



COMPLIANCE AND PERFORMANCE MONITORING STRATEGY FOR ABATEMENT CERTIFICATE PROVIDERS

Table of Contents

Part 1 – Introduction	3
1.1 The accreditation process - setting the scope of compliance requirements	3
1.2 Establishing a framework for compliance and performance monitoring	4
1.3 Objectives of the Compliance and Performance Monitoring Strategy	4
 Part 2 – Establishing and Monitoring Compliance	 6
2.1 How is compliance established and monitored?	6
2.2 When are audits conducted?	6
2.2.1 Pre-accreditation audits	7
2.2.2 Ongoing compliance audits	8
2.3 Annual reporting	10
2.4 The GGAS Registry	11
 Part 3 – Compliance and Performance Monitoring Regimes	 13
3.1 Levels of compliance and performance monitoring	13
3.1.1 First tier compliance monitoring	13
3.1.2 Second tier compliance monitoring	14
3.1.3 Third tier compliance monitoring	14
3.1.4 Fourth tier compliance monitoring	15
3.2 Rewarding compliance	15

Part 4 – Managing Non-Compliance	16
4.1 Overview	16
4.1.1 Circumstances when non-compliance can occur	16
4.1.2 The Scheme Administrator's powers	16
4.2 Investigation of potential contraventions	17
4.2.1 Discovery of potential contravention	17
4.2.2 Initial response and preliminary investigation	17
4.2.3 Request for Further Information	18
4.2.4 Audit investigation of suspected contravention	19
4.2.5 Formal investigation/hearing by the Scheme Administrator	19
4.3 Compliance enforcement options	20
4.3.1 Notice of Contravention – No Further Action	20
4.3.2 Undertakings	21
4.3.3 Notice(s) of Contravention – Intention to Prosecute, Suspend or Cancel Accreditation	22
4.3.4 Surrender of abatement certificates	23
4.4 Compliance outcomes	23
4.4.1 Amendment to Conditions of Accreditation	23
4.4.2 Suspension or cancellation of accreditation	24
4.4.3 Prosecution for an offence	25
4.5 Review of Scheme Administrator decisions	26

Part 1 – Introduction

1.1 The accreditation process - setting the scope of compliance requirements

The NSW Greenhouse Gas Abatement Scheme (the Scheme) uses project-based abatement to recognise and quantify greenhouse gas reductions. Administrative processes have been established to allow persons to come forward with abatement projects and, based on a set of Scheme Rules¹, become accredited with respect to that project. Once accredited, an Abatement Certificate Provider (or ACP) can then create abatement certificates in accordance with the Scheme Rules and register those certificates on the Scheme Registry.

Assessing abatement projects, accrediting ACPs, ensuring the ongoing compliance of ACPs, and managing the Scheme Registry are all the responsibility of the Scheme Administrator. The Scheme Administrator is essentially a decision-making body with powers and functions conferred on it by legislation and regulatory instruments (the Scheme Rules).

When an application for accreditation is received, the Scheme Administrator undertakes an assessment of the application to determine eligibility and whether the Scheme Rules have been applied correctly by the applicant. During this assessment process, an independent audit of some of the information supplied by the applicant may be required. “Pre-accreditation audits” are used by the Scheme Administrator to address specific issues of eligibility such as Record Keeping Systems, specific emissions factors, and (where relevant) correct metering arrangements. Once the Scheme Administrator has completed its assessment of the application it determines the application by accrediting or refusing accreditation.

An accredited ACP has a series of ongoing obligations under the Scheme. These are specified both in the legislation, Scheme Rules and in a set of Conditions of Accreditation which are imposed by the Scheme Administrator as part of the formal accreditation process. The Conditions of Accreditation are divided into General Conditions of Accreditation, which apply to all ACPs in a certain category (e.g. Generators), and Special Conditions of Accreditation, which are specific to that ACP and that abatement project. Special Conditions may specify further ongoing auditing requirements, the need to submit Annual Reports, and other conditions specific to a particular accreditation. These Special Conditions, together with the Scheme Rules, set the scope of the future compliance requirements of the ACP. They also set the

¹ The Scheme Rules consist of the Electricity Supply Act 1995, the Electricity Supply (General) Regulation 2001, and five Greenhouse Gas Benchmark Rules 2003

framework for the Scheme Administrator's responsibilities to monitor the ongoing compliance of that ACP.

During the assessment phase of the accreditation process there is a strong emphasis on an applicant's capacity and capability to comply with the requirements of the Scheme. This is meant to reveal any errors or inconsistencies in the application and to assist the applicant to strengthen their systems and procedures so that compliance with the Scheme over time becomes a matter of course. The advantages of this approach are that it encourages a culture of voluntary compliance by the ACP and minimises the likelihood of non-compliance incidences in the future.

1.2 Establishing a framework for compliance and performance monitoring

The Scheme Administrator has adopted a framework for compliance and performance monitoring whereby an applicant undergoes a rigorous assessment during the accreditation phase ("validation"), including where necessary, the use of pre-accreditation audits to verify the information provided. Once accredited, the ACP is subject to further auditing requirements as a means of ensuring ongoing compliance under the Scheme ("verification"). The use of audits for validation and verification purposes is a key element of the means by which the Scheme Administrator monitors ongoing compliance of ACPs under the Scheme.

A clear strategy for establishing and maintaining compliance is aimed at minimising the risk of:

- inappropriate accreditation of an applicant, and
- invalid creation of abatement certificates.

