

**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**TENTH rePORT**

**OF**

**2011**

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**SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

**MEMBERS OF THE COMMITTEE**

Senator M Fifield (Chair)

Senator C Brown (Deputy Chair)

Senator M Bishop

Senator S Edwards

Senator G Marshall

Senator R Siewert

**TERMS OF REFERENCE**

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

**SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

**TENTH REPORT OF 2011**

The Committee presents its Tenth Report of 2011 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

|  |  |
| --- | --- |
| **Bill** | **Page No.** |
| Australian Energy Market Amendment (National Energy Retail Law) Bill 2011 | 420 |
| Competition and Consumer Legislation Amendment Bill 2011 | 424 |
| Excise Legislation Amendment (Condensate) Bill 2011 Excise Tariff Amendment (Condensate) Bill 2011 | 427 |
| Tobacco Plain Packaging Bill 2011 | 432 |

# Australian Energy Market Amendment (National Energy Retail Law) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Resources and Energy

***Introduction***

The Committee dealt with this bill in *Alert Digest No. 8 of 2011.* The Minister responded to the Committee’s comments in a letter dated 23 August 2011. A copy of the letter is attached to this report.

***Alert Digest No. 8 of 2011 - extract***

Background

This bill is part of the Council of Australian Governments’ energy reform program, under which non-economic distribution and retail regulation of gas and electricity will come under the national energy institutional framework and regulatory arrangements.

The bill amends:

* the *Australian Energy Market Act 2004* to apply the new National Energy Retail Law and the National Energy Retail Regulations in Australia's offshore areas as laws of the Commonwealth. The National Energy Retail Law is part of a cooperative Commonwealth, State and Territory regime for the regulation of non-economic distribution and retail regulation of gas and electricity known as the National Energy Customer Framework. The new National Energy Retail Law will have the Australian Energy Regulator (AER) as regulator and the Australian Energy Market Commission (AEMC) will be responsible for changes to the new National Energy Retail Rules made under the National Energy Retail Law;
* the *Australian Energy Market Act 2004* to provide for the conferral of functions and powers under the National Energy Retail Law and the National Energy Retail Regulations on the AER, the AEMC, the Australian Competition Tribunal (ACT), and the Commonwealth Minister by the new National Energy Retail Law;
* the *Competition and Consumer Act 2010* to address technical issues with the conferral of functions and powers on the AER by the new National Energy Retail Law and also under local energy instruments made under State application Acts for the three national energy laws (the National Energy Retail Law, the National Electricity Law and the National Gas Law); and
* the *Administrative Decisions (Judicial Review) Act* *1977* to provide for judicial review of decisions under the new National Energy Retail Law regime.

Incorporating material by reference

Insufficient parliamentary scrutiny

Schedule 1, item 10

Item 10 of Schedule 1 of the bill inserts New Division 2A to the *Australian Energy Market Act 2004* (Cth). The proposed section 11T applies laws ‘as amended from time to time’ by and under the *National Energy Retail Law (South Australia) Act 2011* (SA) as laws of the Commonwealth. This enables Commonwealth law to, in effect, be determined by another Parliament. The explanatory memorandum explains that this is because the bill implements a cooperative State and Territory/Commonwealth scheme. The explanatory memorandum also notes that the relevant laws which will apply as a law of the Commonwealth may only be amended with the unanimous agreement of the Ministerial Council for Energy (which includes the Commonwealth Minister) and, thus, that they may only be ‘amended with the consent of the relevant Commonwealth Minister’ (see the explanatory memorandum at page 17). Further, mechanisms through which the Commonwealth has the power to influence or modify the relevant laws are also noted in the explanatory memorandum (see the explanatory memorandum at page 17, paragraph 42).

While the Committee understands the arrangements through which cooperative schemes are often implemented and the arguments in favour of a uniform national approach, it is concerned to ensure that legislation is subject to appropriate legislative scrutiny. The Committee would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption. **The Committee therefore requests the Minister’s advice about whether any proposed changes will be referred to it prior to their adoption.**

*Pending the Minister's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.*

***Minister's response - extract***

I note the Committee has requested advice about whether any proposed changes to the South Australian *National Energy Retail Law (South Australia) Act 2011* will be referred to it prior to their adoption. The Alert Digest expresses concern at page 3 that the applied law regime '... enables Commonwealth law to, in effect, be determined by another Parliament'. The Digest goes on to note that as a result the Committee 'would welcome an opportunity for it to consider and comment on an exposure draft of any proposed amendments prior to their adoption'.

