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Introduction

The Clean Energy Regulator (the Regulator) is an independent regulator responsible for administering a number of climate change laws. These include:

- *National Greenhouse and Energy Reporting Act 2007*
- *Renewable Energy (Electricity) Act 2000*
- *Carbon Credits (Carbon Farming Initiative) Act 2011,* and
- *Australian National Registry of Emissions Units Act 2011.*

The purpose of these laws is to:

- encourage the use of clean energy
- encourage the generation of electricity from renewable sources
- provide for projects that both remove carbon dioxide from the atmosphere, and reduce greenhouse gas emissions
- provide for the reporting and dissemination of information relating to greenhouse gas emissions, energy consumption and energy production of corporations
- provide a legislative basis for the registry used to issue and monitor emissions units, and
- provide the Regulator with a range of monitoring and enforcement powers, to help ensure compliance and address any non-compliance (outlined further in the policy).

The Regulator administers a number of schemes under the climate change laws, including the:

- Emissions Reduction Fund;
- National Greenhouse and Energy Reporting Scheme;
- Large-scale Renewable Energy Target; and
- Small-scale Renewable Energy Scheme.

This policy sits within the broader Australian Government law enforcement policy context. It should therefore be read in conjunction with other relevant instruments and documents, including the *Prosecution Policy of the Commonwealth, Commonwealth Fraud Control Framework and the Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions.*
Purpose of this policy

This policy outlines the approach adopted by the Regulator to optimise compliance with the climate change laws it administers. This includes explaining the role of education to encourage compliance, and the overall approach to compliance monitoring and enforcement.

Approach

Responsibility for complying with relevant requirements under legislation administered by the Regulator (including ensuring the accuracy of all information provided to the Regulator) rests with the individual person or organisation to whom the legislation applies.

The Regulator monitors participant’s ability and willingness to meet their obligations under the legislation, using a risk-based approach to detecting non-compliance and actively encouraging the return to compliance. This is achieved by:

- assisting participants to understand their rights and obligations through education, training, guidance and other resources
- supporting those who want to do the right thing, including using participant feedback to enhance relevant systems, resources and processes
- ensuring procedural fairness and natural justice is consistently applied to all participants
- ensuring decision-making follows rigorous corporate governance processes and can withstand review and scrutiny, including by the Administrative Appeals Tribunal and courts
- using intelligence and information analysis wherever possible, to help inform all regulatory response decisions
- ensuring regulatory responses are both proportionate to the risks posed by any non-compliance, taking into account the conduct of scheme participants (including their compliance history)
- actively pursuing those who opportunistically or deliberately contravene the law, and
- ensuring the investigative process and the resolution of enforcement matters are conducted as efficiently and professionally as possible.
Policy implementation

Engagement and education

The Regulator recognises that engagement, education and support in the first instance are vital to best ensuring participants meet their obligations, and to avoid inadvertent non-compliance. To assist participants, the Regulator publishes resources and guidance information such as guidelines, factsheets, booklets, brochures, newsletters, calculators and online resources.

The Regulator also ensures participants have the opportunity to raise issues of concern, and to participate in workshops and discussion forums.

Monitoring compliance

The Regulator monitors compliance with the climate change laws to:

- assist in determining levels of compliance
- identify behavioural trends (e.g. across participants and schemes)
- detect possible contraventions and identify any subsequent education or other prevention opportunities or enforcement action required, and
- assess operational and program effectiveness and identify opportunities for improvement.

In taking a risk based approach to compliance, the effort in monitoring is focussed around:

- the likelihood that the non-compliance might have occurred
- the likely consequences of non-complaint behaviour
- the level of activity, resources and costs necessary to be reasonably assured that clients are meeting their legislative requirements.

Compliance monitoring methods include:

- reviewing information provided by participants through applications made to the various legislative schemes, and information provided to registries
- reviewing information obtained under the Regulator’s information-gathering powers
- inspections and audits, as defined under the relevant respective legislation, and
- analysing information obtained from a range of sources, including from the general public, peak bodies and industry groups, non-government organisations, other government agencies, and relevant international bodies.
Contraventions

Determining appropriate responses to contraventions

Suspected contraventions of any laws administered by the Regulator are assessed to determine the most appropriate response.

