



National Greenhouse and Energy Reporting Amendment Bill 2008

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National Greenhouse and Energy Reporting Amendment Bill 2008

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Portfolio: Climate Change and Water

Commencement: Clauses 1-3, and Schedule 1, items 2-7, 11, 13-22 and 24-35 commence on Royal Assent. Schedule 1, items 1, 8-10, 12, and 23 commence on the date of Proclamation or 6 months after Royal Assent, whichever is the earlier.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *National Greenhouse and Energy Reporting Act 2007* (the Act) to:

- make mandatory the separate disclosure of scope 1 (direct) and scope 2 (indirect) greenhouse gas emissions
- allow the Minister to specify conditions, rating systems and the particular rating for the use of alternative methods, which have been determined by the Minister, to measure greenhouse gas emissions
- allow publication of information relating to those methods of measurement where the use of those methods satisfies the conditions
- extend the obligations to comply with an external audit to members of a registered corporation's group
- amend provisions relating to reporting requirements.

Background

The Act was passed in September 2007 establishing a national mandatory corporate reporting system for, and dissemination of information related to, greenhouse gas emissions, energy consumption and production. The reporting obligations under the Act are intended to lay the foundation for the proposed national emissions trading scheme, due to be introduced in 2010.

Probably the most controversial issue contained in the (then) Bill was the potential override of existing State and Territory Greenhouse and energy reporting schemes by the national scheme to be established under the Act. This was partially addressed by

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amendments made by Parliament to clauses 5 and clauses 27. Background on this and other aspects of the Bill can be found in the [Bills Digest](#) prepared at the time of its introduction. Note that the amendments were made after the Digest was produced so the Digest does not address the amendments.

One of the objects of the Act, set out in section 3, is to introduce a single national reporting framework to 'underpin the introduction of an emissions trading scheme in the future'. Both the Garnaut [Climate Change Review](#)¹ and the Carbon Pollution Reduction Scheme [Green Paper](#)² state that although the National Greenhouse Energy Reporting Scheme (NGERS) will be the basis for the carbon emissions scheme:

However, in some areas, NGERS will need to be strengthened to support the special financial importance attached to the emissions reported under the scheme.

At the time of the Act's commencement regulations underpinning much of the detail of the Act had not been promulgated. The National Greenhouse and Energy Reporting (Measurement) Determination 2008 ([NGER Determination](#)) and the National Greenhouse and Energy Reporting Regulations 2008 ([NGER Regulations](#)) have now been published and commenced operation on 1 July 2008. The NGER Regulations establish detailed requirements which underpin the Act. The NGER Determination provides methods and criteria for calculating greenhouse gas emissions and energy data under the Act.

The NGER Regulations have the key definitions, rules for nomination, provisions on activities and facilities, the details of obligations relating to registration and reporting, and provisions relating to disclosure. Some key concepts and interrelationships between the Act and the NGER Regulations are outlined below.

Regulation 2.23 provides the definitions for 'emissions', 'production' and 'consumption' under section 10 of the Act. By subregulation 2.23(2) 'emissions' has been defined to mean:

Meaning of emissions

- (2) ***Emissions*** of greenhouse gas, in relation to a facility, means the release of greenhouse gas into the atmosphere as a direct result of 1 of the following:
- (a) an activity, or series of activities (including ancillary activities) that constitute the facility (*scope 1 emissions*);
 - (b) 1 or more activities that generate electricity, heating, cooling or steam that is consumed by the facility but that do not form part of the facility (*scope 2 emissions*).

1. Garnaut, Climate Change Review, Draft Report, 4 July 2008, p. 23.

2. Carbon Pollution Reduction Scheme, *Green Paper*, 16 July 2008, p. 194.

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‘Greenhouse gas’ is defined in the Act as follows:³

greenhouse gas means:

- (a) carbon dioxide; or
- (b) methane; or
- (c) nitrous oxide; or
- (d) sulphur hexafluoride; or
- (e) a hydrofluorocarbon of a kind specified in the regulations; or
- (f) a perfluorocarbon of a kind specified in the regulations.

Regulation 2.14 provides a definition of ‘overall control’ for the purposes of section 9 of the Act. A corporation will have **overall control** in relation to an activity or series of activities if it has the authority to introduce and implement the operating, health and safety, or environmental policies of the activities. If there is more than one corporation that can satisfy this test, then the corporation that has the ‘greatest’ authority to introduce and implement the policies will be taken to have overall control.⁴ This is similar to the definition of ‘**operational control**’ contained in section 11 of the Act relating to when a controlling corporation or another member of the corporations group has operational control over a facility.

