

PREPARING FOR A GREEN ENERGY FUTURE

Thursday 1st December 2011

A seminar presented by members of Gordon & Jackson's List

Chairman: Jonathan Beach QC

**Presenters: Dr Damien Lockie
Karen Le Faucheur**

**GORDON & JACKSON
Barristers' Clerks
205 William Street
Melbourne 3000**

**Dx 94 Melbourne Vic
Ph 9225 7333
www.gordonandjackson.com.au**

GORDON & JACKSON

DISCLAIMER OF RESPONSIBILITY

The provision of seminar papers by Gordon & Jackson is a free service provided for members of the legal profession.

It is not intended nor recommended that the seminar papers and the information contained in them be used by members of the public.

Gordon & Jackson, the members of List S and the authors of the seminar papers do not accept responsibility for the information or opinions contained in the seminar papers. No guarantee, undertaking or warranty is provided concerning the accuracy, completeness or currency of the information provided in the seminar papers or for any damage sustained by any person as a result of any reliance placed on such information.

As the law is constantly evolving and subject to change it is very likely that the information contained in the seminar papers may be out of date even shortly after publication.

GORDON & JACKSON, Barrister's Clerk

AUSTRALIA'S CLEAN ENERGY FUTURE Clean Energy Act 2011 (Cth) and related laws

Dr Damien L Lockie
Barrister and Mediator
Adjunct Professor, Bond University

Karen J Le Faucheur
Barrister

1

OVERVIEW

- Introduction to 'Australia's Clean Energy Future'
- Greenhouse Gas emissions reduction (Australia and International)
- Obligations and Liability
 - Obligations to register and report: *National Greenhouse and Energy Reporting Act*
 - Liability to surrender eligible emissions units: *Clean Energy Act*
- Disclosure
- Enforcement and regulator powers
- Assistance programs
- Supply chain
- Client legal needs

2

CLEAN ENERGY OBJECTS

- Give effect to Australia's international obligations
- Support development of an effective global response to climate change
- Take flexible and cost effective action to meet Australia's long term target to reduce GHG emissions by 80% off 2000 GHG levels
- Price GHG emissions so as to encourage investment in clean energy and support jobs and competitiveness in the economy
- Support economic growth while reducing pollution

3

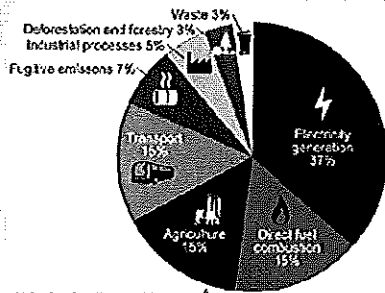
TIMELINE

- Legislation passed 8 November 2011, RA 18 November 2011
- 1 July 2012 commencement date
- Fixed charge for 3 years starting at A\$23
 - A\$24.15 in 2013-14
 - A\$25.40 in 2014-15
- Flexible charge from 1 July 2015 subject to a collar and cap for 3 years: A\$15 minimum (indexed) to A\$20 + 2016 international price (Indexed)
- Regulations to be finalised before 1 July 2012

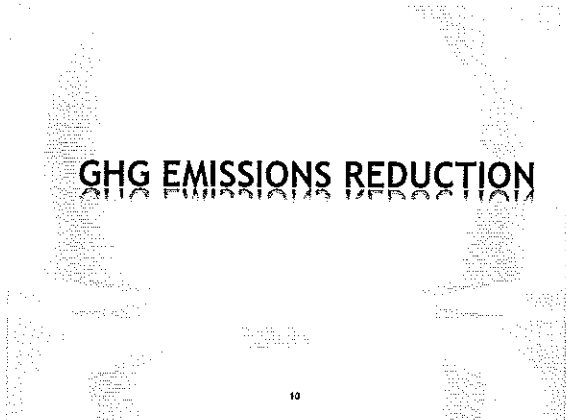
CARBON PRICING MECHANISM

- Carbon price applies to liable entities in:
 - stationary energy
 - industrial processes
 - fugitive emissions (except decommissioned coal mines)
 - emissions from non-legacy waste
- Equivalent carbon price will be applied to:
 - large business transport emissions
 - non-transport use of liquid and gaseous fuels
 - synthetic greenhouse gases
- Emissions not covered:
 - Agricultural and land sector emissions
 - Emissions from the combustion of biofuels and biomass