As a first step, a preliminary examination and analysis of relevant facts is conducted to decide the likelihood that a contravention has occurred or may occur, the degree of seriousness, and any likely consequences. To assist in determining the appropriate response, the Regulator uses a risk-based approach that considers participant behaviour and motivation. The continuum at Figure 1 (below) shows how behaviours and motivations are matched against potential responses, according to the level of risk posed by the behaviours.

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**BEHAVIOURS AND MOTIVATION**

**VOLUNTARY COMPLIANCE**
- Informed self assessment
- Management is compliance-oriented

**ACCIDENTAL NON-COMPLIANCE**
- Not yet compliant
- Attempting compliance (e.g. developing internal control systems to ensure compliance)

**OPPORTUNISTIC NON-COMPLIANCE**
- Resistance to compliance
- Lack of indication of intention to comply (e.g. no indication of systems in place to ensure compliance)

**INTENTIONAL NON-COMPLIANCE**
- Deliberate non-compliance
- Criminal intent or fraud
- Other illegal activity

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**CLEAN ENERGY REGULATOR’S RESPONSE**

**HELP AND SUPPORT**
- The Regulator will release information and guidelines to assist understanding of participants’ obligations
- The Regulator will provide opportunities for complying participants to ask questions, discuss issues of concern and participate in educational and discussion forums
- The Regulator will use proactive audits to develop a better understanding of capabilities to comply.

**EDUCATE AND PROVIDE FEEDBACK**
- The Regulator will provide additional guidance to targeted participants
- Where an apparent non-compliance is identified, the Regulator will provide relevant parties with an opportunity to respond
- The Regulator will provide feedback on adequacy of systems and arrangements to ensure compliance

**CORRECT BEHAVIOUR**
- The Regulator will respond to detected non-compliance according to the severity (e.g. accepting enforceable undertakings, giving infringement notices, revocation and suspension)
- Contraventions that have a serious impact will be dealt with accordingly
- Publication of information about breaches and enforcement activities

**ENFORCE THE LAW**
- Where appropriate, the Regulator will initiate investigations, pursue civil action, or refer any relevant cases for criminal prosecution

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**Figure 1: Response Continuum**
Responses to contraventions

A range of responses to contraventions exist. These include:

- targeted education that ensures participants are made aware of their legislative obligations, and they have sufficient guidance and advice to assist them to meet their future obligations.

- automatic penalties in certain circumstances (e.g. failure to pay shortfall charges under the *Renewable Energy (Electricity) Act 2000* (REE Act))

- corrective actions, undertaken for serious or continuing contraventions. These include the exercise of suspension and revocation powers, infringement notices, enforceable undertakings or pecuniary penalties

- referral of suspected breaches of offence provisions or suspected fraudulent or dishonest behaviour for investigation and potential prosecution

- pursuing civil actions for breaches of civil penalty provisions, and

- criminal sanctions, for persons or organisations found to have breached offence provisions contained in laws administered by the Regulator, or to have engaged in dishonest or fraudulent conduct in connection with schemes established by those laws.

A full list of responses to contraventions is at Attachment A.

While all suspected contraventions are carefully considered, the Regulator exercises discretion when determining the type of response it will employ to address contraventions or otherwise resolve matters, including decisions as to whether to investigate further.

As a general principle, the Regulator is less likely to pursue legal actions where a person or entity has demonstrated good faith and/or is willing to resolve matters administratively.

Behaviour that is likely to result in enforcement action is:

- suspected serious civil contravention or criminal offence, including fraud

- the entity is unwilling to return to compliance

- repeated or habitual relapse into non-compliance, and

- conduct that appears to involve deliberate or intention non-compliance.

