Business Council of Australia

submission

Submission to the Department of the Environment on the Carbon Tax Repeal

NOVEMBER 2013

Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

Contents

The Business Council of Australia (BCA) brings together the chief executives of more than 100 of Australia's leading companies, whose vision is for Australia to be the best place in the world in which to live, learn, work and do business.

About this submission

The government has released a consultation paper and related exposure draft legislation designed to repeal the carbon tax.

The BCA supports the wind-up of the current carbon pricing mechanism (CPM), given it places excessive costs on business and households because the carbon charge under the legislation is now one of the highest in the world.

This submission does not consider the design of the Direct Action policy which will replace the CPM. This matter will be addressed in future submissions.

In this submission the BCA is taking the opportunity to raise a number of matters in relation to three key aspects of the legislation, namely:

- implications should the legislation be implemented retrospectively
- the proposed powers of the Australian Competition and Consumer Commission (ACCC) in relation to price exploitation and false and misleading representations
- the objectives and matters to be considered in the 2014 review of the Renewable Energy Target (RET).

This submission does not address the range of complex issues specific to the electricity sector which are considered in the joint submission of the Energy Supply Association of Australia, Energy Retailers Association of Australia, Energy Networks Association and the National Generators Forum.

BCA energy and climate change position

Australia needs to ensure it has a comprehensive and coherent national energy policy that drives the development of our energy resources, supports a strong energy export industry, and provides for the secure, reliable and efficient delivery of competitively priced energy to households and businesses.

Australia's energy sector needs to deliver these growth opportunities while meeting best practice environmental standards and seeking to minimise our greenhouse gas emissions in line with global efforts using national rather than state-based approaches.

Australia should continue to play its role in the international climate change negotiations to progress an approach to emissions reduction that includes clear and binding commitments from all major emitters.

Australia should renew its focus on adaptation to manage the long-term impacts of climate change and on research and development in support of technological advancements to support the lowering of emissions from all energy sources.

In summary, Australia's energy and climate change policy should ensure:

- Australia's future economic growth and not compromise Australia's global competitiveness
- a reduction in Australia's greenhouse gas emissions at lowest cost and commensurate with global action
- the development of our energy exports in an environmentally responsible manner
- the delivery of secure, reliable and competitively priced energy in the long-term interests of both domestic and international consumers

- competition through the operation of open and transparent markets with strong consumer protections
- a stable, technology-neutral, long-term investment environment
- Australia's access to diverse supply chains to enhance our energy security.

Key points

The current carbon pricing mechanism does not support the reduction of greenhouse gas emissions at lowest cost, nor does it preserve the competitiveness of Australian industries.

The draft legislation provides the basis for the wind-up of the CPM.

The draft legislation also includes sections designed to prevent companies from exploiting prices or making false and misleading representations in relation to the removal of the carbon price.

Until this legislation is passed-companies will continue to pay one of the highest carbon costs globally.

Any delay in the repeal will have adverse impacts on companies liable under the current legislation.

Liable companies will continue to face compliance obligations under the CPM and associated non-recoverable costs for a yet-to-be-determined period, possibly into the next financial year or longer.

As it is possible that this legislation will not be passed prior to 1 July 2014, there are particular concerns for business in terms of complying with the retrospective nature of this legislation.

Assessing contracts and determining price variations will take time if it is to be done properly.

The repeal legislation has not factored in that companies will not be able to instantly change arrangements and that at a minimum companies will need three months to review contracting arrangements.

It must also be recognised that the proportion of the carbon price that has been passed through may be less than the full carbon price depending on the nature of the industry and contract.

This has implications for government and community expectations about the scale of price reductions. It also means the ACCC will need to be considered in its approach to reviewing prices.

The role of the ACCC will be important in ensuring community confidence that the removal of the carbon tax is happening in an appropriate manner. There are elements of the repeal legislation, however, which make the role of the ACCC and the matters it should take into consideration in assessing whether there has been price exploitation unclear and subjective.

With the wind-up of the Climate Change Authority, consideration needs to be given to the arrangements for the 2014 review of the Renewable Energy Target. To remove any ambiguity it will be important for the government to make clear the matters that will be included in the review either in the legislation or in related documents.

