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SUBMISSION ON THE DRAFT CARBON TAX BILL 2017

INTRODUCTION:

1. In this document the Legal Resources Centre (“LRC”) submits comments on the Carbon Tax Bill, 2017 [B-2017] ‘(the “Bill”).
2. The LRC is an independent non-profit public interest law clinic, founded in 1979, which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances.
3. In light of the above, the Environmental Justice Focus Group within the LRC, undertakes work on a wide spectrum of environmental topics, including matters concerning air pollution and carbon dioxide emissions.
4. This submission is broken into the following sections:
 - 4.1. background and South Africa’s legal framework in terms of reducing CO² emission;
 - 4.2. concerns about the effectiveness of the Bill; and

4.3. Concerns about the impact of the Bill on low-income households and communities.

BACKGROUND AND SOUTH AFRICA'S LEGAL FRAMEWORK IN TERMS OF REDUCING CO² EMISSION:

5. With near-unanimous consensus, the scientific community agrees that anthropogenic activities have resulted in shifts in the Earth's natural environmental cycles i.e. the effect of man-made greenhouse gas emissions ("GHG emissions") on increasing global air temperatures. These shifts have and will continue to disrupt these cycles in interconnected, inter-sectoral, and in unforeseen negative ways.
6. In order to prevent such calamities from occurring, countries through the United Nations have entered into agreements, signed declarations and established inter-government working groups to curb the effects of climate change, limit the increase in average global temperature and to reduce each country's respective current GHG emissions to pre-determined levels. Examples of these include the creation of the United Nations Framework Convention on Climate Change ("UNFCCC"), The Kyoto Protocol ("KPO"), the Paris climate agreements ("PCA") the Inter-governmental Panel on Climate Change ("IPCC"), the Doha Amendment and the Inter-governmental Panel on Climate Change Code (IPCCC").
7. The UNFCCC is a non-binding international agreement between 195 countries. As the first major comprehensive international instrument to inhibit climate change, this agreement laid the framework for future international interventions against climate change such as the KPO and PCA. The primary goal of the UNFCCC was to stabilise *greenhouse gas*

*concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system.*¹

8. Another key component of the UNFCCC is the principle of common but differentiated responsibilities. The agreement recognised the historical and current differences in countries' contributions to climate change. Additionally, it recognised the historical and current differences in the capacities of countries to mitigate climate change. As such, Annex 1 countries (the countries of the OECD and 12 countries in Central and Eastern Europe transitioning to market-based economies) committed to more regular and intensive reporting on their GHG emissions, the reduction of their GHG levels to 1990 levels, and funding for Non-Annex 1 countries to support their efforts to mitigate the effects of climate change.²
9. Non-Annex 1 countries were subjected to less intensive and regular reporting schedules and in some cases, the reporting schedules were dependent on funding from Annex 1 countries.³ However, the agreement still stressed the important role that Non-Annex 1 countries play in stunting the effects of climate change.
10. South Africa is classified as a Non-Annex 1 country and it signed the UNFCCC in 1993 and ratified it in 1997.⁴
11. Recognising the limitations in the UNFCCC, the KPO was developed to strengthen international obligations and resolve to mitigating the effects of climate change. The

¹ Article 2 UNFCCC

² Barnard & Carter 'Demystifying the Global Climate change Regime' in Humby, Kotze, Rumble & Gilder (eds) *Climate Change Law & Governance in South Africa* (Original Service 2016) 3-7

³ Ibid 3-7

⁴ United Nations 'Parties & Observer States: South Africa', *United Nations Climate Change*, http://unfccc.int/tools_xml/country_ZA.html

KPO's primary goal was to set up binding targets and timeframes for GHG emissions reductions for Annex 1 countries while incentivising and encouraging Non-Annex 1 countries to set targets as well.⁵ In the first commitment phase from 2008-2012, Annex 1 countries agreed to reduce their overall GHG emissions by at least 5 percent below 1990 levels.⁶ Additionally, it outlined the framework for the creation of an international carbon trading market and incentivised Annex 1 countries to support the mitigation efforts of Non-Annex 1 countries.

