Clean Energy Regulator

Approach to Debt Recovery

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## Document control

### Document location

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### Document history

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1. Purpose

The purpose of this Clean Energy Regulator Debt Recovery Policy is to provide overarching guidance to the agency on responses to different types of debt situations (e.g. unit shortfall charge, certificate shortfalls, civil penalty, cost recovery, commercial matters), and different types of debtors and their circumstances (e.g. major liable entity, local authority, individual).

This debt recovery policy is intended to be instructive rather than prescriptive, to be adaptable to circumstances as they present case by case. It sets out the posture of the Regulator when pursuing debt recovery, and needs to be applied in conjunction with relevant legislation and operational documents (e.g. P9 Debt Management Policy, Standard Operating Procedures, Chief Executive Instructions).

This debt recovery policy should be read in conjunction with the agency’s Compliance, Education and Enforcement Policy, which sets out the principles adopted by the Regulator to optimise compliance with the climate change laws. Such principles include educating for and encouraging voluntary compliance, actively pursuing those who opportunistically or deliberately contravene the law. The principles also ensure that regulatory responses are proportionate to the risks posed by any non-compliance and take into account the conduct of scheme participants, including their compliance history.

2. Legislative Context

Debt definition

A debt is money owing to the Commonwealth, such as money owing as a result of an agreement, a transaction or legislation. For example, a person who has been overpaid a benefit may owe a debt to the Commonwealth as a result of the overpayment.

The Financial Management and Accountability Act 1997 deals specifically with “debts” and “amounts owing to the Commonwealth”. Generally, a “debt” is a sum of money owing to the Commonwealth, which is known and not being disputed, due for payment now, and capable of being recovered. By contrast, an “amount owing to the Commonwealth” may not yet be due for payment (e.g. an invoice has been issued but payment is not due until next month).

Financial Management and Accountability Act 1997

The Regulator is subject to the Financial Management and Accountability Act 1997 (FMAA 1997), which provides that a Chief Executive must pursue recovery of each debt for which they are responsible. There are limited legislative circumstances where a debt might not be pursued. Annexure A outlines key FMAA 1997 provisions.

Section 47 of the FMAA 1997 requires a Chief Executive of an agency to recover debts for which it is responsible. In effect, section 47 places a positive duty on the Chief Executive of the Regulator to pursue recovery of all debts due to the Commonwealth. However, section 47 provides the Chief Executive with discretion not to pursue recovery where:
• the debt has been written off, as authorised by the FMAA 1997, or
• the Chief Executive is satisfied that the debt is not legally recoverable, or
• the Chief Executive considers that it is not economical to pursue recovery of the debt.

Section 44 of the FMAA 1997 also requires the Chief Executive of an agency to manage the affairs of an agency in a way that promotes the efficient, effective, economical and ethical use of resources for which the Chief Executive is responsible, and in a way that is not inconsistent with the policies of the Commonwealth. This obligation also applies in the context of using resources to pursue the recovery of debts. The Finance Circular FC2009/09: Discretionary Compensation and Waiver of Debt Mechanisms is to be read in conjunction with Section 44 of the FMAA 1997.

The Regulator’s Chief Executive Instructions (CEIs) are made under the authority of the FMAA 1997 and are binding on all officials. Chapter 9 provides guidance to staff on the management of debts and amounts owing to the Commonwealth, and the exercise of the discretion not to pursue recovery of debts. The principle of debt recovery according to these CEIs is that:

“Debts and amounts owing to the Commonwealth, including any incorrect payments or overpayments of public money, represent a cost to taxpayers if not recovered and should therefore be pursued to the greatest possible extent.

Subsection 47(1) of the FMA Act obliges Chief Executives to pursue recovery of all debts for which they are responsible, unless the debt has been written off as authorised by an Act, or it is considered that the debt is not legally recoverable or that recovery is not economical to pursue.

In relation to amounts owing to the Commonwealth, the general principle is that such amounts should immediately be paid in full when they become due for payment. However, in certain circumstances it may be appropriate to defer the time for payment, allow payment by instalments, or waive the amount owing to the Commonwealth. Section 34 of the FMA Act provides the Finance Minister with the power to make such decisions.”

The Finance Minister has delegated powers, including to enter into installment arrangements and to delay payment of debts to Chief Executives.