Key recommendations

The BCA recommends that:

- the government take into consideration that companies will require at least three months once the legislation is passed to amend the range of contracts that they have in place with carbon pass-through clauses and ensure companies are not penalised during this time.
- the legislation should make clear how the supplementary allocation of Jobs and Competitiveness Program (JCP) units to liquefied natural gas (LNG) producers for 2014–15 will be managed. The application for supplementary assistance for 2013–14 would be included in the 2014–15 JCP application under the CPM scheme. The repeal Bill should make clear that application for this allocation is provided for in the 'true up' process for 2013–14 JCP unit allocation.

- the legislation should include provisions to deal with the situation where goods and services such as refrigerant stock are sold after the repeal of the CPM, which had been purchased with a carbon cost component included.
- those parts of the repeal legislation dealing with additional powers for the ACCC should be amended to address areas of ambiguity. Section 60C and section 60C (2)(c) should be redrafted to define "unreasonably high" and remove the ambiguity as to what the ACCC should consider when considering price exploitation.
- section 60E (2)(c) would appear to be tasking the ACCC with the role of setting maximum electricity and gas prices. The legislation should be redrafted in such a manner as not to cause the ACCC to be a price-setting authority in effect.
- the government should ensure the 2014 review of the Renewable Energy Target is expanded to include explicit consideration of the consequences of:
  - changes in demand for electricity
  - the repeal of the carbon price
  - the impact it is having on business electricity prices given the RET accounts for a larger component of electricity costs for large users compared to households.

Commentary on the proposed repeal

The current carbon pricing mechanism (CPM) does not support the reduction of greenhouse gas emissions at lowest cost, nor does it preserve the competitiveness of Australian industries.

The draft legislation provides the basis for the wind-up of the CPM and the removal of the carbon price in the Australian economy, which is one of the highest in the world.

The draft legislation also includes sections designed to prevent companies from exploiting prices or making false and misleading representations in relation to the removal of the carbon price.

The submission looks at three general issues – the implications of retrospective legislation, the proposed powers of the ACCC and the terms of reference for the 2014 review of the Renewable Energy Target.

Retrospectivity

The government is seeking to repeal the CPM prior to 1 July 2014 to allow for an orderly wind-up of the compliance and other requirements of the CPM. Concluding the CPM before the commencement of the next financial year allows for a smooth transition.

The repeal legislation does include clauses in support of retrospective application of the legislation should there be a delay in the repeal.

Until Royal Assent is given, all liable parties under the current clean energy legislation will be required to comply with that legislation. This would include the situation where the assent occurs after 1 July 2014. Liable entities will still accrue liabilities and will continue to recover the cost sufficient to cover their carbon price liability.

In turn, if there is a delay in repeal, these businesses will face the possibility of having to reverse the pass-through (including potential refund of monies charged) up to the date when repeal does occur, again adding more cost and administrative difficulty to businesses.

The repeal legislation has not factored in that companies will not be able to instantly change pricing arrangements and that at a minimum companies will need three months to review contract clauses.

Business continues to argue for the repeal of the carbon tax legislation to be agreed at the earliest time possible prior to the end of this financial year and to take effect on 1 July 2014.

Should the repeal be delayed and the government required to enact the legislation retrospectively, businesses will have to contend with a number of complexities. Examples are outlined below.

Review of contracts

A range of contracts will need to be revisited and revised as a result of the passage of the legislation.

Companies, for example, that have used the Australian Financial Markets Association's Carbon Addendum may have contracts that contain very precise trigger clauses for scheme termination. The application of backdating of a decision to remove compliance obligations mid-way through the compliance year (e.g. backdating to 1 July 2014) could potentially disrupt legal contractual arrangements for cost pass-through or create unintended windfall gains between businesses operating in a particular sector.

Companies with contracts that have flow-through effects in pricing such as those in bilateral power purchase agreements which have fixed the customer's price as a carbon-inclusive price, with the retailer accepting the risk of movements in input costs and consequently needing to continue to pass this through to consumers will need to determine how to address the impact of retrospective legislation

Many contracts contain a "Change of law" clause which prevents the amending of clauses within the contract until such time as the change in law has been enacted. This effectively means contract renegotiation cannot be undertaken until after any repeal legislation is passed.

Given the number and complexity of the contracts in place, the process to review and amend contracts will take time and due to the nature of the "Change of Law" clauses, companies are suggesting it could take a minimum of three months to amend carbon pass-through clauses within their businesses.

