Carbon tax price reduction obligation

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Introduction

On 17 July 2014 the Clean Energy Legislation (Carbon Tax Repeal) Act 2014 amended the Competition and Consumer Act 2010 (the CCA) to include a new Part V – Carbon Tax Price Reduction Obligation. The main objects of the new Part V are:

• to deter price exploitation in relation to the carbon tax repeal at each point in the supply chain for regulated goods, and

• to ensure that all cost savings attributable to the carbon tax repeal are passed through the supply chain for regulated goods (s.60AA of the CCA).

The intention of Parliament, in enacting the new Part V of the CCA, is to ensure that all cost savings attributable to the carbon tax repeal are passed on to consumers of regulated goods through lower prices (s.60AA(2) of the CCA).

Regulated goods are:

• natural gas
• electricity
• synthetic greenhouse gas, or
• synthetic greenhouse gas equipment (s. 60B of the CCA).

The carbon tax price reduction obligation requires suppliers of regulated goods to pass through all cost savings relating to the regulated supply that are directly or indirectly attributable to the carbon tax repeal (s.60C of the CCA). In determining whether a supplier has charged a price that fails to pass through all the cost savings, regard will be given to the supplier’s costs and other relevant matters that may influence the price.

The purpose of this guidance document is to provide information to businesses on the carbon tax price reduction obligation and explain the consequences of a failure to comply with the carbon tax price reduction obligation.

The examples given in this document are simplified illustrations of a principle and should not be read as actual scenarios. Suppliers of regulated goods and other businesses will be subject to a wide range of factors affecting their input costs and the prices they charge.

The ACCC’s role

Under the new Part V of the CCA, the ACCC has a role in monitoring prices to assess the general effect of the carbon tax repeal. Using information gathered through this monitoring role, the ACCC is closely scrutinising prices charged for regulated goods. Where the ACCC suspects that suppliers of regulated goods have not passed through the required cost savings, it will investigate using a range of new and existing powers. Should the ACCC consider that a supplier of regulated goods is in breach of the carbon tax price reduction obligation, it will take appropriate enforcement action against the supplier. (see The ACCC’s enforcement powers, p 13).

The ACCC’s enforcement approach will vary depending on the circumstances and will be decided in accordance with the ACCC’s Compliance and Enforcement Policy. The carbon tax price reduction obligation is an enforcement priority for the ACCC. Where a supplier has failed to pass through all cost savings attributable to the carbon tax repeal, the ACCC will consider court action including penalties against the supplier.
Suppliers of regulated goods that breach the carbon tax price reduction obligation may be subject to court imposed pecuniary penalties of up to $1.1 million per contravention for corporations and $220,000 per contravention for individuals. Electricity or natural gas suppliers and bulk synthetic greenhouse gas importers will also be subject to a penalty of 250% of the value of any cost savings they fail to pass through.

The carbon tax price reduction obligation

Section 60C - Price exploitation in relation to the carbon tax repeal

(1) An entity must not engage in price exploitation in relation to the carbon tax repeal.

(2) For the purposes of this Part, an entity engages in price exploitation in relation to the carbon tax repeal if, and only if:
   a) it makes a regulated supply, and
   b) the price for the supply does not pass through all of the entity’s cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal.

(3) For the purposes of this Part, in determining whether the price for a supply made by an entity does not pass through all of the entity’s cost savings relating to the supply that are directly or indirectly attributable to the carbon tax repeal, having regard to the following matters:
   a) the entity’s cost savings that are directly or indirectly attributable to the carbon tax repeal
   b) how the cost savings mentioned in paragraph (a) can reasonably be attributed to the different supplies that the entity makes
   c) the entity’s costs
   d) any other relevant matter that may reasonably influence the price.

Entity that makes a regulated supply (s.60C(2)(a))

The term entity is broad, referring to corporations, individuals and others (s.60A of the CCA). An entity makes a regulated supply (and is referred to in this document as a supplier of regulated goods) if it supplies regulated goods within the period 1 July 2014 to 30 June 2015.