The compliance monitoring regime imposed by the Scheme Administrator on each ACP is tailored to the applicant at the time of accreditation. It specifies the audit requirements, whether Annual Reports are required, and identifies the nominated number of certificates which may be created by the ACP on an annual basis. The Scheme is designed so that over time the Scheme Administrator can recognise good compliance performance and, if appropriate, relax an ACP's compliance monitoring regime.

1.3 Objectives of the Compliance and Performance Monitoring Strategy

The key objectives of the Compliance and Performance Monitoring Strategy are to:

- provide transparency in the administration of the Scheme
- assist participants to understand their obligations under the Scheme
- minimise the incidence of invalid creation of abatement certificates

- provide cost effective compliance options
- encourage a culture of compliance among participants, and
- provide for credible enforcement options in the event of non-compliance.

Part 2 of this paper presents the means by which compliance is established and monitored, outlines the use of audits and discusses the various tools available to the Scheme Administrator to support compliance such as Annual Reports and the Scheme Registry. Part 3 describes the different audit regimes which may be imposed on an ACP, outlines the criteria for determining when each regime is appropriate, and discusses the adjustment of an ACP's compliance monitoring regime based on compliance performance.

Finally, Part 4 of this paper discusses the means by which the Scheme Administrator deals with non-compliance issues by reference to its legislative powers under the *Electricity Supply Act 1995* (the Act) and the *Electricity Supply (General) Regulation 2001* (the Regulation). Within this framework, the Scheme Administrator's response reflects the actions of the ACP and the severity of the non-compliance event. The means by which the Scheme Administrator may enforce compliance in these situations and instances where an ACP has the right to appeal are also discussed.

Part 2 – Establishing and Monitoring Compliance

2.1 How is compliance established and monitored?

The Act and the Regulation give the Scheme Administrator powers to ensure the compliance of ACPs with the Scheme. Section 97HA(3)(b) of the Act states that a function of the Scheme Administrator is:

“...to monitor, and to report to the Minister on, the extent to which accredited abatement certificate providers comply with this (Electricity Supply) Act, the regulations, the greenhouse gas benchmark rules and any conditions of accreditation.”

The purpose of these monitoring and reporting powers is to protect the integrity of the Scheme by ensuring that ACPs do not contravene the conditions of their accreditation or create abatement certificates that do not represent ‘eligible abatement’.

The means by which the Scheme Administrator monitors compliance is through the use of audits, Annual Reporting by ACPs, and controls embedded with the Greenhouse Gas Registry.

2.2 When are audits conducted?

A principal element of the Scheme Administrator’s management of risk is the use of audits to gain comfort over the information provided by parties. The Regulation gives the Scheme Administrator power to require audits to be conducted of ACPs in relation to:

- their eligibility for accreditation,
- the creation of abatement certificates, or
- compliance with any Conditions of Accreditation.

The Regulation allows the Scheme Administrator to conduct audits at any time. Audits may be conducted at the expense of the ACP, and the ACP has an obligation under the Regulation to cooperate.

For the purposes of administering the Scheme, the term ‘audit’ is used to mean the use of third party independent auditing firms to validate information supplied during the accreditation phase, to verify an ACP’s ongoing eligibility, and to verify calculations carried out by an ACP in the course of creating abatement certificates. The Scheme Administrator requires audit opinions to be in the form of positive assurance (with constructive recommendations where necessary) and the Scheme Administrator has established a robust audit framework to ensure that audits are conducted in a consistent and transparent way. This includes establishing a trained Audit Panel,

providing an Audit Guideline and various key documents and templates, and keeping a database (the Schedule of Audits and Annual Reports) which summarises and records the types and timings of audits and their findings.

Audits associated with applications for accreditation generally include an assessment of such matters as record keeping arrangements, the accuracy and reliability of metering equipment, the application of appropriate methodologies under the relevant Rule, and the calculation of baselines and other relevant values. These pre-accreditation audits are described in more detail in section 2.2.1 below.

Audits associated with ongoing compliance by an ACP generally include an assessment of their abatement calculations with respect to the Rules, the Conditions of Accreditation and the methodologies described in the ACP's application for accreditation. Importantly, these audits involve the auditor providing assurance over a specific number of abatement certificates for abatement activities in a specified period of time. These ongoing compliance audits are described in more detail in section 2.2.2 below.

2.2.1 Pre-accreditation audits

As an ACP is only required to comply with the requirements of the Scheme once it is accredited, "compliance" only strictly applies after accreditation. However, the pre-accreditation process, including pre-accreditation audits, is often relevant to determining the appropriate regime for ongoing compliance monitoring after accreditation.

In order to be satisfied that an applicant is eligible for accreditation, the Scheme Administrator needs to be satisfied that the party is carrying out an eligible activity under the relevant Rule, has appropriate record keeping and, in relevant cases, has metering arrangements acceptable to and approved by the Scheme Administrator. The majority of applications received since the start of the Scheme have been audited as part of the accreditation process.

In considering whether an audit is required prior to accreditation, the Scheme Administrator will consider a number of factors, including:

- the information provided by the applicant,
- the number of abatement certificates to be generated from the activity,
- the complexity of the activity and calculation methodology selected,
- the capacity of the applicant to surrender abatement certificates in the future should the need arise, and
- any previous audit history of the applicant under the Scheme.

Where the Scheme Administrator considers the risk to be very low, the Scheme Administrator may, in a limited number of circumstances, determine that an audit is not required prior to accreditation. In these circumstances, the Scheme Administrator may elect to defer the audit of certain information provided by the applicant (in particular record keeping arrangements). An audit may be deferred until the project has been operational for a certain period of time, in order to gain assurance that the project has been implemented as described in the application for accreditation. This is commonly the case in the Scheme Administrator's assessment of Future Projects (i.e. abatement projects that are yet to be implemented).

