 The intention is that scheme projects will be eligible for determination as a JI Track 1 project, subject to any additional requirements imposed by the Kyoto rules and necessary checks in line with existing requirements for approval of Australian entities' participation in JI projects abroad. For example, proponents would need to provide documentary evidence of approval of the project from another Annex I Party before determination as a JI project could be finalised, a prerequisite for issuance of emission reduction units.

9.74 Once a project has been approved as an Australian-hosted JI project, a proponent could request that Kyoto ACCUs, assigned amount units or removal units be converted into emission reduction units [*Part 11, Division 3, clause 157(1)(b)(iii)*] (and also see clause 38 of the Registry bill).

9.75 The specific process for exchanging Kyoto ACCUs, assigned amount units or removal units will be detailed in the regulations and will give effect to any applicable Kyoto rules. This will include technical specifications to ensure that conversions of Kyoto units that occur within the Australian registry comply with the data exchange standards required by the international transaction log.

9.76 For example:

Elsie's reforestation project has had an international investor lined up since inception. Elsie has accordingly requested that her project also be approved as a Joint Implementation project. Following approval of the project as a scheme project, this approval is obtained from Australia's National Authority for the CDM and JI shortly after the project starts. As she progressively receives notification that the project is eligible to receive Kyoto ACCUs throughout the project's life, Elsie lodges a request to convert these to emission reduction units, and immediately sells the emission reduction units to her investor as per their initial contract.

Peter's landfill emissions avoidance project has received Kyoto ACCUs which he has since exchanged for assigned amount units. He then finds an overseas buyer who is interested in the project but wants emission reduction units for compliance with their country's emissions trading scheme. Peter applies to have his project approved as a Joint Implementation project, receives this approval, requests conversion of his assigned amount units to emission reduction units, and sells these to his international buyer.

Voluntary Cancellation of Australian carbon credit units

9.77 ACCUs may be voluntarily cancelled. This can be achieved either through the holder of ACCUs requesting that the Administrator cancel the units under Part 14 of the bill or through the voluntary automatic unit cancellation regime.

Voluntary cancellation on request

9.78 A registered holder of ACCUs may request the Administrator to cancel one or more units. Part 14 of the bill provides for the voluntary cancellation of ACCUs. Part 6 of the *Australian National Registry of Emission Units Bill 2011* (Registry bill) provides for the voluntary cancellation of Kyoto units and non-Kyoto international emissions units. This implements the Government's policy that voluntary cancellation allows individuals and organisations to contribute to stronger national climate change mitigation by reducing the supply of eligible emissions units.

9.79 The process for applying to cancel ACCUs under the bill is identical to the process for applying to cancel Kyoto units and non-Kyoto international emission units under the Registry bill. For units that may be subject to voluntary cancellation, the registered holder of the emissions units transmits an electronic notice to the Administrator requesting the Administrator to cancel the units. The notice must specify the units to be cancelled and the person's relevant Registry account(s) [*Part 14, clause 173(1) and (2)*].

9.80 The action to be taken by the Authority varies depending on the type of unit.

9.81 If the request relates to an ACCU, then the ACCU is cancelled and removed from the person's registry account. If the unit is a Kyoto ACCU, the Minister must direct the Administrator to transfer a Kyoto unit from the Commonwealth holding account to a voluntary cancellation account before the end of the 'true-up period' for the relevant Kyoto commitment period [Part 14, clause 173(3)]. The 'true-up period' is the period following each Kyoto commitment period during which Kyoto units from the relevant commitment period can be transferred and acquired for the purposes of meeting Annex 1 countries' emissions reduction targets.

9.82 By cancelling a Kyoto unit within the relevant commitment period, the Government will ensure that voluntary cancellation of Kyoto ACCUs leads to additional global abatement.

9.83 The Administrator must publish information about the number of voluntarily cancelled ACCUs on its website, including the name of the person who held the units and the total number of ACCUs that have been cancelled [Part 12, Division 3, clause 163].

9.84 This allows private entities to cancel Kyoto units, which means they cannot be used by Australia or another Kyoto Party for the purposes of meeting their emission reduction targets ensuring additional global abatement.

9.85 If the request relates to a non-Kyoto ACCU, there is no need for a corresponding reduction in Kyoto units from the Commonwealth holding account. This is because there is nothing that needs to be done to ensure that non-Kyoto abatement is not counted towards Australia's Kyoto target – this is already a feature of the Kyoto rules.

9.86 Removing the entry for the non-Kyoto ACCU from the person's account will ensure that the non-Kyoto ACCU cannot be transferred or re-used.

9.87 Request to cancel Kyoto units or non-Kyoto international emissions units are handled under the Registry bill.

Voluntary automatic cancellation

9.88 Some project proponents may sell the potential carbon storage associated with their project as a way of funding the project. Under this business model, activities such as tree planting are used to offset the impacts of polluting activities such as driving a car.

9.89 Such projects may be included in the scheme but the project proponent is expected to apply for voluntary automatic cancellation of their ACCUs when they apply for an eligible project declaration. Automatic cancellation of credits will prevent double crediting of abatement that has already been sold and used. If a project is subject to voluntary automatic cancellation, any ACCUs issued for a project will be

immediately cancelled and removed from the project proponent's account [Part 2, Division 3, clause 19].

9.90 The project eligibility declaration would note that the project is subject to automatic voluntary cancellation [Part 3, Division 2, clause 23(4)]. This would be recorded on the register of offset projects, allowing customers to check that the projects that they have funded have been properly included in the scheme.

9.91 If the credit is a Kyoto credit, the Administrator will cancel a Kyoto unit from the Commonwealth's holding account [Part 2, Division 3, clause 19(2)(c)(i)-(ii)]. This is to ensure that the abatement is not counted towards Australia's Kyoto Protocol account.

9.92 Each cancellation must be recorded in the registry [Part 2, Division 3, clause 19(3)].

9.93 For example:

Greenfoot Pty Ltd helps individuals and organisations to offset the impacts of polluting activities such as driving a car by planting native forests.

Greenfoot wants to include their native forests in the scheme so that they will be subject to the scheme's integrity measures, particularly the permanence obligations. Importantly, Greenfoot customers want their abatement to be additional to the Kyoto target.

Greenfoot applies for an eligible project declaration and for automatic voluntary cancellation for the project. The Administrator records the automatic voluntary cancellation status on the Register of Offsets Projects.

When units are issued, the Administrator cancels the units and removes the entry for the ACCUs from Greenfoot's Registry account, and as the units are Kyoto ACCUs, the Administrator also transfers a Kyoto unit from a Commonwealth holding account to a voluntary cancellation account.

Chapter 10

Monitoring and enforcement

Outline of chapter

10.1 This chapter addresses the various mechanisms provided in the bill related to monitoring and enforcement. These include information gathering, record keeping, monitoring, liability of company officers, administrative penalties, criminal and civil penalties, enforceable undertakings and anti-avoidance provisions.

10.2 The relevant provisions are in Parts 18 to 18 and 20 to 23 of the bill. The administrative penalty – for failure to comply with relinquishment requirements – is set out in Part 15 of the bill.

10.3 Reporting and auditing are also critical elements of the monitoring and enforcement, and are covered by Chapters 7 and 8 of the explanatory memorandum. Offences and penalties relating to the Registry are contained in the Registry bill.

Context

10.4 Effective enforcement arrangements are vital to ensuring the credibility of the scheme. Non-compliance with obligations could bring the scheme into disrepute and undermine its environmental integrity. This would have flow-on effects to its credibility for domestic and international purchasers of Australian carbon credit units (ACCUs) and could ultimately affect the value of credits generated under the scheme. For these reasons, the bill provides the Administrator with a range of monitoring and enforcement powers and mechanisms designed to promote confidence in an evolving market for carbon offsets.

10.5 The monitoring and enforcement provisions in the bill have been developed in accordance with the Australian Government's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Power*, issued in 2007.

Explanation of new law

Information gathering powers

10.6 The bill includes information-gathering powers which will allow the Administrator to require the provision of information, documents and

answers to questions in order to monitor general compliance or to undertake more specific investigations into suspected breaches. Importantly, the bill also includes constraints to ensure that these powers are exercised in a proportionate and justifiable way.

10.7 If the Administrator believes on reasonable grounds that a person has information or a document that is relevant to the operation of the Act or associated provisions, the Administrator will be able to require, by written notice, that person to give that information or documents, or to provide copies [*Part 16, clause 185*]. The person has at least 14 days to produce the information, documents or copies [*Part 16, clause 185(3)*].

10.8 The phrase ‘associated provisions’ is defined to include the proposed Carbon Credits (Carbon Farming Initiative) Regulations and specified provisions of the *Criminal Code* in so far as those sections relate to the scheme [*Part 1, clause 5, definition of ‘associated provisions’*].

10.9 This is a civil penalty provision, as are the ancillary contraventions. General provisions relating to civil penalties, including the pecuniary penalties, are included in Part 21 of the bill.

10.10 The Administrator may inspect and copy the documents that the person was required to produce, and retain a copy of documents produced [*Part 16, clause 187*]. A person is entitled to reasonable compensation if they have been required to provide copies [*Part 16, clause 186*].

10.11 The Administrator may retain documents produced for as long as is necessary [*Part 16, clause 188(1)*]. However, the Administrator will supply a certified copy of the documents to the person otherwise entitled to possession [*Part 16, clause 188(2)*].

10.12 A person is not excused from giving information or producing a document following notice from the Administrator on the grounds that it might incriminate them or expose them to a penalty [*Part 16, clause 189(1)*]. However, the information given or document produced, the giving of the information or document and any information, document, or thing obtained as a consequence is not admissible in evidence against an individual in the following circumstances:

- civil proceedings for the recovery of other than administrative penalties and late payment penalties in respect of failure to surrender or relinquish units;
- criminal proceedings, unless the proceedings are for an offence relating to the provision of false or misleading information or documents when the Administrator has asked for them [*Part 16, clause 189(2)*].

10.13 The treatment of self-incrimination is addressed in more detail below, under ‘Power of Inspectors’.

Record-keeping requirements

10.14 Records must be kept by various scheme participants to support the information which they provide under the scheme. This will enable the Administrator and, where relevant, inspectors and auditors, to check the accuracy and completeness of information provided to the Administrator, for example, information provided in applications leading to the issuing of Australian carbon credit units (ACCUs).

