Impact Summary: NZ ETS Improvements – Issues with the Companies Act

Section 1: General information

Purpose
The Ministry for the Environment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by Cabinet.
Key Limitations or Constraints on Analysis
There are no limitations or constraints on the analysis in this summary.
Responsible Manager (signature and date):

Matthew Cowie

Manager – Climate Change Policy

Climate Change Directorate

Ministry for the Environment

Date: 22/11/18

A Quality Assurance Panel with representatives from the Ministry for the Environment and the Treasury Regulatory Quality Team has reviewed the Regulatory Impact Assessment (RIA) "Impact Summary: NZ ETS Improvements – Issues with the Companies Act" produced by the Ministry for the Environment and dated November 2018. The panel considers that it meets the Quality Assurance criteria.

More detail on the assessment of this and the other RIAs can be found at: [link to be added].

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

There is uncertainty in the interaction between section 324 of the Companies Act 1993 and provisions of the Climate Change Response Act 2002 (CCRA) in a situation where a company has been wound up, liquidated, dissolved or otherwise ceased to exist.

Under section 324 of the Companies Act 1993, when a company is removed from the New Zealand Companies Office Register, any remaining property (which would include emission units) vests in the Crown with effect from the removal from the New Zealand Companies Office Register.

However, section 18D of the CCRA makes provision for the continuing operation of an account when a company 'is wound up, liquidated, dissolved, or otherwise ceases to exist'.

Pursuant to section 18D an account holder's representative may operate an account until a successor (if any) is appointed.

It is not made clear within the provisions of the CCRA whether the account representative's ability to "operate the holding account" (which would include carrying out transactions) would continue to exist under section 18D, even after a company had been removed from the NZ Companies Register and section 324 applies. Section 18D is stated to apply if an account holder is 'is wound up, liquidated, dissolved, or otherwise ceases to exist'. The natural meaning of this wording is that the winding-down period, liquidation or dissolution process has been completed such that the account holder has ceased to exist.

There is an apparent inconsistency between the Companies Act and the CCRA in this respect.

Therefore there is a lack of clarity as to what action is to be taken by the regulator in connection with an account which holds property to which section 324 applies.

Clarity is needed as to whether Regulators are required to close an account in such a circumstance and transfer the assets to the Crown.

2.2 Who is affected and how?

Parties affected by this problem are account holders, liquidators and administrators, any person or entity who may have an interest in the assets of a company which is an account holder on winding up, liquidation, dissolution or otherwise ceasing to exist, account holder representatives and the Crown.

2.3 Are there any constraints on the scope for decision making?

There are no constraints on the scope for decision making, or interdependencies or connections, other than that resolution could require amendment to primary legislation.

Section 3: Options identification

3.1 What options have been considered?

Option 1 is to amend the CCRA to make clear that when a company is removed from the New Zealand Companies Register, ownership of the property (the units) in an account vests in the Crown in accordance with section 324 of the Companies Act and the Registrar is empowered to close the account (despite anything in section 18D of the CCRA).

Option 2 is to prescribe that section 18D of the CCRA takes precedence over section 324 of the Companies Act 1993. This would allow an account holder's representative to continue to operate the account, including transferring units from it and closing it, even if the account holder has ceased to exist.

3.2 Which of these options is the proposed approach?

Option 1 is preferred.

It is inconsistent with the provision in the Companies Act 1993 for an account holder representative to be able to access and manage the accounts of an account holder which has ceased to exist (whether as a consequence of winding-up, liquidation, dissolution or otherwise). Although any assets in those accounts would typically have been distributed according to liquidator or bankruptcy or other related guidance, sometimes assets remain after those procedures are finished.

It is important to note as a point of context that the Companies Act 1993 provides rules to deal with any assets that are then later found. For example, this can occur when companies are struck off when they own real property (i.e. land) and LINZ records show them as registered proprietors. There is a Companies Act process to restore the company to the New Zealand Companies Register to deal with such property.

It is not appropriate for the account holder representative to be able to deal with assets when that account holder company has 'ceased to exist' and ownership of its property has vested in the Crown pursuant to section 324 of the Companies Act 1993.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties	**Comment**: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*
Additional costs of proposed approach, compared to taking no action		
Regulated parties		Nil
Regulators		Nil
Wider government		Nil
Other parties	Account holder representatives would not be able to access the account when account holders cease to exist, when emission units remain in an account	Low
Total Monetised Cost		Nil
Non-monetised costs		Low
Expected benefits of proposed approach, compared to taking no action		
Regulated parties	Improved clarity	Low
Regulators	Improved clarity as to the operational requirements flowing from applicable legislation	Low
Wider government	Vesting of any remaining emission units in closed accounts	Low
Other parties		Nil
Total Monetised Benefit		Low
Non-monetised benefits		Low

4.2 What other impacts is this approach likely to have?

There will be no other impacts.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Consultation was held on this proposal within a package of planned NZ ETS improvements over August - September 2018. The consultation document sought views on whether an account holder's representative should be able to operate an account until a succession plan is in place, and whether units remaining in a closed account should vest in the Crown. Unfortunately, neither of those questions accurately described the issue, being the lack of clarity on which legislation takes precedence in the event of account holder ceasing to exist.

A majority of submitters considered account holder representatives should be able to operate an account until a succession plan is in place. No detailed reasons were provided. However, one submitter considered the Companies Act 1993 should take precedence over provisions in the CCRA, because the account holder representative should not be able to take control over a company asset when the company no longer exists.

Most submitters supported emission units returning to the Crown once an account is closed. Those in opposition misunderstood the ownership issue, and that as the company would no longer exist, the units would no longer be considered company assets.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

This proposal is one of several operational changes that will be carried through to the proposed Climate Change Response Amendment Bill in 2019, and come into effect from 1 January 2021.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The scheme regulator will continue to monitor accounts in the NZ Emissions Trading Register, including the use and activities of account holder representatives.

7.2 When and how will the new arrangements be reviewed?

No review of the arrangements is planned.