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CARBON REPORTING

Do you have to report your greenhouse gas emissions and energy consumption or production?

As part of the Federal Government's environmental initiative, corporations must now monitor and record greenhouse gas emissions, energy production and energy consumption if they have operational control of "facilities" that may exceed the legislative threshold requirements set out in the *National Greenhouse and Energy Reporting Act 2007 (Cth)* (**Act**). Under the Act, all "controlling corporations" (ie the ultimate Australian holding company) of corporate groups were required to register with the Greenhouse and Energy Data Officer (**GEDO**) by **31 August 2009**, and report to the GEDO by **31 October 2009**, if they met the thresholds for the financial year 1 July 2008 to 30 June 2009.

While the deadlines for registration and reporting for the 2008/2009 financial year have passed, corporations are encouraged to assess whether they should have registered and reported in the 2008/2009 financial year. If a corporation becomes aware that it fell within the scope of the Act for

that financial year, the Department of Climate Change (which oversees the GEDO) should be notified without delay. Failure to register and report, particularly where the corporation and/or its chief executive officer knew that the company fell within the Act, could result in substantial penalties.

In the 2008/2009 financial year, there were 680 corporations that registered and reported under the Act. While the obligation to register and report will depend on a corporation's individual circumstances, some useful examples of corporations that have already registered in the 2008/2009 financial year include:

- Wesfarmers Limited;
- Westfield Holdings Limited;
- Woolworths Ltd;



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- ALDI Stores (a Limited Partnership);
- Myer Holdings Limited;
- Lendlease Corporation Limited;
- Centro Properties Limited; and
- Mirvac Limited.

Importantly, the number of corporations that will fall within the Act in the current year (2009/2010) and subsequent years will inevitably increase as the thresholds for compliance reduce progressively from year to year under the Act.

Therefore, corporations are encouraged to assess whether they are likely to fall within the Act in the 2009/2010 and subsequent financial years. The next registration and reporting deadlines are **31 August 2010** and **31 October 2010** respectively. If it is likely that a corporation will fall within the Act for 2009/2010, it should have already begun monitoring

and recording its greenhouse gas emissions, energy consumption and/or production.

Who is caught within the thresholds?

The Act sets out different threshold limits at both a 'corporate level' and at a 'facility level'.

At the corporate threshold level, a controlling corporation must register and report if all the facilities under the operational control of its members exceed any one of the following thresholds:

- emits 125 kilotonnes (**kt**) of greenhouse gases or produces or consumes more than 500 terajoules (**TJ**) of energy in the reporting period **1 July 2008 to 30 June 2009**; or
- emits 87.5 kt of greenhouse gases or produces or consumes more than 350 TJ of energy in the reporting period **1 July 2009 to 30 June 2010**; or
- emits 50 kt of greenhouse gases or produces or consumes more than 200 TJ of energy in the reporting period **1 July 2010 to 30 June 2011** or any year thereafter.

At the facility threshold level, a controlling corporation must register and report if a facility under the operational control of a member emits more than 25 kt of greenhouse gases or produces or consumes more than 100 TJ of energy within the reporting year.

In more practical terms (and using only electricity, petrol and diesel as potential sources of greenhouse gas emissions and energy consumption), a controlling corporation will be caught in the 2009/2010 financial year if:

- (a) all the facilities under the control of the corporate group (ie the corporate threshold level) exceed:
- 860,000L of petrol per month (approximately 8,600,000km per month); or
 - 760,000L of diesel per month (approximately 9,880,000km per month); or
 - 6,000,000 kWh of electricity per month (an annual electricity bill of approximately \$8.5 million); or
 - a combination of petrol, diesel and/or electricity in proportion to the above figures.
- (b) a facility under the control of one of its members (ie the facility threshold level) exceeds:
- 250,000L of petrol per month (approximately 2,500,000km per month); or
 - 225,000L of diesel per month (approximately 2,925,000km per month); or
 - 1,750,000 kWh of electricity per month (an annual electricity bill of approximately \$2.5 million); or
 - a combination of petrol, diesel and/or electricity in proportion to the above figures.

It is important to note that there are other sources that could potentially contribute to a corporation's overall greenhouse gas emissions and energy consumption which could trigger one or more of the thresholds. A complex document called the NGER Measurement Determination sets out the measurement methods to be used for estimating emissions.



Cornwall Stodart has a close relationship with a number of service providers who are able to assist in determining emissions output and whether a corporation is likely to exceed the current thresholds.

Who are the members of a corporate group?

The Act applies to a “controlling corporation’s group”, which comprises:

- the controlling corporation (ie the ultimate Australian holding company);
- subsidiaries of the controlling corporation;
- joint ventures involving any members of the controlling corporation’s group; and
- partnerships involving any members of the controlling corporation’s group.

These are the “members” of the corporate group.

The controlling corporation is responsible for registering and reporting on behalf of the members of its corporate group. Typically, the controlling corporation will be self evident, that is, the entity at the top of the corporate group hierarchy within Australia. However, in some cases, it may be more difficult to determine the identity of the controlling corporation (for example, where there are joint ventures, partnerships, unit trusts or cross border structures involved).