10.15 The capacity to audit offsets reporting is essential to monitoring compliance and ensuring the integrity of the scheme.

10.16 The regulations may require a person to make a record of relevant information, and retain that record for 7 years after making the record [*Part 17, Division 2, clause 191(1) and (2)*]. The regulations can also require project proponents to retain records of information used to prepare an offsets report. These records must be retained for 7 years after the report was given to the Administrator [*Part 17, Division 2, clause 192(2)*]. Project proponents must also comply with any record-keeping requirements that are specified in the applicable methodology determination [*Part 17, Division 2, clause 193(1) and (2)*].

10.17 The 7-year retention periods for records are consistent with obligations under 22(3) of the *National Greenhouse and Energy Reporting Act 2007*.

10.18 These requirements and the ancillary contraventions are civil penalty provisions [*Part 17, Division 2, clause 191 to 193*].

Monitoring powers

10.19 Part 18 provides for the appointment of inspectors who may enter premises to determine whether the Act or associated provisions have been complied with or to substantiate information provided under the Act or associated provisions.

10.20 The usual duty of an inspector is expected to be to examine documentation, for example, records held by entities which are liable under the scheme.

10.21 The powers of an inspector and the rights and responsibilities of the occupier of the premises are described below.

Appointment of inspectors

10.22 The Administrator may appoint a member of the Department's staff or the Australian Federal Police as an inspector [*Part 18, Division 2, clause 196(1)*]. The staff member may be at the Senior Executive Service (SES) level, or acting SES level, or at the Executive Level 1 or 2 (or equivalent officer performing these functions). It is envisaged that inspectors will require detailed knowledge of the scheme and the ability to identify and interpret technical data, such as data used in a project's

abatement calculations. For this reason, it is necessary to allow for Executive Level 1 and 2 staff with detailed technical knowledge and skills to be appointed as inspectors, as well as SES level staff.

10.23 A person appointed as an inspector must have suitable qualifications and experience, and comply with any direction of the Administrator [*Part 18, Division 2, clause 196(2) and (3)*].

10.24 Such a direction is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 18, Division 2, clause 196(4)*]. This provision is included to indicate that an exemption from the *Legislative Instruments Act 2003* is not sought or required.

10.25 The inspector must carry an identity card issued by the Administrator [*Part 18, Division 2, clause 197(1)*]. The form of the card is to be prescribed. Failure to return the card is a strict liability offence [*Part 18, Division 2, clause 197(2)*]. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in drafting this provision. Three criteria for strict liability offences listed at page 25 of the guide were fulfilled:

- the offence is not punishable by imprisonment and is punishable by a penalty of less than 60 penalty units for an individual;
- the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences; and
- there are legitimate reasons for penalising persons lacking ‘fault’ because potential offenders will be placed on notice to guard against the possibility of any contravention.

Power of inspectors

10.26 An inspector can enter premises and exercise monitoring powers to determine whether this Act or the associated provisions have been complied with or to substantiate information provided under the Act or associated provisions. The inspector can only enter premises with the consent of the occupier or under a monitoring warrant [*Part 18, Division 3, clause 198*].

10.27 An inspector’s monitoring powers include the power to search the premises and to inspect any document on the premises [*Part 18, Division 3, clause 199*]. While on the premises, an inspector may operate electronic equipment to see whether it contains relevant information [*Part 18, Division 3, clause 199*]. The inspector may also secure items for up to 24 hours if entry to the premises was under a monitoring warrant, while a warrant authorising the seizure of those items is being sought. This period can be extended by a magistrate [*Part 18, Division 3, clause 199*].

10.28 Inspectors may be assisted by other persons if this is necessary and reasonable [*Part 18, Division 3, clause 200(1)*]. A person assisting an inspector may enter the premises and exercise monitoring powers in relation to the premises, but only in accordance with a direction given by the inspector [*Part 18, Division 3, clause 200(2)*]. A written direction is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 18, Division 3, clause 200(4)*]. The provision is included to indicate that an exemption from the *Legislative Instruments Act* is not sought or required.

10.29 Where the inspector has entered the premises with the consent of the occupier, he or she may ask the occupier to answer relevant questions or produce relevant documents. When entry was under a monitoring warrant, the inspector may require the occupier to answer relevant questions or produce relevant documents. It is an offence not to comply with such a requirement. The maximum penalty is 30 penalty units [*Part 18, Division 3, clause 201*]. The treatment of self-incrimination in this context is addressed below.

10.30 Part 18 of the bill also addresses:

- Consent of the occupier, including limitations and withdrawal of consent [*Part 18, Division 4, clause 203*].
- The announcement that must be made by an inspector before entering premises under a monitoring warrant [*Part 18, Division 4, clause 204*].
- The need to be in possession of the warrant to execute it [*Part 18, Division 4, clause 205*].
- The requirement that the inspector provide a copy of the warrant to the occupier who is present and inform him or her of the rights and responsibilities of the occupier [*Part 18, Division 4, clause 206*].
- Using expert assistance to operate electronic equipment [*Part 18, Division 4, clause 207*].
- Compensation for damage to electronic equipment [*Part 18, Division 4, clause 208*].

10.31 The occupier is entitled to observe the execution of a monitoring warrant, but not if he or she impedes the execution [*Part 18, Division 5, clause 209*].

10.32 The occupier must provide the inspector and persons assisting the inspector with all reasonable facilities and assistance where there is a monitoring warrant applying to the premises. Failure to do so is an offence. The penalty is a maximum of 30 penalty units [*Part 18, Division 5, clause 210*].

Self-incrimination under clauses 189 and 202

10.33 A person is not excused from giving information or producing a document following notice from the Administrator on the grounds that it might incriminate them or expose them to a penalty [*Part 18, Division 3, clause 202(1)*]. However, in the case of an individual, the answer or document, the giving of the answer and producing the document, and any information, document or thing obtained as a consequence is not admissible in evidence in specified circumstances [*Part 18, Division 3, clause 202(2)*]. The circumstances are the same as in the self-incrimination provision in the information gathering powers [*Part 16, clause 189*].

10.34 Provisions under which a person may be required to answer questions or to produce information or documents are a common enforcement mechanism in Commonwealth legislation. These provisions are appropriate when such powers will assist in the administration of Commonwealth legislation.

10.35 Clauses 189 and 202 override an individual's privilege against self-incrimination, but provide an individual with immunity such that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the person (known as 'derivative use' immunity) with limited exceptions [*Part 16, clause 189*] [*Part 18, Division 3, clause 202*]. However, the information could be used against a third party, such as an accomplice.

10.36 The effective administration of the scheme is an issue of public importance which could impact on the Australian community and business. Non-compliance could undermine the scheme's integrity. Clauses 189 and 202 enhance the ability of the Administrator to monitor and ensure compliance with the scheme in a way that is consistent with the views of the Scrutiny of Bills Committee, as well as Commonwealth legal policy regarding the privilege against self-incrimination [*Part 16, clause 189*] [*Part 18, Division 3, clause 202*].

Monitoring warrants

10.37 The requirements for the issue of a monitoring warrant by a magistrate and the content of the warrant are specified [*Part 18, Division 6, clause 211*].

10.38 The power to issue a monitoring warrant is conferred on a magistrate in his or her personal capacity. It need not be accepted but when it is exercised the magistrate has the same protection and immunity as if he or she were exercising the power as a member of the court of which the magistrate is a member [*Part 18, Division 7, clause 212*].

Liability of executive officers of bodies corporate

10.39 Where a body corporate contravenes a civil penalty provision, and its executive officer knew (or was reckless or negligent as to whether) the contravention would occur, the officer will be subject to a civil penalty if he or she was in a position to influence the conduct of the body corporate, in relation to the contravention, but failed to take all reasonable steps to prevent it [*Part 20, clause 217*].

10.40 The phrase ‘executive officer’ is defined to mean a director, chief executive officer, chief financial officer or secretary of the body corporate [*Part 1, clause 5, definition of ‘executive officer’*].

10.41 The terms ‘reckless’ and ‘negligent’ are explained for the purpose of this provision [*Part 20, clause 217(2) and (3)*]. This is necessary because the provision is a civil penalty provision.

10.42 The court may have regard to all relevant matters in determining whether an executive officer failed to take all reasonable steps [*Part 20, clause 218*]. These matters may include the action (if any) the officer took to ensure that the body corporate arranges regular professional assessments of its compliance with civil penalty provisions. This would only be considered to the extent that the action is relevant to the contravention. The word ‘professional’ refers to the qualifications and experience of the person undertaking the assessment and does not require, on every occasion, that the assessment is undertaken by a person outside the organisation. The court may also have regard to other specified factors including the extent to which the body corporate implemented those recommendations and any other actions taken by the executive officer. The word ‘professional’ refers to the qualifications and experience of the person undertaking the assessment and does not require, on every occasion, that the assessment is undertaken by a person outside the organisation [*Part 20, clause 218*].

10.43 Extended accessorial liability is appropriate in this context. The aim is to ensure that compliance with obligations under the scheme is taken seriously at a high level within liable entities. Liability is not being imposed simply because the person is an officeholder at the relevant time but requires a degree of blame before a civil penalty can be imposed.

10.44 Example of liability of executive officers:

- A chief executive officer is aware that his or her company was failing to comply with its carbon maintenance obligation and was in a position to influence this conduct, but failed to take all reasonable steps to prevent this contravention.

Administrative penalties

Administrative penalty – relinquishment

10.45 The relinquishment mechanism is described in chapter 6 of this explanatory memorandum.

10.46 Failure to relinquish ACCUs as required will result in an administrative penalty [Part 15, Division 3, clause 179]. The administrative penalty is proportional to the shortfall in relinquishment

10.47 If the person has relinquished none of the required units, the penalty is calculated in accordance with the formula:

$$\text{Penalty units amount} = [\text{Number of units required to be relinquished}] \times [\text{Prescribed amount}] \text{ [Part 15, Division 3, clause 179(2)]}$$

10.48 If the person has relinquished only some of the required units, the penalty is calculated in accordance with the formula:

$$\text{Penalty amount} = [\text{Number of units required to be relinquished} - \text{number of relinquished units}] \times [\text{Prescribed amount}] \text{ [Part 15, Division 3, clause 179(3)]}$$

10.49 The prescribed amount will be \$20 for each Kyoto or non-Kyoto unit that is not relinquished or 200% of the market value for the relevant unit, whichever is the greater [Part 15, Division 3, clause 179(3)]. Regulations may set out a method by which the market value will be ascertained [Part 15, Division 3, clause 179(6)]. For example, the regulations may require the market value to be determined using prices on a public exchange (if one emerges) which generates published data on prices for ACCUs, or employing a qualified person to carry out a valuation.