The *Australian Energy Market Amendment (National Energy Retail Law) Bill 2011* is necessary to give effect to co-operative energy market reform agreed through the Ministerial Council on Energy (MCE).

Section 11T specifically operates to 'pick up' the National Energy Retail Law (Retail Law), which is part of an Act of South Australia, and apply it (along with the Regulations and Rules made under it) as Commonwealth law in the offshore areas which fall outside state or territory jurisdiction. In this sense, the Commonwealth applied Retail Law is expected to have little practical operation.

In the interests of consistency, section 11T gives effect to the relevant agreed nationally harmonised approach to the application of national laws in the energy sector, which are legislated through the South Australian Parliament (given South Australia is the lead legislator for MCE agreed legislation). Other participating jurisdictions will include equivalent provisions to section 11T in their application Acts for the National Energy Retail Law.

This legislative approach is consistent with the approach taken to the Commonwealth's application of the National Electricity Law that was previously agreed by the Commonwealth Parliament when it enacted the *Australian Energy Market Act 2004* (AEM Act). It is also consistent with the approach taken to the Commonwealth's application of the National Gas Law, when the AEM Act was amended for that purpose in 2007. Like the National Energy Retail Law, the National Electricity Law and the National Gas Law are both set out in an Act of the South Australian Parliament.

There are checks and balances in place - specifically, MCE agreed proposals being legislated in South Australia will be subject to proper scrutiny by the South Australian Parliament, and must be agreed to by the Commonwealth Government through MCE processes.

The Commonwealth Parliament always retains the right to amend or repeal Commonwealth legislation, including the AEM Act, at a future date.

Accordingly, I advise I do not propose to provide the Committee with future proposed amendments to the applied Law prior to their enactment by the South Australian Parliament.

***Committee Response***

The Committee thanks the Minister for this response. The Committee is disappointed that the Minister has declined the opportunity to obtain its technical expertise in scrutiny matters at an early stage in the development of future laws and remains willing to be consulted in future.

# Competition and Consumer Legislation Amendment Bill 2011

Introduced into the House of Representatives on 27 May 2010 and reintroduced on 15 June 2011

Portfolio: Treasury

This bill is substantially similar to a bill introduced in the previous Parliament.

***Introduction***

The Committee dealt with this bill in *Alert Digest No. 6 of 2011.* The Minister responded to the Committee’s comments in a letter dated 8 September 2011. A copy of the letter is attached to this report.

***Alert Digest No. 6 of 2011 - extract***

Background

This bill amends the *Competition and Consumer Act 2010* to clarify the operation of the provision relating to mergers and acquisitions.

The bill also amends the unconscionable conduct provisions of the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001.*

The bill also corrects minor drafting errors made in the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010.*

Retrospective commencement

Schedule 3

Schedule 3 of the bill corrects drafting errors in the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*. These corrections are to apply with retrospective effect from 1 January 2011, the date on which the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* commenced. The justification for the proposed approach is that the amendments correct only ‘typographical drafting errors’ and ‘to ensure that the amendments in that Act have always applied as intended’ (see the explanatory memorandum at page 25). **The Committee notes this information and the implication that these are minor amendments of a machinery nature, but seeks the Treasurer's confirmation that the amendments do not have potential to cause any detriment.**

*Pending the Treasurer's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

***Minister's response - extract***

The Alert Digest notes the retrospective effects of proposed paragraph 21 (3)(b) of the *Australian Consumer Law* (ACL) and proposed paragraph 12CB(3)(b) of the *Australian Securities and Investments Commission 2001* (ASIC Act). These provisions are identical and allow a Court to consider conduct that was engaged in or circumstances that existed before the commencement of the respective sections.

The Bill amends the unconscionable conduct provisions of the ACL and ASIC Act to insert interpretative principles and to unify the consumer and business-related unconscionable conduct provisions of each law. Section 21 of the ACL and 12CB of the ASIC Act would replace similar provisions of the ACL and the ASIC Act that prohibited unconscionable conduct. As the Explanatory Memorandum states, the intention is not to change the meaning of the law, but to provide businesses, consumers and the Courts with greater clarity around the pre-existing meaning of the relevant provisions.

