

# Carbon price gone: implications for pricing



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Elisa de Wit<sup>1</sup>, Noni Shannon and Claire Forster

## Introduction

Earlier today the Government succeeded in its fourth attempt to repeal the carbon price.

After a surprising defeat of the legislation in the Senate last week, there was a scramble to make and pass further amendments to the *Clean Energy Legislation (Carbon Tax Repeal) Bill 2014 (Main Repeal Bill)* this week before the winter recess. The amendments made to the Main Repeal Bill were to respond to the much publicised additional concerns of the Palmer United Party (PUP) by building in further mechanisms to “ensure that lower prices resulting from the repeal of the carbon tax are passed on to consumers”. Originally tabled by the PUP, the final version of the amendments ended up being tabled by the Government in the House of Representatives.

As anticipated, the PUP senators and other cross-benchers voted with the Coalition to pass the Main Repeal Bill, which will repeal the *Clean Energy Act 2011* (Cth). This will remove the carbon pricing mechanism (CPM) when it receives Royal Assent later this month. However, the repeal of the CPM will be effective from 1 July 2014.

We have previously reported on the retrospective issue and other implications arising from the repeal of the CPM [here](#).

This update focuses on the changes made to the *Competition and Consumer Act 2010* (Cth) (CCA) by the Main Repeal Bill regarding the pass through of cost savings from the CPM repeal through the supply chain. It covers the PUP amendments and highlights the four key pricing messages for business.

## Suppliers of regulated goods must pass through cost savings connected to the CPM repeal

Between 1 July 2014 and 30 June 2015, businesses will be prohibited from:

- supplying natural gas, electricity, synthetic greenhouse gas (SGG) and SGG equipment (**Regulated Goods**); and
- where 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 CPM repeal.

Importantly, this prohibition does not capture all businesses – it will only apply to suppliers of electricity, natural gas, SGG, and SGG equipment.

On the PUP’s insistence, the prohibition is now put in slightly stronger words than the original drafting, which prohibited charging prices that were “unreasonably high” in the context of the CPM repeal. However, relevant suppliers had already interpreted this previous wording as generally requiring a pass through of cost savings connected with the CPM and it is expected that they will already have taken steps towards quantifying and determining a means to pass them through.

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<sup>1</sup> Partner. Norton Rose Fulbright has a market leading climate change practice. Please contact Elisa on [elisa.dewit@nortonrosefulbright.com](mailto:elisa.dewit@nortonrosefulbright.com) if you would like to know more about the legislation and the implications for your business.



A “reasonableness” standard still applies when scrutinising pricing under the new drafting. The CCA will require that regard be had to:

- the entity’s cost savings that are directly or indirectly attributable to the CPM repeal;
- how those cost savings can reasonably be attributed to the different supplies that the entity makes;
- the entity's costs; and
- any other relevant matter that may reasonably influence the price.

Therefore:

- Only costs savings that are realised by an entity must be passed through.
- Pricing may not fall by the full amount of the CPM cost saving if there are other costs and pricing factors that reasonably influence price.
- However, a conservative (or generous) approach to price reductions should generally be adopted. This is because a failure to incorporate the full cost saving into pricing can result in harsh consequences including a requirement to pay the Commonwealth 250% of the cost saving that was not passed through and pecuniary penalties in excess of \$1.1 million.
- It will be a matter of accounting to determine the extent to which an entity’s costs have decreased due to the CPM repeal, how to pass this through to its customers and how it communicates these matters. In doing so, entities should:
  - apply a rigorous verification and calculation method to ensure that the extent of its cost savings in connection with the CPM repeal are accurately measured and not understated;
  - fairly apportion those cost savings between its customers on a defensible basis;
  - know and be able to verify the amount that it has passed through to its customers in savings attributable to the CPM; and
  - if the customer’s prices are not reduced by the amount of the savings attributable to the CPM repeal, keep accurate records as to the other cost impacts or reasons that justify that position.

### **Business must not misrepresent the effect of the CPM, or its repeal, on prices**

Applicable to all entities, whether in the energy industry or not, is the prohibition against false or misleading representations in relation to the effect of the CPM, or its repeal, on prices. A breach of this prohibition may result in the imposition of a pecuniary penalty in excess of \$1.1 million (for a body corporate).

Businesses should therefore refrain from making any representations or statements to the effect that:

- the cost impact of the CPM repeal on it is less than it actually is (e.g. to justify maintaining or increasing its prices);
- a decision to increase, maintain or decrease its prices is attributable to or connected with the cost impact of the CPM repeal to a greater degree than is actually the case (e.g. to disguise the fact that it is attempting to increase its margins); or
- it is increasing or maintaining its prices (or decreasing them to a lesser extent than expected) for one reason, when it is actually doing it for another reason.

## **Substantiation will be required if you are an energy retailer or producer of electricity**

If you are a licensed electricity or gas retailer or “any other entity that produces electricity in Australia” (i.e. an electricity generator), you should:

- **expect a notice from the ACCC by the end of August** (being 30 days after the CPM repeal receives royal assent) requesting information and documentation demonstrating the impact of the CPM repeal on your supply input costs and how those reductions are being reflected in your pricing. **A response to the notice will be due 3 weeks after its receipt from the ACCC;**
- **start preparing a CPM repeal substantiation statement for the ACCC which must be sent to the ACCC by the end of August** (being 30 days after the CPM repeal receives royal assent) explaining average savings (either on an annual percentage price basis or an annual dollar price basis) 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 customer during the 2014/15 financial year; and
- **start preparing a CPM repeal statement for your customers which must be sent to those customers during September** (being the period between 30 and 60 days after the CPM repeal receives royal assent) explaining average savings that have been or will be passed on to each class of customer during the 2014/15 financial year.

Items (1) and (2) above will also apply to a bulk SGG importer that sells SGG to SGG customers.

Information to substantiate the estimates set out in the substantiation statement must be provided to the ACCC and the substantiation notice must be publicised on the retailer’s website. Retailers can choose how to communicate with their customers (e.g by including information on invoices, bill inserts, separate letters or on websites).

## **ACCC has strong monitoring and enforcement powers in connection with suspected contraventions**

The ACCC will be empowered to monitor the prices of certain goods and services to assess the general effect of the CPM repeal on those prices. This will be in addition to the inquiries that the ACCC has already made of numerous businesses under an interim direction to the ACCC under the CCA by the Federal Government in March.

The ACCC will have a new power to issue notices requiring the production of information or documents that:

- relate to prices or the setting of prices; and
- will or may be useful to the ACCC in fulfilling its new price monitoring function.

The ACCC will also receive the power to issue infringement notices to entities for failing to pass through cost savings and for the making of false or misleading CPM repeal representations. The ACCC will only need to have “reasonable grounds” to issue an infringement notice, and recipients will either need to pay a specified penalty (\$102,200 for listed corporations, \$10,200 for other body corporates and \$2,040 for individuals), or face the prospect of the ACCC taking court action in relation to the alleged contravention. Paying the specified penalty under an infringement notice will protect a business from further action by the ACCC.

*If you require any assistance in understanding the implications of the repeal of the CPM or the PUP amendments, please contact a member of our [climate change team](#). In particular, we have been assisting a number of businesses with preparation of responses to the ACCC’s information requests, and are well placed to provide advice on the scope and content of substantiation statements or consumer repeal statements.*