10.50 The administrative penalty is due and payable 30 days after the compliance deadline [Part 15, Division 3, clause 179(4)]. From this point a late payment penalty will accrue [Part 15, Division 3, clause 180].

10.51 The Administrator is empowered to remit the late payment penalty in part or in whole if it is satisfied that certain criteria are met. For example, the Administrator may remit some or the entire penalty where there are special circumstances [Part 15, Division 3, clause 180(2)].

10.52 Other aspects of the relinquishment mechanism are addressed in Chapter 6 of this explanatory memorandum

Civil penalties

Which provisions are civil penalty provisions?

10.53 The majority of penalty provisions in the bill, including ancillary contraventions, such as aiding a contravention, are civil penalty provisions. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* describes civil penalties as follows:

“A civil penalty provision is set out in a similar way to an offence and is subject to proceedings in court. However, it is enforced by civil proceedings that are subject to the procedures and rules of evidence in civil cases. Proof is on the balance of probabilities. A civil penalty provision only carries a financial penalty, not an imprisonment penalty. The imposition of a civil penalty does not constitute a criminal conviction.”

- 10.54 The bill contains the following list of civil penalty provisions:
- 76 Offsets reports [*Part 6, Division 2, clause 76*]
 - 78 Notification requirement – ceasing to be the project proponent for an eligible offsets project otherwise than because of death [*Part 6, Division 3, clause 78*]
 - 79 Notification requirement – death of the project proponent for an eligible offsets project [*Part 6, Division 3, clause 79*]
 - 80 Notification requirement – methodology determinations [*Part 6, Division 3, clause 80*]
 - 81 Notification requirement – natural disturbances [*Part 6, Division 3, clause 81*]
 - 82 Notification requirement—reversal of sequestration due to conduct of another person [*Part 6, Division 3, clause 82*]
 - 83 Notification requirement—project becomes inconsistent with a regional natural resource management plan [*Part 6, Division 3, clause 83*]
 - 84 Notification requirement – recognised offsets entities [*Part 6, Division 3, clause 84*]
 - 85 Any notification requirements set in regulations [*Part 6, Division 3, clause 85*]
 - 97 Carbon maintenance obligation [*Part 8, Division 2, clause 97*]
 - 185 Administrator may obtain information and documents [*Part 16, clause 185*]
 - 191 Record-keeping requirements — general [*Part 17, Division 2, clause 191*]
 - 192 Record-keeping requirements – preparation of offsets report [*Part 17, Division 2, clause 192*]
 - 193 Record-keeping requirements – methodology determinations [*Part 17, Division 2, clause 193*]
 - 194 Project monitoring requirements – methodology determinations [*Part 17, Division 3, clause 194*]
 - 214 Compliance audits [*Part 19, Division 2, clause 214*]
 - 215 Other audits [*Part 19, Division 2, clause 215*]

217 Civil penalties for executive officers of bodies corporate [*Part 20, clause 217*]

10.55 The reason for choosing to make these civil penalty provisions is that contraventions of these provisions do not involve conduct of such serious moral culpability that criminal prosecution is warranted. Further, as many recognised entities are expected to be bodies corporate, financial disincentives provided by civil penalties are likely to be the most useful and effective.

Civil penalty orders jurisdiction and amount

10.56 Both the Federal Court and competent state and territory courts can make civil penalty orders [*Part 21, clause 220*].

10.57 It is for the Court to determine whether a person has contravened a civil penalty provision and to order the person to pay a penalty [*Part 21, clause 221*].

10.58 The maximum amount of the pecuniary penalty is specified, as are the matters which the court may have regard to in determining the amount of the penalty [*Part 21, clause 221(3), (4) and (5)*].

10.59 The maximum amount for a civil penalty is 10,000 penalty units for a body corporate and 2,000 penalty units for other persons [*Part 21, clause 221(4) and (5)*]. The phrase ‘penalty unit’ is defined by reference to section 4AA of the *Crimes Act 1914* [*Part 1, clause 5, definition of ‘penalty unit’*]. Currently, a penalty unit is \$110.

10.60 Substantial penalties are required to provide an adequate deterrent against inaccurate record-keeping or reporting. Financial gains could be made from contravention of the obligations under the scheme. For example, the maximum penalty of 10,000 penalty units (or \$1,100,000) is equivalent to 44,000 ACCUs at \$25 per unit, which may be a small proportion of the units issued to a recognised entity under the scheme over a project’s lifetime.

10.61 Matters which the court may have regard to in determining the amount of the penalty include the nature and extent of the contravention, any previous contraventions, and, in the case of a body corporate, whether it has exercised due diligence to avoid the contravention [*Part 21, clause 221(3)*]. These factors reflect the approach indicated in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. They follow the *Australian Law Reform Commission Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*.

Evidential burden

10.62 Clause 230 relates to a mistake of fact. It provides that a person is not liable to have a civil penalty order made against him or her for a contravention of a civil penalty provision where:

- the person considered whether or not facts existed; and

- was under a mistaken but reasonable belief about those facts; and
- had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

10.63 A person who wishes to rely on the relevant subsections bears an evidential burden in relation to that matter [*Part 21, clause 230*]. This approach is justified where a matter is peculiarly within the defendant's knowledge and not available to the prosecution.

Continuing contraventions

10.64 Where a contravention occurs, the bill contains disincentives against the contravention continuing. A person who contravenes specified civil penalty provisions which involve, for example, a requirement to do something within a particular period, commits a separate contravention on each of the days on which it fails to comply [*Part 21, clause 232(2)*].

10.65 Generally, the penalty is limited to 5 per cent (each day) of the penalty for the initial contravention. However, in the case of a contravention of a requirement by the Administrator to provide information or documents [*Part 16, clause 185(2)*] the penalty is up to 10 percent (each day) of the penalty for the initial contravention, recognising that the person is always provided with adequate time to meet the requirement [*Part 21, clause 232(3)*].

10.66 Other examples of continuing contravention provisions are those dealing with compliance with the record-keeping requirements for methodology requirements [*Part 17, Division 2, clause 193(2)*] and a failure to comply with a requirement to notify where natural disturbances have caused a significant reversal of carbon dioxide removal or sequestration by a project [*Part 6, Division 3, clause 81(2)*].

Other provisions about civil penalties

10.67 While the Crown in each of its capacities is bound by the Act, the Crown is not liable to a pecuniary penalty. This protection does not apply to authorities of the Crown or to administrative penalties or late payment penalties [*Part 1, clause 8*].

10.68 The bill provides a power in clause 183(4) to allow the Consolidated Revenue Fund to be appropriated so that the Commonwealth can make interest payments to people who make overpayments on administrative penalties [*Part 15, Division 3, clause 183(4)*]. An administrative penalty is payable where a person fails to relinquish ACCUs by the compliance deadline [*Part 15, Division 3, clause 179*] and where a late payment penalty is payable when the administrative penalty is not paid within the time specified for payment [*Part 15, Division 3, clause 180*]. This appropriation power is limited in the sense that the administrative penalty will, at most, apply only to persons who are required to relinquish units but fail to do so.

10.69 Other aspects of the civil penalty regime are also addressed in Part 21 of the bill. Of particular significance are:

- only the Administrator may apply for a civil penalty order [Part 21, clause 222]; and
- a requirement that the rules of evidence and procedure for civil matters be applied when hearing proceedings for a civil penalty order [Part 21, clause 225].

10.70 Other provisions address the grouping of proceedings [Part 21, clause 223], a 6-year time limit on initiating civil penalty proceedings [Part 21, clause 224] and the relationship between civil and criminal proceedings initiated with respect to the conduct which is substantially the same [Part 21, clause 226 to 229].

10.71 Special provision is made to remove the requirement to prove the state of mind, including intention, knowledge, recklessness or negligence, of a person who does not comply with a requirement [Part 21, clause 231], for example, to give the Administrator particular information [Part 16, clause 185(4)]. The reason for this provision is that it is reasonable to expect those subject to the provision will take steps to guard against any inadvertent contravention.

Criminal provisions

10.72 As indicated above, the provisions in the bill which are criminal offences are only those involving such culpability that criminal penalties are justified.

Which provisions are criminal provisions

- | | |
|-----|--|
| 197 | Identity cards [Part 18, Division 2, clause 197] |
| 201 | Inspector may ask questions or require questions to be answered and seek production of documents [Part 18, Division 3, clause 201] |
| 210 | Occupier to provide inspector with facilities and assistance [Part 18, Division 5, clause 210] |
| 234 | Scheme to avoid existing liability to pay administrative penalty [Part 22, clause 234] |
| 235 | Scheme to avoid future liability to pay administrative penalty [Part 22, clause 234] |
| 270 | Secrecy [Part 27, clause 270] |
| 276 | Disclosure to certain persons and bodies [Part 27, clause 276] |
| 277 | Disclosure to certain financial bodies [Part 27, clause 277] |
| 282 | Disclosure for purposes of law enforcement—protected Administrator information [Part 27, clause 282] |

283 Disclosure for purposes of law enforcement—protected DOIC information [*Part 27, clause 283*]

10.73 The above generally relate to behaviour which involves dishonest or fraudulent conduct, or could involve considerable harm to society, the environment, the scheme or its participants.

10.74 Project proponents are likely to have far more information about their projects than the Administrator, particularly if they have failed to report. It is therefore essential for the effective operations of the Administrator that the information gathering and monitoring powers are adequate and that the requirements of inspectors are complied with [*Part 18, Division 3, clause 201*] [*Part 18, Division 5, clause 210*]. The maximum penalty for contravention of clause 201 (which relates to a failure to answer questions or produce documents to an inspector) is 30 penalty units. The maximum penalty for contravention of clause 210 (which relates to assistance to an inspector under a monitoring warrant) is also 30 penalty units.