AUSTRALIA'S CARBON POLLUTION PROFILE



Source: Scoping Australia's Clean Energy Future 2011 - 2014 emissions from the National Greenhouse Gas Inventory 2001, DGEE analysis



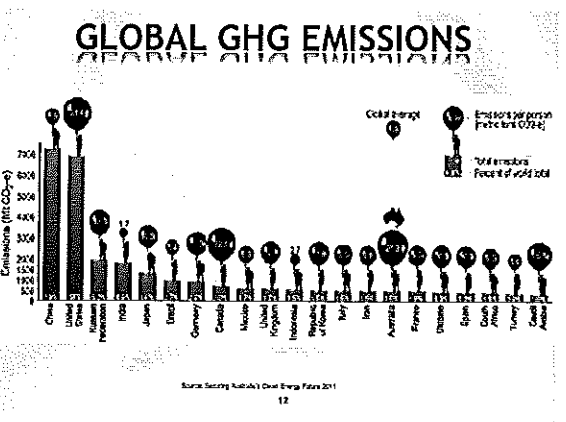
INTERNATIONAL FRAMEWORK

United Nations Framework Convention on Climate Change (UNFCCC 1992)

- 'common but differentiated responsibility' for man-made influence on climate system
- precautionary principle & intergenerational equity

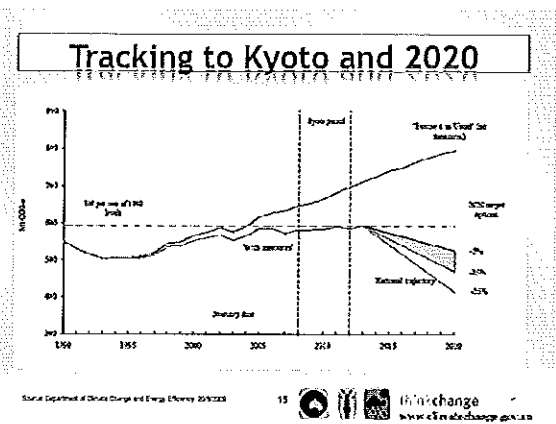
Kyoto Protocol (1997) / Marrakesh Accords

- Binding reduction targets for Annex 1 Nations (total 5% off 1990 baseline)
- Australia is latest signatory to the Kyoto Protocol:
 - 100% of 1990 baseline
 - 1.5% of global GHG emissions
- Kyoto Protocol commitment period covers 5 years 1/1/2008 - 31/12/2012
- Nation targets expressed as ASSIGNED AMOUNT UNITS (AAUs)
- 3 flexibility mechanisms:
 - 'offsets'
 - Clean Development Mechanism (CDM) (Art. 12) → Certified Emission Reductions (CERs)
 - Joint Implementation (JI) (Art. 6) → Emission Reduction Units (ERUs)
 - 'trading' of AAUs between Nations (Art. 17)

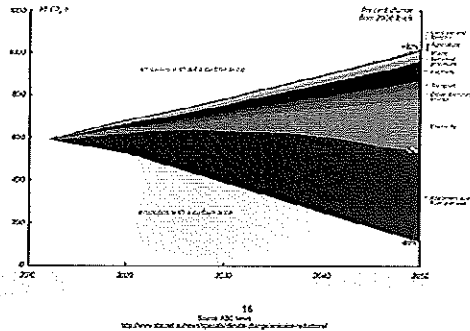








HOW WILL EMISSIONS BE CUT?



CLEAN ENERGY ECONOMICS

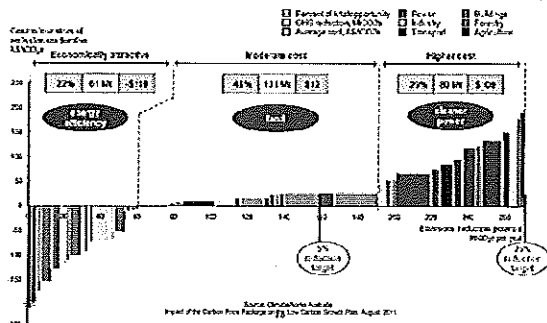
- More than 50% revenue recycling into tax relief and household assistance
- \$10 billion Clean Energy Finance Corporation will invest in the commercialisation and deployment of renewable energy, energy efficiency and clean technologies
- \$3.2 billion Australian Renewable Energy Agency will streamline and coordinate the administration of existing support for renewable energy
- \$200 million Clean Technology Innovation Program (over 5 years) will provide further support for businesses to support R&D in renewable energy and other low-pollution measures
- \$800 million Clean Technology Investment Program will invest (over 7 years) in energy efficient capital equipment and low-emissions technologies in the manufacturing sector
- \$200 million Clean Technology Food and Foundries Investment Program (over 6 years):
 - \$100 million to metal forging and foundry sector
 - \$100 million to food processing sector
- \$946 million biodiversity fund to support restoration and management of biodiverse carbon stores