The results of the pre-accreditation audit provide the Scheme Administrator with further insight into the adequacy of the applicant's systems and processes. This information is often used to determine the ongoing audit requirements for a particular ACP, which upon accreditation are specified in the ACP's Special Conditions of Accreditation. Generally, the Special Conditions will specify what sort of ongoing compliance audits are required, as well as any specific adjustments, enhancements or notifications that are required for the abatement project to remain eligible in the eyes of the Scheme Administrator. This has often included certain steps that must be taken by the ACP prior to the first registration of abatement certificates (e.g., minor enhancements to record keeping procedures or documentation of calculation steps and associated assumptions).

2.2.2 Ongoing compliance audits

The Scheme Administrator imposes a regime of ongoing compliance audit requirements on each ACP at the time of accreditation (as described above). In determining the appropriate ongoing audit regime to impose as part of an ACP's Special Conditions, the Scheme Administrator exercises its judgement taking into account the individual circumstances of each accreditation and deciding on a case-by-case basis.

So far, the Scheme Administrator has imposed three different types of audit requirements in various combinations, depending upon the ACP's audit regime:

- pre-registration audits
- periodic audits (annual, biennial, etc)
- spot audits.

Pre-registration audits

Pre-registration audits provide the highest level of assurance to the Scheme Administrator that certificates will be appropriately created. In this situation, prior to registering abatement certificates, the ACP must submit to an audit of its record keeping and calculations (and in certain cases, other specified issues). An ACP's Special Conditions may impose a once off pre-registration audit requirement prior to the first

registration of abatement certificates or may require pre-registration audits on an ongoing basis prior to each registration of abatement certificates.

A pre-registration audit condition has been used for organisations where there is no track record (e.g. the company is a start-up based on the benefits from being accredited) and the number of certificates being registered is very large. It has also been used where the pre-accreditation audit has uncovered some aspects of the applicant's business which need to be rectified prior to any certificates being registered. Once this level of assurance is achieved, an ACP's Special Conditions are reviewed and may be adjusted to reflect the performance of the ACP. Otherwise it may impose an unreasonable financial burden on the ACP. Whether the ACP is moved to a periodic or spot audit basis will depend on the individual circumstances of the ACP. The Scheme Administrator exercises its discretion based on individual circumstances and its judgement of the level of risk.

Periodic audits

Periodic audits (usually annual) are the most common approach adopted by the Scheme Administrator to manage ongoing compliance. They have been used to monitor ACPs who are creating a large number of certificates and where the projects themselves are highly complex and may have variables that need to be confirmed periodically. Generally, where an ACP is creating in excess of 100,000 abatement certificates per annum and the size of their portfolio is limited (i.e. only one or two accreditations under the Scheme), each accredited project will be placed on an annual periodic audit regime for the life of its participation in the Scheme. Where an ACP has a large portfolio of accredited projects, and some of these create in excess of 100,000 certificates per annum, it is likely that the entire portfolio will be put onto a combination of periodic and spot audits.

There are many abatement projects creating less than 100,000 certificates where it is appropriate to conduct periodic audits on a less frequent than annual basis. The Scheme Administrator has adopted the approach that where an ACP project is creating more than 50,000 but less than 100,000 certificates, that project will generally be placed on a biennial audit regime. Those projects creating less than 50,000 but greater than 5,000 certificates will generally be placed on a triennial audit regime. This approach will mean that 90 per cent of abatement projects will receive an audit of certificate creation at some point during a three year cycle. This provides a high level of confidence in any claimed abatement by ACPs.

However, as indicated above, the periodic audit regime for individual ACPs will be determined by the Scheme Administrator, taking account of all relevant circumstances.

Spot audits

A regime involving spot audits (as the primary auditing regime) is applied where the Scheme Administrator has a high degree of confidence in the performance of the ACP, the technology being used to create abatement certificates is straightforward and the low number of abatement certificates that the accreditation is likely to produce poses a small risk to the integrity of the Scheme. Under these circumstances, a pre-registration or periodic audit requirement may be relaxed and replaced by a spot audit in line with the perceived risk to the Scheme.

Spot audits may also be used by the Scheme Administrator to revisit an accreditation and establish that the ACP continues to meet the original eligibility criteria for the accreditation. While annual reporting provides a reasonable level of comfort to the Scheme Administrator that these criteria are being met, an audit provides the Scheme Administrator with a greater level of assurance.

It is worth noting that spot audits can also be required by the Scheme Administrator at any time regardless of any other specified audit requirement in the conditions of accreditation. A spot auditing regime is not usually specifically reflected in an ACP's Special Conditions; the Scheme Administrator instead relies on its general powers under the Regulation and General Conditions to conduct audits at any time. Similarly, for ACPs with a pre-registration audit or periodic auditing regime, the Scheme Administrator may also rely on these general powers to conduct additional (spot) audits.

As ACPs demonstrate a good compliance history and no other issues arise with their accreditations, the Scheme Administrator will consider whether to amend the Special Conditions of Accreditation and may move the ACP onto progressively lower levels of auditing requirements, eventually to a spot auditing regime.

2.3 Annual reporting

A key aspect of the Scheme Administrator's ability to monitor an ACP's ongoing compliance with their conditions of accreditation is to require Annual Reporting. Annual Reports must be signed by a person with authority to sign on behalf of the ACP and have a legally significant declaration.

Standard Annual Reporting requirements have been imposed as a condition on the majority of accreditations. The exceptions to this are for small Demand Side Abatement accreditations where:

- the Annual Reporting requirements are less stringent, only requiring the ACP to inspect the project and confirm that the project remains installed and fully operational, and that the record keeping arrangements have not changed since the date of accreditation, or

- abatement certificate registration occurs less than once per annum (for example, where an ACP has forward created abatement certificates in respect of a project that creates less than 2,000 abatement certificates per annum) in which case no Annual Report is required.