12. The Doha amendment to the KPO outlined the GHG emissions reduction targets for the second reporting phase (2013-2020) and included a revised list of GHG emission to be reported.⁷ In this agreement, the Annex 1 countries agreed to a target of reducing their emissions levels to 20 percent below 1990 levels by 2020.⁸ However, the Doha amendment is currently not in force as at least 144 countries who have ratified the KPO must accept this amendment. Currently, 109 countries have agreed to the Doha Amendment and are enacting measures to comply with it.⁹

13. South Africa signed the KPO in 2002 and ratified it in 2005.¹⁰ South Africa also ratified the Doha Amendment in 2015.¹¹

14. Once again acknowledging the dangerous impact that climate change has on the Earth and the need for a renewed and strengthened global approach to mitigation, the PCA was

⁵ Barnard & Carter 3-8

⁶ The Kyoto Protocol Article 2 section 1

⁷ Doha Amendment to the Kyoto Protocol Article 1: Amendment A. Annex B to the Kyoto Protocol & B Annex A to the Kyoto Protocol

⁸ Lehmann 'South Africa's Climate Change Commitments and Regulatory Response Potential' in Humby, Kotze, Rumble & Gilder (eds) *Climate Change Law & Governance in South Africa* (Original Service 2016) 8-6

⁹ United Nations 'Status of the Doha Amendment', *United Nations Climate Change*, http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php

¹⁰ United Nations 'Parties & Observer States: South Africa'

¹¹ United Nations 'Status of the Doha Amendment'

developed. The primary goal of the PCA is to ensure that *global temperatures do not exceed 2.0 C above pre-industrial temperatures*.¹² Countries that signed and ratified the PCA are required to submit national plans in which they outline their proposed efforts to reducing GHG emissions and other impacts of climate change. These plans are to be revised every 5 years with a focus on increasing a country's commitment to mitigating climate change dependent on its economic capacities.¹³ Developed countries were also required to biannually report its efforts on funding for green projects and projects to reduce GHG emissions in developing countries.¹⁴ Additionally, the PCA sent out the long-term goal of a carbon neutral economy by 2100 in order to stem the rise of global temperatures. 195 of the 197 parties to the UNFCCC signed the agreement with 175 parties as of date have ratified the agreement.¹⁵

15. South Africa signed the PCA in 2015 and ratified it in 2016.¹⁶

16. Besides the United Nations, other regional and economic organisations have committed themselves to protecting the environment, sustainable use of natural resources, and other efforts to mitigate the effects of climate change. One such organisation is the Southern African Development Community (SADC).

17. South Africa has been a member of SADC since 1994. SADC has not developed an organisational treaty specifically concerning member states' obligations to mitigating the effects of climate change. However, SADC members do have specific environmental

¹² United Nations 'The Paris Agreement' , *United Nations Climate Change*, http://unfccc.int/paris_agreement/items/9485.php

¹³ Paris Climate Agreement

¹⁴ Paris Climate Agreement

¹⁵ United Nations 'The Paris Agreement

¹⁶ United Nations 'Parties & Observer States: South Africa'

obligations outlined in The Southern African Development Treaty, The SADC Protocol on Energy, The SADC Protocol on Mining, and the SADC Protocol on Health.

18. The Southern African Development Treaty states that members *Achieve sustainable utilisation of natural resources and effective protection of the Environment.*¹⁷

19. South Africa signed and ratified this document in 1994.

20. The SADC Protocol on Energy outlines the obligations member states have in relation to energy infrastructure, policies, and the sharing of technology and best practices. In regards to environmental policy, the Protocol outlines that member states should *develop and utilise electricity in an environmentally sound manner, and subject electricity to environmental impact assessment in conformity with agreed basic environmental standards.*¹⁸ The Protocol also outlines that member states should invest in creating incentives, such as financing and specific technical support, to *promote increased production and use of renewables in an economically and socially acceptable manner.*

21. South Africa signed and ratified this document in 1996.

22. The SADC Protocol on Mining outlines in Article 8, the requirements on Member states on environmental protection. Its guiding principle is that *member states shall promote sustainable development ensuring that a balance between mineral development and environmental protection is attained.*¹⁹ It also encourages a regional approach in deciding

¹⁷ The Southern African Development Treaty Article 5: Objectives Subsection G

¹⁸ SADC Protocol on Energy

¹⁹ SADC Protocol on Mining Article 8

environmental impact assessments, programs to train environmental scientists in fields related to the mining sector, and efforts to share information on environmental protection and environmental rehabilitation.

23. South Africa signed and ratified this document in 1997.

24. The current constitution of the Republic of South Africa requires that South Africa comply with its international agreements per Section 231, section 232 and Section 231.