17

CLIMATEWORKS

GHG EMISSIONS REDUCTION INVESTOR COST CURVE

Exhibit 1 - 2112 greenhouse gas emissions reduction investor cost curve (from 2012 to 2050) for Australia



OBLIGATIONS AND LIABILITY

19

SOURCES

ENTITY	ACTIVITY	SOURCE LAW
CONTROLLING CORPORATION	REGISTER	NGER
	MEASURE	NGER
	REPORT	NGER
LIABLE ENTITY	ACQUIRE & TRANSFER ELIGIBLE EMISSIONS UNITS	CE (Part 3)
	SURRENDER	CE (Part 6)

20

NGER FRAMEWORK

- NGER: National Greenhouse and Energy Reporting
- NGER Act 2007 (Cth)
- NGER Regulations 2008
- NGER (Measurement) Determination 2008
- NGER (Audit) Determination 2009

21

NGER FRAMEWORK

- Controlling corporation: top holding company in Australia
- Controlling corporation's group: s 8
 - controlling corporation
 - subsidiaries
 - joint ventures
 - partnerships

22

REGISTRATION

- Obligation on Controlling Corporation
- Registration Obligation: s 12
- Must apply to register if the Controlling Corporation's group meets a threshold for a financial year
- Thresholds: s 13
- Single facility threshold or total group facilities threshold
- Threshold reduced if control only for part of year

Threshold type	Emission of GHG (CO ₂ -e) (Scope 1 & 2)	Production or consumption of energy
Total group facilities	50 kilotonnes	200 terajoules
Single facility	25 kilotonnes	100 terajoules

REPORTING

General Reporting Obligation: s 19

- A registered corporation must report on GHG emissions and energy production/consumption from the operation of facilities under the operational control of the corporation and its members
- Report by 31 October after compliance year

Record keeping Obligation: s 22

- Must keep records of the activities of the members of its group so as to report accurately and enable the Greenhouse and Energy Data Officer to ascertain whether the corporation has complied with its obligations

Reporting obligations of holders of reporting transfer certificates: s 22G

- If a corporation was the holder of a reporting transfer certificate it must report on GHG emissions and energy production consumption from the operation of the facility

24

CLEAN ENERGY ACT 2011

- Arrangement -See attached Schedule C
- Establishing liability
- Eligible emissions units
- Liable entities
- GHG from facility
- Anti-avoidance
- Acquisition and surrender
- Interface with other schemes

26

BASIC DESIGN

- Direct liability imposed on 'liable entities' for scope 1 GHG emissions (or potential emissions) for which they are responsible
- Emissions obligations 'covered' by *surrendering* an eligible emissions unit for each tonne of emissions (emissions #)
- CE Act creates a system for:
 - assessing liability for emissions, which is how a liable entity knows whether it is liable for emissions; and
 - meeting liability for emissions through payment and surrender processes for eligible emissions units
- Mechanism similar in the fixed charge and the flexible charge periods, except for trading of emissions units

27

LIABILITY

LIABILITY THRESHOLD

- 25,000 tonnes of CO₂-e for full year control
- Applicable threshold adjusted if only part year control

LIABILITY SHIFT

- no double counting - quotation obligation transfer number (OTH)
 - mandatory
 - voluntary
- Liability Transfer Certificate for facility
 - controlling corporation group
 - financial control

32

CLEAN ENERGY COMMAND

- Compliance period from 1 July to 30 June
- No obligation to cover emissions
- Emissions shortfall - unit shortfall charge, imposed by *Clean Energy (Unit Shortfall Charge) Acts* -
 - fixed period = unit shortfall x 130% unit charge
 - flexible period = unit shortfall x 200% baac for units in previous year
- No make good of unit shortfall