Participants in a joint venture or partnership are required to nominate a responsible entity that will bear the onus of registering and reporting. If a participant is not nominated, all participants will become liable to register and report under the Act.

Further, recent amendments to the Act now allow, under certain circumstances, an entity with “financial control” over a facility to apply for a Reporting Transfer Certificate (**RTC**) to undertake the obligations of registering, reporting, record keeping and general compliance under the Act.

Cornwall Stodart is able to assist in determining which entity is the controlling corporation (ie who is liable to register and report to the GEDO), who are the members of the controlling corporation’s group and whether a corporation is able to apply for an RTC.

Do the activities of a member constitute a “facility”?

Determining whether activities of a member of the corporate group constitute a “facility” and determining a facility’s boundaries are central to the application of the Act. Importantly, the Act only captures facilities within Australia. According to the NGER Guidelines, four criteria can be used to determine if an activity or series of activities forms a “facility” under the Act:

1. Activities must produce greenhouse gas emissions or produce or consume energy. This includes emissions produced by activities at or attributed to the facility, such as:
 - (a) industrial process or transport activities that are attributed to the facility (scope 1 emissions); and
 - (b) consumption of electricity at the facility that has been produced at another site which does not form part of the facility (scope 2 emissions).

However, it excludes greenhouse gases that are generated in the wider economy as a consequence of the facility’s activities but that are physically produced by another facility, eg an employee’s business travel on a commercial airline (scope 3 emissions).
2. Activities must form part of a single production process. An activity or series of activities forms part of a single undertaking or enterprise if it produces one or more products or services (under the primary production process) at a site. Other separate production processes would also be considered part of a single facility if they are under the “overall control” of the same corporation. “Overall control” means the authority to introduce and





implement operating, environmental or health and safety policies for the activity.

3. Activities must occur at a single site. Activities occurring at a single site would usually be considered part of a single facility (except if the activities form an entirely separate production process controlled by a separate corporation). Some activities, known as 'listed' activities, can be attributed to a site even though they occur away from that site (such as record keeping, storage, cleaning and maintenance). Importantly, single site criteria do not apply to the transport and network industry sectors, however there are other criteria to be used for these exceptions.
4. Activities must be attributable to a single industry sector. The corporation must determine the principal activity of the facility and attribute that activity to an "industry sector". "Industry sector" refers to the industry classifications and codes listed in ANZSIC, a widely accepted system for classifying industrial activities.



Is the facility under the "operational control" of a member of the corporate group?

The test for "operational control" is whether the controlling corporation or member has the authority to introduce and implement operating, health and safety and environmental (**OHSE**) policies.

Under the Act, only one corporation can have operational control.

If more than one corporation or member has the authority, then the one that has the greatest authority to implement OHSE policies is deemed to have operational control.

Uncertainty may arise as to who has operational control between an owner of a facility, the facility's manager (or outsourced operator) and/or the tenant of the facility. The test for operational control is both a factual and legal question and in many cases will be determined by the contractual arrangements between the relevant parties.

In practice, defining the boundaries of facilities within the corporate group and determining whether a member has operational control of a particular facility can be far from straight forward. Cornwall Stodart is able to assist in identifying and resolving these issues.

Keeping records

Under the Act, a registered corporation must keep records of the activities of the members of its group that:

- (a) allow it to report accurately under the Act; and
- (b) enable the GEDO to ascertain whether the corporation has complied with its obligations under the Act.

The corporation must keep the records for **seven years** from the end of the year in which the activities take place.

Penalties

Failure to comply with the Act can result in substantial civil penalties, including:

- \$220,000 (maximum) plus \$11,000 for each day that the offence continues for both a failure to register with and a failure to report to the GEDO; and
- \$110,000 (maximum) for failure to keep records.

Under the Act, the GEDO may also issue an infringement notice equal to one-fifth of the maximum penalty that a Court could impose (ie \$44,000) if it has reasonable grounds to believe that a person has contravened the Act.

Importantly, a chief executive officer of a corporation that has contravened the Act may also be held personally liable for a civil penalty (up to \$220,000) if they knew the contravention would occur (or were reckless or negligent) and failed to take reasonable steps to prevent the contravention. In order to maximise the prospects of satisfying this "reasonable steps" test, the following are examples of actions that should be taken:

1. implementation of a formal compliance program and plan;
2. obtaining legal advice on the application of the Act;
3. assessment of the corporation's compliance using independent professional assessors/ auditors;
4. ensuring accurate data collection; and
5. training and education of employees to ensure they have a working knowledge of the compliance requirements.

What to do next?

If you are a controlling corporation or a member of a controlling corporation's group and you are likely to meet the thresholds (either at the facility or corporate level) or you are unsure whether or not you are required to register and report under the Act for any given financial year, you should promptly seek legal advice as to the appropriate course of action in order to avoid substantial penalties and/or negative public perception to your corporation.

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