The Act left the definition of ‘industry sector’ to the NGER Regulations. Regulation 2.06 defines ‘industry sector’ as those industries set out in Schedule 2 of the Regulations. The range of industries is extensive.⁵ One report gives a brief summary of the initial impact of the system:⁶

By law, coalmines, power stations, aluminium smelters, banks, supermarkets and airlines that emit more than a certain threshold must keep carbon accounts. About 700 companies will eventually be required to join the scheme.

This significance of the definition of ‘industry sector’ relates to the existing definition of a ‘facility’ in section 9. Whether a company has reporting obligations under the Act may sometimes relate to whether a ‘facility’ it operates exceeds the various thresholds outlined in section 13. The definition of a facility allows for it to be made up of a series of activities—however these activities must be contained within one ‘industry sector’. For example, as under Schedule 2 of the NGER regulations, oil and gas extraction and

3. National Greenhouse and Energy Reporting Act 2007, section 7.

4. National Greenhouse and Energy Reporting Regulations 2008, subregulations 2.14(1) and (2).

5. Appendix B, ANZSIC industry sectors: Schedule 2 of the Regulations, [National Greenhouse and Energy Reporting Guidelines](#)

6. Stephanie Peating, ‘Reporting rules set scene for trading scheme’, *Sydney Morning Herald*, 27 June 2008, p. 7.

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electricity generation are counted as different industry sectors, a company that had a gas-fired power station located on, and fed by, a gas field that it operated, would count these operations as separate facilities.

Companies will initially be required to report if⁷

- They have operational control of facility that emits 25 kilotonnes or more of greenhouse gases, or produce or consume 100 terajoules or more of energy; or
- Their corporate group emits 125 kilotonnes or more greenhouse gases, or produces or consumes 500 terajoules or more of energy.

Lower thresholds for corporate groups will be phased in by 2010-11. The final thresholds will be 50 kilotonnes for greenhouse gases or 200 terajoules of energy.⁸ However non-energy (non-combustion) greenhouse emissions from agriculture, land use, land use change and forestry activities **will not** be included ‘until methodologies for reporting at the facility and corporation level are sufficiently developed’.⁹

Under the proposed Carbon Pollution Reduction Scheme (which the Government intends to commence 1 July 2010), stationary energy, transport, industrial processes, waste and fugitive emissions from oil and gas production could be covered from scheme commencement. The Government also proposes to include reforestation in the scheme from commencement on a voluntary basis, but will not include agriculture before 2015.¹⁰

Key Issues

The requirement to report on indirect emissions

In the second reading speech, the Minister stated:¹¹

The Bill will ensure the public and investors have access to information on both a corporation’s scope 1 (direct) and scope 2 (indirect) greenhouse gas emissions. This distinction has been added following public consultation. Corporations will benefit from a greater public understanding of how their emissions profile is composed,

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7. Australian Government, Department of Climate Change, National Greenhouse and Energy Reporting System. The thresholds for determining whether a company is required to report are set out in section 13 of the Act.
 8. *ibid.*
 9. *ibid.*
 10. Carbon Pollution Reduction Scheme Green Paper, *Fact Sheet 3*, ‘Scheme Coverage’.
 11. The Hon. Wayne Swan, ‘Second Reading Speech: National Greenhouse and Energy Reporting Amendment Bill 2008’, House of Representatives’, *Debates*, 26 June 2008, p. 6022.

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rather than from the publication of a single total. In some sectors, scope 2 (indirect emissions) can compose a significant share of a corporation's total greenhouse gas emissions footprint.

There has been some criticism¹² by the National Generators Forum of this proposal to include the reporting of indirect emissions (scope 2 emissions) from electricity saying it will add to the red tape of the system without assisting emissions trading. In the same newspaper report, other business groups have warned they 'will face huge compliance costs reporting their indirect emissions'.

The Government's reported response includes that there will be an online tool to automatically calculate these emissions which will mean there will not be any increase in the reporting burden.¹³

Financial implications

The Explanatory Memorandum states the Bill will have no financial impact.

Main provisions

Section 10 of the Act governs the making of regulations and determinations for the definitions of, and the mechanisms for measuring, emissions, energy production and energy consumption. Subsections 10(1) and (2) state the regulations will define certain expressions. Subsection 10(3) gives the Minister power to make determinations, by legislative instrument, setting out the methods or criteria for methods by which the amounts of the emission, reduction, removal, offsets, production or consumption are to be measured. **Item 3** extends subsection 10(3) by adding **new paragraphs 10(3)(c), (d) and (e)** to allow the Minister to specify conditions, rating systems and the particular rating in relation to the different methods of measurement specified in the determinations.