Under s. 60B of the CCA, regulated goods include:
   a) natural gas, or
   b) electricity, or
   c) synthetic greenhouse gas (SGG) (typically refrigerant gas), or
   d) SGG equipment which is equipment containing SGGs.

Under s.60B(2) of the CCA, the Minister may declare additional kinds of goods to be regulated goods for the purposes of s.60B. It is open to the ACCC to recommend additional goods to the Minister where issues are identified through the ACCC’s monitoring role. Once goods are specified to be regulated goods in a legislative instrument, suppliers of those goods will be subject to the carbon tax price reduction obligation.
Pass through of all cost savings attributable to the carbon tax repeal (s.60C(2)(b), s.60C(3)(a) and (b)).

Now that the carbon tax has been repealed, suppliers of regulated goods will need to adjust their prices to ensure they are passing through all cost savings that are directly and indirectly attributable to the carbon tax repeal. As a starting point, where suppliers of regulated goods have increased their prices because of cost increases attributable to the carbon tax, they should decrease their prices by the same amount now that the carbon tax has been repealed.

**Example**

Prior to the imposition of the carbon tax, a supplier of regulated goods charged $660 per unit. Upon the introduction of the carbon tax, the supplier raised its prices to $680 to account for a direct cost increase of $20 attributable to the carbon tax. Six months later, the supplier increased its prices to $710 to take into account an additional indirect cost increase of $30 attributable to the carbon tax which had been passed through to the supplier by its suppliers over time. Following the repeal of the carbon tax, the supplier would need to reduce its prices by $50, not by $20 (the amount by which the price was initially increased).

If the supplier intends to adjust their prices by a smaller amount, the ACCC expects that they will be able to support that decision with evidence and show that they are still passing through all cost savings attributable to the carbon tax repeal.

A supplier of regulated goods may have compliance costs related to the carbon tax repeal, which could affect how they adjust their prices following the repeal. The ACCC expects suppliers of regulated goods to be able to explain and provide evidence of their compliance costs if they claim those costs have an effect on their price adjustments. Compliance costs might include the costs of accounting for or managing your carbon tax liability and the removal of your carbon tax liability. Compliance costs relating to the carbon tax repeal are likely to be short-term and once they are no longer being incurred, this is an additional cost saving attributable to the carbon tax repeal that should be passed through.

**Methodology**

As a starting point, suppliers of regulated goods should consider using the same methodology as they used when the carbon tax was introduced. If the supplier used a particular basis or method to calculate the impact of the carbon tax on costs and the resulting price increase, to ensure all cost savings are passed through, it may be appropriate for the supplier to use the same method to calculate the price reduction. For example, if the supplier averaged the effect of the carbon tax across its business and then increased the price of each product uniformly, they should all fall by that amount now that the carbon tax has been repealed. Alternatively, if the supplier calculated the impact of the carbon tax on a per-product basis, the price of each product should now be reduced by the specific amount by which it was increased.

If a supplier of regulated goods intends to use a different methodology to adjust their prices now that the carbon tax has been repealed, the ACCC expects they will be able to explain and justify this decision to show that all cost savings attributable to the carbon tax repeal are being passed through.

**Margin**

Another way for a supplier of regulated goods to check if they have passed through all cost savings attributable to the carbon tax repeal is to consider their margin. The margin on the price for supply of a regulated good should not increase as a result of the carbon tax repeal.
If other factors have affected the supplier’s margin since the carbon tax was introduced, the supplier will need to explain these factors to the ACCC and show how it is passing through all cost savings attributable to the carbon tax repeal.

**Timing**

In order to comply with the carbon tax price reduction obligation, suppliers of regulated goods should pass through cost savings as soon as practicable, to ensure that they are passed through the supply chain for regulated goods. Where there is a delay in pass through of a cost saving indirectly attributable to the carbon tax repeal, a supplier of regulated goods need not lower their prices until they receive the cost saving from their supplier, but should make inquiries with their supplier to determine when they will receive the saving and pass it through as soon as practicable. Suppliers of regulated goods should ensure this delay is as limited as possible.