31

ELIGIBLE EMISSIONS UNITS

ELIGIBLE EMISSIONS UNIT

- Carbon unit: s 94
- Eligible international emissions unit
- Eligible Australian carbon credit unit
- NB Substitution is subject to limits:
 - IEUs = 50%
 - ACCUs = 5%

HOLD

- A person holds an eligible emissions unit if the person is the registered holder of the unit

REGISTERED HOLDER

- "the person in whose Registry account there is an entry for the unit"

32

CARBON UNITS

- Primary market created by Government: CE s 94
- Key Features:
 - Equate to one tonne of GHG emissions
 - Electronic
 - Indefinite life (until surrendered)
 - Personal property
 - Regulated as financial products
 - Vintages - a Carbon Unit with a particular vintage year can be issued at any time in a 20 month period, from 1 July of the compliance year up to 1 February in the next year
 - Tradeability determined by whether issued for a fixed charge
 - Tax treatment

33

GHG FROM FACILITY OPERATION

EMISSION = SCOPE 1 Emissions: CE s 30

GHG is released into the atmosphere as a direct result of the operation of the facility and released in Australia and regulations include under the CE Act

37

EXCLUDED GHG

- Emissions attributable to the combustion of liquid petroleum fuel, liquid petroleum gas, liquefied natural gas, or compressed natural gas that has been subject to any duty under the *Customs Tariff Act 1995* (Cth) or any duty under the *Excise Tariff Act 1921* (Cth)
- Agricultural emissions
- Emissions from the combustion of biofuels and biomass
- Fugitive emissions from decommissioned underground coal mines
- Legacy emissions from landfill and emissions from closed landfill (closed from 1 July 2008)
- Synthetic GHGs

38

ANTI-AVOIDANCE

- CE s 29: Very similar to *Part IVA ITAA36*
- Determination By Regulator
- Cancel 'Benefit' of threshold
- Applies to a Scheme entered into after 15 December 2008 by 1 or more persons (need not be a liable entity)
- dominant purpose test:
 - enter into, commence to carry out, or carried out for the dominant purpose of:
'enabling [liable entity] to obtain the benefit of one or more threshold provisions in relation to a facility ...'
- 6 factors control objective exercise of discretion
- cancellation published on regulator's website

DISCLOSURE

46

NAME AND SHAME

- NGER Act: Publication of report by 28 February
- CE Act: Publication of information
 - Information about liable entities: liable entities public information database
 - persons likely to be liable
 - unit shortfall of a person
 - default assessments
 - unpaid administrative penalties
 - Information about units
 - auction results
 - banked and borrowed units
 - totals of emissions numbers and shortfalls

47

MANDAORY DISCLOSURE UNDER CORPORATIONS ACT 2001 (CTH)

Director's Report

- must include information about a company's environmental performance in regard to environmental regulations where the company is subject to a particular and significant environmental regulation: s 299(1)(f)
- listed companies to include any information that their shareholders would reasonably require to make an informed assessment about the company's performance, including its operations, financial outcomes and future strategies and potential future performance: s 299A
- include non-financial risks (such as environmental issues) and environmental concerns that may impact on a company's performance or strategies

48

ENFORCEMENT AND REGULATOR POWERS

52

REGULATOR DISCRETIONS

- Audit (NGER Act)
- Access and information powers
- Anti-avoidance determination
- Name and shame
- Non-compliance penalties
 - Civil and criminal
 - Infringement notice
- Shortfall penalties
- NB: ARNEU - anti-abuse controls over registry accounts and transactions
- NB: Corporations Act - market integrity rules

53

CIVIL LIABILITY PENALTIES

NGER Act

- Failure to register = fine \$220,000 max
- Failure to report = fine \$220,000 max
- Daily penalty = fine \$11,000 per day
- CEO also liable = \$220,000 max

CE Act

- Unit shortfall penalty = 130% - 200% BAAC
- Late payment penalty = 20% per annum
- Other failures = fine \$1,100,000 max
- CEO also liable = \$1,100,000 max

54

UNIT SHORTFALL

- No units surrendered
 - unit shortfall = emissions number
- Insufficient units surrendered
 - unit shortfall = emissions number - surrendered units
- Borrowed units
 - unit shortfall = over borrowed units
- Default assessment

55

REGULATOR POWERS

INVESTIGATION BY REGULATOR

- Inspectors may enter premises to:
 - determine compliance
 - substantiate information provided
 - exercise monitoring powers
 - operate equipment and computers