To facilitate compliance with Annual Reporting requirements, standard templates for an Annual Report Statement have been developed for projects accredited under the DSA and Generation Rules. These templates have been made available to ACPs via the Scheme website.

The standard scope of the Annual Reporting condition is designed to confirm that

- the subject of the accreditation (i.e. the Generating System or Abatement Project) is still fully operating in the manner indicated in the ACP's application for accreditation;
- the characteristics and details of the subject of the accreditation are not materially different from the characteristics and details identified in the ACP's application for accreditation; and the number of NGACs created by the ACP during the reporting period (usually a calendar year) together with supporting calculations.

Special reporting requirements

In addition to the Annual Reporting requirement, the General Accreditation Conditions require ACPs to notify the Scheme Administrator of any changes to their record keeping arrangements or metering equipment at the time those changes are implemented.

2.4 The GGAS Registry

The NSW Greenhouse Gas Abatement Scheme Registry (the Registry) provides details of accredited ACPs and the ownership of Abatement Certificates at any point in time. The Registry is not a trading platform as trading of certificates is expected to occur outside of the Registry. Where such a trade has occurred, whether bilaterally, through brokers or through other trading platforms, the change in ownership of those certificates is recorded on the Registry.

The Scheme Administrator enters the accreditation details of all ACPs into the Registry. As part of these details, the nominated number of certificates that the ACP intends to register from the project, either annually or over the life of the project, is also included. The Registry then allows the ACP to register certificates up to this nominated amount without further action.

The ACP must notify the Scheme Administrator in writing, either via email or letter, about any discrepancies, errors or omissions in the Registry's information and if necessary, seek approval to adjust the nominated number of certificates it will register on an annual basis or over the life of the project.

Where an ACP tries to register certificates in excess of 110% above the nominated number without notifying the Scheme Administrator, the Registry does not allow

automatic registration, but instead sends an email notifying the Scheme Administrator of this action. The Scheme Administrator may then contact the ACP to clarify the number of certificates to be registered. Further information may be required at this point before registration will be permitted. The Scheme Administrator may decide to alter the number of certificates that may be registered by an ACP for a project at any time, based on advice from the ACP or an auditor.

These control points allow the Scheme Administrator to track whether an ACP is complying with some key conditions of accreditation. They are also designed to ensure that all certificates appearing in the Registry represent verifiable abatement and have been validly created.

Part 3 – Compliance and Performance Monitoring Regimes

3.1 Levels of compliance and performance monitoring

As outlined in Part 2 above, the Scheme Administrator has adopted a combination of on-going audit requirements and Annual Reporting and included these in the Conditions of Accreditation for ACPs. Controls embedded within the Registry also prevent ACPs from incorrectly registering certificates.

Part 3 examines how the Scheme Administrator combines these elements into four distinct tiered compliance and performance monitoring regimes, each incorporating various auditing and reporting requirements. Each of these is designed to manage a different level of risk and each ACP is assigned an appropriate regime. However, there is some flexibility in the application of these regimes, and the Scheme Administrator may in appropriate cases apply a regime that is a combination of the regimes outlined below.

When deciding the appropriate compliance and performance monitoring regime for an ACP, the Scheme Administrator considers the track record of the party to date, the number of projects that have been accredited for that ACP, and the number of abatement certificates that have been or will be created by the project. Where an ACP can demonstrate prior experience under the Scheme and has a proven track record, a lower level of compliance monitoring may be required.

The frequency, timing and scope of audits required of an ACP will be specified in its Conditions of Accreditation (other than in the case of a spot auditing regime, in which case there will be no specific reference) and will initially be determined at accreditation.

The Scheme Administrator's four tier hierarchy of compliance monitoring is examined below.

3.1.1 First tier compliance monitoring

This is the most rigorous level of ongoing compliance monitoring imposed on an ACP. The first tier of compliance monitoring has been used for organisations where there is no track record (e.g. a start-up company based on the benefits of being accredited), the number of certificates being registered is large, the abatement project involves a complex calculation methodology or as a result of recommendations from the pre-accreditation audit.

It is envisioned that ACPs will only rarely be placed on first tier compliance monitoring. In general, the most likely situation where this can arise is where the auditors give qualified audit assurance with recommendations to carry out remedial action and for the ACP to be reaudited.

This level of compliance monitoring usually requires:

- pre-registration audit of initial abatement certificate creation;
- re-audit of the ACP's record keeping arrangements in conjunction with the pre-registration audit
- annual audit of abatement certificates created in a calendar year; and
- annual reporting.

3.1.2 Second tier compliance monitoring

The most common level of ongoing compliance monitoring imposed on an ACP is a combination of annual audits and reporting. Annual audits and reporting have been used to monitor ongoing compliance by ACPs who either are creating a large number of certificates annually or where the projects themselves are highly complex and may have variables that need to be confirmed periodically. Second tier compliance monitoring will generally be imposed where an applicant is creating in excess of 100,000 abatement certificates per annum.

This level of compliance monitoring usually requires:

- annual audit of abatement certificates created in a calendar year;
- annual reporting; and
- where warranted, an audit of the ACP to reconfirm its eligibility for accreditation, record keeping arrangements and metering equipment.

3.1.3 Third tier compliance monitoring

This is an intermediate level of ongoing compliance monitoring imposed on an ACP that combines periodic auditing of abatement certificates registered by the ACP and annual reporting. Third tier compliance monitoring will be used for organisations that have established a sound compliance record but where the number of certificates being registered is large or the abatement project involves a complex calculation method and periodic checking of abatement certificate creation is desirable.

