

6 June 2012

Mr Tim Bryant
The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Bryant,

Submission:

- ***Clean Energy Legislation Amendment Bill 2012;***
- ***Clean Energy (Customs Tariff Amendment) Bill 2012; and***
- ***Clean Energy (Excise Tariff Legislation Amendment) Bill 2012.***

The Climate Change Working Group of the Business Law Section of the Law Council of Australia (CCWG) thanks the Committee for the opportunity to comment on the above draft Regulations.

The CCWG makes the following comments, queries or recommendations:

1. **General**

The CCWG considered the amendments to implement the policy regarding the treatment of gaseous fuels as set out in BUDGET PAPER NO. 2 2012-13 at page 13.

2. **Further amendment required to the *Clean Energy Act 2011 (CEA)* by variation to the *Clean Energy Legislation Amendment Bill 2012 (the Bill)***

The CCWG notes the defining of a number of the terms used in the CEA and the *National Greenhouse and Energy Reporting Act 2007 (NGERA)* in the various Regulations made under those Acts during 2012¹. While these have addressed most of the issues raised in previous submissions made by the CCWG, one area of concern remains.

The area which needs be clarified is the definition of "supply" of natural gas. Despite the new regulations which deal with this to some extent, there remains confusion as to where in a gas supply chain liability arises. In negotiating Gas Sale Agreements and Gas Transmission Agreements, it is important for all parties

¹ *Clean Energy Amendment Regulation 2012 (No. 1), Clean Energy Amendment Regulation 2012 (No. 2), and National Greenhouse and Energy Reporting Amendment Regulation 2012 (No. 1)*

to be able to determine with certainty who in the gas supply chain has CEA liability so that OTNs (Obligation Transfer Numbers) can be properly quoted, and appropriate reimbursement obligations imposed.

In a number of gas transportation/transmission agreements, title in the transported gas is expressed to transfer from the shipper to the pipeline operator at the inlet flange and then from the pipeline operator to the shipper at the outlet flange. This could be characterised as an "exchange", and therefore a supply that results in the pipeline operator being liable for the embodied emissions in the gas where the shipper withdraws the gas at the outlet flange for use.

This is not really an exchange of gas which the CCWG regards as being intended to attract liability under the CEA - while the molecules of gas that are supplied at the outlet flange are unlikely to be the same molecules that are injected at the inlet flange (due to comingling), this is not the same as X delivering gas to Y at point A in exchange for Y delivering gas to X at point B.

The CCWG therefore suggests that the definition of "supply" (CEA s.5) be amended to read:

"supply", in relation to natural gas, means the transfer of legal or beneficial ownership of the gas by way of sale, exchange or gift, but does not include:

(a) such transfer of ownership of natural gas as may occur from the operator of a pipeline to another person in respect of gas that is transported through that pipeline; or

(b) a supply of a kind referred to in the regulations."

Paragraph (b) would allow for the regulations to deal with any other appropriate exceptions as the need for them becomes recognised from time to time.

3. **Other Regulations**

The CCWG notes that despite the liability provisions of the CEA commencing on 1 July 2012, the Regulations to deal with the

- supplementary allocations for the LNG sector in the Jobs and Competiveness Program (Part 7, Section 116 (buy-back), *Clean Energy Act 2011*);
- the prescribed percentage relating to facilities in Joint Petroleum Development Area and/or Greater Sunrise unit area (sections 26-28, *Clean Energy Act 2011*);

are yet to me made² and asks to be consulted about them.

4. **Definitions in Regulations – delegation of legislative power**

As outlined in an earlier submission, the CCWG remains concerned about the apparent delegation of legislative power by providing for key definitions used in the CEA and NGERA in Regulations, rather than the Acts themselves. The issue is well canvassed in Chapter 5 of the Report of the Senate Standing Committee for the Scrutiny of Bills report of Committee work in the 41st Parliament³, entitled

² <http://www.climatechange.gov.au/government/clean-energy-future/regulations.aspx>, accessed 6 June 2012.

³ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/work37/report/c05.htm

“Inappropriate Delegation of Legislative Power”. The same issue was highlighted by the same Senate Committee in Chapter 5 of the Report released on 10 May 2012⁴.

This would be avoided by including key definitions in the Acts themselves, rather than their Regulations.

If you have any questions in relation to the submission, in the first instance, please contact the Chair of the Working Party on Climate Change,

Yours sincerely,

Acting Secretary-General

⁴http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/future_direction_2011/report/index.htm