



SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S CLEAN ENERGY FUTURE LEGISLATION

CLEAN ENERGY LEGISLATIVE PACKAGE

SEPTEMBER 2011

SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S CLEAN ENERGY FUTURE
LEGISLATION

September 2011

PRIMARY CONTACT FOR SUBMISSION:

Erwin Jackson, Deputy CEO
The Climate Institute
Level 15, 179 Elizabeth St
Sydney NSW 2000
info@climateinstitute.org.au

The Climate Institute (TCI) welcomes the opportunity to submit its views to the Joint Select Committee on Australia's Clean Energy Future Legislation on the Clean Energy Future legislative package released by the Government in July 2011.

Established in late 2005, The Climate Institute is an Australian-based non-partisan, independent research organisation focused wholly on finding solutions to climate change. Our vision is for a resilient Australia prospering in a low carbon global economy, and participating fully and fairly in international climate change solutions. We seek to achieve this vision by catalysing and driving the change and innovation needed for a low pollution economy and culture in Australia.

Ahead of the Clean Energy Future package announcement, The Climate Institute developed five key tests¹ to assess the policy package developed by the Government, independents and Greens.

Based on these tests TCI has described the Clean Energy Future package as a vital and long overdue step forward with great potential for Australia to cut pollution, clean up the economy, reduce energy waste and join the global effort to tackle climate change.²

PROCESS TO DATE

Over the last year, TCI has provided a number of submissions on the development of the package including:

1. submissions³ to the Multi-Party Committee on Climate Change (MPCCC) and an associated discussion paper on governance and cap and target setting process⁴, and;
2. a submission on the Exposure Draft Clean Energy Bill legislative package⁵.

These build on previous input into Government processes starting with the PM's Task Group on Emissions Trading⁶, the Garnaut Review⁷ and the Carbon Pollution Reduction Scheme processes⁸.

KEY LEGISLATIVE ISSUES

In the submission on the Exposure Draft package TCI identified three key issues that need particular attention to ensure an economically, environmentally and politically robust set of Clean Energy legislation passes the Australian Parliament.

Key changes suggested to the draft exposure legislation (the Bill) included:

1. **Honour Australia's global commitments:** Ensure the legislation, and its implementation, is consistent with Australia's international commitments – this is relevant to Objects, Definitions and decision making criteria in the Bill.
2. **Instill integrity in carbon budgeting:** Link shorter term pollution limits and reviews to the longer term cumulative 2050 carbon pollution budget.

¹ The Climate Institute, Five Key Tests for the Pollution Policy Package, 2011, http://www.climateinstitute.org.au/images/reports/tci_policybrief_5tests_july2011.pdf

² The Climate Institute, Passing the pollution policy test: Australia enters the global clean energy economy, 2011, http://www.climateinstitute.org.au/images/reports/tci_policybrief_passingthepollutionpolicytest_july2011.pdf

³ The Climate Institute, Submission to the Multi-Party Climate Change Committee on Carbon Price Architecture, 2011, http://www.climateinstitute.org.au/images/reports/tci_mpcccs submission_march2011.pdf

⁴ The Climate Institute, Discussion Paper: Achieving carbon pollution and a switch to clean energy, 2011, http://www.climateinstitute.org.au/images/reports/tci_discussionpaper_targetsandcaps_governance_june.pdf

⁵ The Climate Institute, Submission on the Clean Energy Legislative Package, 2011, http://www.climateinstitute.org.au/images/reports/tci_cleanenergylegislativepackagesubmission_august2011.pdf

⁶ The Climate Institute, Submission to the PM's Task Group on Emissions Trading, 2006.

⁷ The Climate Institute, Submission to the Garnaut Climate Change Review, 2008, <http://www.climateinstitute.org.au/images/reports/tci%20interim%20report%20response.pdf>

⁸ The Climate Institute, Green Paper Submission, 2008, <http://www.climateinstitute.org.au/images/reports/tcigpsub.pdf> and; The Climate Institute, Submission to Senate Economics Committee, 2008, http://www.climateinstitute.org.au/images/reports/tci_submission_senate_select_committee.pdf

3. **Ensure greater accountability and clearer liability:** This applies to actions taken by the Minister in setting pollution caps and ability of third parties to challenge breaches of the Bill. The unusual ability of the Regulator to remit and waive penalties for non-compliance should be removed.

Other critical issues included more clearly defining the actions of other nations, carbon leakage and fuel arrangement in Productivity Commission reviews, and ensuring Clean Energy Investment Plans are consistent with the required reduction in pollution intensity of the sector.

Overall the amendments to the Bill substantively address many of TCI concerns with the draft legislation. Appendix 1 outlines outstanding issues that remain to be resolved in a satisfactory manner and TCI would be happy to speak to this submission at the Committee's convenience.