25. In addition to South Africa's international obligations and agreements, its domestic legislation requires mechanisms to protect the environment and reduce the rate/effects of climate change.²⁰

26. South Africa also has localised legislation to curb the effects of climate change. This, inter alia, includes the Electricity levy and the Fuel Generation levy.²¹

27. As such, South Africa has both domestic and international obligations to mitigate and adapt to the effects of climate change. However, it must be noted that these obligations are dependent on the socio-economic feasibility and effects of said legislation.

CONCERNS ABOUT THE EFFECTIVENESS OF THE CARBON TAX BILL

²⁰ See section 24 of the Constitution read with the National Environmental Management Act section 2(4) principles of environmental law.

²¹ Also see National Environmental Management: Air Quality Act 39 of 2004, Framework for Air Quality Management 2012, National Atmospheric Emission Reporting Regulations 2015, Regulations prescribing the atmospheric emission licence processing fee 2016, National Greenhouse emission reporting regulations 2017, National Pollution Prevention Plans Regulations 2017, Declaration of Greenhouse gases as priority air pollutions 2017 and National Climate Change Response Policy 2011.

28. The LRC acknowledges the creation of the Bill as a useful instrument to mitigate the effects of climate change and align South African domestic policy in the direction of its international obligations as per the Constitution. However, the LRC has concerns about the effectiveness of the Bill, in its current form, to achieve the necessary obligations.

Independent modelling:

29. The first issue pertains to our ability to meet our international commitments. On 9 December 2009 the President of South Africa stated that South Africa will implement mitigation actions that will collectively result in a 34 – 42 percent deviation below its business as usual emission trajectory by 2020 and 2025 (this was reflected in the National Climate Change Response White Paper).²² However, in an independent modelling undertaken by The Partnership for Market Readiness, through the World Bank group, it suggests that the implementation of the Bill will result in a reduction of emissions by 13 to 14.5 percent relative to business-as-usual by 2025.²³ Though this is a step in the right direction, the Bill in its current form will not result in South Africa meeting its international commitments to reduce emission by 42 percent relative to business-as-usual by 2025. As a result, South Africa will not meet its own and international commitments unless the Bill increase the value of the tax, i.e. higher than R120/ton of CO².

Failure to effect emitter behaviour with the current price scheme:

²² National Climate Change Response - White Paper –https://www.environment.gov.za/sites/default/files/legislations/national_climatechange_response_whitepaper.pdf

²³ Partnership for Market Readiness. (2016) *Modelling the Impact on South Africa's Economy of Introducing a Carbon Tax*, p viii, from <http://www.treasury.gov.za/comm_media/press/2016/2016111001%20%20Carbon%20Tax%20Modelling%20Report%20Final%20Oct%202016.pdf>

30. The LRC understands the need for the Bill to both mitigate the effects of climate change while ensuring the continued economic growth of the country and the competitiveness of its firms. The LRC also understands the need to provide incentives to nudge firms into adopting more efficient and less-carbon intensive practices. However, the LRC has concerns that the Bill does not price GHG emissions at a level which will shift emitter behaviour.
31. The nominal tax rate is R120 per CO² equivalent, however, with the variety of tax-free allowances taken into account, the Explanatory Memorandum marked Annexure 1, proclaims that The Bill has *an initial effective carbon tax rate range as low as R6 to R48 per ton Co2e*.
32. Acknowledging the above, the LRC recommends that the thresholds expressed in the Bill be reviewed and renewed studies/modelling exercises be undertaken to compare their effectiveness in shifting the behaviour of GHG emission producers and the possible economic impacts of adjusting these thresholds.
33. The LRC specifically asks that the 60 percent basic tax-free allowance on combustion emissions be reviewed and if possible reduced. For example, based on the formula expressed in the Bill, a company that produces 10,000 tCo2e who does not produce either industrial or fugitive emissions, is not trade exposed, has not purchased carbon offsets, has not participated in the carbon budget process, nor outperforms its peers would still receive the 60 percent basic tax free allowance. The amount that they would be liable based on the tax would then be as follows:

- a. $E=10,000$ tonnes Co_2e ,
- b. $F=D=S=P=O$, $C=60\%$,
- c. $X = \{(E - D - S) * (1 - C) * R\} + \{P * (1 - J)\} * R + \{F*(1-K)*R\} = \{(10,000-0-0)*(1-0.6)* R120\}+ 0+)= \textbf{R 480,000}$
- d. or expressed in other terms, an effective tax rate of R48 per tCo2.