Other Legislation

The Public Service Act 1999 contains a code of conduct for all Commonwealth employees, including obligations to be openly accountable for their actions.

The Regulator has obligations under the Legal Services Directions 2005 to be a model litigant (i.e. act honestly, fairly, consistently, promptly) regarding handling monetary claims. Litigation is not the necessary end point of debt recovery activity – indeed, the Regulator should only start court proceedings if it has considered other ways to resolve a dispute (e.g. alternative dispute resolution processes). However, the model litigant obligation does not prevent the Regulator from acting firmly and properly to protect its interests. It does not therefore preclude all legitimate steps being taken to pursue debts including legal costs where appropriate.
The Regulator also has obligations under the Civil Dispute Resolution Act 2011, if considering litigation to recover a debt, where the debt is not related to a criminal or civil penalty provision. This Act does not apply if the Regulator is seeking an order winding up a company after a failure by the company to comply with a statutory demand. This Act requires the Regulator to file a ‘genuine steps’ statement indicating what steps (if any) it has taken to resolve a dispute before commencing legal proceedings. What action constitutes a ‘genuine step’ is up to the parties to determine within the context of their particular dispute and could include participating in an alternative dispute resolution process. The Court can take this into account when exercising its discretion to award costs, as well as impose other consequences (e.g. through case management) for agencies who do not comply with their obligations.

Publication of unpaid debts

The Regulator is required to publish a range of unpaid debts on its website:

- **Clean Energy Act 2011** - details of unpaid unit shortfall charges and unpaid penalties associated with a failure to relinquish emissions units when required (ss188, 191, 204) amounts (i.e. who owes it and how much).
- **Carbon Credits (Carbon Farming Initiative) Act 2011** - details of unpaid penalties associated with a failure to relinquish ACCUs when required (s165).
- **Australian National Registry of Emissions Units Act 2011** - details of unpaid penalties associated with a failure to relinquish Australian-Issued International Units when required (s63F).
- **Renewable Energy (Electricity) Act 2000** - gives the Regulator discretionary power to publish large-scale generation certificate (LGC) shortfalls and small-scale technology certificate shortfalls (s134).

Sources of debt

The legislation administered by the Regulator contains sources of debt (e.g. unit shortfall charges; auction payments; civil penalties – refer Annexure B). Sources of debt owed to the organisation may also arise out of other activities (e.g. contractual matters; employee relations) however these are not within the scope of this document.
3. Debt recovery principles

The Regulator's debt recovery principles are:

1. early engagement,
2. entities should pay debts when due,
3. the Regulator is not a credit provider,
4. debt is to be managed on a risk management basis,
5. the Regulator will adopt the most appropriate remedy in dealing with non-compliant parties, and
6. actions are to be perceived as equitable by those entities who do comply with their obligations.

3.1 Early engagement

In most cases, the Regulator will know that an entity is liable to have a debt due and owing to the Commonwealth under the laws administered by the Regulator.

Therefore, it is important that the Regulator monitors the behaviour of entities and actively engages with that entity where there is a reasonable risk that the entity:

- is not aware of a potential liability, or
- indicates that it may not be able or willing to meet its liabilities under laws administered by the Regulator when they fall due.

Early engagement can take many forms; however, the Compliance, Education and Enforcement Policy should be applied. The Policy relevantly states:

The Regulator will encourage participants to voluntarily comply with legislative requirements.

The Regulator's approach will be based on the following considerations:

- Assisting participants to understand their rights and obligations through education and training programs.
- Supporting those who want to do the right thing and, where appropriate, incorporating feedback into enhancement of systems and processes.
- Using intelligence analysis where possible to inform regulatory response decisions.

3.2 Entities should pay debts when due

The overarching principle is that entities liable for debts to the Regulator must pay all such charges, fees, payments and other financial obligations when due in accordance with the applicable legislation.

Because the Regulator has obligations imposed by laws (eg the FMAA 1997 and the clean energy laws), the Regulator may not have the same flexibility in relation to debts that commercial organisations have. For example, the Regulator may not be able to extend the
time when a debt falls due (although it may, in some cases be able to agree instalments plans or deferral of payment).

3.3 The Regulator is not a credit provider

The Regulator is not a credit provider, and its usual position is that the debts will be recovered in accordance with FMAA 1997 section 47 and 44.