When considering whether a supplier of regulated goods has passed through all cost savings attributable to the carbon tax repeal, the ACCC will typically compare the price charged by the supplier immediately prior to the repeal with the price charged post-repeal. However, certain factors such as significant demand changes, significant discounting or regulatory decisions may mean there is a more appropriate basis for comparison. If a supplier of regulated goods considers that a different period for comparison is appropriate, the ACCC expects that they will be able to explain and provide evidence to support their view.

**Attribution of cost savings to the carbon tax repeal (s.60C(2)(b), s.60C(3)(a) and (b))**

The carbon tax price reduction obligation requires that a supplier of regulated goods pass through all cost savings that are directly or indirectly attributable to the carbon tax repeal. To say that a cost saving is attributable to the carbon tax repeal means that it occurs because of, or results from, the repeal of the carbon tax.

**Cost savings that are directly attributable to the carbon tax repeal**

Cost savings that are directly attributable to the carbon tax are those that arise from the removal of a carbon tax liability. Some suppliers of regulated goods will have been required to pay the carbon tax on their emissions, or to pay an Equivalent Carbon Price Levy (ECPL) such as that imposed on SGG suppliers. Any supplier of regulated goods that increased their prices to account for a direct carbon tax liability must lower its prices by the same amount.

**Cost savings that are indirectly attributable to the carbon tax repeal**

Cost savings indirectly attributable to the carbon tax repeal are carbon tax cost savings passed through to suppliers of regulated goods by other businesses that supply them. Where these other businesses increased their prices due to the carbon tax and lower their prices now that the carbon tax has been repealed, the supplier of regulated goods must pass these cost savings on to its customers.

One example of an indirect cost saving attributable to the carbon tax repeal would be where a supplier of regulated goods has lower insurance premiums or security costs due to the lower value of their stocks of regulated goods following the carbon tax repeal.

Where a supplier of regulated goods acquires electricity, natural gas, synthetic greenhouse gases or synthetic greenhouse gas equipment (regulated goods) from other suppliers, these other suppliers will also be subject to the carbon tax price reduction obligation. When these other suppliers lower their prices to pass through all their cost savings attributable to the
carbon tax repeal, the supplier of regulated goods must pass these savings on to its customers.

Example

Supplier X is a supplier of natural gas. Supplier Y supplies electricity to Supplier X. Both Supplier Y and Supplier X are subject to the carbon tax price reduction obligation. This means that now that the carbon tax is repealed, Supplier Y must pass through any cost savings in the form of lower electricity prices to Supplier X. For Supplier X, this is an indirect cost saving attributable to the carbon tax repeal that must be passed through to Supplier X’s customers.

If a supplier of regulated goods is concerned that one of their suppliers is failing to pass through cost savings attributable to the carbon tax repeal, they should contact the supplier to obtain information on the effect of the carbon tax repeal on its costs and pricing. Similarly, if a supplier of regulated goods is uncertain as to the amount by which one of their supplier’s previous price increases was due to the carbon tax, they should contact the supplier to obtain the information.

Given that they are required to pass through cost savings indirectly attributable to the carbon tax repeal, it is good practice for suppliers of regulated goods to query price reductions following the repeal with their suppliers, to determine whether they are attributable to the repeal.

Example

A supplier of regulated goods imports synthetic greenhouse gases and stores and sells those gases to wholesalers and large-scale users. Following the imposition of the carbon tax, the supplier was subject to an Equivalent Carbon Price Levy (ECPL) which was passed on to customers through increased prices. One of this supplier’s input costs is electricity, which has increased due to the carbon tax. This increased cost was also passed on to customers.

The supplier has experienced two categories of cost increase to:

- a cost that is directly attributable to the carbon tax—the ECPL
- a cost that is indirectly attributable to the carbon tax—the increased electricity prices
- and has passed these increases on to its customers by increasing its prices.