Section 12 of the Act governs applications for registration. The heading to section 12 is amended to be more specific to become '**[a]pplying to register in relation to meeting a threshold**' by the new note added by **item 4**. **Item 4** repeals and substitutes **subsection 12(1)** to effectively delete **paragraph 12(1)(b)** which is dealt with in **item 6** (see further below). **New subsection 12(1)** requires a corporation whose group meets one or more of the thresholds under section 13 during a financial year to apply to be registered. An application must be made by 31 August in the financial year after the trigger year¹⁴ (**new subsection 12(4)**).

12. Hepworth and Breusch, 'Emissions red tape hits business', *Australian Financial Review*, 17 March 2008, p. 1.

13. *ibid.*

14. A 'trigger year' will be any year after 30 June 2009 that the thresholds are met.

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Item 6 repeals subsection 12(2) and inserts **new subsections 12(2), (3) and (4)**.

New subsection 12(2) will have the effect that once a corporation is registered in a financial year it will continue to be registered and will not have to reapply for registration in the next financial year that the threshold is reached.

New subsection 12(3) will allow a company that anticipates that it is likely to meet the threshold requirements to apply to be registered. The test under the provision is if the CEO of the corporation 'is satisfied' that the corporation 'is likely to meet' one or more of the thresholds. The Explanatory Memorandum gives further detail on the test:¹⁵

This means a corporation may choose to apply for registration **based on a reasonable expectation** that the threshold will be met in the future. (Emphasis added).

Item 7 amends **section 14** to reflect the proposed changes made in section 12. It will have the effect that a corporation that is not registered under section 12 may apply to be registered if the corporation or one of its members is undertaking or proposing to undertake a greenhouse gas project.¹⁶

Items 9 and 10 amend **section 15** by repealing **subsection 15(2)** and inserting the limitations of that provision into **paragraph 15(1)(c)**. This means that a corporation must provide to the Greenhouse and Energy Data Officer (the GEDO) information required by the regulations, being information that relates to one or more members of a controlling corporation's group.

Item 11 amends **paragraph 16(4)(a)** to change 'must register' to 'registers' under Division 13 to allow the GEDO to enter on the register corporations that are registered through voluntary action, such as under section 14 or subsection 17(2).

Item 12 simplifies the matters required to be entered on the register under section 16 of the Act. As the Explanatory Memorandum explains:¹⁷

Currently, the effect of subparagraph 16(4)(b)(i), in combination with other provisions, is to allow regulations to cover the publication of all members of a corporation's group on the register (and hence in an application for registration), or none. This increases the burden on corporations applying for registration, as it requires the corporation to provide information on corporations which are not directly relevant for reporting purposes.

15. National Greenhouse and Energy Reporting Amendment Bill 2008, Explanatory Memorandum p.5, paragraph 14.

16. Subject to certain exceptions, a 'greenhouse gas project' is defined in section 7 of the Act and is an activity or series of activities designed to remove or reduce the emission of gases and which meets the requirements specified in the regulations.

17. Explanatory Memorandum, p. 6, paragraph 24.

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The amendment is as a result of the amendment to sections 12 and 17 of the Act in relation to registration processes.

Item 13 repeals subsection 17(1) and replaces it with **new subsection 17(1)** so that the GEDO must register a corporation if it has applied for registration under section 12, in accordance with section 15. The amendment will have the effect of removing the requirement that the GEDO must be satisfied that a corporation meets the thresholds specified by section 13 as part of the application. (Note, however, that a corporation can still be deregistered under section 18 of the Act if the GEDO is satisfied that the registered corporation's group is not likely to meet any of the thresholds under section 13 for the financial year and the next 2 financial years).

Items 14 and 15 make consequential amendments to **section 19** arising from the amendments to section 12 and subsection 10(3) discussed above.

Items 17-20 amend section 21 by removing the voluntary¹⁸ reporting requirements relating to offsets of greenhouse gas emissions, which will be governed instead under **new section 21A** inserted by **item 22**. Section 21 will govern voluntary reports relating to greenhouse gas projects, reduction of greenhouse gas emission and removals of greenhouse gases. As the Explanatory Memorandum explains:¹⁹

By separating the concept of 'offsets' from projects undertaken by the registered corporation or a member of its group, the new section 21A will allow a corporation to report on offsets which may be created by the purchase of duly recognised credits purchased from outside the corporation's group.

'Offsets' is yet to be defined in the regulations.

