



AUSTRALIA'S CARBON PRICING SCHEME

The Carbon Pricing Scheme, to be implemented in Australia via the Clean Energy Bill 2011 (Cth) and 12 additional pieces of supporting legislation, was passed by the House of Representatives on October 12, 2011 and is likely to pass in the Senate by November. The scheme will operate like an emissions trading scheme with a fixed carbon permit price that transitions into a cap and trade scheme after three years. It consists of two phases—a fixed-price phase commencing July 1, 2012, followed by a floating-price phase commencing automatically on July 1, 2015.

In the fixed-price phase, the carbon price will commence at \$23/tCO₂-e, indexed annually at a real rate of 2.5 percent per year. In the floating price phase, an annual cap will exist on the number of carbon permits to be issued in each year, and the price of those permits will be determined by the market forces of supply and demand. However, for the first three years of this phase, there will be a carbon permit floor price of \$15 (increasing by 4 percent per year in real terms) and a carbon permit ceiling price of \$20 above the expected international price (increasing by 5 percent per year in real terms). This

price collar will minimize any price volatility that may occur upon the switch to the full market trading of carbon permits in this phase.

The scheme will cover the emission of four of the six Kyoto Protocol greenhouse gases (carbon dioxide, methane, nitrous oxide, and perfluorocarbons), from the stationary energy (e.g., electricity generation), industrial processing (e.g., aluminum smelting), fugitive emissions (except decommissioned coal mines), and emissions from landfill waste and waste water treatment (except emissions from legacy waste). Natural gas retailers will be liable for the greenhouse gas emissions embodied in the gas that they supply. Transport fuels will be excluded from the carbon pricing scheme, as will emissions from the agricultural and land sectors (including fisheries and forestry).

An entity will be liable under the carbon pricing scheme if it has operational control of a facility that emits more than 25,000tCO₂-epa in greenhouse gas emissions per year, and will be required to acquire and surrender emission units equivalent to its annual emissions. Facilities such as coal mines, power

stations, smelters, and natural gas processing plants will be affected. A liable entity may be able to transfer that liability either to another member of its corporate group or to an entity outside its corporate group that has financial control over that facility.

If a person is a liable entity in a financial year, the person will have a unit shortfall (and be liable to pay a unit shortfall charge) if the person does not, before the end of the next February 1, surrender a number of eligible emissions units equal to the person's emissions number for the year. A liable entity may pay any unit shortfall charge imposed by either surrendering the requisite number of eligible emissions units or by paying the charge in cash. A entity's carbon liability for the year is calculated with reference to the applicable carbon price at the time and the emissions exceeding the threshold value.

The legislation also allows for emissions-intensive trade-exposed industries and coal-fired power generators to receive assistance to offset their carbon liabilities, by way of free carbon units.

WHAT YOU SHOULD DO

Liable entities will need to consider how they allocate liability under the carbon pricing scheme within their corporate group or within the unincorporated joint ventures of which they may be members. This will require a consideration of both statutory and contractual liability and cost transfer and allocation mechanisms.

Entities that supply or purchase emissions-intensive or energy-intensive goods or services will need to consider whether their existing contractual arrangements provide for the pass-through of costs associated with the carbon pricing scheme and will need to take into account the allocation

of such costs when negotiating future contracts. It is highly desirable that contractual provisions for the pass-through of carbon pricing scheme costs are tailored to the particular transaction and include appropriate incentives designed to minimize those costs.

Directors of liable entities should put in place strategies to manage their companies' liabilities under the carbon pricing mechanism, including by implementing appropriate purchasing and hedging strategies and through the implementation of effective compliance programs.

Listed companies should consider whether the carbon pricing scheme triggers an obligation under applicable stock exchange rules or corporations legislation to disclose to the market the likely impact of the carbon pricing scheme on their operations. This is equally applicable to entities listed outside of Australia, which may have a subsidiary operating in Australia that may be liable under the carbon pricing scheme.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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