Section 51AB of the *Trade Practices Act 1974* (TPA), which is the predecessor provision to section 21 of the ACL, was inserted into the TPA by the *Trade Practices Revision Act 1986.* Section 51AB of the TPA included a provision identical to proposed paragraph 21(3)(b) of the ACL and 12CB(3)(b) of the ASIC Act, to allow a court to consider conduct that was engaged in or circumstances that existed before the commencement of that section. Accordingly, limited retrospective application of the unconscionable conduct provisions has been a feature of the law since 1986. Further, proposed paragraph 21(3)(b) of the ACL and proposed paragraph 12CB(3)(b) of the ASIC Act are not applied retrospectively in a substantive sense, given that the new paragraphs would not create any new rights or obligations.

As indicated in the Explanatory Memorandum, this approach also ensures that there is no gap, whereby conduct engaged in or circumstances that existed prior to the commencement of the amendments would not be able to be considered under the amended provisions.

The Committee has asked for confirmation that the minor amendments in Schedule 3 of the Bill do not have the potential to cause any detriment, as they would commence retrospectively. I can confirm that all amendments in Schedule 3 are to correct typographical errors that do not alter the effect of the relevant provisions.

***Committee Response***

The Committee thanks the Parliamentary Secretary for this response, which addresses its concerns.

Excise Legislation Amendment (Condensate) Bill 2011 Excise Tariff Amendment (Condensate) Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Treasury

***Introduction***

The Committee dealt with these bills in *Alert Digest No. 8 of 2011.* The Minister responded to the Committee’s comments in a letter dated 25 August 2011. A copy of the letter is attached to this report.

***Alert Digest No. 8 of 2011 extract – Excise Legislation Amendment (Condensate) Bill 2011***

Background

The bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of Realised (VOLWARE) prices determination does not affect the making of the determination.

The bill also provides for producers to seek a review within 28 days of receiving written notice of a final VOLWARE price determination.

Retrospective operation

Schedule 1, Part 2, item 4

The purpose of this bill and the related Excise Tariff (Condensate) Bill 2011 is to address uncertainties which have arisen in relation to policy changes made in 2008. The effect of the 2008 changes was to remove the Crude Oil Excise exemption so that the Crude Oil Excise regime would apply to condensate production from the North West Shelf project area. These changes were implemented on 13 May 2008. It is intended that the amendments proposed by these bills will apply from that date. Thus, the bills clearly have retrospective operation.

The intention of the proposed amendments in the Excise Legislation Amendment (Condensate) Bill is 'to clarify that failure to provide petroleum producers with written notification setting out the terms of a Volume Weighted Average of realised prices determination does not affect the making of the determination' (see page 3 of the explanatory memorandum).

The intention of the proposed amendments in the Excise Tariff Amendment (Condensate) Bill is 'to clarify and confirm the area encompassed by the 'Rankin Trend' condensate production area, located within the North West Shelf project area' (see page 3 of the explanatory memorandum). The relevant area was prescribed in a 2008 by‑law as the Rankin Trend, but doubts have arisen as to whether the Rankin Trend encompasses an area which is larger than was intended. The amendments insert a statutory definition of the Rankin Trend and also allow for additional reservoirs to be added to the Rankin Trend condensate production area in the future (where the Minister is satisfied of particular matters).

The explanatory memorandum for these bills, at page 3, states that the measures will have no revenue impact as they ‘affirm the current application of the Crude Oil Excise regime’ and, at page 10, that the amendments ‘affirm the current operation application of Crude Oil Excise to condensate production’. However, the explanatory memorandum does not squarely address the justification of the retrospective operation of the proposed amendments. The suggestion appears to be that as the amendments conform to the original policy intention of the changes made in 2008 the retrospective operation of the amendments is well justified. Nevertheless, clarification of the law constitutes legal change (even if it is in line with what are considered to be the original policy intentions of the legislation) and the Committee expects changes to the law that are given retrospective operation to be fully justified. In particular, the Committee is attentive to the potential for such changes to adversely affect the rights or interests of affected individuals. It is disappointing that these matters (particularly as they relate to Schedule 1, Part 2, item 4 of this Bill and Schedule 1, Part 2, item 5 of the Excise Tariff Amendment (Condensate) Bill) are not directly addressed in the explanatory memorandum. In these circumstances, the Committee **seeks the Minister’s further explanation of the changes in both bills, and particularly whether they will give rise to detriment to any person.**

*Pending the Minister's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

***Alert Digest No. 8 of 2011 extract – Excise Tariff Amendment (Condensate) Bill 2011***

Background

This bill amends the *Excise Tariff Act 1921* to:

* clarify and confirm the area encompassed by the ‘Rankin Trend’ condensate production area, located within the North West Shelf project area; and
* make regulations to extend the area of the Rankin Trend to include additional reservoirs or groups of reservoirs.