INFRINGEMENT NOTICES

- Regulator may give an infringement notice:
 - Reasonable grounds that a person has contravened a civil penalty provision
 - 28 days to pay
 - Infringement penalty = 20% of maximum penalty
 - Payment expunges liability (and record)

56

OTHER ENFORCEMENT

Part 10 - FRAUDULENT CONDUCT

- Conviction by a Court of an offence committed after 15/12/2008
- Criminal Code (Cth) ss 134, 135, 136, 137
- Court is satisfied issue of units was directly or indirectly attributable to the commission of the offence
- Court can order units to be relinquished (Part 11)



General application of Commonwealth laws

- Fraud against the Commonwealth = jail

57

EITE ASSISTANCE

- Jobs and Competitiveness Program
- Support for Emissions Intensive Trade Exposed (EITE) Industries:
 - targeted towards industries that conduct trade-exposed activities and have the most significant exposure to a carbon price (i.e. most emissions intensive)
 - linked to production levels and provided on the basis that production continues in Australia
 - balanced against objectives for non-assisted sectors and households;
 - transitional
 - consistent with Australia's international trade obligations

61

EITE ASSISTANCE

- Trade-exposure: assessed as follows
 - trade shares being greater than 10 per cent in any one of the years 2004-05, 2005-06, 2006-07 or 2007-08; or
 - demonstrated lack of capacity to pass through costs due to the potential for international competition
- Emissions-intensity: assessed on the basis of industry wide weighted average emissions intensity
- Assistance limited to activity that is above an industry threshold of:
 - 1000 tonnes of CO₂-e per million dollars of revenue; or
 - 3000 tonnes of CO₂-e per million dollars of value added

62

EITE ASSISTANCE

- 94.5 per cent of the allocative baseline for activities that have an emissions intensity above:
 - 2000 tonnes of CO₂-e/million dollars of revenue; or
 - 6000 tonnes of CO₂-e/million dollars of value added
- 66 per cent of the allocative baseline for activities that have an emissions intensity between:
 - 1000 tonnes CO₂-e/million dollars of revenue and 1999 tonnes of CO₂-e/million dollars of revenue; or
 - 3000 tonnes of CO₂-e/million dollars of value added and 5999 tonnes of CO₂-e/million dollars of value added

63

ENERGY SECURITY MEASURES

- Free carbon units will be provided to coal-fired electricity generators
- Operator applies for assistance
- Regulator determines annual assistance factors based on emissions intensity and a division of the available pool of free carbon units (to maintain cap)
- Free carbon units cover 5 years of future operation, subject to:
 - meeting a power system reliability test and
 - passing a windfall profits test

64

SUPPLY CHAIN

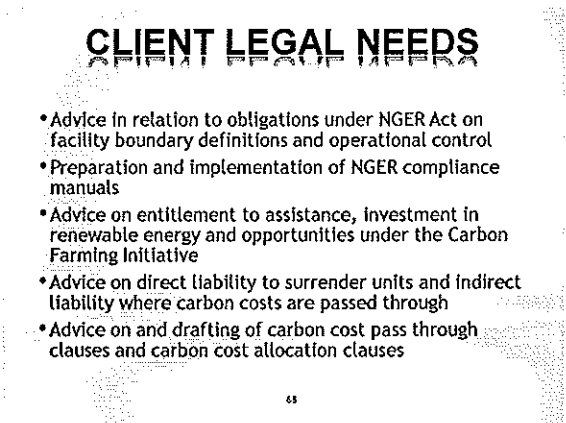
65

CARBON DOWN OR NEUTRAL

- Carbon constrained economy impacts pricing:
 - price increase will attempt to flow through the supply chain to end consumer
 - carbon is embedded in operations and built environment and in energy consumed
- Increasing competitive pressure to reduce costs and reduce carbon footprint
 - Energy Efficiency Opportunities Act 2006 (Cth)
 - Building Energy Efficiency Disclosure Act 2010 (Cth)
 - Competition and Consumer Act 2010 (Cth)

