

## I am a Builder - How will the Carbon Tax Affect Me?

### Construction Update

#### What is the Carbon Price Mechanism?

The Carbon Price Mechanism ("CPM") (or carbon emissions trading scheme) is designed to reduce Australia's greenhouse gas emissions, by applying a cost to the producers of greenhouse gas emissions (like CO<sub>2</sub>). The CPM will commence on 1 July 2012 and as a member of the building industry it will affect you.

#### How will CPM affect my business?

Organisations that produce large quantities of greenhouse gas emissions, eg steel, cement and brick manufacturers will be required to purchase carbon credits for each tonne of greenhouse gases they omit. It is expected that these organisations will pass on the cost of the carbon credits by increasing the price of the building materials they produce. This means your building material costs will likely go up.

#### Can I pass on my materials costs increases prior to entering into a contract?

Yes – as a contractor, you can increase your tender prices prior to entering into a contract. But the issue arises where material suppliers raise their prices after you have signed your contract.

If you are entering into a contract prior to 1 July 2012 you should consider carefully what type of contract will enable you to recover any future price increases to your building materials. For instance you might decide to tender on a lump sum contract basis and increase your tender price to cover what you think will be your additional costs.

Alternatively, you might decide to tender on a cost plus basis and thereby pass on your building materials costs to the owner. For post 1 July 2012 contracts you should be able to calculate your increased costs from supplier invoices and include these in revised tender prices.

#### Who does this affect?

- Construction companies
- Building contractors
- Building manufacturers

#### Article Highlights

- Ensure you can fully substantiate your Carbon Price Mechanism in costs increases you could be be fined under the *Competition & Consumer Act (Cth)*
- Regular "change in tax" contracts clauses may not be sufficient to cover the CPM as it is not a "tax".



### Can I pass on any increase in my costs in existing contracts?

This is more difficult. If you have entered into a cost plus contract prior to 1 July 2012 you can try and pass on any increases in the costs of your building materials to the principal, subject to the comments below.

However, if you have entered into a lump sum contract prior to 1 July 2012, and your suppliers have put their prices up, you will struggle to pass these costs on.

Standard clauses in existing contracts may not help you either. Recent commentary suggests that parties will not be able to use the "change in law" clauses to justify increasing prices to cover higher material costs due to the CPM. As a general rule "change of law" clauses are only effective where the change in law could not be reasonably anticipated at the time the contract was executed. This is not the case with the CPM as it has been expected for some time.

Similarly, "change in tax" clauses won't help, for it is presently considered that the CPM is not a "tax". However, if the "change in tax" clauses are drafted to include charges, imposts, levies and so forth then the CPM may be caught.

For your future contracts, you could think about including some transparent CPM costs pass through clauses.

### Australia Competition and Consumer Commission penalties

Under the *Competition and Consumer Act 2010* (Cth) you must not make any false, misleading or deceptive claims about the price of your goods or services. This includes when you advise a principal that your building costs have increased due to the CPM. If the ACCC considers that you have made a false or misleading claim, the ACCC has the power to issue you with a substantial fine.

The best way for you to protect yourself is:

- advise a principal that your prices will increase at 1 July 2012 and that this increase is due to a number of reasons impacting on your building costs; or
- to be able to fully substantiate how the CPM has affected your prices. This requires you to have all the relevant documents from your suppliers to show how they have applied the carbon credit to their prices.

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