This level of compliance monitoring usually requires:

- periodic audit of abatement certificates created (generally, biennial for accreditations that create between 50,000 to 100,000 abatement certificates annually or triennial for accreditations that create more than 5,000 but less than 50,000 abatement certificates annually);
- annual reporting; and

- where warranted, an audit to reconfirm eligibility for accreditation, record keeping arrangements and metering equipment.

3.1.4 Fourth tier compliance monitoring

This is the lowest level of ongoing compliance monitoring imposed on an ACP and is a combination of spot audits of abatement certificate creation and annual reporting. Spot audit assurance is generally applied where the Scheme Administrator has a high degree of confidence in the performance of the ACP, the technology or method being used to create abatement certificates is straight forward, or the number of abatement certificates that the accreditation is likely to produce is small.

This level of compliance monitoring usually requires:

- spot audit of abatement certificates created;
- annual reporting; and
- where warranted, an audit of the ACP to reconfirm its eligibility for accreditation, record keeping arrangements and metering equipment.

3.2 Rewarding compliance

A key outcome of developing a culture of compliance among ACPs is the potential opportunity to move to a lower level of compliance monitoring (other than those accreditations creating greater than 100,000 certificates per annum). Review of the Annual Reports and any audit reports are the means by which the Scheme Administrator can monitor performance.

When an ACP has established a history of positive assurance for any required audits (with an audit opinion that all abatement certificates have been created in accordance with the relevant Rule and any conditions of accreditation), the ACP's conditions of accreditation may be reassessed with a view to moving towards a lower level of compliance monitoring.

Additionally, it is reasonable that where an organisation has multiple accreditations, any reporting and audit requirements would be aligned with each other so that reporting and auditing time periods are consolidated. This will assist both the ACP and Scheme Administrator to continue to monitor compliance. When previously accredited ACPs add additional accreditations of a like variety to their portfolios, the presumption will be that these will generally be placed on the existing level of compliance monitoring for their portfolio.

Part 4 – Managing Non-Compliance

4.1 Overview

While the use of a mixture of audits and reporting requirements are the key elements by which the Scheme Administrator monitors ongoing compliance of ACPs under the Scheme, it remains an ACP's responsibility to ensure that it complies with the Act, Regulation, relevant Scheme Rule and any conditions of its accreditation. The Scheme Administrator considers any non-compliance, even minor contraventions by an ACP, as potentially serious.

The remainder of this Strategy considers the investigation and enforcement options available to the Scheme Administrator, when and how they may be applied, together with any potential outcomes.

4.1.1 Circumstances when non-compliance can occur

Non-compliance issues can arise at any time during an ACP's accreditation. The two main circumstances when non-compliance issues may arise are:

1. upon discovery that information supplied to the Scheme Administrator as part of an application for accreditation was incorrect or false and misleading, and
2. failure to comply with accreditation requirements, in particular:
 - a) not maintaining eligibility for accreditation (including not complying with conditions of accreditation), and
 - b) abatement certificates not created in accordance with Act, Regulation, Rules and Conditions of Accreditation.

4.1.2 The Scheme Administrator's powers

The Act and Regulation give the Scheme Administrator broad discretion to deal with non-compliance. Some of the explicit powers of the Scheme Administrator are to:

- require audits and investigations (including hearings);
- amend an ACP's conditions of accreditation at any time, or suspend or cancel an ACP's accreditation in various circumstances
- prosecute an ACP under certain circumstances; and
- require the surrender and cancellation of certificates following a successful prosecution.

- In some instances where, for example, the contravention is minor or the ACP has already taken action to remedy the cause of the contravention, the Scheme Administrator has the discretion to take no further action against the ACP. However, it is the responsibility of the Scheme Administrator to include mention of any contravention in the Scheme Administrator's annual Scheme Report to the Minister.

4.2 Investigation of potential contraventions

4.2.1 Discovery of potential contravention

The Scheme Administrator may receive information about a possible contravention from a range of sources, including:

- self-reported non-compliance by an ACP
- Annual Reports submitted by the ACP
- third parties (e.g. media reports, information exchange with other agencies, consumer and competitor complaints), or
- audits (including those conducted as part of an ACP's conditions of accreditation).

4.2.2 Initial response and preliminary investigation

On receipt of information about a potential contravention by an ACP, the matter is recorded and a preliminary investigation is undertaken to establish the basic facts and whether or not a contravention has occurred which would warrant the Scheme Administrator proceeding with further investigations.

If following the preliminary investigation the Scheme Administrator forms the view that the allegation is groundless, the Scheme Administrator may decide that no further action will be taken, unless new information subsequently comes to light.

If the preliminary investigation indicates that a contravention has or is likely to have occurred, the Scheme Administrator will consider whether to prosecute and will take into account the seriousness of the alleged contravention, including considerations of:

method of discovery (e.g. whether the ACP self-reported the contravention or it was discovered via an external source or audit)

the nature of the alleged contravention (e.g. the number of abatement certificates involved and other consequences for the integrity of the Scheme)

- any explanation for the contravention provided by the ACP
- compliance history of the ACP
- level of transparency and cooperation received from the ACP, including any remedial action that the ACP volunteers to undertake

- capacity to make good on the contravention,
- any remedial action already taken by the ACP, and
- level of benefit gained by the ACP from the contravention.