10.75 Ancillary contraventions, such as aiding a contravention, are addressed by the *Criminal Code*.

10.76 As indicated above, the Crown in each of its capacities will be bound by the Act, but the Crown is not liable to be prosecuted for an offence. This protection does not apply to an authority of the Crown [*Part 1, clause 8*].

Court orders to relinquish units

10.77 In addition to the specific criminal provisions listed above, conduct in relation to the scheme may constitute contravention of provisions of the *Criminal Code*. For example, conviction for an offence against specified provisions of the *Criminal Code* is one of the preconditions for a court order to relinquish units [*Part 13, clause 171*]. The offences specified include making a statement in information provided to the Administrator or in an application for the issue of units, knowing that it is false. An example is providing false identity documents in an application for a Registry account.

10.78 Following conviction for an offence against certain specified provisions of the *Criminal Code*, the court may order that the offender should relinquish a specified number of ACCUs, Kyoto ACCUs or non-Kyoto ACCUs [*Part 13, clause 171*]. Before making such an order, the court must be satisfied that the issue of any or all of the units was attributable to the offence. The applicable provisions in the *Criminal Code* include section 136.1 which relates to giving false or misleading information to a Commonwealth entity.

10.79 A person is required to comply with such an order even if he or she is not the registered holder of any ACCUs [*Part 13, clause 171(5)*].

10.80 The procedure for relinquishment is addressed in Part 15 of the bill and chapter 6 of this explanatory memorandum.

10.81 For example:

Treehandler Ltd is a recognised offsets entity under the scheme. It is the project proponent for projects which sequester carbon through reforestation. Treehandler applies to the Administrator for a certificate of entitlement for the issue of ACCUs, and knowingly includes false information in the application regarding the quantity of carbon dioxide sequestered through its activities. As a result, the Administrator issues to Treehandler a certificate and 2,000 more emissions units than Treehandler is entitled to.

The fraudulent conduct is discovered and Treehandler is found guilty of the offence. Treehandler is exposed to the criminal penalty under section 136.1 (false or misleading statements in applications) of the *Criminal Code*. The court also orders the company to relinquish 2,000 emissions units. The Administrator cancels the recognition of the company under clause 65(1)(a)(iii) of the bill.

Treehandler then fails to relinquish any of the units by the specified time, and is further exposed to an administrative penalty under clause 179(2) of the bill. The penalty is \$20 for each Kyoto or non-Kyoto unit that is not relinquished or 200% of the market value for the relevant unit, whichever is the greater. If, for example, \$20 is the greater value, then Treehandler is liable to pay \$40,000 to the Commonwealth

Enforceable undertakings

10.82 Enforceable undertakings are useful mechanisms for the Administrator to help ensure compliance without necessarily taking court action. This power could be used, for example, when an offsets entity has been found to have errors in its reports and calculations of emissions factors. The entity may be willing to enter into an enforceable undertaking specifying the processes which it would implement so that it can produce compliant reports in the future.

10.83 The Administrator is able to accept enforceable undertakings [Part 23, clause 237].

10.84 Such undertakings are published on the Administrator's website [Part 23, clause 237(5)].

10.85 The undertakings are enforceable by the Administrator in the Federal Court. The Court has a wide discretion as to the orders it can make. These include an order directing the person to comply with the undertaking [Part 23, clause 238].

10.86 Enforceable undertakings are useful mechanisms for the Administrator to help ensure compliance without necessarily taking court action. This power could be used, for example, when an offsets entity has been found to have errors in its reports and calculations of emissions

factors. The entity may be willing to enter into an enforceable undertaking specifying the processes which it would implement so that it can produce adequate reports in the future.

Polly has received ACCUs in respect of her approved reforestation project. As her project has been specified under Regulations as a kind of project that does not need an audit report to accompany her application. However, a later report identifies that due to poor record keeping, it is not clear whether the application she submitted for the Certificate of Entitlement was correct in all aspects. Polly enters into an enforceable undertaking to voluntarily surrender the ACCUs she has received. This will maintain the environmental integrity of the scheme without the Administrator having to take action to prove that Polly's application was misleading (which may be difficult to prove, given the quality of the records).

Anti-avoidance provisions

10.87 Entering into schemes aimed at ensuring that a body corporate or trust will, for example, be unable to pay an existing or future liability to pay an administrative penalty is a criminal offence [*Part 22, clause 234 and 235*]. These provisions are comparable to those which apply in relation to various taxes. They are aimed at artificial schemes involving, for instance, deliberate 'asset-stripping' to render a company unable to acquit its liabilities or to prevent recovery of penalty-related debts by the Administrator.

10.88 The maximum penalties specified in these provisions are 2,000 penalty units or 7 years' imprisonment, or both. The maximum penalties are justified by the considerable financial incentive to avoid payment of liabilities under the scheme.

10.89 In general, the penalties are designed to ensure there is an adequate penalty for the worst possible case. The deliberate evasion of the administrative penalty following failure to relinquish ACCUs would have serious consequences for integrity of the scheme. There would be a strong financial incentive for an unscrupulous proponent to enter into avoidance arrangements. If scheme participants resorted to these tactics, it would mean that the number of ACCUs issued for projects would eventually be higher than the amount of greenhouse gas emissions abated. This could bring the scheme into disrepute and damage the ACCU market, to the detriment of other participants.

10.90 For example, a proponent might receive 400,000 ACCUs for a forestry project covering 1,000 hectares (assuming 400 tonnes of carbon dioxide equivalent per hectare are stored by the project). If the proponent was required to relinquish all ACCUs received (for example, because they cleared the forest), and they failed to relinquish, the resulting administrative penalty could be \$8 million (at \$20 per ACCU) or higher.

The possibility of imprisonment, as well as a pecuniary penalty, is needed to deter such conduct.

Procedure for relinquishment of units

10.91 The bill makes provision for the relinquishment of ACCUs where:

- units were issued as a result of the person providing false or misleading information [*Part 7, Division 2, clause 88*] (see below);
- a court order based upon fraudulent conduct is made [*Part 13, clause 171*] (see above);
- a sequestration project has been revoked by the Administrator [*Part 7, Division 3, clause 89*] (see chapter 3);
- a sequestration project is voluntarily terminated by the project proponent [*Part 3, Division 4, clause 32*] (see chapter 6); or
- the project proponent for a sequestration project deliberately reverses the carbon store or does not re-establish the carbon store following a natural disturbance [*Part 7, Division 3, clause 90 and 91*] (see permanence discussion in chapter 6).

Relinquishment where there has been false or misleading information

10.92 If a person has received ACCUs for a project because they gave false or misleading information to the Administrator, they would have to hand back the ACCUs [*Part 7, Division 2, clause 88*]. This applies for both sequestration offsets projects and emissions avoidance projects.

10.93 This applies if the information given by the person to the Administrator was false or misleading in a material particular [*Part 7, Division 2, clause 88(1)(d)*] and was:

- given in an application or in connection with an application under the bill or the regulations;
- contained in an offsets report; or
- contained in a notification under Part 6 of this bill [*Part 7, Division 2, clause 88(1)(c)*].

10.94 For the ACCUs to be required to be relinquished, the issue of the ACCUs must have been directly or indirectly attributable to the false or misleading information that the person provided [*Part 7, Division 2, clause 88(1)(e)*].

10.95 The Administrator may require the person to hand back a specified number of Kyoto or non-Kyoto ACCUs [*Part 7, Division 2, clause 88(2) and (4)*]. The number of Kyoto ACCUs which would need to be

handed back would not be greater than the number of Kyoto ACCUs which were issued to the person because of the false or misleading information [*Part 7, Division 2, clause 88(3)*]. Similarly, the number of non-Kyoto ACCUs which would need to be handed back would not be greater than the number of non-Kyoto ACCUs which were issued to the person because of the false or misleading information [*Part 7, Division 2, clause 88(5)*].

10.96 The project proponent has 90 days to comply with the requirement [*Part 7, Division 2, clause 88(6)*].

Procedure for relinquishment

10.97 ACCUs can be electronically relinquished by a registered holder through giving notice to the Administrator [*Part 15, Division 2, clause 175(1)*]. The notice must specify the units being relinquished, the reason why the units are being relinquished, and the account number of the Registry account where the units are held [*Part 15, Division 2, clause 175(2)*].

10.98 A relinquishment notice can be deemed to be given where a person is subject to a relinquishment requirement, and at the same time the Administrator is required to issue ACCUs to the person [*Part 15, Division 2, clause 176*]. This clause allows the Administrator to deduct the number of ACCUs that must be relinquished from the number of ACCUs that will be issued. It allows the Administrator to recover ACCUs subject to a relinquishment requirement and encourages compliance with the scheme.

10.99 Where Kyoto ACCUs are being relinquished, either voluntarily or as a requirement of the bill, a person has the option to transfer to the Commonwealth an equal number of substitute units instead of relinquishing the Kyoto ACCUs [*Part 15, Division 2, clause 177(1), (2)*]. The substitute units that can be transferred are:

- a certified emission reduction unit;
- an emission reduction unit;
- a removal unit;
- an assigned amount unit issued in Australia; or
- a prescribed eligible carbon unit [*Part 15, Division 2, clause 177(6)*].

10.100 If a person chooses to transfer substitute units instead of transferring Kyoto ACCUs, they must provide the Administrator with an electronic notice of this [*Part 15, Division 2, clause 177(2)*] and specify the substitute units being transferred and the reason the relinquishment requirement applied [*Part 15, Division 2, clause 177(3)*].

10.101 Where a person is relinquishing non-Kyoto ACCUs, either voluntarily or as a requirement of the Act, a person has the option to

transfer to the Commonwealth an equal number of substitute units instead of relinquishing the non-Kyoto ACCUs [*Part 15, Division 2, clause 178(1), (2)*]. The substitute units that can be transferred, and the procedure for notifying the Administrator is the same as for transfer of Kyoto ACCUs instead of relinquishment described above [*Part 15, Division 2, clause 178(2), (3), (6)*].

10.102 Failure to relinquish ACCUs or sufficient ACCUs, will lead to an administrative penalty, see above [*Part 15, Division 3, clause 179*]. These administrative penalties are a debt due to the Commonwealth [*Part 15, Division 3, clause 181*], and may be set-off against any amount payable to the person by the Commonwealth [*Part 15, Division 3, clause 182*].

