Senate Standing Committee on Environment and Communications
Legislation Committee
Answers to questions on notice
Environment portfolio

Question No: 226

Hearing: Additional Estimates

Outcome: Agency

Programme: Clean Energy Regulator

Topic: Redbank power station

Hansard Page: N/A

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Question Type: Written

Senator Back asked:

Did the CER undertake any due diligence before the Redbank Power Station was paid $8.8 million as a cash payment from the Energy Security Fund in September 2013 just weeks before the receivers, KordaMentha, were appointed on 5 October 2013?

Answer:

Background

Questions on Notice numbers 225, 226 and 231 through to 239 (Additional Estimates 2016) seek information about the due diligence, investigation, risk management and debt recovery actions that were undertaken by the Clean Energy Regulator in relation to Redbank Power Station and its carbon pricing mechanism debt and entitlements it received under the Energy Security Fund.

The following information sets out how the Regulator administered the carbon pricing mechanism generally. Specific responses are then provided for each Question on Notice.

A number of the matters raised in these questions have already been the subject of discussion at Senate Estimates hearings, including in February 2015. An extract of that Hansard appears at the end of this response.

Role of the Clean Energy Regulator

The Clean Energy Regulator was established in April 2012 for the purpose of administering the new carbon pricing mechanism and a number of existing schemes, including the Renewable Energy Target and National Greenhouse and Energy Reporting (NGER) Scheme.

The Clean Energy Regulator was responsible for monitoring compliance with the carbon pricing mechanism, including reporting under the NGER Scheme (to determine liability), acquitting of liability and the recovery of debts owing to the Commonwealth as the result of non or late acquittal.

In relation to the Energy Security Fund (ESF), the Regulator was not responsible for cash payments under the ESF. These payments were administered and made by the Department of Climate Change and Energy Efficiency. The payments were made in June 2012. The Clean Energy Regulator was responsible for the issuing of free units under the ESF in September 2013.

As the administrator of the carbon pricing mechanism, the Clean Energy Regulator was authorised to collect, and if necessary, sue to recover liability incurred in relation to the carbon tax. The Clean Energy Regulator does this on behalf of the Commonwealth. Companies who sought to recoup the cost of the carbon tax from customers were not collecting the carbon tax on behalf of the Commonwealth.

The Regulator's approach to due diligence and risk management in the carbon pricing mechanism

Between April 2012 and April 2013, the Regulator built capability, including substantial information technology systems, to implement the emissions reporting, liability acquittal and issuing of free carbon units aspects of the carbon pricing mechanism. This included conducting a number of information sessions for approximately 360 liable entities to ensure they fully understood both their obligations and entitlements. Risk and fraud plans were prepared on the carbon pricing mechanism and appropriate controls were implemented. This work was the subject of multiple independent audits including by the ANAO.

Identification of potential liable entities commenced prior to the stand-up of the Clean Energy Regulator by the then Regulatory Division of the Department of Climate Change and Energy Efficiency. The purpose of these scans were to, among other things, understand the characteristics of liable facilities and liable entities under the clean energy legislation based on data already reported under the NGER legislation.

Based on this analysis, and earlier analysis of potential liable entities by the Department of Climate Change and Energy Efficiency, the Clean Energy Regulator undertook a number of activities to ensure that entities with a potential liability had the information they needed to understood the obligations created by the clean energy legislation, and discharge those obligations where necessary. These activities included, but were not limited to, correspondence, guidance, workshops, and direct contact by officers of the Clean Energy Regulator.

Potential liable entities were monitored by the Clean Energy Regulator prior to key statutory dates.

The purpose of this monitoring was to ensure that liable entities understood their obligations, had the necessary information to ensure compliance, and were aware of the possible consequences of non-compliance. The monitoring allowed officers of the Clean Energy Regulator to identify entities that were presenting indicators that they were at risk of non-compliance of statutory deadlines and consequently target education and support activities appropriately.