At this point the Scheme Administrator will issue a 'Notice of Contravention: Remedial Action Required' to the ACP which sets out the nature of the alleged contravention and the actions required to rectify it. If the ACP admits the contravention but the contravention is minor and the matter is resolved satisfactorily, then the ACP must write to the Scheme Administrator and confirm that any required action has been completed. The Scheme Administrator assesses this response, and if satisfactory, issues a 'Notice of Contravention – No Further Action' to the ACP. (See further Part 4.3.1 below.)

Where there is either insufficient information to properly determine if a contravention has occurred and/or the ACP denies the allegation, the matter may proceed to the 'Request for Further Information' (RFI) stage (see Part 4.2.3).

Where the ACP admits the contravention and fully cooperates and the Scheme Administrator forms the view that no further information is required, but the matter is sufficiently serious, the matter may proceed directly to compliance enforcement options (see Part 4.3 below).

4.2.3 Request for Further Information

Where there is insufficient information to properly determine if a contravention has occurred and/or the ACP denies the allegation, the Scheme Administrator may issue a 'Notice of Investigation - Request for Further Information' (RFI) to the ACP which will generally include:

- notification to the ACP that a potential contravention is under investigation
- a copy or a summary of the compliance information (as appropriate)
- a copy of any other relevant material relating to the possible contravention under investigation, and
- an itemised request for information needed to further clarify the issue.

The ACP will be given a reasonable timeframe in which to respond to the RFI. An RFI aims to provide the ACP with every opportunity to demonstrate cooperation with the Scheme Administrator from an early stage in the non-compliance investigation. Not only does the letter put the ACP on notice of the potential contravention but it offers the ACP the opportunity to provide an explanation of the contravention and to take corrective action.

As the compliance policy aims to foster a culture of compliance, any such positive actions by the ACP will be recorded in the Non-compliance Database and may be a

relevant consideration when the Scheme Administrator determines the appropriate enforcement or remedial action to be taken against the ACP.

4.2.4 Audit investigation of suspected contravention

If the Scheme Administrator is dissatisfied with the ACP's response to the RFI, it could undertake an audit investigation as provided for under the ACP's Accreditation Conditions². Where an audit investigation is required the Scheme Administrator would initiate an audit investigation by providing a 'Notice of Audit Investigation' to the relevant ACP. The notice details the issue(s) that are to be investigated and any information that the Scheme Administrator requires the ACP to submit. The legislation states that the ACP is required to bear all audit costs.

When the audit is concluded, the findings are reported to the Scheme Administrator (with a copy to the ACP) and the ACP is invited to reply within a reasonable time before the Scheme Administrator determines whether or not further action is appropriate.

Clause 73IG of the Regulation requires an ACP to provide such information and assistance as is necessary to comply with any audit. Failure to cooperate could be an offence under section 97JA of the Act (as it is an offence under that section to hinder, obstruct or interfere with the Scheme Administrator in the exercise of its functions).

The Scheme Administrator's auditing powers are only be used for auditing ACPs. If information from third parties is required, see Part 4.2.5.

4.2.5 Formal investigation/hearing by the Scheme Administrator

If necessary, the Scheme Administrator may broaden its investigation to include obtaining information from third parties. The Scheme Administrator may use its powers under 97HC(1) of the Act (by notice in writing signed by the Chairperson of the Tribunal) to require information and documents from any person.

If the Scheme Administrator considers it necessary to question the ACP, its officers or third parties, it may conduct a hearing. In addition to giving the Scheme Administrator power to require the provision of information or documents, section 97HC(1) of the Act also gives the Scheme Administrator statutory powers to require the ACP (or its officers), or any other person, to attend a meeting of the Tribunal to give evidence.

² This is generally included as Special Condition 1 in all accreditations, which in turn refers to the General Conditions. In addition, s.97HA(3)(c) of the Act gives the Scheme Administrator the power to conduct audits for the purposes of the Scheme. Clause 73M of the Regulations sets out the matters and purposes where the Scheme Administrator may conduct audits or cause an audit to be conducted (see Part 2.2 above for further information).

Where the Scheme Administrator considers that the appropriate response to an ACP's contravention is the suspension or cancellation of its accreditation, the Scheme Administrator will ensure that the ACP is given an adequate opportunity to present its case. Ordinarily the Scheme Administrator will offer the ACP a hearing.

Refusal or failure to comply with the above directions without reasonable excuse may constitute the offence of obstructing or hindering the Scheme Administrator under section 97JA of the Act³. In this situation the Scheme Administrator may initiate a prosecution against the non-complying party (see Part 4.4.3 below).

4.3 Compliance enforcement options

As indicated in Part 4.2.3 above, as the compliance strategy aims to foster a culture of compliance, any positive actions by the ACP (including cooperation and remedial action) will be recorded and may be a relevant consideration when the Scheme Administrator determines the appropriate enforcement or remedial action to be taken.

The Scheme Administrator will only issue a Notice of Contravention if the Scheme Administrator is satisfied on reasonable grounds (after appropriate investigations and giving the ACP a reasonable opportunity to be heard) that a contravention has occurred. (See Part 4.4.2 below regarding the standard of proof.)

4.3.1 Notice of Contravention – No Further Action

The most appropriate regulatory response for the Scheme Administrator may be to take no action against the ACP but include mention of the contravention in the Scheme Administrator's annual Scheme Report to the Minister. This might be because the contravention is minor and the ACP has already taken action to remedy the cause of the contravention.

If the Scheme Administrator decides to take no enforcement action in relation to a contravention, it will ordinarily inform the ACP in writing of its decision. A 'Notice of Contravention – No Further Action' will be sent to the ACP notifying it of the details of the contravention. The Scheme Administrator and the ACP may agree on the voluntary surrender (or forfeit) of mistakenly created abatement certificates without the need to take further action against the ACP for an offence (see Part 4.3.4 below). The Notice will recognise actions that the ACP has taken to rectify the breach and to avoid a recurrence.