Retrospective operation

Schedule 1, Part 2, item 5

See comments for the related Excise Legislation Amendment (Condensate) Bill 2011 above seeking the Minister's comments on this provision.

*Pending the Minister's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

***Minister's response - extract***

The Committee has requested further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person. In relation to this, please find attached my response to the Committee.

I trust this information addresses the concerns raised by the Committee.

**Excise Tariff Amendment (Condensate) Bill 2011**

**Schedule 1, Part 2, item 5**

**Excise Legislation Amendment (Condensate) Bill 2011**

**Schedule 1, Part 2, item 4**

**Concern**

The Committee seeks the Minister's further explanation of the changes in both Bills, and particularly whether they will give rise to detriment to any person.

**Response**

In the 2008-09 Budget, the Government announced the removal of the longstanding Crude Oil Excise exemption that had applied to condensate production, with effect from midnight 13 May 2008. The intention of the measure was to increase the return to the Australian community for allowing private interests to extract non-renewable energy resources located in the North West Shelf project and onshore Australia, and was estimated to raise around $2.5 billion in revenue over the four years to 2011-12.

Doubts have subsequently been raised by the North West Shelf joint venture (NWSJV) regarding two elements that are essential to the imposition of Crude Oil Excise. These are:

* the area encompassed by the 'Rankin Trend' prescribed condensate production area; and
* the validity of Volume Weighted Average of Realised Prices (VOLWARE) prices, which are the prices used to calculate excise liability.

In relation to the first issue, in November 2008, the Tax Commissioner prescribed the 'Rankin Trend' through by-law as a condensate production area with effect from 13 May 2008. The Rankin Trend is located in the North West Shelf project area and encompasses a number of closely located reservoirs. It was prescribed as a single condensate production area on the basis that the reservoirs comprised a single field.

The NWSJV have suggested that the area encompassed by the Rankin Trend prescribed condensate production area is uncertain, on the basis that the term, 'Rankin Trend', is normally used by geologists to refer to a very large region of the subsurface in the North West Shelf, and not the discrete condensate production area intended.

With regard to the second issue, it has also been suggested that a failure to provide a notice to relevant producers regarding a VOLWARE determination, within the time allowed for such determinations to be made under the *Petroleum Excise (Prices*) *Act 1987*, invalidates the determination itself.

The Excise Tariff (Condensate) Amendment Bill and the Excise legislation (Condensate) Amendment Bill address these issues. The amendments apply from 13 May 2008 to remove any uncertainty regarding the operation of the law since it came into effect.

Similarly the Excise Legislation (Condensate) Amendment Bill amends the *Petroleum Excise (Prices) Act 1987* to clarify that a failure to provide a notice to producers setting out the terms of a VOLWARE price determination does not affect the validity of the determination itself.

While the amendments take effect at a time prior to their introduction, they are not retrospective in the sense that they do not result in an additional impost on the NWSJV. Rather, they confirm and clarify the application of Crude Oil Excise to condensate produced from the North West Shelf as intended under the original 2008-09 Budget measure, and consistent with how excise has been applied to that area since the removal of the excise exemption.

Were the amendments not to apply from the commencement of the original measure, then the operation of the law over the intervening period between the original measure and the amendments would be open to challenge, and the significant amount of revenue already collected would remain at risk.

As noted, prescribed condensate production areas and VOLWARE determinations are necessary for the imposition of crude oil excise. Were either the Rankin Trend condensate production area, or the related VOLWARE price determinations found to be invalid, then no crude oil excise would be payable during the intervening period, contrary to the intent of the 2008-09 measure.

***Committee Response***

The Committee thanks the Minister for this response and **leaves the question of whether the proposed approach is appropriate to the Senate as a whole**.

Tobacco Plain Packaging Bill 2011

Introduced into the House of Representatives on 6 July 2011

Portfolio: Health and Ageing

***Introduction***

The Committee dealt with these bills in *Alert Digest No. 8 of 2011.* The Minister responded to the Committee’s comments in a letter dated 7 September 2011. A copy of the letter is attached to this report.