Compliance rates and debt recovery

As a result of the actions by the Clean Energy Regulator (in the form of scanning, direct monitoring, identification of entities at high risk of non-compliance, education, and targeted support), compliance under the *National Greenhouse and Energy Reporting Act 2007* and the *Clean Energy Act 2011* for the provisional surrender period under the carbon pricing mechanism ending 17 June 2013 was very high.

Over its 2 year administration of the carbon pricing mechanism, there was a 99.5 per cent on time acquittal of liability.

The design of the carbon pricing mechanism contemplated non-compliance (by allowing for unit shortfall charge and penalty interest) and debt recovery (section 136 of the *Clean Energy Act 2011*). At this stage, the carbon pricing mechanism has collected $13.425 billion worth of carbon units (including Australian Carbon Credit Units and free carbon units issued under both the Jobs and Competitiveness Program and ESF) and recovered an additional $35.2 million from shortfall and late payment penalties. The amount of presently unrecovered debt (approximately $60.2 million) is equivalent to 0.45 per cent of that $13.425 billion.

The Regulator vigorously pursued all carbon pricing mechanism debts.

At this stage, only two entities have not fully acquitted their liability (for a total indebtedness of approximately $60.2 million). Both companies are now in liquidation.

The Commonwealth is, by law, an unsecured creditor in relation to these debts.

The Regulator established and followed purpose built debt recovery policies and procedures. A selection of these can be found on the Regulator's website.[1] The Regulator also received expert advice from the Australian Government Solicitor in relation to debt recovery options.

Specific Answers to Questions on Notice

QoN 225	*Did the CER undertake any due diligence when the Redbank Power Station was issued with 365,600 carbon units in September 2013, just weeks before the receivers, KordaMentha, were appointed?*

Yes.

The Clean Energy Regulator was responsible for the issuing of the 365,600 carbon units in September 2013 to Redbank Project Pty Limited.

The Clean Energy Regulator had undertaken both general (see Background) and specific due diligence in relation to Redbank Project Pty Limited.

The Clean Energy Regulator was aware in early 2013 of potential risks related to Redbank Project Pty Limited. The identified risks related to potential legal non-compliance and financial viability. As a result, the Clean Energy Regulator monitored Redbank Project Pty Limited leading up to both acquittal of carbon pricing mechanism liability and the issuing of units in September 2013.

Redbank Project Pty Limited complied with the law by acquitting its initial carbon price liability in June 2013.

In terms of financial viability, as the question notes, receivers were not appointed to Redbank Project Pty Limited until after the ESF units were issued.

In any event, there were no grounds for the Regulator to refuse to issue ESF carbon units in September 2013. By law, the Regulator could only refuse to issue free carbon units in an eligible financial year for a generation complex where:

(i) The generation complex did not have a certificate of eligibility for coal-fired generation assistance in force (s 161(1) *Clean Energy Act 2011*);
(ii) The generation complex had failed the power station reliability test for the eligible financial year (s169(2) *Clean Energy Act 2011*); or
(iii) A person who owned, controlled or operated the generation complex had not given the Resources and Energy Minister a valid Clean Energy Investment Plan for the eligible financial year prior to 15 August in that year (s177(1) *Clean Energy Act 2011*).

Redbank did not fall within any of those three exemption categories. The Regulator was therefore obliged to issue the relevant units on 2 September 2013.

QoN 226	*Did the CER undertake any due diligence before the Redbank Power Station was paid $8.8 million as a cash payment from the Energy Security Fund in September 2013 just weeks before the receivers, KordaMentha, were appointed on 5 October 2013?*

[1] http://www.cleanenergyregulator.gov.au/About/Freedom-of-information-(FOI)/Freedom-of-Information-(FOI)-disclosure-log – see entry for FOI 14_2013

As set out above, the Clean Energy Regulator was not responsible for this payment. The payment was made by the Department of Climate Change and Energy Efficiency.