34. This 60 percent basic tax-free allowance is given to all taxpayers, who produce combustion emissions, regardless of their sector or industry.

35. The LRC also suggests that the tax-free allowances for green incentives; the performance allowance, the Carbon budget allowance, and the offset allowance be reviewed and if possible increased. Again, this would be dependent on independent modelling, but theoretically, this would provide a greater incentive for producers of GHG emissions to shift to less GHG intensive emissions and thus result in greater abatement.

36. Lastly, the LRC proposes that an annexure is added to the Bill which explains the projected revenue that will be raised through it as this information is not currently available. The LRC understands that independent modelling exercises and studies show the possible effects on the GDP of South Africa with the adoption of it but it does not give an approximate figure for the projected revenue raised through the carbon tax.²⁴

Compliance and Enforcement

²⁴ Partnership for Market Readiness

37. In terms of the National Climate Change Response (the “NCCR”) it is stated that carbon taxes and emissions trading schemes, and incentives are going to be complemented by appropriate regulatory policy measures. According to the NCCR this is essential to driving and facilitating mitigation efforts.
38. To date the only major environmental regulatory system that is in place to regulate compliance and enforcement of environmental pollution is the NEMA together with Specific Environmental Management Acts (“SEMA”). The NEMA together with the SEMA, allows any person to hold another (both criminally and civilly), be it a natural or juristic, accountable for damage to the environment, this would include pollution emitted by companies who emit GHG emission into the atmosphere. This has allowed for various specialised departments that specifically deal with compliance and enforcement to be established within the Department of Environmental Affairs.
39. The Carbon Tax Bill, however, will replace this accountability when dealing with emissions. The purpose of this is to obtain a greater conformity of compliance through a tax revenue system rather than accountability via individual court cases which are difficult to prove due to legal and evidentiary burden of proof together with the need of vast amounts of resources to secure a verdict or conviction.
40. In order for the Bill to be effective there must be a compliance and enforcement system. Currently, in the Bill there is no direct provision for any compliance and enforcement system. There is, however, a compliance and enforcement system that will be linked to the Custom and Excise Act. This effectively will make the Commissioner for the South African Revenue Service the department responsible for compliance and enforcement.

The LRC believes that this will result in a system that is insufficient for compliance and enforcement, for the following reasons:

- 40.1. the Bill makes, the Commissioner for the South African Revenue Service who is an expert in matters pertaining to finance and export and import control to become an expert in issues pertaining to the protection of the environment and pollution;
- 40.2. the Commissioner for the South Africa Revenue Services will have insufficient capacity to properly check and enforce non-compliance; and
- 40.3. the failure to include the Department of Environmental Affairs, other than setting the report methodology to be submitted to the Commissioner for the South African Revenue Services.

41. In light of the above, the LRC, advocates that the Bill include a direct compliance and enforcement mechanism to hold liable those who avoid paying their carbon tax, which works in union with the Department of Environmental Affairs who have the expertise to scientifically determine if a person is liable or not.

CONCERNS ABOUT THE IMPACT OF THE BILL ON LOW-INCOME HOUSEHOLDS AND COMMUNITIES:

Positive impact for Specified revenue recycling:

42. The LRC acknowledges the Bill's attempts to balance South Africa's commitment to mitigating the effects of climate change while acknowledging the socio-economic realities of the country. Given the historical context of gross discrimination faced by the majority of South Africans under the Apartheid system and the current context of vast inequality, the effects of the Bill on the most marginalised must be taken into account. It is on this point that the LRC would like to raise a series of concerns with the Bill.
43. The current edition of the Bill does not include a guarantee of revenue recycling. The only mention of the issue of revenue recycling is in the Explanatory Memorandum marked Annexure 1 wherein it explained that the Bill will be revenue neutral through revenue recycling.
44. The LRC, as explained in the Explanatory Memorandum marked Annexure 1, understands that it is not the rule of thumb for Treasury of South Africa to directly earmark revenues raised for specific projects (i.e. revenue recycling). However, this has been undertaken in the past with great success. An example of a specific earmarking is the fuel generation levy in which revenue from this levy is recycled into the Road Accident Fund.²⁵
45. Taking the above into consideration, the Explanatory Memorandum includes possible programs in which the revenue from the Bill can be applied, however does not directly link it for that purpose. This includes a reduction of the electricity generation levy, a credit rebate for the renewable energy premium, and a tax incentive for energy efficiency

²⁵ This has allowed the Road Accident Fund to appropriate enough fund to allow persons from a poor and marginalised sector to claim for damages when involved in a motor vehicle accident. Also see, Road Accident Fund 'Fuel Levy', *Road Accident Fund*, <https://www.raf.co.za/About-Us/Pages/Fuel-Levy.aspx>,

savings. These measures constitute a combination of tax shifting i.e. the shift of incidence and rate of one tax (usually a reduction) in response to the introduction of a new tax.