10.103 Any overpayments of Administrative penalties must be refunded by the Commonwealth and there is provision for interest to be paid by the Commonwealth on those overpayments [*Part 15, Division 3, clause 183*].

Chapter 11

Review of decisions

Outline of chapter

- 11.1 This chapter addresses provisions in Part 24 of the bill, which provide for merits review of decisions.
- 11.2 Other relevant provisions are contained in Parts 2, 3 and 9 of the bill.

Context

- 11.3 The Government has committed to sound appeals processes for decisions under the scheme, including judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and merits review. The bill consistently provides for merits review by the Administrative Appeals Tribunal of administrative decisions that affect scheme participants, financially or otherwise.

Explanation of new law

Merits review

Decisions which are subject to merits review

11.4 There is an extensive list of decisions by the Administrator which are subject to merits review [*Part 24, Division 2, clause 240*]. A decision by the DOIC to refuse to endorse a methodology proposal because withheld information could substantially prejudice public submission is also reviewable [*Part 9, Division 2, clause 112(9) and 120(9)*], [*Part 24, Division 2, clause 245A*].

11.5 The objective of this approach is to ensure that decisions are correct and preferable according to the facts on which the decision was based, that all persons affected by a decision are treated fairly, and to encourage the quality, consistency, openness and accountability in decisions made by the Administrator and the DOIC.

11.6 The list does not include those decisions where the Administrator has no discretion, including for example, a decision by the Administrator to issue units to the holder of a certificate of entitlement which is automatic in character and not appropriate to merits review [*Part 2, Division 2, clause 11*].

11.7 The list also does not include decisions which are of a legislative character, for example, where they relate to the making of a methodology determination by the Minister [*Part 9, Division 2, clause 106(1)*], or where they relate to the making of regulations, for example, any requirements relating to project eligibility [*Part 3, Division 2, clause 27(4)(l)*]. The list also does not include decisions which are intermediate steps towards decisions which are of a legislative character, for example, the refusal of the DOIC to endorse a proposal for a methodology determination [*Part 9, Division 2, clause 112(2)(b)*] or advice by the DOIC to include an item on the positive list [*Part 3, Division 6, clause 41(2)*].

11.8 These exceptions to merits review are consistent with Government policy on administrative review and the Commonwealth Administrative Review Council publication *What Decisions should be Subject to Merit Review?*

11.9 The bill provides for two avenues of merit review: internal reconsideration by the Administrator and external review by the Administrative Appeals Tribunal.

Internal reconsideration

11.10 Where the decision is made by a delegate of the Administrator, the person affected by the decision may first apply for internal reconsideration by the Administrator [*Part 24, Division 2, clause 241*]. This arrangement provides an opportunity for the affected person to put their case directly to the Administrator, through a process that will generally be less costly and time consuming than external review.

11.11 An application for internal reconsideration must be made within 28 days after being informed of the decision or, if the Administrator extends the deadline, within the extended deadline [*Part 24, Division 2, clause 241(4)*].

11.12 The Administrator must make a decision on the application within 90 days of receiving it [*Part 24, Division 2, clause 243*].

11.13 That decision may be to affirm, vary or revoke the decision and a written statement of reasons must be provided to the applicant within 28 days after making the reconsidered decision [*Part 24, Division 2, clause 242*].

Application to the Administrative Appeals Tribunal

11.14 If the person affected is not satisfied with the outcome of internal reconsideration of a decision, he or she may apply to the Administrative Appeals Tribunal to review the decision. If the original decision was not made by a delegate of the Administrator, or was made by the Administrator, the person affected may apply directly to the Tribunal without going through internal reconsideration [*Part 24, Division 2, clause 244*].

Stay of proceedings

11.15 The court is empowered to stay proceedings for recovery of an administrative penalty or late payment penalty following failure to relinquish a particular number of Australian carbon credit units, while the decision to require relinquishment is subject to internal reconsideration or to an application for review by the Administrative Appeals Tribunal [*Part 24, Division 2, clause 245*].

11.16 In practice, the Administrator is unlikely to pursue recovery of debts associated with non-relinquishment while a relinquishment notice is under review. However, this provision provides greater certainty for scheme participants by clarifying their ability to access the courts to halt recovery proceedings

Chapter 12

Domestic Offsets Integrity Committee and Carbon Credits Administrator

Outline of chapter

12.1 This chapter addresses the establishment and functions of the Domestic Offsets Integrity Committee (DOIC). The specific requirements applying to the DOIC when it considers draft methodologies are covered in Chapter 5 of the explanatory memorandum on Methodology Determinations.

12.2 This chapter also sets out the appointment, functions and other matters relating to the Carbon Credits Administrator (the Administrator).

12.3 The relevant provisions are contained in Parts 9, 25, 26 and 27 of the bill.

Context

12.4 The value of Australian carbon credit units (ACCUs) issued under the scheme will depend on their environmental credibility, in particular confidence by purchasers and the public that each ACCU represents genuine emissions reductions equivalent to no less than one tonne of carbon dioxide. To provide additional confidence in the integrity of offsets methodologies and the value of ensuing ACCUs, an independent expert panel, the DOIC will assess draft methodologies and advise the Minister on whether they should be approved.

12.5 An interim DOIC was established in October 2010 to commence the work of assessing methodologies and enable a prompt start of the scheme. The bill provides for this work and any methodologies endorsed by the DOIC to be transferred to the statutory scheme under transitional provisions.

12.6 The Government's intention for the Carbon Credits Administrator is to establish a regulator similar to the Greenhouse and Energy Data Officer under the *National Greenhouse and Energy Reporting Act 2007*. This Administrator will be required to make independent decisions that are based on the scheme's objectives and requirements set out in the bill.

Explanation of new law

Establishment and functions of the DOIC

12.7 The DOIC will be constituted to assess and advise the Minister on matters relating to the making, variation or revocation of methodology determinations *[Part 26, Division 1, clause 254] [Part 9, Division 2, clause 106(4)(b)] [Part 9, Division 2, clause 114(2)(b)] [Part 9, Division 2, clause 123(2)]*.

12.8 The DOIC will also advise the Minister and the Secretary of the responsible Department about matters that relate to offsets projects and are referred by the Minister or the Secretary *[Part 26, Division 1, clause 255]*.

12.9 The DOIC may also do anything incidental or conducive to the performance of its specified functions *[Part 26, Division 1, clause 255(d)]*.

Membership of the DOIC

12.10 The DOIC must have five to six members, including the Chair *[Part 26, Division 2, clause 256]*.

12.11 The Minister must be satisfied that anyone appointed to the DOIC has substantial experience or knowledge in at least one field relevant to the functions of the DOIC *[Part 26, Division 2, clause 257(2)]*. As the DOIC's overarching function is to ensure the environmental integrity of methodologies used under the scheme, it is envisaged that a person with strong general environmental credentials will be appointed to the DOIC.

12.12 The Minister must ensure that one DOIC member is an SES officer or holds an Executive Level 2 position in the Department *[Part 26, Division 2, clause 257(5)]*. The main purpose of including a departmental officer on the DOIC is to ensure that proposed methodologies are consistent with methods used in Australia's National Greenhouse Accounts, which are compiled by the Department.

12.13 The Minister must also ensure that one DOIC member is an officer of the Commonwealth Scientific and Industrial Research Organisation (CSIRO), nominated by the Organisation's Chief Executive *[Part 26, Division 2, clause 257(6)]*. The CSIRO officer will assist the DOIC in its assessment of methodologies by accessing the considerable scientific research capabilities and information held by CSIRO.

12.14 Members of the DOIC hold office on a part time basis *[Part 26, Division 2, clause 257(7)]*.

12.15 All members are to be appointed for a period of up to five years *[Part 26, Division 2, clause 258]*.

12.16 The Minister can appoint an acting Chair or acting member of the DOIC when there is a vacancy in the office of the Chair or in the

office of a member; or when the Chair or a member is absent from duty or absent from Australia [*Part 1, clause 6*] [*Part 26, Division 2, clause 259*].

12.17 The Minister can terminate the appointment of a DOIC member, but only on narrow grounds, including bankruptcy, misbehaviour, physical or mental incapacity, unsatisfactory performance, or repeated absence from meetings of the DOIC [*Part 26, Division 2, clause 267*].

12.18 The bill is not prescriptive as to how the DOIC should make decisions. Subject to some minimum procedural requirements which may be prescribed in regulations, the DOIC can regulate proceedings at its meetings as it sees appropriate. The regulations could include matters relating to the convening of meetings, the constitution of a quorum and the manner of decision-making [*Part 26, Division 2, clause 260(1)*].

12.19 The bill contains a number of provisions aimed at ensuring that DOIC members do not have interests that conflict with the proper performance of their duties. In particular, the bill establishes:

- a general requirement that members must give written notice to the Minister of all interests that conflict, or could conflict, with the proper performance of their functions [*Part 26, Division 2, clause 261*];
- a specific requirement that members disclose to a meeting of the DOIC a conflict of interest in any matter before the DOIC, and absent themselves from any deliberation or decision with respect to that matter unless the DOIC determines otherwise [*Part 26, Division 2, clause 262*]; and
- a prohibition on any member from engaging in any paid employment that conflicts, or may conflict, with the proper performance of his or her duties [*Part 26, Division 2, clause 263*].

12.20 A failure to comply with the above requirements may provide grounds for the termination of a member's appointment [*Part 26, Division 2, clause 267(2)*].

12.21 Members of the DOIC are to be paid at a rate determined by the Remuneration Tribunal, the independent tribunal established under the *Remuneration Tribunal Act 1973* to handle the remuneration of key Commonwealth offices. Where no determination has been made by the Tribunal, members are paid at the rate prescribed in regulations [*Part 26, Division 2, clause 264*].

12.22 The Minister may grant leave of absence to the Chair of the DOIC on terms and conditions that the Minister determines. The Chair of the Committee may grant leave of absence to a DOIC member on terms and conditions decided by the Chair [*Part 26, Division 2, clause 265*].