The Regulator has no authority to prosecute breaches of laws administered by other regulators. However, breaches of the law may be relevant to schemes that the Regulator does administer. For example, where a person is required to meet a fit and proper person requirement to participate in a climate change law scheme, the person’s history of compliance or non-compliance with the law is taken into account. Similarly, where the Regulator receives information alleging a contravention of the law which could affect eligibility for a benefit under a scheme administered by the Regulator, the Regulator will investigate (including the use of its coercive information gathering powers if appropriate) and consider further action or referral. Where the Regulator obtains information that indicates a possible breach of a law outside the scope of the Regulator’s
administration or is better handled by another agency (for example, allegations of fraudulent behaviour or potential scams), it refers that information to the appropriate body for their attention.

**Publication of contraventions**

In some cases the Regulator is legally obliged to publish information. An example is the acceptance of enforceable undertakings under the REE Act. The Regulator will publish such information as soon as practicable after the information becomes available.

The Regulator will also publish the commencement and outcomes of any court action, the issuance of infringement notices and other types of enforcement action. Generally, this information will be published as soon as practicable. However, in some circumstances, such as an ongoing investigation, the Regulator will use its discretion on the timing of any publication.

**Policy review**

The Regulator is committed to administering the climate change laws in a transparent, ethical and accountable manner. As part of this, the Regulator regularly reviews this policy and its implementation, to ensure the policy is relevant and that all relevant operational experience and legislative amendments are incorporated. Where amendments to this policy are required, the updated policy can be found on the Regulator website at [www.cleanenergyregulator.gov.au](http://www.cleanenergyregulator.gov.au).

**Further information**

Further information about the Regulator, the relevant legislation, and all relevant administrative, civil and criminal penalties can be found at [www.cleanenergyregulator.gov.au](http://www.cleanenergyregulator.gov.au) or by telephone 1300 553 542.
Attachment A: Monitoring and enforcement options

This attachment outlines the Regulator’s enforcement options under the:

- National Greenhouse and Energy Reporting Act 2007 (NGER Act)
- Renewable Energy (Electricity) Act 2000 (REE Act)
- Carbon Credits (Carbon Farming Initiative) Act 2011 (CFI Act), and
- Australian National Registry of Emissions Units Act 2011 (ANREU Act).

Monitoring

Audits by independent auditors: The Regulator may appoint an auditor to audit a person’s compliance with one or more aspects of the legislation; or, require a person to appoint an auditor if the Regulator believes that the person has contravened, is contravening or is proposing to contravene the legislation.

Inspections: The Regulator will use inspectors/authorised officers to enter premises by consent or under warrant in order to determine whether the legislation and associated provisions have been complied with, or to substantiate information provided under the legislation and associated provisions.

Information-gathering: The Regulator may require a person to provide information or documents, where it believes on reasonable grounds that the information or documents are relevant to the operation of the legislation.

<table>
<thead>
<tr>
<th></th>
<th>NGER Act</th>
<th>REE Act</th>
<th>CFI Act</th>
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<tr>
<td>Independent audit</td>
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<td>Information-gathering</td>
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Responding to contraventions

Default assessments: Under the REE Act, the Regulator may make an assessment of a liable entity’s large-scale generation shortfall and associated charge (if any) for the year or, of an entity’s small-scale technology shortfall and associated shortfall charge for the year.

Under the CFI Act, a person commits an offence where that person has entered into a scheme to avoid an existing, or future liability, to pay an administrative penalty or a unit shortfall charge.

Under the REE Act, where the Regulator is of the opinion that an arrangement was entered into for the sole or main purpose of avoiding payment of a renewable energy shortfall charge otherwise than in accordance with
that Act, the entity is liable to pay an amount of shortfall charge equal to the amount that it would have been liable to pay if the arrangement had not been made.

**Enforceable undertakings**: The Regulator may accept a written undertaking from a person that they will do, or refrain from doing, certain things in order to comply with the relevant Act. Breach of such an undertaking may result in court action.

