National Environmental Law Association

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Carbon Tax Repeal Submissions
Carbon Tax Repeal Taskforce
Department of the Environment
GPO Box 787
CANBERRA, ACT 2601

4 November 2013

Dear Sir/Madam

Consultation draft bills to repeal the Clean Energy Act 2011 (Cth)

The National Environmental Law Association (NELA) welcomes this opportunity to comment on consultation draft bills for the repeal of the *Clean Energy Act 2011* (Cth) and associated legislation ('the carbon tax legislation').

NELA is Australia's leading national environmental law organisation with a membership base that includes legal practitioners, law firms, academics, judges and policy makers.

While the process of repealing the carbon tax legislation and consequential amendments to remaining laws is relatively straight-forward, NELA wishes to raise three areas of concern.

1. The political process to legislate the repeal of the Act and consequential amendments is causing uncertainty, especially if it extends beyond 1 July 2014 and therefore the repeal is retrospective. This will make it very difficult to advise clients about the precise effect of the repeal, and the approach of the Australian Competition and Consumer Commission to carbon pricing pending and following the repeal.
   NELA recommends that the government consider "switching off" the application of penalty provisions from 1 July 2014 until the repeal legislation is enacted, in order to provide a safe harbour. Such an approach would eliminate the retrospective operation of any penalty provisions.
2. The unavoidable consequence of the repeal is that entities affected by the *Clean Energy Act 2011* (Cth) and associated legislation may nonetheless continue to report under the *National Greenhouse and Energy Reporting Act 2007* (Cth). Because these two pieces of legislation have been so inter-related in concept and operation, NELA is concerned that unwinding sections 30 (and especially s 30(2)) and 31 of the *Clean Energy Act 2011* (Cth) (dealing with the definition and measurement of covered emissions) may increase the scope of greenhouse gases subject to the operation of the *National Greenhouse and Energy Reporting Act 2007* (Cth).

NELA recommends that the government avoid this unintended effect by reproducing an equivalent provision to s 30(2) exempting emissions from reporting under the *National Greenhouse and Energy Reporting Act 2007* (Cth).

3. Justice Pain of the NSW Land and Environment Court in the case of *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40 held that a liability under the *Clean Energy Act 2011* (Cth) was a sufficient answer to a requirement imposed on a project proponent under State planning laws to offset scope 1 greenhouse gas emissions. Her Honour said (at [16]):

> I am satisfied that the scheme as represented in the CE [Clean Energy] Act, together with related legislation (*Carbon Credits (Carbon Farming Initiative) Act* 2011 (Cth); *National Greenhouse and Energy Reporting Act* 2007 (Cth)), meets at a practical level the purpose of imposing a condition requiring the offsetting of Scope 1 GHG emissions

Repeal of the *Clean Energy Act 2011* (Cth) will render the current intersection between Commonwealth and State laws otiose.
NELA recommends that the government consider including a Federal legislative rule to save the principle outlined by Pain J, if it is the intention of the Federal Government that the repeal of the 'carbon tax' 'opens Australia for business'.

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NELA wishes to thank Dr Damien Lockie, Barrister and Mediator, Victorian Bar for preparing this submission on our behalf.

Please contact us if you wish to discuss this submission.

Yours faithfully

Amanda Cornwall
President
National Environment Law Association