However, it is critical that the Bills are now passed, without delay, to put a price and limit on pollution, provide the certainty to invest in clean energy and begin contributing to Australia's fair share internationally.

APPENDIX 1: Enhancements to the Clean Energy Future legislative package

<p>Honour Australia’s global commitments</p>	<p>The requirement that the Climate Change Authority (CCA) must consider “<i>undertakings relating to the reduction of greenhouse gas emissions that Australia has given under international climate change agreements;</i>” (Part 22, Division 2, Section 289, (2)(b)) is a substantial improvement.</p> <p>However, while the Minister must consider the reports of the CCA in setting carbon pollution caps (Part 2, Section 14 (2)(b)) they do not have to consider undertakings made by Australia. This risks future governments backsliding on current international commitments under the Cancun Agreements and similar future agreements. It is also inconsistent with the actions of other nations such as in the EU and China who have or are in the processes of making commitments under the Cancun Agreements legally binding domestically.</p>
<p>Suggested change:</p>	<p>Include “<i>must have regard to undertakings relating to the reduction of greenhouse gas emissions that Australia has given under international climate change agreements</i>” under (Part 2, Section 14 (2)). This replaces Part 2, Section 14 (2)(c)(i).</p>
<p>Instil integrity in carbon budgeting</p>	<p>In the inclusion of a definition of carbon budgets and consideration of carbon budgets in cap setting processes are important improvements to the Bill. See Part 1, Section 5; Part 2, Section 14 (2) (b) (ii); Part 22, Section 288 (1)(b); Part 22, Section 289 (1)(b); Part 22, Section 290 (10); Part 22, Section 291 (1)(b); Part 22, Section 293 (b).</p>
<p>Suggested change:</p>	<p>Reference to carbon budgets should be included in Part 7, Section 156, (2) (l) to ensure the Productivity Commission considers the implications of carbon budgets for assistance to emission intensive trade exposed industries.</p>
<p>Ensure greater accountability and clearer liability</p>	<p>Unlike other environmental legislation and trade practices laws, for example the Environment Protection and Biodiversity Conservation Act 1999 and the Competition and Consumer Act 2010 (CCA), there is no clarity of opportunity for third parties to bring proceedings to remedy or restrain breaches of the Clean Energy Bill.</p> <p>This remains a significant failing of the current legislation.</p> <p>For example, there are two primary provisions under the CCA that confer open standing upon a person seeking to enforce certain provisions of that Act – Section 80 and Section 163A.</p> <p>Case law has established that those sections have a wide scope – they allow any person, whether or not that person has a personal interest in the matter, to seek relief from the court. While the sections confer ‘wide’ standing, they are tempered by the power of the court to stay proceedings that are oppressive, vexatious or an abuse of the process; and refuse relief on discretionary grounds if the applicant does not have a sufficiently close or real interest in the matter.</p>

	<p>Parties seeking to invalidate or limit the scope of the open standing provisions under the CCA have deployed the argument that those provisions will ‘open the flood-gates’ of litigation. This argument has been dismissed as unfounded by judges of the High Court[†] and by the Australian Law Reform Commission.</p> <p>The whole purpose of this legislation and climate change policy is to encourage actions for broad public, environmental and future generational benefits. There should be open standing to enforce all public and private breaches of duties imposed by the legislation.</p> <p>Enabling any citizen to ensure liable entities comply with their obligations, or to compel the minister to do so - would enhance the accountability of the Scheme and allow it to be enforced should a future Government decide not to enforce it without securing the support of both houses of Parliament.</p> <p>The legislation also creates merit appeal rights for companies from decisions of the Clean Energy Regulator which may offer little opportunity for public scrutiny. The practice and outcome of such appeals should be carefully monitored as part of the general reviews of the Climate Change Authority.</p>
Suggested change	Enable open standing to allow third parties to remedy breaches of public and private duties arising from the Bill.

^{*} Section 80 allows the Australian Competition and Consumer Commission (ACCC) or “any other person” to apply to the court for an injunction, including an interim injunction, to restrain breaches or attempted breaches of the restrictive trade practices and industry code provisions of the CCA; and Section 163A allows “a person” to apply to the Federal Court for an order of prohibition, certiorari, or mandamus, or to make a declaration in relation to the operation or effect of any provision of the Australian Consumer Law (other than the consumer guarantee provisions of Division 1 of part 3-2 or the compliance with substantiation notices provisions of Part 4-5); or the validity of any act or thing done, proposed to be done or purporting to have been done under the CCA.

[†] The High Court has justified the wide construction of the open standing provisions on a number grounds including that if applicants had to prove that they are a ‘person aggrieved’, time, money and resources would be wasted from case to case in determining the question; and enforcement agencies tend to become unable or unwilling to enforce the law because of inadequate resources or because they become too close to those against whom they should be enforcing the law, and wide standing provisions counteract this tendency to limit enforcement.