Unlike other creditors, the Regulator cannot choose not to deal with non-compliant debtors.

The Regulator’s debt recovery posture seeks to determine the most appropriate compliance response to achieve desired behaviour from the entity.

Where the Regulator has early and active engagement with potentially liable entities, it is reasonable to expect that entities will raise any difficulty with payment of debts at an early stage. However, this cannot be assured for various reasons (including market sensitivity, embarrassment and general reticence to admit financial difficulties). The Regulator should encourage potentially liable entities to raise any anticipated difficulties as soon as possible.

When choosing a compliance response towards an entity, the Regulator will consider that entity’s attitude towards compliance. In relation to debt recovery, this would include providing early notice of potential difficulties paying debts and historical compliance with reporting and other obligations.

3.4 Debt is to be managed on a risk management basis

The Regulator deals with a variety of regulated entities. The various strategies the Regulator employs are intended to maximise the likelihood of voluntarily compliance with the statutory financial obligations and minimise the consequences of non-compliance.

The risk to be managed by those responsible for securing key legislative obligations (e.g. unit shortfall charges and outstanding auction payments), or for collecting outstanding civil penalties, is that the charges, payments and debts will not be paid within time frames required by the relevant legislation or acceptable to the Chief Executive, if at all.

Managing this risk is about making decisions to do something in the most effective and timely manner, based on an evaluation of all relevant circumstances.

The Regulator must evaluate:

- The nature of the risk. Generally, the overall compliance risk of the entity is assessed by reference to the entity’s individual circumstances and compliance history; and
- The risk exposure. The Regulator would review an entity’s viability before determining an appropriate course of debt recovery action. Assessment of viability includes the ability of an entity to pay its outstanding debts to the Regulator and meet its ongoing commitments under the legislation.
3.5 The Regulator will adopt the most appropriate remedy

The Regulator acknowledges its obligation to manage and recover debts in a fair, effective and proportionate manner and in accordance with the requirements of applicable legislation.

In dealing with entities which do not comply with their obligations, the Regulator will take into account the entity’s compliance history and will look to use measures which will result in both current and future compliance.

The range of non-compliant parties runs from those which want to pay but cannot, to those which can pay but do not, to those which evade statutory liabilities altogether.

Through its engagement with entities, the Regulator will remind entities that we expect them to:

• be truthful in their dealings with us,
• make payments by the due date, and
• be cooperative in their dealings with us.

In general, the Regulator will differentiate the approach by continuing to work with entities that are viable and are cooperative with us; while taking firmer action against those that choose not to engage with the Regulator, have a history of serious non-compliance, or default on instalment arrangements. For this reason, it is important that the Regulator encourages entities to be open with us, inform us of their situation and come to us early if their business circumstances change.

Debt recovery activities the Regulator may implement include:

• Early intervention - telephone, letters, external collection agencies.
• Firmer action - garnishees, director penalty notices, statutory demands.
• Enforcement - legal action, bankruptcy proceedings, company wind-ups.

3.6 The Regulator’s actions are to be equitable, and perceived as equitable by those entities which do comply with their financial obligations

Confidence in legislative mechanisms develops commitment to compliance with them. The regulated community will want to see a fair system of enforcement activity where necessary and across the range of regulated activities.

Any debt recovery arrangements agreed to in regards to debtors should be perceived as equitable by those entities which do comply with their obligations (perception of equity). A decision to enter into a debt recovery arrangement will take into account the particular circumstances of the debtor entity, including:

• the entity’s compliance history
• whether the reasons for the potential non-compliance were beyond the entity’s control, and the steps taken to mitigate the effects of those circumstances
• the ability of the entity to meet the obligation within a reasonable timeframe, and
• the steps taken to ensure future legislative obligations are met on time.

The Regulator will take a balanced and differentiated approach to debt recovery, including:

• assisting those entities attempting to work with us and do the right thing, including early engagement with practical support and assistance, e.g:
  » flexible payment arrangements that align with cash flow
  » remitting or reducing penalties or interest if appropriate and possible
  » where entities are experiencing serious hardship or financial difficulty (including where debt recovery action may have an impact on employees or customers), then possible longer payment arrangements, remission of interest charged, write-off (as appropriate)
  » where entities are impacted by natural disasters, consider appropriate immediate and longer term responses based on individual circumstances and the extent of the disaster impact (e.g. hold on collection activity, stopping correspondence)

• being firm but fair with those entities which choose not to work with us, continually default on payment arrangements, or don't have the capacity to pay and don't take steps to resolve their situation.