The payment was made in June 2012, not September 2013.

QoN 231	*Has the Australian Government Solicitor or the Investigations and Enforcement branch of the CER made any progress in the recovery of the remaining $45.4 million carbon tax liability owing to the federal government by the receivers, now that the remaining assets of the Redbank Power Station have been sold? Assets including the fuel supply agreement with Rio-Tinto (termination fee ~$80+ million) and the electricity supply agreement with Energy Australia (~$60+ million)?*

The Regulator has not recovered further amounts since receiving the $5.75 million part payment on 31 July 2014. The Regulator lodged its proof of debt with Redbank's liquidators on 19 February 2016 detailing the $51,746,413.72 owed by Redbank on the date of the liquidators' appointment.

The liquidators are currently investigating Redbank's affairs. The Regulator will continue to monitor the situation and has no intention of abandoning its claim on behalf of the Commonwealth.

If any person has information that might be relevant to the recovery of funds by the Commonwealth, this should be provided to the Clean Energy Regulator. Further, if any person has information relating to the recovery of funds owing to, or the distribution of funds from the sale of, Redbank Project Pty Limited, this information should be provided to the liquidators.

QoN 232	*Is the CER aware that '333,' a subsidiary company of KordaMentha, were advising the secured creditors of the Redbank Power Station for a number of years prior to it being placed into receivership with KordaMentha on 5 October 2013? If so, when did the CER become aware of this?*

No.

QoN 233	*Were KordaMentha and their representatives successful in dissuading the CER from collecting the remaining unpaid carbon tax liability?*

No. The Regulator has never written off the debt. The Regulator has implemented its debt recovery policies and actively pursued the debt, including the use of the Australian Government Solicitor.

From January to December 2015, the Regulator sought and obtained numerous updates from KordaMentha on the process for sale of Redbank or its assets, and at each update, re-evaluated whether legal action should be taken. On each occasion, it was decided that taking legal action was unlikely to increase or decrease the Regulator's chances of recovering the debt on behalf of the Commonwealth. However, taking legal action would, in all likelihood, lead to the premature closure of the power station (with a resulting impact on jobs) and diminish the chance of a sale of the power station.

The Clean Energy Regulator continues to engage with Ferrier Hodgson, who were appointed as liquidators in December 2015. The Regulator lodged a proof of debt with the liquidators on 19 February 2016. The proof of debt was in the amount of $51,746,413.72, being the amount of the debt at the date of appointment of the liquidator.

QoN 234	*What documentation was used by KordaMentha/333 in negotiating with the CER that purported as to when the federal government became an unsecured creditor of the $51 million carbon tax collected from Energy Australia consumers by the Redbank Power Station?*

The Commonwealth became an unsecured creditor on 3 February 2014 when Redbank Project Pty Limited failed to surrender any carbon units to meet their final 2012-13 carbon price liability.

Redbank Project Pty Limited incurred further debts on 16 June 2014 (due to failure to meet provisional liability for 2013-14) and 2 February 2015 (due to failure to meet final liability for 2013-14).

KordaMentha have never disputed the existence or amount of Redbank's debts to the Regulator, nor did they dispute when the debts were incurred. KordaMentha first claimed that Redbank's debts to the Regulator were unsecured in a letter of 3 February 2014.

The position in relation to money collected from consumers is discussed in the response to SE16/27.

QoN 235	*What was the evidence that was used by KordaMentha/333 during the negotiation with the CER that gave the impression as stated by Ms Munro that: "it was evident that it was unlikely that later on there would be such a degree of recovery available."?*

By letter of 2 June 2014, KordaMentha told the Clean Energy Regulator that there were secured debts of over $200 million and that Redbank's assets were unlikely to cover that amount.

Throughout negotiations on the standstill deed in June and July 2014, on request from the Regulator, KordaMentha provided three valuations of Redbank. None of these valuations exceeded the value of the secured debts.