³ Section 97JA(4) of the Act states that it is a reasonable excuse if "*complying with the notice or to answer the question might tend to incriminate a natural person or make the person liable to any forfeiture or penalty.*"

Reporting to the Minister on the extent of compliance under the Scheme is a core function of the Scheme Administrator⁴. The Scheme Administrator shall record all instances of non-compliance, and shall report to the Minister on the extent to which ACP's comply with the Act, the Regulation, the relevant Scheme Rule and any conditions of accreditation.

4.3.2 Undertakings

Where the nature of a contravention requires more extensive remedial actions to be undertaken by the ACP in order to remedy the contravention, the Scheme Administrator will issue a 'Notice of Contravention: Undertaking Requested'. This notice sets out the nature of the contravention and the actions required to rectify the contravention and the timeframe within which the actions should be carried out.

In these circumstances the Scheme Administrator will require the ACP to provide an undertaking to the Scheme Administrator including terms that address the following matters:

- actions to prevent a recurrence and to ensure systems are in place to detect future contraventions
- the time period within which the undertaking will be complied with.

In order to assist the ACP, a standard form template for how the undertaking should be presented will be sent with the Notice of Contravention: Undertaking Requested'.

To ensure undertakings are complied with, the Scheme Administrator may monitor their implementation and effectiveness. This may take the form of requests for information or through an audit of the ACP at the expiry of the time period within which compliance with the undertaking is required. In addition, the Scheme Administrator has the option of imposing a Special Condition of Accreditation making it a condition of accreditation that the ACP complies with the undertaking (see Part 4.4.1 below).

Where the Scheme Administrator has reason to believe that an ACP has not complied with an undertaking, the Scheme Administrator will attempt to resolve the matter by consultation. If the Scheme Administrator is satisfied that the ACP has breached the undertaking, it may pursue enforcement action within its statutory powers. Further action may include:

- action to specifically enforce the undertaking
- suspending or cancelling the ACP's accreditation for breach of the undertaking (as a condition of accreditation) or for the original contravention (see Part 4.4.2 below), or

⁴ Section 97HA(3)(b) of the Act.

- prosecuting the ACP for the original contravention (see Part 4.4.3 below).

4.3.3 Notice(s) of Contravention – Intention to Prosecute, Suspend or Cancel Accreditation

In circumstances where the Scheme Administrator is satisfied on reasonable grounds that a serious contravention has occurred, the Scheme Administrator will issue either a 'Notice of Contravention – Intention to Suspend or Cancel Accreditation' or a 'Notice of Contravention – Intention to Prosecute' to the ACP. The Notice of Contravention will include:

- the details of the contravention in question
- a request for an explanation of how and why the contravention occurred (unless such explanation has already been obtained through the investigation processes)
- outline the Scheme Administrator's intention to take further enforcement or regulatory action, i.e. suspension or cancellation of the ACP's accreditation or an intention to prosecute the ACP for the offence, and
- require the ACP to show cause why the Scheme Administrator should not take the proposed enforcement or regulatory action.

The ACP will be given an opportunity to respond to the Notice of Contravention and make submissions to the Scheme Administrator regarding the compliance matter. The time period allowed for a response will vary. In determining the appropriate response time the complexity of the matter and seriousness of the contravention will be relevant considerations as both may require the ACP to obtain legal advice in order to prepare an effective response. The Notice of Contravention will specify an appropriate timeframe for response.

Any response, including any offer by the ACP to provide an undertaking to carry out remedial action (see Part 4.3.2 above), will be considered by the Scheme Administrator prior to determining whether to proceed with the enforcement or regulatory action or to modify its approach in light of the ACP's response. If the ACP has not adequately responded within a reasonable timeframe, the Scheme Administrator will proceed with the enforcement or regulatory action outlined in the Notice of Contravention. The decision whether to suspend or cancel accreditation, or whether to prosecute will be advised at this time.

In some circumstances it may be appropriate to suspend or cancel accreditation as well as prosecute for an offence (see Part 4.4.3 below).

4.3.4 Surrender of abatement certificates

Currently, abatement certificates (other than those surrendered by benchmark participants for compliance) can only be surrendered to the Scheme Administrator pursuant to a surrender order issued under s.97EF of the Act. A surrender order may be issued following a successful prosecution for offences under s.97J(1) (relating to the improper creation of abatement certificates) or s.97DD(5) of the Act⁵ (contravention of conditions of accreditation) (see Part 4.4.3).

Failure to comply with a surrender order is also an offence and has its own penalties under the Act⁶. If a person fails to comply with a surrender order, the Scheme Administrator may cancel any abatement certificates of which the person is the registered owner. The effectiveness of this action depends solely on the person subjected to the surrender order owning enough abatement certificates to cover the number required to be surrendered.

However, the *Electricity Supply Amendment Act 2005* has amended the *Electricity Supply Act 1995* in respect of the circumstances when the Scheme Administrator may cancel abatement certificates in the Registry. The Act amends s.97EE of the Act to enable a person registered as the owner of an abatement certificate to surrender that certificate at any time by notice in writing to the Scheme Administrator and provides for cancellation of that certificate on acceptance of the surrender by the Scheme Administrator.

This change to the legislative framework allows the Scheme Administrator and the ACP to agree on the surrender of mistakenly created abatement certificates without the need to take further action. This approach further encourages a culture of voluntary compliance and cooperation with the Scheme Administrator among ACPs while retaining the Scheme Administrator's enforcement powers.