Following the carbon tax repeal, the supplier receives cost savings that are:

- directly attributable to the carbon tax repeal—the removal of the ECPL
- indirectly attributable to the carbon tax repeal—the reductions in electricity prices.

The supplier will be required to pass through all cost savings directly and indirectly attributable to the carbon tax repeal to its customers.
An entity’s costs and other relevant matters (s.60C(3)(c) and (d))

In determining whether a supplier of regulated goods has failed to pass through all cost savings attributable to the carbon tax repeal, regard must be given to matters including:

- the entity’s costs
- any other relevant matter that may reasonably influence the price.

An entity’s costs (s.60C (3) (c))

Suppliers of regulated goods, like other businesses, will be subject to a wide range of costs such as the cost of raw materials, labour or other business costs which are unrelated to the carbon tax repeal. Where a supplier’s costs that are not related to the carbon tax have increased, they may pass these increases through to their customers by increasing prices. Following the carbon tax repeal, suppliers of regulated goods may experience cost increases that are unrelated to the carbon tax.

Example

A supplier of regulated goods charges $15 per unit, of which $3 is attributable to cost increases resulting from the carbon tax. Following the carbon tax repeal, the supplier lowers its prices to $12 per unit. Several months later, the supplier experiences significant increases in the price of its raw materials and raises its price to $14 per unit. This subsequent price increase does not mean that the supplier has failed to pass through all cost savings attributable to the carbon tax, though the ACCC may investigate and ask the supplier for evidence of its cost increases.

However, these cost savings must be of a genuine kind and suppliers of regulated goods should not use their other costs as an excuse to avoid passing through all cost savings attributable to the carbon tax repeal. When considering the price charged by a supplier of regulated goods following the carbon tax repeal the ACCC will have regard to any objective evidence of the supplier’s costs and of any changes to those costs. The ACCC will seek comprehensive objective evidence of a supplier’s costs, particularly where the supplier has increased their price following the carbon tax repeal, or where it appears that the supplier is not complying with the carbon tax price reduction obligation.

Any other matter that may reasonably influence the price (s.60C(3)(d))

In assessing whether a supplier of regulated goods has failed to pass through all cost savings attributable to the carbon tax repeal, regard will be given to other relevant matters that may affect the suppliers’ price following the carbon tax repeal.

Examples of other relevant matters include:

- potential international effects, such as global shortages, exchange rate fluctuations or international trade obligations
- where a business is operating in an industry that is subject to price regulation and is unable to adjust its prices immediately or fully in order to reflect the impact of the carbon tax repeal
- market price volatility
- approved regulatory price increases.
Where a supplier of regulated goods relies on these other matters to support its price, the ACCC expects that the supplier will be able to provide evidence that shows how its price has been affected.

**Monitoring and reporting**

The ACCC has been given a Direction to monitor prices, costs and profits relating to the supply of regulated goods by corporations and the supply of goods by liable entities to assess the general effect of the carbon tax scheme in Australia. New powers given to the ACCC in Part V of the CCA enhance the monitoring role put in place by the Direction which commenced on 1 March 2014. Under s.60G of the new Part V of the CCA the ACCC may monitor prices to assess the general effect of the carbon tax repeal and determine whether a business has failed to comply with the carbon tax price reduction obligation. Under s.60H of the new Part V of the CCA, the ACCC may require a person (including a corporation) to produce information or documents if they would be useful to the ACCC in monitoring prices.

In order to aid the ACCC in detecting suppliers of regulated goods which fail to comply with the carbon tax price reduction obligation, the new Part V of the CCA gives the ACCC a number of important information gathering powers, to require suppliers of regulated goods to justify their prices and in some cases, to provide that justification directly to consumers. The ACCC will be closely monitoring pricing adjustments by suppliers of regulated goods to ensure that cost savings arising from the carbon tax repeal are passed through.

