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It should be noted that the name of this Bill as introduced on 22 October 2009 is actually the Carbon Pollution Reduction Scheme (Charges – Customs) Bill 2009. This Bill is identical to the earlier Bill of the same name which was first introduced in the House of Representatives on 14 May 2009, passed unamended on 4 June 2009, but then negatived by the Senate on 13 August 2009.

The addition of the reference ‘[No. 2]’ has been made by the Department of the House of Representatives Table Office to indicate that the Bill is introduced for a second time.

Carbon Pollution Reduction Scheme (Charges – Customs) Bill 2009 [No. 2]

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Law and Bills Digest Section

Contents

Purpose	2
Background	2
Reintroduction of the Carbon Pollution Reduction Scheme Bills and this Digest	2
Committee consideration	3
Key issues	3
Main provisions	4

Carbon Pollution Reduction Scheme (Charges – Customs) Bill 2009 [No. 2]

Date introduced: 22 October 2009

House: House of Representatives

Portfolio: Climate Change and Water

Commencement: The formal provisions (sections 1 and 2) will commence on the day of Royal Assent. The main operative provisions (sections 3 to 8) will commence at the same time as the operative provisions of the *Carbon Pollution Reduction Scheme Act 2009*¹ commence.²

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 safeguard the constitutional validity of the proposed *Carbon Pollution Reduction Scheme Act 2009* in respect of the levying of charges for the issue of Australian emissions units.

Background

Reintroduction of the Carbon Pollution Reduction Scheme Bills and this Digest

The Carbon Pollution Reduction Scheme (Charges – General) Bill 2009 (the original Bill) was first introduced into Parliament on 14 May 2009 as part of the 11-Bill Carbon Pollution Reduction Scheme (CPRS) package of legislation. Along with the other CPRS Bills, the original Bill was passed by the House of Representatives on 4 June, but negatived in the Senate on 13 August 2009.

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1. This Act will come into force upon the passage of the Carbon Pollution Reduction Scheme Bill 2009 [No. 2], as that Bill has been titled by the House of Representatives Table Office.
 2. That is, 28 days after the day the Carbon Pollution Reduction Scheme Bill 2009 receives Royal Assent. There is an additional condition that the other Bills of the Carbon Pollution Reduction Scheme package must also have received Royal Assent by that time.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The content of the current Bill, the Carbon Pollution Reduction Scheme (Charges – General) Bill 2009 [No. 2] is identical to the original Bill. As such, this Digest is essentially unchanged from the [Digest](#) produced in June for the original Bill.³ For commentary on recent developments regarding the proposed CPRS, including the reintroduction of the CPRS Bills, see relevant sections in the Digest on the Carbon Pollution Reduction Scheme Bill [No. 2] 2009.

Committee consideration

At the time of writing, the current Bill has not been referred to any committee. The original Bill, along with the others in the CPRS package, was referred to the Senate Standing Committee on Economics for inquiry and report by 15 June 2009. Details of the inquiry are at http://www.aph.gov.au/senate/committee/economics_ctte/cprs_2_09/index.htm

Key issues

Section 55 of the Commonwealth Constitution states:

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

In Australia, the classic formulation of what is a tax was set down some 70 years ago by Latham CJ of the High Court of Australia:

... [a tax] ... is a compulsory acquisition of money by a public authority for public purposes, enforceable by law, and is not a fee for services rendered.⁴

This formulation is not necessarily a legally exhaustive test of whether in all circumstances a charge is a tax, but as a broad guide it remains valid.

Part 4 of Division 2 of the Carbon Pollution Reduction Scheme Bill 2009 Bill [No. 2] (the primary Bill) provides that a charge may be payable to the Commonwealth for the issue of

3. A Martyn *Carbon Pollution Reduction Scheme (Charges – Customs) Bill 2009*, Bills Digest no. 150, 2008–09, Parliamentary Library, Canberra, 2008, viewed 23 October 2009, <http://www.aph.gov.au/Library/pubs/bd/2008-09/09bd150.pdf>

4. *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276. See <http://www.austlii.edu.au/au/cases/cth/HCA/1938/38.html> viewed 28 October 2009.

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an Australian emissions unit. The Government has stated that it does not consider such a charge is a tax within the meaning of the constitution, and thus the primary Bill does not impose a tax.⁵ However, to avoid any risk of a contravention of the first paragraph of section 55 above, it has introduced three separate Bills, along with inserting clause 91 in the primary Bill.

Clause 91 in the primary Bill provides that if the charge for the issue of an Australian emissions unit is in fact a tax, then the charge is not imposed by the primary Bill, but whichever of the following three Acts are relevant in the circumstances:

- *the Carbon Pollution Reduction Scheme (Charges—Customs) Act 2009*
- *the Carbon Pollution Reduction Scheme (Charges—Excise) Act 2009*
- *the Carbon Pollution Reduction Scheme (Charges—General) Act 2009*

This approach avoids any possibility of the non-taxation elements of the primary Bill being ‘of no effect’ under section 55 of the Constitution. It then safeguards the validity of the primary Bill, and hence the legislative underpinning of the CPRS.

Main provisions

Clause 4 provides that the State, Territory and Norfolk Island governments are bound by the Bill, but the Commonwealth is not. It is unclear why the Bill has been drafted to exempt the Commonwealth, and neither the second reading speech nor the Explanatory Memorandum sheds any light on this.

Clauses 5-6A deal with the geographical coverage of the Bill. It applies in all Australian external territories, the exclusive economic zone and continental shelf, and the Timor Sea Joint Petroleum Development Area.

Clause 7 states that if a charge is payable to the Commonwealth for the issue of an Australian emissions unit, whether as result of an auction or by a fixed charge, and that charge is taxation within the meaning of section 55 of the Constitution, then the charge is imposed by clause 7, so far as the charge is a customs duty (within the meaning of section 55).

Clause 8 provides that the Bill cannot impose a tax upon property of any kind belonging to a State. This is to ensure that the Bill does not contravene section 114 of the Constitution, which prevents the Commonwealth and the States from taxing each other’s property.

5. G Combet, Second reading speech, Carbon Pollution Reduction Scheme (Charges – General) Bill 2009, House of Representatives, *Debates*, 14 May 2009, p. 14.

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