12.23 A Committee member may resign by giving the Minister a written resignation [*Part 26, Division 2, clause 266*].

12.24 In the event that any terms and conditions of employment need to be specified and are not already dealt with in the bill, the Minister may make a determination on those matters [*Part 26, Division 2, clause 268*].

12.25 The responsible Department will provide secretariat functions for the DOIC, and may be assisted by any other Commonwealth Department, agency or authority, where their services are made available [*Part 26, Division 2, clause 269*].

Establishment and functions of the Carbon Credits Administrator

Carbon Credits Administrator

12.26 A Carbon Credits Administrator (the Administrator) will be created to manage the scheme [*Part 25, clause 246*].

Functions of the Administrator

12.27 The functions of the Administrator are as contained in the main bill, the *Australian National Registry of Emissions Units Bill 2011*, or any other law of the Commonwealth, such as the *Freedom of Information Act 1982*. The Administrator has a broad discretion to undertake any activities that will assist him or her perform these functions [*Part 25, clause 247*].

Appointment of the Administrator

12.28 The Administrator will be a Senior Executive Service employee of the responsible Department appointed by the Secretary by written instrument [*Part 25, clause 246(2)*].

12.29 The instrument of appointment is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 25, clause 246(3)*]. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required

Acting Administrator

12.30 The Secretary may appoint a person to act as Administrator when there is a vacancy, or the Administrator is absent or overseas or is otherwise unable to perform his or her duties [*Part 25, clause 248(1)*]. The Acting Administrator must meet the same eligibility requirements as the Administrator [*Part 25, clause 248(2)*]. Should there be a problem with the appointment process, for example, because the Administrator returns from leave while there is an Acting Administrator, the actions of the Acting Administrator are valid [*Part 25, clause 248(3)*].

Delegation by the Administrator

12.31 The Administrator has the power to delegate some or all of his or her duties to a substantive or acting Senior Executive Service (SES) or Executive Level 2 employee in the Department. A delegate must comply with any written directions of the Administrator [*Part 25, clause 249*].

Because the Administrator is only a single SES officer, it is necessary for them to be able to delegate to a lower level officer. As the bill prescribes most powers of the Administrator, the Administrator's function involves very little exercise of discretion and therefore such a delegation is appropriate. However the power to make, vary or revoke a legislative instrument cannot be delegated by the Administrator [*Part 25, clause 249(3)*].

Persons assisting the Administrator

12.32 The Administrator may be assisted by Australian Public System employees in the Department made available for the purpose by the Secretary. The Administrator may also be assisted by officers and employees of other Commonwealth or state and territory agencies and authorities [*Part 25, clause 250 and 251*].

Consultants

12.33 The Administrator may engage suitably qualified consultants on behalf of the Commonwealth and set the terms and conditions of their engagement [*Part 25, clause 252*].

Minister may give directions to the Administrator

12.34 The Minister may provide written directions to the Administrator of a general nature in relation to performance of his or her duties. The Administrator must comply with the Minister's direction [*Part 25, clause 253*].

12.35 This provision does not empower the Minister to direct the Administrator on any particular matters or cases, such as the declaration of an eligible offsets project, the issuing of ACCUs to a project proponent, or imposing a carbon maintenance obligation. Administrative decisions such as these must be made independently by the Administrator or their delegate.

Chapter 13

Publication of information and secrecy

Outline of chapter

13.1 This chapter describes information which will be collected under the scheme and be made publicly available on the Administrator's website or a public Register of Offsets Projects (the Register), the protection of confidential information, and disclosure of protected information to entities other than the Administrator for legitimate purposes.

13.2 The relevant provisions are contained in Parts 12 and 27 of the bill.

Context

13.3 Publication of information is important to promote transparency and public confidence in the scheme, as well as provide factual information to the public for purposes such as land conveyances. Some of the provisions are required in order to meet specific obligations that Australia has under the Kyoto Protocol.

13.4 The scheme seeks to protect the commercially sensitive information provided to the Administrator by ensuring that any disclosure is related to the purpose for which the information was collected and is carried out within specified constraints.

Explanation of new law

Publication of Information

Register of offsets projects

13.5 The Administrator will maintain an up-to-date, web-based Register, which lists abatement projects under the scheme [*Part 12, Division 5, clause 167(1) and (4)*].

13.6 The Register will assist to promote scheme transparency on many aspects of projects approved under the scheme. This will assist the public and carbon markets to make informed judgements as to the integrity of ACCUs issued under the scheme. It will also allow potential buyers to locate potential sources of ACCUs and to identify projects with attributes that may be of interest to the buyer, such as its benefits for biodiversity conservation.

13.7 The purpose of the Register is also to assist with land conveyancing. People wanting to buy land that has a sequestration project will need to know the exact location of the project, when it was established, what kind of project it is, how many units have been issued and whether any units have been relinquished. This will allow them to factor into the sale price of the land the potential costs (including opportunity costs) and benefits of the project.

Information on the Register

13.8 The Register must set out the following information about each project:

- The name of the project, the project proponent and a description of the project [*Part 12, Division 5, clause 168(1)(a), (c) and (f)*]. This identifying information is needed to distinguish between projects.
- The location of the project and the project area [*Part 12, Division 5, clause 168(1)(b), (c)*]. This information is for conveyancing purposes and may be of general public interest. For example, regional bodies and state governments may have an interest in the monitoring the number and type of projects, as well as the amount of abatement they generate.
- The name of the applicable methodology determination used by the project [*Part 12, Division 5, clause 168(1)(g)*].
- Whether the project declaration has been made conditional on regulatory approvals being obtained prior to the end of the first crediting period [*Part 12, Division 5, clause 168(1)(h)*].
- Whether the project is consistent with the relevant regional natural resource management plan [*Part 12, Division 5, clause 168(1)(i)*]. This provision is to create an incentive for projects to be consistent with regional plans. For reputational reasons, buyers are less likely to want Australian carbon credit units (ACCUs) from projects that are known to be inconsistent with regional plans.
- Whether the project is subject to the voluntary automatic cancellation regime [*Part 12, Division 5, clause 168(1)(j)*]. This is so that consumers who have purchased services such as tree-planting services can readily identify that while the activity they have financed has been included in the scheme, it will not be double counted, and the proponent will not receive both ACCUs and the payment for the tree-planting service.
- If any Kyoto or non-Kyoto ACCUs have been issued for a project, the total number of ACCUs issued, the financial year in which they have been issued, and the person to whom they

have been issued must be included on the Register [*Part 12, Division 5, clause 168(1)(k) and (l)*].

- Whether any ACCUs have been relinquished and whether the project is subject to a carbon maintenance obligation [*Part 12, Division 5, clause 168(1)(m) and (n)*]. This information is to assist with conveyancing. This information will tell someone who is interested in buying the land whether more ACCUs are likely to be issued for the area, how many ACCUs they would have to hand back if they wanted to remove carbon stores and whether the land is subject to a carbon maintenance obligation.
- If Kyoto ACCUs have been issued, how many (if any) have been exchanged for different Kyoto units [*Part 12, Division 5, clause 168(1)(k)*]. The Kyoto rules require information relating to Kyoto units to be published.
- Whether the project is a joint implementation project [*Part 12, Division 5, clause 168(1)(d)*]. The Kyoto rules require this information to be published. If the project is a joint implementation project, other information that is specified in the regulations will also be published [*Part 12, Division 5, clause 168(1)(p)*].
- Information about environmental or community benefits of a project [*Part 12, Division 5, clause 168(1)(o)(i)*]. This will assist buyers who have a preference, and are willing to pay a premium, for ACCUs issued for projects that generate particular co-benefits.
- Any other information about the project that the Administrator considers relevant [*Part 12, Division 5, clause 168(1)(q)*].

13.9 Information about community and social benefits must meet the requirements specified in the regulations [*Part 12, Division 5, clause 168(1)(o)(iii)*]. It is intended that the regulations will specify an environmental and social co-benefits index, to provide a credible, low cost way for proponents to rate, market and obtain a premium for co-benefits, for example, protecting biodiversity.

13.10 The Register must also identify areas of land that were formerly project areas which are subject to carbon maintenance obligations, and set out the total number of ACCUs issued in relation to the project [*Part 12, Division 5, clause 168(3)*]. This information will tell someone who is interested in buying the land whether they would have continuing obligations to maintain carbon stores or a positive obligation to restore carbon stores to the benchmark sequestration level.

13.11 Project proponents can request that information about the project area not be included on the Register [*Part 12, Division 5, clause 169(1)(a)*]. This will allow the location of projects to be kept confidential, for example, where publication would pose security risks.

13.12 A request to withhold information about a project area must be in writing and in an approved form [*Part 12, Division 5, clause 169(2)*]. The Administrator would approve the request if it was satisfied that publishing the information would substantially prejudice a proponent's commercial interests and that this prejudice outweighs the public interest in publishing the information [*Part 12, Division 5, clause 169(1)(b)*]. There would be a significant public interest in publishing the project area for a sequestration offsets project because anyone wanting to take an interest in the project land would want to know the location of the project.

13.13 The Administrator will take all reasonable steps to make a decision about the request within 30 days and will advise the project proponent in writing if the request is refused [*Part 12, Division 5, clause 169(3) and (4)*]. This provision is not intended to result in the invalidity of a decision made after that time but imposes a duty to take all reasonable steps to make the decision within that timeframe.

Information about relinquishment requirements

13.14 The Administrator must publish on their website information about relinquishment requirements, including the name of the person and the details of the relinquishment requirement [*Part 12, Division 4, clause 164(1) and (2)*].

13.15 This information is of relevance to the carbon market, which has a strong interest in the integrity of the scheme and whether particular abatement providers are complying with scheme obligations. Providing the public and potential carbon market buyers with information about relinquishment is likely to promote scheme compliance.

13.16 The Administrator will also indicate on their website whether:

- the person has relinquished ACCUs to meet a relinquishment requirement and the number of ACCUs relinquished [*Part 12, Division 4, clause 166*];
- whether the relinquishment requirement is being reconsidered by the Administrator or by the Administrative Appeals Tribunal, and the outcome of these reviews [*Part 12, Division 4, clause 164(3)*]; or
- whether a late penalty payment has been issued with respect to a relinquishment requirement and the details of the unpaid penalty amount [*Part 12, Division 4, clause 165*].