If businesses or consumers are concerned that a supplier of regulated goods has not passed on cost savings arising from the carbon tax repeal, they should consult any material made available by the supplier, or raise the issue with the supplier directly. Suppliers of regulated goods should anticipate questions from their customers about the effect of the carbon tax repeal and be prepared to respond to them. In making public statements or responding to customer inquiries, suppliers of regulated goods should ensure that any statements they make about the impact of the carbon tax repeal on their prices are truthful and supported by evidence. The CCA prohibits misleading and deceptive conduct and false or misleading representations and s.60K of the new Part V of the CCA specifically prohibits false or misleading representations concerning the effect of the carbon tax repeal on the price of a good or service.

**Carbon tax removal substantiation notice**

Under s.60FA of the new Part V of the CCA, the ACCC must, within 30 days after 17 July 2014, give a written notice (carbon tax removal substantiation notice) to:

- electricity retailers and producers that sell electricity to electricity customers
- natural gas retailers that sell natural gas to natural gas customers, and
- bulk SGG importers that sell SGGs to SGG customers.

The ACCC has issued carbon tax removal substantiation notices. In their response, recipients of a carbon tax removal substantiation notice must provide the ACCC with a written statement that explains:

- how the carbon tax repeal has affected, or is affecting their regulated supply input costs, and
- how reductions in their regulated supply input costs that are directly or indirectly attributable to the carbon tax repeal are reflected in the prices charged by the supplier for regulated supplies of electricity, natural gas or synthetic greenhouse gas.
Recipients of a notice must also provide information and/or documents that substantiate the explanation set out in their statement provided in response to the carbon tax removal substantiation notice.

The ACCC’s website provides more information on the carbon tax removal substantiation notice at the following page: Carbon tax removal substantiation notice.

**Carbon tax removal substantiation statement**

Under s.60FD of the new Part V of the CCA, electricity retailers and producers that sell electricity to electricity customers, natural gas retailers that sell natural gas to natural gas customers and bulk SGG importers that sell synthetic greenhouse gas to SGG customers were required to provide a carbon tax removal substantiation statement by 18 August 2014. The statement must set out the supplier’s estimate on an average annual percentage price basis, or an average annual dollar price basis, of the supplier’s cost savings that have been, are or will be directly or indirectly attributable to the carbon tax repeal and that have been, are being or will be passed on to each class of the supplier’s customers during the financial year that began on 1 July 2014. Each supplier must also provide information that substantiates these estimates. The ACCC notes that it is necessary for the carbon tax removal substantiation statement to provide an estimate for each class of customer.

In addition to providing the statement to the ACCC, it must also be published on the supplier’s website until 30 June 2015 (s. 60FD of the CCA).

The ACCC’s website provides more information on the carbon tax removal substantiation statement at the following page: Carbon tax removal substantiation statement.

**Statement to customers**

Under s.60FE of the new Part V of the CCA, electricity retailers and producers that sell electricity to electricity customers and natural gas retailers that sell natural gas to natural gas customers will, within 30 days of 17 July 2014, prepare a statement to customers. The statement must identify, on an average annual percentage price basis, or an average annual dollar price basis, the estimated cost savings to each class of customers that have been, are, or will be directly or indirectly attributable to the carbon tax repeal and are for the financial year that began on 1 July 2014.

This statement must be communicated to customers within the period of 30 to 60 days after 17 July 2014.

The ACCC’s website provides more information on the statement to customers at the following page: Statement for customers.

**The ACCC’s enforcement powers**

If a supplier of regulated goods fails to comply with the carbon tax price reduction obligation, the ACCC will, in accordance with its Compliance and Enforcement Policy, take enforcement action against that supplier. Where the ACCC initiates proceedings against a supplier of regulated goods, the CCA provides for significant penalties to be imposed upon that supplier by the courts.

**Notices that may be issued by the ACCC**

Under s.60D of the new Part V of the CCA, the ACCC may give a supplier of regulated goods a notice if it considers the supplier has not passed through all cost savings attributable to the carbon tax repeal. The notice serves as prima facie evidence for court
proceedings that the price charged by the supplier did not pass through all cost savings directly or indirectly attributable to the carbon tax repeal.