4.4 Compliance outcomes

4.4.1 Amendment to Conditions of Accreditation

Clause 73J(1) of the Regulation states that the Scheme Administrator may impose a condition of accreditation on an ACP “*either at the time of accreditation or any time during the period in which the accreditation remains in force*”. Additionally, cl.73J(4) of

⁵ Section 97EF(2) of the Act specifies that surrender order may be made against a person only if they have been found guilty of an offence against s.97DD(5) or s.97J(1) of the Act.

⁶ Section 97EF(7) of the Act

the Regulations states that the Scheme Administrator may at any time “revoke or vary a condition imposed on the accreditation” of an ACP.

Depending on the nature of the ACP’s contravention, the Scheme Administrator may determine that it is appropriate to amend the ACP’s conditions of accreditation. The amendment may involve the imposition of additional conditions or the varying of existing conditions. Examples may include conditions that:

- increase the tier level for compliance monitoring imposed on the ACP
- require the ACP to undertake corrective action or implement procedures within a specified period to, for example, remedy deficiencies in the ACP’s record keeping arrangements
- impose additional reporting requirements, including reporting on progress towards undertaking corrective action or implementing procedures; or
- require the ACP to provide a financial assurance to cover all unverified certificate creation.

If the Scheme Administrator determines to impose or vary a condition of the ACP’s accreditation, it is required to provide the ACP with a written notice setting out the reasons for the decision to impose or vary the condition⁷.

4.4.2 Suspension or cancellation of accreditation

Clause 73HC(1) of the Regulation states that the Scheme Administrator may suspend or cancel the accreditation of a person as an abatement certificate provider in respect of an activity on any of the following grounds:

- (a) *the Scheme Administrator is satisfied that the person has ceased to be eligible for accreditation as an abatement certificate provider in respect of the activity*
- (b) *the person has requested the suspension or cancellation*
- (c) *the Scheme Administrator is satisfied that the person has contravened a provision of the Act, the Regulations, the greenhouse gas benchmark rules or a condition to which the accreditation is subject*
- (d) *the person has become bankrupt, applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit*
- (e) *the person is a corporation that is the subject of a winding up order or for which a controller or administrator has been appointed.*

In order to determine that a person “has contravened a provision of the Act, the Regulations, the greenhouse gas benchmark rules or a condition to which the accreditation is subject” the Scheme Administrator needs to be satisfied of the civil

⁷ Clause 73J(4) & (5) of the Regulation.

burden of proof (i.e. that on the balance of probabilities, the contravention is more likely than not to have happened).

Where the Scheme Administrator considers that the appropriate response to an ACP's contravention is to initiate a prosecution or suspend or cancel an ACP's accreditation, the Scheme Administrator will ensure that the requirements of procedural fairness are followed.

4.4.3 Prosecution for an offence

In some circumstances, the contravention is so serious that the Scheme Administrator may suspend or cancel an accreditation and also decide to prosecute. In these circumstances, prior to initiating a prosecution the Scheme Administrator will send a 'Notice of Contravention – Intention to Prosecute' to the ACP. The ACP will be given an opportunity to present its case as to why the Scheme Administrator should not proceed with the prosecution (see the discussion of procedural fairness in Part 4.3.3 above).

The principal offences for which a person may be prosecuted, in the relevant court⁸, in relation to the NSW Greenhouse Gas Abatement Scheme include:

- Contravening a person's Conditions of Accreditation as an ACP: s.97DD(5) of the Act
- Improperly creating abatement certificates: s.97J(1) of the Act
- Obstructing or hindering the Scheme Administrator: s.97JA of the Act
- Providing false or misleading information: s.97JB of the Act
- Failure to comply with a surrender order: s.97EF(7) of the Act.

Any person (including IPART in its capacity as Scheme Administrator) may initiate proceedings in relation to offences under Part 8A of the Act⁹. However, there is no express obligation or duty in the Act which requires the Scheme Administrator to initiate proceedings under section 102 for offences committed under Part 8A of the Act.

⁸ Sections 102(1) & (2) of the Act states that offences under the Act can be dealt with summarily before either the Local or Supreme Courts. Section 102(4) of the Act states that the maximum penalty that the Local Court may impose is 100 penalty units (in the case of a corporation) and 50 penalty units (in any other case). Section 102(3) of the Act states that proceedings for an offence against the Act or the regulations may be instituted at any time within 2 years after the commission of the offence.

⁹ Section 14 of the *Criminal Procedure Act 1986* states that "A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of persons." The *Electricity Supply Act 1995* does not confer the right to initiate proceedings on any specified person or class of person so any person has standing to initiate proceeding under that Act.

Accordingly, the Scheme Administrator has a broad discretion as to whether or not it initiates a prosecution.

4.5 Review of Scheme Administrator decisions

Where the Scheme Administrator makes a determination that is listed as a 'reviewable decision' in the *Electricity Supply Act 1995*, it is obliged under the *Administrative Decisions Tribunal Act 1997 (NSW)* to take such steps as are reasonable in the circumstances to notify a person of the decision and their right to have it reviewed by the Administrative Decisions Tribunal.

Sections 971 (2), (3) & (4) of the *Electricity Supply Act* list the following decisions as reviewable:

- refuse accreditation of the person as an ACP
- cancel or suspend the accreditation of the person as an ACP
- refuse registration of the creation of an abatement certificate
- refuse registration of the transfer of an abatement certificate, and
- impose a surrender order on an ACP.

In addition, clause 73N of the Regulation also lists as reviewable any decisions to:

- impose or vary a condition of accreditation of an ACP; and
- make a claim on or realise any financial assurance provided by an ACP.