**Penalty infringement notices**: Where the Regulator has reasonable grounds to believe that a person has breached a civil penalty provision, the Regulator may issue that person with a penalty infringement notice. The penalty infringement notice will specify the contravention and the amount of the penalty. Failure to pay the stated amount may result in court action in relation to the alleged contravention.

**Suspension**: The Regulator may suspend a person’s registration where that person has been convicted of an offence under the REE Act or where the Regulator has reasonable belief that the person has committed any such offence, or contravened a civil penalty provision. Other reasons for suspension include where the Regulator is satisfied that the person is not a fit and proper person, or where the registration was obtained improperly.

**Revocations**: The Regulator may unilaterally revoke the declaration of an eligible offsets project under the CFI Act in various circumstances, for example, where the Regulator is satisfied that the project is no longer eligible or the project proponent is no longer a fit and proper person. The Regulator must consult with the project proponent before such a decision is made.

**Relinquishment of units**: The Regulator may issue to a person a notice requiring the person to relinquish units under various circumstances, for example, where units are issued to a person as a result of the person knowingly providing false or misleading information. Failure to relinquish units may result in the person being liable to pay an administrative penalty to the Commonwealth. A court may also order relinquishment if units were issued as a result of fraudulent conduct.

**Unilateral closure of registry accounts**: The Regulator may unilaterally close a person’s registry account where that person has contravened, or is contravening, the provisions relating to the Australian National Registry of Emissions Units. If the Regulator has closed a person’s account, it will not open another account in that person’s name. The Regulator may also apply the following enforcement options to accounts within the Australian National Registry of Emissions Units:

- refuse to give effect to an instruction to transfer units to or from a registry account
- impose conditions restricting or limiting the operation of a registry account for a period of time, or
- suspend a registry account for a period of time.

The following table sets out the responses available to the Regulator under the relevant climate change law:

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<thead>
<tr>
<th>RESPONSE</th>
<th>NGER Act</th>
<th>REE Act</th>
<th>CFI Act</th>
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<td>Enforceable undertakings</td>
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<td>Infringement notices</td>
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<td>Suspensions</td>
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<td>RESPONSE</td>
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<td>Revocations</td>
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<tr>
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<tr>
<td>Unilateral closure of a registry account</td>
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<tr>
<td>Refusal to give effect to an instruction to transfer units to or from a registry account</td>
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<tr>
<td>Imposition of conditions restricting or limiting the operation of a registry account for a period of time</td>
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**Court action:** The Regulator will pursue legal action, where appropriate, for continuing or serious contraventions. Legal action may result in a court:

- making an injunction requiring a person to do an act, or thing, or restraining a person from certain conduct

- making an order directing a person to comply with an enforceable undertaking (where the court is satisfied that an enforceable undertaking has been breached)

- making an order directing a person to pay to the Regulator an amount up to the amount of any financial benefit gained, where the gain is directly or indirectly attributable to the breach of an enforceable undertaking

- making an order directing a person to compensate any other person who has suffered loss or damage as a result of a breach of an enforceable undertaking

- ordering relinquishment of carbon units, where the issue of the units is attributable to fraudulent conduct.

- making an order directing a person (including executive officers of bodies corporate) to pay a penalty as a result of breaching one of the civil penalty provisions (as well as the penalty for the initial breach, some civil penalty provisions are subject to additional penalties that accrue on a daily basis from the time of the contravention; some penalties are also scalable), and/or

- convicting a person suspected of having contravened any of the various criminal offence provisions in the Act.

The Clean Energy Regulator’s Compliance, Education and Enforcement Policy is made available on the understanding that the Commonwealth is not providing professional advice. Before relying on any material, readers should obtain appropriate professional advice. The information contained in this policy is current at the time of release but is subject to change. While reasonable care has been taken in preparing this information, the Commonwealth provides no warranties and makes no representations that the information is correct, complete or reliable. The Commonwealth expressly disclaims liability for any loss, however caused and whether due to negligence or otherwise, arising directly or indirectly from the use or reliance on information contained in the policy.