The ACCC may also, under s.60E of the new Part V of the CCA, issue a notice to a supplier of regulated goods if it considers that the supplier has not passed through all cost savings attributable to the carbon tax repeal. A notice given under s.60E must specify the supply of regulated goods to which it relates and give a maximum price that, in the ACCC’s opinion, may be charged for that supply. The notice does not set a maximum price for supply, but the ACCC may seek such an order through the courts (see below).

Infringement notices

Under s.60L of the new Part V of the CCA, the ACCC may issue infringement notices to suppliers of regulated goods that fail to pass through all cost savings attributable to the carbon tax repeal. An infringement notice requires the payment of $102,000 per alleged contravention for a listed corporation, $10,200 for a body corporate other than a listed corporation and $2,040 for an individual. Anyone issued with one or more infringement notices will have 28 days to pay the notice. If they do so, court action cannot be commenced regarding the alleged conduct. Where a supplier of regulated goods chooses not to pay infringement notices, the ACCC may take court action against the supplier for the contravention.

Court action and penalties

Where the ACCC considers that a supplier of regulated goods has failed to pass through all cost savings attributable to the carbon tax repeal, the ACCC may commence court proceedings against that supplier. The supplier would potentially face:

- court imposed pecuniary penalties of up to $1.1 million per contravention for a body corporate and $220,000 per contravention for individuals
- for electricity or natural gas suppliers or bulk SGG importers, a penalty amount equal to 250 per cent of those cost savings that were not passed through (s.60CA of the CCA)
- court orders that the price for the supply not exceed a certain amount and/or an order requiring the supplier to refund specified customers (s.80A of the CCA)
- injunctions
- declarations
- compensation orders
- orders requiring the supplier to disclose information, and
- orders requiring the supplier to publish corrective advertising.

The carbon tax repeal and other sections of the Competition and Consumer Act 2010

In relation to the carbon tax repeal, the ACCC will also have regard to other sections of the CCA including the competition provisions and the prohibitions of false and misleading representations (s.29 of the Australian Consumer Law (ACL)) and misleading and deceptive conduct (s.18 of the ACL). These sections of the CCA apply to all businesses and in accordance with its Compliance and Enforcement Policy the ACCC may exercise its enforcement powers if there is a potential breach of the law.

The ACCC will be concerned if a business, even one that was not a supplier of regulated goods, had the capacity to pass through cost savings arising from the carbon tax repeal to
consumers but failed to do so. The ACCC notes that the purpose of the new Part V of the CCA, as set out in section 60AA, is to ensure that all cost savings attributable to the carbon tax repeal are passed through to consumers of regulated goods and that 60AA (2) states this is intended to occur through lower prices. The ACCC expects that the normal operation of competitive forces will lead businesses to pass through these cost savings, and where this does not occur, the ACCC may examine the relevant market further.

The ACCC expects that consumers will ask questions of their suppliers about the impact of the carbon tax repeal on their pricing. All businesses, including but not limited to suppliers of regulated goods, should be prepared to respond to these questions. The ACCC will carefully scrutinise any statements by businesses regarding the effect of the carbon tax repeal on their prices to ensure that they are not false or misleading. In addition to the general prohibition on false and misleading representations and misleading and deceptive conduct under the CCA, s.60K of the new Part V of the CCA specifically prohibits false or misleading representations concerning the effect of the carbon tax repeal on the price of a good or service. Examples of statements that may be misleading include:

- a business represents that its prices do not need to be reduced after the carbon tax repeal because it did not pass through the cost increases attributable to the carbon tax to its customers when in fact, the business did pass through these cost increases (either directly, or as part of a more general price increase), or

- a business, in its dealings with customers, understates the amount by which it needs to reduce its prices to pass on the benefits of the carbon tax repeal, thereby leaving its prices at a higher level and increasing its margin.

Businesses should ensure that statements they make regarding the impact of the carbon tax repeal on their prices are truthful and supported by evidence.