The maximum penalty of 1000 penalty units (\$110 000) under section 21 and **new section 21A** is deliberately pitched at half the penalty that applies for breach of the mandatory reporting requirements set out in section 19.²⁰

Item 23 repeals subsection 24(1) and substitutes **new subsections 24(1), (1A), (1B) and (1C)**. The amendment to **subsection 24(1)** inserts that the GEDO must publish on a website, by 2 February each year, the totals of scope 1 emissions and scope 2 emissions, as well as totals of energy production and energy consumption. The current provision does not refer to scope 1 and scope 2 emissions. As noted above, 'emissions' has now been

18. Mandatory reporting requirements are dealt with in section 19 of the Act.

19. Explanatory Memorandum, p. 8, paragraph 35.

20. *ibid.*, p. 8, paragraph 37 .

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defined in the regulations. The Explanatory Memorandum states that the rationale for provision of data on the separate type of emissions to the public is:²¹

[s]een as necessary to provide appropriate levels of clarity on the emissions footprint of Australian corporations.

The Minister, in his second reading speech,²² recognises that the amendment goes beyond existing policy in this area of public disclosure but asserts that:

Even here, the amendments do not impose a new reporting burden on corporations. Instead, the effect of the amendments will be to increase the amount of information collected by the system which may be publicly disclosed.

New subsection 24(1A) will allow the GEDO to publish:

- totals for each member of the corporations group, or for each business unit reported in relation to the corporation's group. **New paragraph 24(1A)(a)** will provide for publication of totals of scope 1 and scope 2 greenhouse gas emissions, energy production and energy consumption

as well as:

- Information relating to the methods that are used to measure the totals (**new paragraph 24(1A)(b)**) and the rating given to each of those methods (**new paragraph 24(1A)(c)**)

This discretion to publish under **new subsection 24(1A)** is subject to the GEDO accepting that publication should not occur if the information would reveal trade secrets or any other matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.²³

The GEDO is not to publish information received under **new subsection 24(1)** unless the corporation's group meets a threshold set out in paragraph 13(1)(a)²⁴ and no application has been made for the information not to be published (**new subsection 24(1B)**). However, even if the GEDO does accept an application not to publish, he²⁵ may instead

21. *ibid.*, p. 8, paragraph 40 .

22. The Hon. Wayne Swan, *op cit.*, p. 6021.

23. National Greenhouse and Energy Reporting Act 2007, section 25.

24. Under this paragraph of the Act, a 'threshold' will be the total amount of greenhouse gases emitted that has a carbon dioxide equivalence of 125, 87.5 or 50 kilotonnes or more in the respective financial years of 1 July 2008, 1 July 2009 or each year thereafter.

25. Mr David Rossiter has been appointed as the GEDO, The Department of Climate, *Media Release*, 1 July 2008.

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publish the fact that the totals concerned fall within a specified range of values (**new subsection 24(1C)**).

Item 26 repeals subsections 24(3) and (4) and substitutes **new subsection 24(3)** to allow the GEDO to publish on a website reports received relating to offsets of greenhouse gas emissions. This refers to reports received under **new section 21A**. There is also discretion to not publish these reports if the GEDO receives an application that the publishing of the report would reveal trade secrets or destroy or diminish the commercial value of any other matter.

Items 29, 30 and 31 amend section 73 to provide that a corporation and each member of the group must provide an external auditor with all reasonable facilities and assistance necessary for the effective exercise of the auditor's duties, with a civil penalty of 250 penalty units applying. The words 'and this section' are deleted at the end of subsection 24(5) so that the heavier penalty of 1000 penalty points only applies to failure to comply with a written notice issued by the GEDO under subsection 73(2) requiring a corporation to appoint an auditor and report the results of the audit to the GEDO.

A similar amendment is made to section 74 by **item 33** so that a corporation and each member of the group must provide facilities and assistance to the external auditor appointed under that section. A penalty of 250 penalty units will apply.

Item 35 provides to save or preserve the validity of certain applications for registration that may have been made before the commencement of amendments that will be made under the Bill if it is passed.

Concluding comments

The Bill's amendments will address some of the complexity of reporting requirements, and will add more reporting details at the same time by adding in obligations for both scope 1 and scope 2 emissions. Organisations that are going to have to start reporting from the middle of 2009 will need to have in place systems to measure their emissions and trade carbon and will need to address all reporting and monitoring responsibilities under the NGERs. Currently about 450 companies are required to report under the scheme and by 2011, the number of organisations is estimated to increase to more than 700.²⁶ Evaluation of the implementation of the scheme and the impact and costs of the measures is still to be undertaken as the 1 July 2008 start up has only occurred.

26. Ben Woodhead, 'Business need to plan for emissions', *Australian Financial Review*, 1 July 2008, p. 37.

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