The repeal legislation should include a period of grace to allow companies to renegotiate contracts of at least three months following the passage of the legislation and they should not be penalised in that time.

Operation of the Jobs and Competitiveness Program

Companies eligible for assistance under the JCP will be required to comply with the current legislation until the date of repeal as both business and the Clean Energy Regulator must comply with the legislation in place at the time. Costs involved in preparing applications and submitting them for audit will be incurred during this time for no perceivable benefit. Additionally, the Clean Energy Regulator will be required to issue JCP units as per the legislation of the day.

There is a need for clarity regarding the JCP and the management of permits for FY2014. JCP entities will receive the major proportion of their free permits 60 days after application (at the latest), in CY2013. The remainder (related to 25 per cent of their direct emissions) will be after the financial year ended (i.e. after 30 June 2014) and it is not explicitly stated in the consultation paper how these will be handled for FY2014.

The repeal legislation should make clear the processes to manage this situation to ensure companies are not adversely impacted.

Under the current repeal Bill it is unclear how the process for managing the supplementary allocations of JCP units to LNG producers will be dealt with. The application for supplementary assistance for 2013–14 would be included in the 2014–15 JCP application under the CPM scheme. The repeal bill must ensure that application for this allocation is provided for in the 'true up' process for 2013–14 JCP unit allocation.

Synthetic greenhouse gases

There are no provisions for the refund of payment of carbon tax on goods and services such as Synthetic Greenhouse Gases (SGG) already paid on imported/manufactured stock. Should SGG be manufactured or imported for resale these will incur a carbon charge up until the date of repeal. This stock of SGG would then contain unrecoverable components of carbon costs that could not be passed through to the customer. Provisions should be included in the repeal legislation to deal with

the situation where refrigerant stock is sold after the repeal of the CPM, which had been purchased with a carbon cost component included.

ACCC

The role of the ACCC will be important in ensuring community confidence that the removal of the carbon tax is happening in an appropriate manner.

It must, however, be recognised that the level of carbon price included in contracts and types of pass-through arrangements mean there will not be a single carbon price for all circumstances.

The ACCC will need to ensure consideration of these issues and the time it will take to renegotiate contracts in any of its actions.

There are elements of the repeal legislation, however, which make the role of the ACCC and the matters it should take into consideration in assessing whether there has been price exploitation unclear and subjective.

The repeal legislation proposes expanded powers for the ACCC for a period of time. The provisions will give the ACCC the power to monitor prices and assess whether the repeal of the carbon price has had an effect on the prices of good supplied or whether there has been price exploitation in the electricity and gas industries. Penalties are up to $1.1 million for a company.

The legislation as drafted is broad in potential intent. Section 60C uses terms such as “unreasonably high” which are not defined. Section 60C (2)(c) then goes on to state “the price for the supply is unreasonably high even if the following matters are also taken into account” suggesting the ACCC could take action if it believes prices are unreasonably high irrespective of changes in other costs or take matters other than the carbon price into account.

These sections need to be redrafted to:

- define “unreasonably high”
- remove the ambiguity as to what the ACCC should examine in section 60C (2)(c).

Section 60E (2)(c) would appear to be tasking the ACCC with the role of setting maximum electricity and gas prices, i.e. it gives the ACCC the power to send out notices to prevent price exploitation where the ACCC must “specify a maximum price that ... may be charged”.

This would appear to be an overreach in terms of the role and capacity of the ACCC. The legislation needs to be drafted in such a manner as not to cause the ACCC to be a price setting authority in effect.

There are already a range of approaches to pricing and in many states there are regulators who already have processes in place to determine electricity prices. Similarly, some states are setting prices for certain classes of electricity and gas users. While both the Northern Territory and West Australian Governments set the electricity price, South Australia and Victoria have fully deregulated prices relying on competition to set the upper price.

Review of the RET

With the wind-up of the Climate Change Authority, consideration needs to be given to the arrangements for the 2014 review of the Renewable Energy Target. To remove any ambiguity it will be important for the government to make clear the matters that will be included in the review either in the legislation or in related documents.

The government should ensure the terms of reference for the 2014 review of the Renewable Energy Target is expanded to include assessment of the consequences of:

- changes in demand for electricity
- the repeal of the carbon price

- the impact it is having on business electricity prices given the RET accounts for a larger component of electricity costs for large users compared to households.

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 **www.bca.com.au**