The Regulator’s firmer action approach would be based on fairness, equity, consistency and differentiated treatment of clients based on individual circumstances. The Regulator will generally notify entities before taking firmer or legal action - to give them an opportunity to pay their debt or demonstrate that they are committed to and able to maintain a payment arrangement.

The decision to take bankruptcy or wind up action would not be made lightly - and only after other courses of action have been properly explored. This firmer action should be taken only if:

• the entity chose not to work with the Regulator despite our efforts to engage it
• the entity defaulted on its payment arrangements,
• the Regulator has reason to lack confidence that the entity will be able to meet its debt obligations,
• the entity has been subject to an audit where deliberate non-compliance with legal obligations was detected (and that may be continuing), or
• where there is suspicion that bankruptcy or liquidation would be used to avoid financial obligations or risking assets (particularly where there may be a reasonable prospect of the business resuming through a new entity), further advice should be obtained.

There are a number of debt recovery options available to the Regulator. For details on all the potential debt recovery options, see P9 – Debt Management Policy Instruction. Which option is appropriate will depend on case specific circumstances (e.g. size of debt, reason for default, entity type, and frequency of offence). The Regulator may, for example, allow for payment in instalments, defer the payment, or pursue settlement. Alternatively, court proceedings and enforcing the judgment debt (e.g. warrant to seize the property, garnishee)

1 For example, section 135 of the Clean Energy Act 2011 permits the Regulator to remit any or all of the late payment penalty of 20 per cent per annum where it would be fair and reasonable to do so.
may be warranted. As a last resort, the Regulator may also apply to order the winding up of a debtor company.

4. Debt recovery system

For assistance on how to recover a debt, contact the Office of the General Counsel and the Chief Financial Officer.

5. Roles and responsibilities

The Chief Executive Officer will:

• provide sufficient support and resources for ensuring debt recovery requirements can be addressed, and
• promote compliance with the Regulator debt recovery policy.

The Chief Financial Officer will:

• develop procedures to support the Debt Recovery Policy, and
• with the assistance of the General Counsel, ensure that the Regulator’s debt recovery procedures comply with its statutory and other legal obligations, and this Debt Recovery Policy.

The General Counsel will:

• ensure legal proceedings are only initiated in appropriate circumstances.

All staff and persons otherwise engaged by the Regulator will adhere to the Regulator’s policies and procedures in debt management and debt recovery.

6. Monitor and review

Staff and system compliance with the debt recovery policy will be monitored to ensure that debts are dealt with in accordance with this policy;

7. Authorisation

This policy is issued under the authority of the Chair and Chief Executive Officer.
8. Annexure A

KEY PROVISIONS

Financial Management and Accountability Act 1997

44 Promoting proper use of Commonwealth resources

(1) A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible.

(1A) The responsibility conferred on the Chief Executive by subsection (1) includes, and is taken to have included, the power to:
   (a) make arrangements, on behalf of the Commonwealth, in relation to the affairs of the Agency; and
   (b) vary those arrangements on behalf of the Commonwealth; and
   (c) administer those arrangements on behalf of the Commonwealth. …

47 Recovery of debts

(1) A Chief Executive must pursue recovery of each debt for which the Chief Executive is responsible unless:
   (a) the debt has been written off as authorised by an Act; or
   (b) the Chief Executive is satisfied that the debt is not legally recoverable; or
   (c) the Chief Executive considers that it is not economical to pursue recovery of the debt.

(2) For the purposes of subsection (1), a Chief Executive is responsible for:
   (a) debts owing to the Commonwealth in respect of the operations of the Agency; and
   (b) debts owing to the Commonwealth that the Finance Minister has allocated to the Chief Executive.

Also note: 34 Finance Minister may waive debts etc.

(1) The Finance Minister may, on behalf of the Commonwealth:
   (a) waive the Commonwealth’s right to payment of an amount owing to the Commonwealth;
   (b) postpone any right of the Commonwealth to be paid a debt in priority to another debt or debts;
   (c) allow the payment by instalments of an amount owing to the Commonwealth;
   (d) defer the time for payment of an amount owing to the Commonwealth.
Note: See also subparagraph 65(2)(a)(ia) (which allows regulations to be made about the Finance Minister considering a report from specified persons before waiving a total amount that is more than a specified amount).