46. The Explanatory Memorandum also includes possible measures to provide free basic electricity, funding for alternative energy sources, and funding/expansion of public transport through the recycling of revenue raised from The Bill.²⁶
47. The LRC recommends that these additional measures, such as the expansion of free basic electricity, funding for alternative energy sources, and the expansion of public transport among others be pursued by the department and that they are included directly in the Bill. This will ensure the development of these programs through revenue recycling and serve the dual purpose of helping to both mitigate climate change and to offset residual effects on poor and marginalised communities.
48. For example, through the model developed by The Partnership for Market Readiness, they found that if all the revenue from the Bill was recycled into the solar industry the reduction of GHG emissions in 2035 would be 46 percent lower than business-as-usual compared to a 33 percent reduction using a more broad-based recycling mechanism. This will also reflect a cost reduction in electricity prices for poor and marginalised communities.
49. The LRC does not endorse just one narrow interest for the recycling of revenue but rather utilised the above example to illustrate how effectively specific earmarking of revenue raised from The Bill could be used to mitigate the effects of climate change.²⁷

²⁶ The Carbon Tax Bill (201) Explanatory Memorandum p 3-4

Residual effects on low income and marginalised communities:

50. The LRC also expresses concerns about the residual effects of the Carbon Tax on low income and marginalised communities.
51. The current socio-economic impact assessment outlines the effects that the Bill could have on low-income households. It indicates that low-income households will have to pay “*higher cost for energy and transport*” but that this should be offset by government subsidies whose “*impact will depend on the extent of recycling*”.²⁸ It also expresses that poor households may be affected by shifts in employment which will then result in shifts in available incomes.
52. The department’s own Socio-Economic Impact Assessment indicates that the impact on low income households and their ability to weather the increased costs will be depend on the extent of recycling. This provides another indication that the Bill should include specific earmarked revenue recycling programs.
53. The LRC also suggests that a study is undertaken on the effects of various proposed revenue recycling models and their impacts on low income and marginalised communities.

²⁷ As stated above the Bill will not allow South Africa to meet its international commitments and therefore allowing a detailed revenue recycling system to be detailed in the Bill will allow our international commitments to be met.

²⁸ Department of Planning, Monitoring, and Evaluation Republic of South Africa. (2017). *Socio-Economic Impact Assessment System*, p 33

54. Once again, in order to mitigate negative effects on low income and marginalised communities, the LRC once again recommends that the Bill earmarks specific programs that the revenue raised from the Bill will be recycled into.
55. Inspiration for the development of specific programmes to help offset the residual effects of the Bill on low income and marginalised communities can be found by examining other countries' approaches to carbon tax policies.
56. For example, even though Australia has a much more developed economy than South Africa, one key provision of its carbon tax policy was the inclusion of a household assistance package. This package consisted of a shift in the income tax by raising the tax-free income threshold with an increase in pensions and other benefits.²⁹ Additionally, special provisions were included for those who had high energy usage due to medical needs. Though not fully explained, the Bill also contained a commitment to focus on the needs of Australian Indigenous peoples and pledged government support to help them transfer to a less carbon-intensive economy.
57. The LRC does not explicitly endorse these policies for the South African context but recommends that similar programs and others be investigated that would be economically feasible, contribute to the efforts of combating climate change and provide assistance for low income and marginalised communities to adapt to any hardships brought upon by the Bill.

CONCLUSION:

²⁹ Clean Energy Bill of The Commonwealth of Australia Explanatory Memorandum: Household Assistance pg. 14

58. Taking all of the above into consideration, the LRC cautiously welcomes the implementation of the Bill in South Africa. To improve this piece of legislation, however, more attention must be given to addressing our international commitments; counteracting the negative impact the Bill will have on poor and marginalised communities; and ensuring the Bill's ability to enforce compliance and effect behaviour change towards a carbon free society.

59. We thank National Treasury of the Republic of South Africa the opportunity to comment on the Bill and hope that our concerns can be addressed.

Yours sincerely

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