The Regulator has continued to monitor the status of Redbank Project Pty Limited, and has maintained regular contact with both KordaMentha (who were appointed as receivers) and more recently, with the liquidators, Ferrier-Hodgson (appointed in December 2015).

QoN 236	*During the CER negotiation with KordaMentha to discuss the part-payment of the liability ($5.75 million), what legal advice was used by KordaMentha in purporting that the government is an unsecured creditor in this case and when was this advice drawn up?*

KordaMentha first claimed that a unit shortfall charge amounted to an unsecured claim against Redbank Project Pty Limited in a letter to the Regulator dated 3 February 2014.

For the reasons set out above, the Clean Energy Regulator was satisfied that the position put by KordaMentha in relation to the Commonwealth's status as an unsecured creditor was correct.

The Regulator did not request, and did not receive, any legal advice from KordaMentha on this point.

QoN 237	*In relation to the carbon tax collected on behalf of the federal government by the Redbank Power Station from Energy Australia's consumers and now owing to the federal government by the receivers, KordaMentha, what legal advice was relied upon in determining that the government is an unsecured creditor in this case?*

Carbon price was required to be paid by liable entities. Liable entities did not "collect" on behalf of the Commonwealth. Liable entities (or their customers) were fully entitled to recoup the cost of the carbon pricing mechanism. This was closely monitored by the ACCC.

Liable entities were required to acquit their liability to the Commonwealth. Failure to acquit their liability meant that the liable entity incurred a debt to the Commonwealth.

Nothing in the *Clean Energy Act 2011* or the associated Acts placed the Commonwealth in the position of a secured creditor. The statutory priority of the Commonwealth to receive a priority payment in corporate insolvencies was abolished from 1 November 1979 by the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth). The only exceptions to this are tax instalment deductions and withholding tax.

As a result, the Clean Energy Regulator (acting on behalf of the Commonwealth) is in the same positon as any other unsecured creditor.

This position was confirmed by the Department of Finance.

The Australian Government Solicitor advised the Clean Energy Regulator on its debt recovery options on the basis that that the Clean Energy Regulator was an unsecured creditor.

QoN 238	*Was there a fraud or risk assessment done under the Commonwealth guidelines in respect of the Redbank Power Station and the risk that it would avoid its financial obligations to the Commonwealth? If so, will you please provide a copy? If not, why not? Who is responsible for the failure to manage this risk?*

No. There was no specific fraud or risk assessment undertaken in relation to Redbank Project Pty Limited.

However, as discussed in Background, the Clean Energy Regulator implemented a comprehensive risk management strategy. Redbank Project Pty Limited was covered by, and monitored under, that strategy.

The design of the carbon pricing mechanism contemplated non-compliance (by allowing for shortfall penalty and interest) and debt recovery (see section 136 of the *Clean Energy Act 2011*).

There was no failure on the part of the Clean Energy Regulator or its staff in relation to the management of risk, including the risk of non-compliance with legislative obligations or debt recovery. This is amply demonstrated by the rate of compliance by liable entities with legislative requirements and the recovery of amounts owed to the Commonwealth (see Background).

The risk in relation to debt recovery is, in part, managed by proactive engagement with liable entities and by application of the Regulator's debt related policies and procedures. These procedures have been applied by the Regulator in its pursuit of amounts owed by Redbank Project Pty Limited. These policies and procedures recognise the various legislative and legal bases on which debts can be recovered. The Regulator has consistently taken legal advice in relation to debt recovery.

QoN 239	*Was there any investigation undertaken by the CER into the financial viability and sustainability of the Redbank Power Station prior to the payment of $8.8 million in cash and the issuing of 365,600 carbon units to the Redbank Power Station in September 2013?*

No specific investigation was undertaken. However, the Clean Energy Regulator had received intelligence about potential financial issues with Redbank in early 2013 and was maintaining a watching brief over a number of entities, including Redbank Project Pty Limited prior to the issuing of units in September 2013.