13.17 These provisions are to ensure that public information about relinquishment is complete, and presents a fair and accurate picture of efforts by project proponents to comply with scheme obligations.

13.18 This information will also enable the Administrator to be made accountable for the quality of its decisions making and decision-making processes. It will show how many relinquishment notices the Administrator has been asked to reconsider, whether its decisions in relation to relinquishment are the subject of administrative appeal and whether the tribunal has upheld or amended the Administrator's decisions.

Information about units

13.19 The Administrator is required to publish and keep up-to-date information about the number and characteristics of the ACCUs it has issued. This is to provide regular and accurate information to the market about the supply of different kinds of ACCUs and facilitate price discovery. Timely market information can help to make changes in the price of ACCUs more gradual and predictable. Publishing information about the characteristics of ACCUs is also intended to inform retail investors and to enable streamlining of product disclosure requirements under the *Corporations Act 2001*. As this information will be published and kept up to date, it will not be necessary for the Commonwealth to issue a product disclosure statement or prospectus in relation to ACCUs.

13.20 Specifically, the administrator must publish on its website:

- the name of each person that receives ACCUs and the total number of credits issued, as soon as practical after the ACCUs are issued [*Part 12, Division 2, clause 160*];
- the name of each person that voluntarily cancels ACCUs and the total number of credits cancelled as soon as practical after carbon credits are issued [*Part 12, Division 2, clause 160*];
- a quarterly report setting out the total number of credits issued over the quarter [*Part 12, Division 2, clause 161*]; and
- an up-to-date statement setting out the characteristics of the units issued [*Part 12, Division 2, clause 162*].

Secrecy

Primary disclosure offences

13.21 The bill seeks to make it an offence for a person who is (or has been) a public official to disclose or use 'protected information' unless one of a number of exceptions apply. 'Protected information' is, in broad terms, information obtained in an official capacity. The penalty for this offence is up to two years' imprisonment or 120 penalty units (which currently equates to \$15,600), or both [*Part 27, clause 270(1)*]. This penalty is

the same as applies to a similar offence in secrecy provisions in section 23 of the *National Greenhouse and Energy Reporting Act 2007*.

Exceptions to primary disclosure offences

13.22 In broad terms, the exceptions – that is, the circumstances in which ‘protected information’ can be disclosed or used – are:

- disclosure or use for the purposes of this Act or a legislative instrument under this Act [*Part 27, clause 271*];
- disclosure to the Minister [*Part 27, clause 272*];
- disclosure to the Secretary of the Department (or a person authorised by the Secretary), where the disclosure is to advise the Minister or facilitate the monitoring of Australia’s compliance with international climate change obligations [*Part 27, clause 273*];
- disclosure by the Administrator or the Chair of the DOIC to a Royal Commission [*Part 27, clause 275*];
- disclosure to specified agencies, bodies and persons where the Administrator is satisfied that the information will assist those agencies in carrying out their functions [*Part 27, clause 276*]. These include:
 - the Greenhouse and Energy Data Officer
 - Australian Carbon Trust Limited (which will require information about ACCUs issued under the scheme in order to administer the Carbon Neutral Program under the National Carbon Offset Standard Carbon)
 - a prescribed professional disciplinary body
 - a person or body which administers schemes that issue prescribed eligible carbon units;
- disclosure to certain operators of financial markets and clearing and settlement facilities, where that body is specified in regulations and where the Administrator is satisfied that the information will assist the body in carrying out its functions, including monitoring and compliance [*Part 27, clause 277*];
- disclosure with the consent of the affected person [*Part 27, clause 278*];
- disclosure necessary to prevent or lessen a serious and imminent threat to the life or health of an individual [*Part 27, clause 279*];
- disclosure where the material is already publicly available [*Part 27, clause 280*];

- disclosure of summaries of protected information or statistics derived from protected information, where the release of the summaries or statistics is not likely to enable the identification of a person [Part 27, clause 281];
- disclosure by the Administrator or the Chair of the DOIC to law enforcement agencies [Part 27, clause 282 and 283];
- disclosure to a person undertaking a review of the Act [Part 27, clause 284]; and
- disclosure to a person reviewing Australia’s compliance with its international obligations relating to reporting of greenhouse gas emissions [Part 27, clause 285].

13.23 To assist methodology applicants and the government in continued methodology development and in improving accounting techniques, some protected information can be disclosed or used when 7 years have passed since the information was provided to the Administrator. This applies to information relating to offsets projects or methodologies which was provided when the application for a project declaration or a methodology determination was made. The Administrator may disclose this information if the disclosure or use is to facilitate the development of methodology determinations [Part 27, clause 274(1) and (2)]. However, this provision for disclosure does not apply to personal information within the meaning of the *Privacy Act 1988* [Part 27, clause 274(3)].

13.24 A document made for the purpose of disclosure to a Royal Commission is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [Part 27, clause 275(4)]. The provision is included to indicate that an exemption from the Legislative Instruments Act is not sought or required.

Evidential burden

13.25 In any prosecution, the defendant will have the evidential burden with respect to the exceptions outlined above [Part 27, clause 274(1) and (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 (see section 13.3 of the *Criminal Code*).

Secondary disclosure offences

13.26 The bill also contains measures to ensure that once protected information has been disclosed, further disclosure is prohibited unless

- the Administrator has consented to the disclosure, and

- the disclosure was for a listed purpose.

13.27 The listed purposes are related to the purpose for which the information was collected and include taking disciplinary or other action, to enforce the criminal law, to enforce a law imposing a pecuniary penalty and to protect public revenue [Part 27, clause 276(4) and (5)] [Part 27, clause 277(4) and (5)] [Part 27, clause 282(4) and (5)] [Part 27, clause 283(4) and (5)].

13.28 Where an offence of secondary disclosure is asserted, the defendant will have an evidential burden to show that the information was disclosed for a relevant purpose. This is appropriate as the purpose of disclosure will be within the defendant's knowledge and this will assist with the protection of information.

13.29 As an extra safeguard, the Administrator or the DOIC may, in writing, impose conditions on further disclosure of protected information [Part 27, clause 276(6)] [Part 27, clause 277(6)] [Part 27, clause 282(6)] [Part 27, clause 283(6)].

13.30 A person commits an offence if they engage in conduct in breach of a condition. This offence is punishable by a penalty of up to two years' imprisonment or 120 penalty units (currently \$13,200), or both [Part 27, clause 276(7)] [Part 27, clause 277(7)] [Part 27, clause 282(7)] [Part 27, clause 283(7)].

13.31 Conditions made under these sections are not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [Part 27, clause 276(8)] [Part 27, clause 277(8)] [Part 27, clause 282(8)] [Part 27, clause 283(8)]. These provisions is included to indicate that an exemption from the *Legislative Instruments Act 2003* is not sought or required.

Chapter 14

Miscellaneous provisions

Outline of chapter

14.1 This chapter addresses the miscellaneous provisions (other than transitional provisions) which are not addressed in other chapters of the explanatory memorandum.

Context

14.2 The miscellaneous provisions are principally contained in Part 28 of the bill. This chapter also includes some discussion of guidance provisions in Part 1 (Preliminary) of the bill and the simplified outlines.

Explanation of new law

Simplified outline

14.3 To assist readers, the bill includes a simplified outline of the scheme [*Part 1, clause 4*].

14.4 Each Part of the bill also contains a simplified outline of that Part's contents.

Commencement

14.5 The substantive provisions of the bill will commence on a day to be proclaimed. If any of the provisions do not commence within six months of the Royal Assent, then they will commence the day after the six months expires [*Part 1, clause 2*].

14.6 This will allow sufficient time to prepare for implementation of the scheme. Preparation will include appointment of the Administrator, establishment or finalisation of scheme processes and IT systems, recruitment of staff, and the provision of assistance for potential applicants.

General functions of the Administrator

14.7 As well as the specific functions of the Administrator provided through the bill, the Administrator has various general functions.

14.8 The Administrator will monitor and promote compliance, conduct and co-ordinate education programs and advise and assist persons

(and their agents) in relation to their compliance obligations [*Part 28, clause 286(a), (b), (c), (e), (f) and (g)*]. This is expected to be a significant part of the Administrator's work in the period leading to the commencement of the scheme and the initial years of the bill's operation.

14.9 The Administrator will also be empowered to collect, analyse, interpret and disseminate statistical information relating to the operation of the Act and associated provisions [*Part 28, clause 286(i)*].

14.10 This is expected to add to the body of information available to persons wishing to purchase abatement and other people who are interested in how the scheme is operating. Other sources of information are the public information released under Part 12 of the bill.

14.11 The Administrator will liaise with regulatory and other relevant bodies about co-operative arrangements for matters relating to the bill or offsetting carbon emissions more generally [*Part 28, clause 286(h)*]. This liaison may be with domestic or overseas bodies, and is intended to facilitate international linking of the CFI with overseas schemes, and to enable the Administrator to learn from experience with other registries.

14.12 The Administrator will also advise the Minister on matters relating to the Act [*Part 28, clause 286(d)*].

Computerised decision-making

14.13 The Administrator will have the capacity to use computer programs for the purposes of decision making [*Part 28, clause 287*]. For example, the Registry may embed decisions rules based on the provisions of the bill, so that Registry functions can be automated and transactions requested by account holders can be carried out efficiently and rapidly.

Electronic notices

14.14 Many actions in relation to the Registry may be done by electronic means. An electronic notice transmitted to the Administrator is defined in the bill [*Part 1, clause 5, definition of 'electronic notice transmitted to the Administrator'*] [*Part 1, clause 7*]. Regulations may prescribe requirements in relation to the security and authenticity of notices transmitted to the Administrator including identification checking processes and encryption of those processes [*Part 1, clause 5(2)*]. This is to give the Administrator the power to determine the level of encryption and identification checking required for different actions in order to maintain the integrity of the Registry.

Requests for further information

14.15 Several clauses in the bill make provision for the Administrator to refuse to consider an application if the Administrator requires additional information in relation to the application and the applicant does not comply. The applications that may be affected by such a refusal are:

- a certificate of entitlement [*Part 2, Division 3, clause 12 and 14*];
- a declaration of an eligible offsets project [*Part 3, Division 2, clause 22 and 24*];
- recognition as an offsets entity [*Part 4, clause 60 and 62*];
- a subsequent crediting period [*Part 5, Division 3, clause 70 and 72*];
- the transition of an offsets project from a prescribed non-CFI offsets scheme [*Part 7, Division 4, clause 92 and 94*].