(3) A waiver may be made either unconditionally or on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances.

(4) In this section:

*amount owing to the Commonwealth* includes an amount that is owing but not yet due for payment.

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*Legal Services Directions 2005*

**NATURE OF THE OBLIGATION**

2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation

(aa) making an early assessment of:

(i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth’s potential liability in claims against the Commonwealth

**THE MODEL LITIGANT OBLIGATION**

4.2 Claims are to be handled and litigation is to be conducted by the agency in accordance with the Directions on The Commonwealth’s Obligation to Act as a Model Litigant … noting that the agency is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.

**DISCLOSURE OF TERMS OF SETTLEMENT**

4.5 The agency is only to agree that the terms of settlement are confidential and cannot be disclosed where this is necessary to protect the Commonwealth’s interests. Before imposing or agreeing to such a condition, the agency is to satisfy itself, including by raising the matter with a party requesting the condition, that the condition is necessary. The agency should also seek to incorporate an exception to enable voluntary disclosure of the settlement (in whole or in part) to the Parliament or to a Parliamentary Committee. Where practicable, the responsible Minister is to be consulted before an agency agrees to a settlement inhibiting voluntary disclosure to the Parliament or to a Parliamentary Committee.

4.5A The agency is to tell the other party to a confidential settlement that disclosure of the settlement may nevertheless be required by law; in particular, to the Parliament or to a Parliamentary Committee which has power to compel disclosure.
ALTERNATIVE DISPUTE RESOLUTION

5.1 The Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (e.g. alternative dispute resolution or settlement negotiations).
9. Annexure B

Possible Sources of Debt to the Clean Energy Regulator

Under legislation

- Under the Clean Energy Act 2011:
  - Unit shortfall charges and associated late payment penalties;\(^2\)
  - Charges imposed on issue of carbon units;\(^3\) and
  - Debts arising from the failure to relinquish carbon units (including associated late payment penalties) when required either under the Jobs and Competitiveness Program or by court order.\(^4\)

- Under the REE Act 2000:
  - Renewable energy shortfall charge or penalty charge, and interest charge;\(^5\) and
  - Renewable energy certificate surrender fees.\(^6\)

- Under the ANREU Act 2011:
  - Debts arising from the failure to relinquish Australian-issued international units (including associated late payment penalties) when required by a court.\(^7\)

- Under the CFI Act 2011:
  - Debts arising from the failure to relinquish ACCUs (including associated late payment penalties) when required by a court or the Regulator.\(^8\)

- Any pecuniary penalty imposed by a court in a civil prosecution under the Clean Energy Act,\(^9\) the ANREU Act,\(^10\) the REE Act,\(^11\) the NGER Act,\(^12\) or the CFI Act.\(^13\)

- Many climate change laws allow for the Regulator to charge administrative fees, e.g. registration or application fees, where prescribed in subordinate legislation.\(^14\)

Other

- Contractual debts e.g. where Regulator has paid money in advance and work was not completed in accordance with the contract.

- Employee debts e.g. where an employee has been paid for benefits they were not entitled to.

\(2\) Clean Energy Act 2011, s136(2)
\(3\) Clean Energy Act 2011, s100(13), s111(7)
\(4\) Clean Energy Act 2011, s214
\(5\) Renewable Energy (Electricity) Act 2000, ss 67, 68, 70, 71, 101, 102
\(6\) Renewable Energy (Electricity) Act 2000, s45E
\(7\) Australian National Registry of Emissions Units Act 2011, s66H
\(8\) Carbon Credits (Carbon Farming Initiative) Act 2011, s181
\(9\) Clean Energy Act 2011, s252(7)
\(10\) Australian National Registry of Emissions Units Act 2011, s69
\(11\) Renewable Energy (Electricity) Act 2000, s154B
\(12\) National Greenhouse and Energy Reporting Act 2007, s34
\(13\) Carbon Credits (Carbon Farming Initiative) Act 2011, s221
\(14\) See, for example, Regulation 28 of the Renewable Energy (Electricity) Regulations 2001.