As set out previously, the payment of cash was administered by the Department of Climate Change and Energy Efficiency.

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Senator BACK: I want to ask some questions about the Redbank project—the operators of the Redbank power station in the Hunter Valley. I want to take you to the Liable Entities Public Information Database for the year 2013-14 and ask if you or your officers can confirm that the Redbank project at that point had an outstanding carbon tax bill of some $36.55 million—made up of $26,759,000 in unpaid provisional units and $9.798 million of unpaid final units—as at the end of June 2014.

Ms Munro: I can give you precise information on that. For the benefit of the committee, I will provide some context for this. We have now had the final acquittal of the carbon tax, the carbon-pricing mechanism. That was completed on 2 February. We have published relevant information on the Liable Entities Public Information Database, which provides a great deal of transparency on the circumstances. Senator Back, for example, was able to interrogate that and see exactly what the situation was. Again, we had a very high level of compliance, so there are at this point in time only two entities in shortfall. One of them is Redbank. The committee should be aware that Redbank is in receivership and has been for some time. That has curtailed its ability, as an entity, to transact. I also mention that, in that context, the Clean Energy Regulator is an unsecured creditor, so we are one of many creditors of that entity.

Going to the numbers, as things currently stand Redbank did not fully acquit its liability for the 2012-13 year, it has not acquit any of its liability for the 2013-14 year, and therefore its total shortfall is equivalent to something just short of 1½ million units, which, as we said, is equivalent to a debt to the Clean Energy Regulator of some $46 million in shortfall charge and, on top of that, they are accruing late payment penalties, which currently stand something shy of $5 million. That is the situation as it stands.

Senator BACK: So the figure is about $51 million as of now. You were saying that the company went into receivership. Do you know when that was and when you were informed of that?

Ms Munro: I am not sure if I have that date, but it certainly goes back to—

Senator BACK: Perhaps you could take it on notice.

Ms Munro: We will take on notice as to when we were advised by Redbank that they—

Senator BACK: My advice is they went into receivership on 5 October 2013.

Ms Munro: It certainly was in 2013. I just do not have the date in front of me.

Senator BACK: I understand the company made a profit of some $26 million in the 2011-12 financial year, but they went into receivership in October 2013. My information is

that the power station was closed up by the receivers in October 2014. Is that your understanding?

Ms Munro: I am not able to comment on the decisions made by the receivers in terms of how they operate that business.

Senator BACK: Could you confirm that Redbank did receive from the Energy Security Fund some $17.7 million, being a cash payment of some $8.7 million from the Clean Energy Regulator and a further figure of some $8.8 million in carbon units at a fixed unit price from the Department of the Environment. Is my information correct?

Ms Munro: Slightly out of kilter, but in the broad it is correct. Under the Energy Security Fund, which was established to deal with some issues in the generation sector, the arrangement was that for the first year there would be a cash payment which was against the 2012-13 anticipated liability, and that was $8.8 million in round terms. That was calculated and paid by the department. The division of responsibility was that the department was responsible for that cash arrangement and then, under the provisions for the 2013-14 liable year, the Clean Energy Regulator had the responsibility for that as part of the Industry Assistance Program, and we issued 365,600 units in September 2013. Again, that is on the public record. You can see that information on our website. You are correct: that has a cash equivalent of roughly the same amount of money.

Senator BACK: Those funds were passed over in September 2013 and then the business went into receivership on 5 October 2013, only some days or weeks after that. Am I right that I heard you say that the Clean Energy Regulator is an unsecured creditor of that figure now totalling $51 million?

