

In the Matter of the
Clean Energy Act 2011(Cth.),
and the *Constitution*.

The Institute of Public Affairs
410 Collins Street,
Melbourne, Vic., 3000.

Short Form Opinion

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In the Matter of the *Clean Energy Act 2011* (Cth.)
and the *Australian Constitution*.

SHORT FORM OPINION

In my opinion the *Clean Energy Act 2011* (Cth) (the Act) is invalid for the following reasons.

First, by imposing a tax, called a charge for the issuing of the carbon units, and dealing with other matters concerning its general administration, the Act contravenes s.55 of the *Constitution*. Those other matters are struck down and are of no effect.

Alternatively, the Act imposes penalties by way of taxation ranging from 130% to 200% for persons who surrender insufficient carbon units. For example for the three 'fixed charge years' to 30 June 2015 this penalty ranged from \$29.90 to \$33.02 per carbon unit. In the 'flexible charge years' to 30 June 2018, a 200% penalty with respect to the minimum charge in 2015 is \$30 per carbon unit, otherwise it is up to double the auction price. Little if any revenue will be raised from this measure. As such it is not a law with respect to taxation and is contrary to s.51(ii) of the *Constitution*.

Secondly, the Act is not 'a law with respect to' trading corporations. It fails to satisfy the provision of s.51(xx) the *Constitution*. Merely proscribing that the Act applies to constitutional corporations is not enough. Saying so doesn't make it so.

Thirdly, there is no warrant for the external affairs power in s. 51(xxix) of the *Constitution* to support the Act. It was not a relevant or appropriate response to the Kyoto Protocol, which is to expire at the end of December and within six months after the commencement of the Act on 1 July 2012. Having stopped broad acre land clearing in Queensland in 2006 will more than likely allow Australia to meet its Kyoto commitment, without the need to have passed the Act. The Act is not a law with respect to external affairs.

Finally, and in the particular case of State owned power stations, the Act violates s.114 of the *Constitution* by effectively imposing a tax on the carbon dioxide emissions contained in the flue gases emitted as waste product. These greenhouse gases are property owned by the States and it is impermissible for the Commonwealth 'to impose any tax on any property of any kind belonging to a State'.

Chambers
19 March 2012


Bryan Pape