66





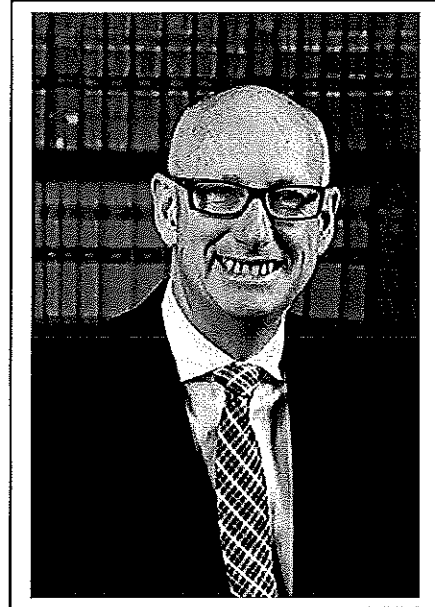
- Advice in relation to obligations under NGER Act on facility boundary definitions and operational control
- Preparation and implementation of NGER compliance manuals
- Advice on entitlement to assistance, investment in renewable energy and opportunities under the Carbon Farming Initiative
- Advice on direct liability to surrender units and indirect liability where carbon costs are passed through
- Advice on and drafting of carbon cost pass through clauses and carbon cost allocation clauses



Dr Damien L Lockie
B. Ec, LL.B, LL.M, Ph. D
FTIA (Life), FCA, FAICD

Barrister-at-Law
Nationally Accredited Mediator
Victorian Bar
T: +61 03 9225 6804
M: 0418 530 025
E: dlockie@vicbar.com.au

Adjunct Professor, Faculty of Law
Bond University
T: +61 07 5595 2084
E: dlockie@bond.edu.au



Damien is dual qualified in law and accounting and formally a partner in the leading legal and accounting firms of Ernst & Young, Baker & McKenzie and Freehills. Damien is admitted to legal practice in the High Court of Australia, Federal Court, Victoria, New South Wales, Queensland, and Western Australia.

Over the course of his 30 year practicing career, Damien has built expertise in revenue law, with a focus on income tax and state taxes. He has expertise in the revenue law implications of:

- corporate business planning and transactions;
- international and domestic business restructures, mergers and acquisitions;
- complex financial and derivatives arrangements;
- government privatisations; and
- infrastructure transactions.

Damien is also an authority on the legal implications of and issues arising from emissions trading and carbon taxation, and he is one of Australia's leading experts in climate and clean energy law. At the bar, Damien's specialities include:

- liability and technical issues under the clean energy law;
- emissions-intensive, trade-exposed entities;
- reporting, disclosure and carbon neutral claims; and
- contract and administrative review, energy audits and disputes.

Damien is a Nationally Accredited Mediator. His litigation and dispute resolution services include:

- litigating on behalf of clients in the Victorian Civil and Administrative Tribunal, Supreme Court and Appeal Court of Victoria, Administrative Appeals Tribunal, Federal Court of Australia and High Court of Australia;
- acting as a mediator; and
- negotiating in (environmental and revenue) audits and disputes.

Damien is an Adjunct Professor of Law at Bond University. Damien's most recent courses include Climate and Clean Energy Law, Environmental Legal Issues, and International Environmental Law. He is also a visiting lecturer in taxation, climate law and resources and environment tax laws at the University of Witwatersrand and the University of Melbourne.

Damien is a Life Member of the Taxation Institute of Australia. He is a Fellow of the Institute of Chartered Accountants in Australia. He is also a member of the Law Council of Australia, Law Institute of Victoria, the American Bar Association, the International Bar Association, and the International Fiscal Association. Damien is a Fellow of Leadership Victoria and a reserve Officer in the Royal Australian Air Force.

Karen J Le Faucheur

B.Com/LLB (Hons) (Melb)

1315

Owen Dixon Chambers West
525 Lonsdale Street
Melbourne Vic 3000

Direct 03 9225 8606

Clerk (Gordon & Jackson) 03 9225 7333

klefaucheur@vicbar.com.au

Karen is a commercial barrister developing an advocacy practice with a focus on general commercial litigation, trade practices, defamation and torts.

Before coming to the Bar, Karen was a Solicitor at Mallesons Stephen Jaques. She worked on general commercial litigation matters including construction and contract disputes. Karen also advised companies in the mining, banking, gas supply, telecommunications and financial services industries on emissions trading and greenhouse and energy reporting.

At Russell Kennedy she worked on a variety of matters, including banking and finance (including conversion and enforcement of securities), contract disputes, coronial, defamation, sports disputes (alleged doping infringements), torts and trade practices (misleading and deceptive conduct).

As a solicitor, Karen drafted pleadings and ran trials in the Supreme Court and the Court of Arbitration for Sport and instructed in interlocutory applications in the Federal, Supreme and County Courts.