Ms Munro: That is correct. That is the understanding that we have. I will just go back. I do not draw any conclusion about the timing of the receivership relative to the receipt of the units. Units were issued at the time it was provided for the units that were provided according to the schedule that was legislated. At the time, Redbank had partially acquitted its liability for 2013. So they had a liability which was some 1.1 million units, and they had actually surrendered 820,000 units on time. It was only in February 2014, after the issuance of the units and after they had gone into receivership, that they went into shortfall with respect to that first year. So the timing is a little bit complicated.

I should correct something that I said with respect to the outstanding debt because what I summarised was the shortfall charge and the late payment penalties. But, in fact, we had received part payment against that total, which you said was around $51 million. They have paid $5.7 million against the liability, but that still leaves an outstanding liability, including the late payment charges, of approximately $45 million.

Senator BACK: When you say they paid the $5.7 million—

Ms Munro: The receivers paid that.

Senator BACK: The receivers have paid $5.7 million.

Ms Munro: So they have made some endeavours to reduce the liability.

Senator BACK: The retailer, I understand, is a company called EnergyAustralia, who would have been charging the carbon tax to the customers of the generator and collecting those funds as part of the invoices, including the carbon tax component. That is actually a collection of a tax payable to the federal government, isn't it, collected, presumably, by the retailer and passed on to the generator, who would have the liability? I am at a loss to understand how those funds, collected from customers in consideration of a tax payable to the Australian government, would not, in fact, be due to a highly secured creditor. How could the federal government not be a secured creditor, in consideration of taxes collected from consumers of the electricity?

Ms Munro **:** You go to several questions of policy in that question, so I will answer the bits that I can, and, possibly, Dr Kennedy might want to comment on the rest. First of all, in terms of where the liability is and the obligation is, the way that the carbon tax worked

in the electricity market was that the liable entity was the generator who actually burns the fuel and has the emissions.

Senator BACK: That is correct.

Ms Munro: So, they are the liable entity. The prices that they receive for their energy in the wholesale market did increase to essentially allow them to pass that through, but there is not a direct pass loop which places the tax obligation on the retailer. So the question, really, I think, is more simple. Here is an entity that received revenue for its generation in the market. It is now in receivership for whatever reasons and therefore, is unable to meet its obligations not just to the Commonwealth of Australia but also to its many other creditors. You could say that that sort of relationship is no different from any of the other inputs, for example, if they could not pay their interest charges to the bank or some other customer bank that is involved in that whole chain. But, to get back to the question of whether the Commonwealth is a secured creditor, that is a policy matter that I assume is the same for all taxes. It is not where the Commonwealth stands in the hierarchy.

Senator BACK: Has there been dialogue between you or your office and the receivers, who I understand to be KordaMentha in terms of some arrangement for the payment in full or in part of those funds owing?

Ms Munro: Again, just to step back for a second, we have a very thoroughly articulated debt management policy, which really goes in the end to our duty being to maximise recovery, or the reasonable prospects of recovery, of those debts. I would say that we have been highly successful in those that we have been able to recover. Most of the unit shortfall charges have been paid. There have been some entities that we have had to pursue in various ways, and we have not been reticent to do that, but there are a series of steps that we go through. In the case of this receiver, it is no different from any others. We have discussed their situation with them; we have pressed them for payment. In this case they have made representations to us about the process that they are going through, which we have taken into account. That led to that part-payment, which only goes a small way to satisfying the obligation, but nevertheless we felt that was important to receive that. We are not able to forgive a debt. We have not stepped back from pursuing it, but naturally we have to pursue that in the context of how that receivership is proceeding and what the process is that is likely to lead to the outcome where we best recover those outstanding debts on behalf of the Commonwealth.

Senator BACK: So you can assure the committee that there has been no agreement reached with the receiver-managers to forgive the balance of that what would be close to $45.6 or $45.7 million?

Ms Munro: Absolutely not. Not only would we not contemplate that; we actually do not have the power. The only person who can forgive debts is the Minister for Finance, and I do not believe that that process has got anywhere close.

Senator Birmingham: He is very forgiving in many ways, but not so much in those ways.