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Department of Industry, Innovation, Climate Change,
Science, Research and Tertiary Education
GPO Box 9839
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Your reference:

Our reference:
2801878

Dear Sir/Madam

Submission by Norton Rose Fulbright on behalf of the Australian Landfill Owners Association on draft Clean Energy Legislation Amendments

Introduction

Norton Rose Fulbright, on behalf of the Australian Landfill Owners Association (**ALOA**), is grateful for the opportunity to present a submission to the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education (**Department**) on the draft Clean Energy Legislation Amendments released in the "Starting Emissions Trading on 1 July 2014" document dated 25 July 2013 (**Clean Energy Legislation Amendments**).

ALOA is an incorporated entity comprising landfill owners across Australia sharing a concern for the future viabilities of the environment and their businesses. ALOA members provide services in waste disposal and collectively operate over seventy per cent of the landfill capacity across Australia receiving over 15 million tonnes of solid waste annually.

ALOA is the representative voice of the landfill industry in Australia.

Background

As has been regularly documented, ALOA considers that the coverage of the waste sector within the CPM has led to unnecessary complications, complexity and expense for both the government and the industry.

In particular, ALOA is concerned that with the proposed linkage with the European Union Emissions Trading Scheme and the implementation of this link one year earlier, the industry will face significant difficulties in accurately pricing carbon in its operations. Part of this difficulty arises because all of a landfill's emissions (and consequently liability) arises in future years, rather than in the year that the waste is received and the carbon price is passed on. This requires certain assumptions to be made about the price of carbon into the future. Given the volatility that has been experienced in the European carbon market, and having regard to the expectation that the Australian carbon market will track the European price, there are enormous difficulties facing the industry in relation to the adoption of any practical pricing methodologies.

One of the solutions that has been put forward by the Department to this issue is the ability for the industry to "over surrender" eligible emissions units in the year that the waste is received, rather than in the year that the emissions occur. For this solution to be acceptable the parameters for "over surrender" need to be clearly established with no risk that the rules may subsequently change.

At present it is our view that these parameters are not in place.

Rules governing over surrender

Section 122 of the Clean Energy Act 2011 (**Act**) sets out how eligible emissions units can be surrendered. Of note, section 122(3) provides that that the surrender notice may only specify the current eligible financial year or an earlier financial year. In other words, it is not possible to specify a later eligible financial year. In the event that eligible emissions units are surrendered in excess of a liable entity's emissions number for a particular year, section 133 applies.

On our reading, section 133 has not been designed or drafted to deal with a deliberate over surrender situation – that is, where a landfill wishes to surrender eligible emissions units in a particular eligible financial year to cover 40 years worth of future emissions liability. Accordingly, we are of the view that specific amendments should be made to section 122 and/or section 133 to deal with a deliberate over surrender of eligible emissions units by the landfill sector.

Quantitative and qualitative restrictions

The Act imposes both quantitative and qualitative restrictions in relation to the use of eligible emissions units. It is possible that these restrictions may change over time. Indeed, the Clean Energy Legislation Amendments have done just this, by lowering the designated limit applicable to Kyoto units from 12.5% to 6.25%. If landfills are able to over surrender eligible emissions units to address a future emissions liability (which could be up to 40 years in the future), they must have certainty that the over surrender cannot be undermined in the future. In other words, that any future changes made to quantitative or qualitative restrictions could not be applied retrospectively.

The need to deal with this aspect and provide a degree of certainty to those in the landfill industry who wish to adopt a practice of over surrender reinforces that specific detailed rules need to be developed as outlined above.

The Clean Energy Legislation Amendments should therefore be expanded to cover appropriate amendments to the Act and any supporting regulations or determinations to provide greater clarity on how deliberate over surrender of eligible emissions units can be utilised by the landfill sector. We would be happy to offer our assistance to help the Department prepare the necessary amendments.

Addressing inequities between the private sector and local government

We also note that there is currently an inequity in reporting obligations between local government and private sector corporations under the Clean Energy Package. Under the current legislation, a private corporation which is in operational control of multiple landfill facilities may be required to provide a report to the Clean Energy Regulator in relation to all of the facilities under its operational control, regardless of whether all the facilities meet the Act thresholds. In contrast, a Council with multiple landfill facilities is only required to provide a report in relation to the facilities under its operational control which meet the Act thresholds.

By way of example, a Council and a private sector corporation are both in operational control of three landfill facilities with the following emissions profiles:

- Facility 1 - emits 30,000 t CO2-e per year;
- Facility 2 - emits 20,000 t CO2-e per year; and
- Facility 3 - emits 10,000 t CO2-e per year.

Under this scenario, the Council would only be required to provide a report (under section 22A of the National Greenhouse and Energy Reporting Act 2008 (**NGER Act**)) in relation to Facility 1. The private sector corporation, however, would be required to provide a report (under sections 19 and 22A of the NGER Act) in relation to all three facilities.

ALOA believes that there is no justifiable reason why the reporting obligations which support the Clean Energy Package should vary depending on the type of entity reporting.

ALOA therefore requests that the Department use the opportunity as part of the Clean Energy Legislation Amendments to ensure that reporting obligations for local government and private sector corporations be made consistent.

We trust the above matters will be addressed before the Clean Energy Legislation Amendments are put before Parliament and look forward to working with the Department to progress the matters raised in this submission.

Yours faithfully

Elisa de Wit
Partner
Norton Rose Fulbright
on behalf of the Australian Landfill Owners Association