14.16 The Administrator may only request information concerning an application where that information is relevant to that application, and it must exercise this power in a reasonable way [*Part 28, clause 288*]. This would prevent the Administrator from making unreasonable requests for additional information following receipt of any type of these applications.

14.17 Similarly, the DOIC may only request information where it is relevant to the matter to which the application relates and must exercise the power reasonably [*Part 28, clause 289*], in relation to:

- a determination of an offsets methodology [*Part 9, Division 2, clause 108 and 119*]; and
- variation of a determination of an offsets methodology [*Part 9, Division 2, clause 116 and 118*].

Agency

14.18 The bill confirms that a project proponent may appoint an agent to take any actions under the bill including making an application, giving a report or providing information, without limiting the principles of agency [*Part 28, clause 290*]. This makes clear that project proponents may engage external expertise to assist with fulfilling scheme requirements. However, a project proponent must still meet any eligibility requirements and be responsible for meeting scheme obligations.

Commonwealth

Delegation by the Minister

14.19 The Minister will be able to delegate any or all of his or her functions or power under the bill or regulations to the Secretary or a senior executive service (SES) employee, or acting SES employee of the Department. This power does not extend to making, varying or revoking legislative instruments. The delegate must comply with any direction of the Minister [*Part 28, clause 291*].

14.20 The Minister has various powers under the Bill. They include the power to direct the Administrator to transfer a Kyoto unit from a Commonwealth holding account to a voluntary cancellation account for

the purposes of voluntary automatic unit cancellation regime [*Part 2, Division 3, clause 19(2)(c)(i)*] or to require advice from the DOIC regarding the positive list for additionality purposes [*Part 3, Division 6, clause 41(2)*].

Delegation by the Secretary

14.21 The Secretary may also delegate his or her functions to a senior executive service (SES) employee, or acting SES employee of the Department. The delegate must comply with any direction of the Secretary [*Part 28, clause 293*]. The Secretary has powers to appoint the Administrator and make APS employee available for the Administrator [*Part 25, clause 246 and 251*].

State and Territories

Delegation by a State Minister or a Territory Minister

14.22 The Minister of a state or territory may delegate any functions or powers under the bill to a person who is an officer or employee of the state or territory and who holds or performs duties that is equivalent to a position occupied by a senior executive service employee in the Australian Public Service [*Part 28, clause 292*]. For instance this could be used to delegate the power to consent to reforestation projects on Crown land.

Concurrent operation of state and territory law

14.23 The bill is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with it [*Part 28, clause 294*].

Arrangements with the states and territories

14.24 The Minister is empowered to make arrangements with a Minister of a state, the Australian Capital Territory, Northern Territory or Norfolk Island with respect to the administration of the bill. A copy of each instrument by which such an arrangement is made is to be published in the Commonwealth Gazette [*Part 28, clause 296(9)*]. Such an instrument is not of a legislative character and is therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 28, clause 296(10)*]. This provisions is included to indicate that an exemption from the *Legislative Instruments Act 2003* is not sought or required.

14.25 Arrangements with another state or territory could include arrangements for magistrates to exercise power in relation to the granting of monitoring warrants [*Part 18, Division 3, clause 198, 199*] and for the exercise of powers by land registration officials [*Part 3, Division 5, clause 39 and 40*].

Legal professional privilege

14.26 The doctrine of legal professional privilege has been described by the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 as follows:

‘It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.’

14.27 The bill includes an explicit provision indicating that it will not affect the law relating to legal professional privilege [*Part 28, clause 295*]

Liability for damages

14.28 The bill specifies that certain persons are not liable to an action for damages for acts done in good faith (or omissions) in the performance of their functions under the bill or the associated provisions. The persons include the Minister, the Minister’s delegates, the Administrator and members of the DOIC and auditors appointed by the Administrator to perform other audits [*Part 28, clause 297*]. The type of provision is common in Commonwealth legislation and enables persons with statutory functions to perform their functions without fear of legal action being taken against them, as long as they perform those functions in good faith.

Executive power

14.29 The bill does not limit the executive power of the Commonwealth [*Part 28, clause 298*].

14.30 This is to make it clear that the bill does not, for example, limit the Commonwealth’s executive power to take various actions to meet Australia’s obligations under the Kyoto Protocol.

14.31 The bill extends to the external Territories, including Christmas Island and Norfolk Island, so that carbon offsets opportunities can be pursued in those places [*Part 1, clause 9*].

Notional payments by the Commonwealth

14.32 The Crown may be liable for an administrative penalty or late payment penalty under the Act [*Part 1, clause 8*].

14.33 To accommodate this, by ensuring such amounts are notionally payable by the Commonwealth, provision is made for the Minister for Finance to give written directions relating to transfers of amounts within or between accounts operated by the Commonwealth [*Part 28, clause 299*].

Compensation for acquisition of property

14.34 The bill ensures that if the scheme would result in an acquisition of property from a person other than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation. Provision is included for the institution of proceedings to recover such compensation if agreement has not been reached. The terms ‘acquisition of property’ and ‘just terms’ have the same meaning as in section 51(xxxi) of the Constitution [*Part 28, clause 300*].

Native Title Act and Racial Discrimination Act not affected

14.35 The approach to native title is intended to be consistent with the *Native Title Act 1993* and the *Racial Discrimination Act 1975*. To reflect this intention, and to ensure that native title continues to be protected, the bill contains statements that the operation of the *Native Title Act 1993* and *Racial Discrimination Act 1975* are not affected [*Part 28, clause 301 and 302*]. See above chapter 4.

Introduced animal emissions avoidance projects

14.36 The bill links the qualification of introduced animal emissions avoidance projects (and resulting eligibility for the benefits under the bill) to the meeting of Australia's obligations under art 8(h) of the *Convention on Biodiversity 1993* in reliance on the external affairs power (section 51(xxix) of the *Constitution*) [*Part 28, clause 303*].

Review of Bill

14.37 Given the evolving nature of offsets schemes, formal reviews of the scheme are one way of ensuring that it is meeting integrity principles, including that abatement is additional, sequestration projects are meeting permanence requirements, and that projects are not resulting in unintended outcomes.

14.38 The Minister must ensure that the first review of the scheme is completed and a report tabled in Parliament by 31 December 2014. The Minister must ensure that subsequent reviews are conducted and reports tabled within 3 years of the previous review. Reviews must include public consultation [*Part 28, clause 306*].

Regulations

14.39 The bill includes a general regulation making power [*Part 28, clause 307*].

14.40 The regulations may apply, adopt, or incorporate with or without modification, a matter contained in another instrument as it exists from time to time, despite subsection 14(2) of the *Legislative Instruments Act 2003*. For example, the regulations could refer to a standard published by

the International Organization for Standardisation, as in force from time to time. The instrument referred to must be published on the Administrator's website unless this would infringe copyright [*Part 28, clause 304*].

14.41 In addition, the regulations may confer a power to make a decision of an administrative character on the Administrator [*Part 28, clause 305*].

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Part 9, Division 2, clause 106(7)	5.1
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Part 9, Division 2, clause 114(5)	5.84
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Part 11, Division 3, clause 157(1)(b)(ii)	9.63
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Part 12: Publication of information

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Part 12, Division 5, clause 168(1)(b), (c)	13.8
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Part 12, Division 5, clause 168(1)(g)	13.8
Part 12, Division 5, clause 168(1)(h)	13.8
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Part 12, Division 5, clause 168(1)(j)	13.8
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Part 12, Division 5, clause 169(2)	13.12
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Part 13: Fraudulent conduct

<i>Bill reference</i>	<i>Paragraph number</i>
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Part 14: Voluntary cancellation of Australian carbon credit units

<i>Bill reference</i>	<i>Paragraph number</i>
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Part 15: Relinquishment of Australian carbon credit units

<i>Bill reference</i>	<i>Paragraph number</i>
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<i>Bill reference</i>	<i>Paragraph number</i>
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Part 17: Record-keeping and project monitoring requirements

<i>Bill reference</i>	<i>Paragraph number</i>
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Part 18: Monitoring powers

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Part 18, Division 2, clause 197	10.72
Part 18, Division 2, clause 197(1)	10.25
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Part 18, Division 3, clause 201	10.29, 10.72, 10.74
Part 18, Division 3, clause 202	10.35, 10.36
Part 18, Division 3, clause 202(1)	10.33
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Part 18, Division 4, clause 204	10.3
Part 18, Division 4, clause 205	10.3
Part 18, Division 4, clause 206	10.3
Part 18, Division 4, clause 207	10.3
Part 18, Division 4, clause 208	10.3
Part 18, Division 5, clause 209	10.31
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Part 19, Division 2, clause 214(4) and 215(3)	8.16
Part 19, Division 2, clause 214(6) and 215(4)	8.17
Part 19, Division 2, clause 214(8)	8.14
Part 19, Division 2, clause 215	8.15, 10.54
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Part 21: Civil penalty orders

<i>Bill reference</i>	<i>Paragraph number</i>
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Part 24: Review of decisions

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Part 25, clause 248(3)	12.3
Part 25, clause 249	12.31
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Part 26, Division 2, clause 257(6)	12.13
Part 26, Division 2, clause 257(7)	12.14
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Part 26, Division 2, clause 260(1)	12.18
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Part 26, Division 2, clause 262	12.19
Part 26, Division 2, clause 263	12.19
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Part 26, Division 2, clause 265	12.22
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Part 27, clause 274(1) and (2)	13.23, 13.25
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Part 27, clause 276(8)	13.31
Part 27, clause 277	10.72, 13.22
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Part 27, clause 277(6)	13.29
Part 27, clause 277(7)	13.3
Part 27, clause 277(8)	13.31
Part 27, clause 278	13.22
Part 27, clause 279	13.22
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Part 27, clause 282(4) and (5)	13.27
Part 27, clause 282(6)	13.29
Part 27, clause 282(7)	13.3
Part 27, clause 282(8)	13.31
Part 27, clause 283	10.72
Part 27, clause 283(4) and (5)	13.27
Part 27, clause 283(6)	13.29
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