***Alert Digest No. 8 of 2011 - extract***

Background

This bill prohibits manufacturers from any form of advertising or promoting tobacco products on tobacco product packaging.

Possible inappropriate delegation

Clause 27

Clause 27 of the bill allows for the regulations to prescribe additional requirements (i.e. in addition to those set out in the bill) in relation to the retail packaging of tobacco products and the appearance of tobacco products ‘to further the objects of this Act’. It is unfortunate that the explanatory memorandum does not explain why it is necessary for additional requirements to be prescribed in the regulations, particularly given that, as Note 2 states, there are offences and civil penalties which ‘apply to the supply, purchase and manufacture etc of tobacco products that do not comply with the requirements’. The Committee prefers that important matters are included in primary legislation whenever possible and **therefore seeks the Minister's advice as to why any further requirements cannot be identified in the primary legislation, particularly as offences and civil penalties may apply.**

*Pending the Minister's reply, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

***Minister's response - extract***

The Committee has noted that clause 27 of the Bill allows for regulations to prescribe requirements, in addition to those set out in the Bill, in relation to the retail packaging of tobacco products and the appearance of tobacco products.

The information I set out below explains that the regulation making power is intended to allow for the detailed and technical requirements for plain packaging to be set out in regulations, consistent with current practice for packaging regulation, to enable efficiency in ongoing administration of the plain packaging requirements.

Chapter 2 of the Bill sets out the general requirements in relation to the packaging of tobacco products and the products themselves. These are intended as broad, although quite comprehensive, prohibitions on features of tobacco packaging that could be taken to be decorative or promotional, including limitations on the appearance of trade marks and on the colour and finish of retail packaging of tobacco products.

In formulating the structure of the Bill, I intended any regulations made under clause 27 of the Bill to be used to specify the detailed and technical requirements for retail packaging, and for the appearance of tobacco products. I have enclosed the draft Regulations, which were tabled at the time of introduction of the Bill, to assist in the Committee's consideration of how clause 27 is intended to be used. The draft Regulations currently specify details such as the dimensions for retail cigarette packaging, the particular colour of packaging, the types of marks that *may* appear on packaging and the way those marks can be displayed.

The Bill and the draft Regulations are intended to work together to regulate tobacco packaging, to ensure that packaging has the lowest appeal to consumers, and to make clear the effects that tobacco consumption has on human health.

Research shows that plain packaging will:

* increase the noticeability, recall and impact of health warning messages;
* reduce the ability of packaging to mislead consumers to believe that some products may be less harmful than others; and
* reduce the attractiveness of the tobacco product, for both adults and children.

In order for plain packaging to continue to have these effects in the long-term, it is desirable that the process for updating the regulatory arrangements be administratively efficient and provide sufficient flexibility to respond to the need for adjustments to the requirements when they arise. For example, should the post-implementation evaluation of the impacts of plain packaging show that some changes are required to the specific details of plain packaging, such updates will most efficiently be achieved through the use of regulations, rather than by requiring the Parliament to consider detailed requirements.

In relation to penalties, under the Bill offences and civil penalties will apply to certain types of conduct in relation to tobacco products that do not comply with regulations made under the Bill. However, this approach is consistent with the way in which other requirements for packaging of tobacco products are mandated. For example, the requirements for graphic health warnings are specified in an information standard made under the *Competition and Consumer ACI 2010* (formerly the *Trade Practices Act 1974*), while the enabling legislation contains the offences for failing to comply with those requirements.

The Committee's concern appears to be that the regulation-making power may be inappropriate because it confers a broad legislative power on the executive. However, the requirements specified in the Bill are already broad and comprehensive and do not leave scope for the regulations to prescribe extensive additional requirements. In addition, the scope of clause 27 is significantly limited by the fact that any additional requirements may only relate to retail tobacco packaging and the appearance of tobacco products. Therefore, it is unlikely that anyone will be subject to prosecution in circumstances that are beyond the contemplation of the Parliament at the time of its consideration of the Bill.

I trust the above explanation is sufficient to reassure the Senate Standing Committee for the Scrutiny of Bills about the intended use of the new regulation making power.

***Committee Response***

The Committee thanks the Minister for this comprehensive response and notes that draft regulations have been tabled.

Senator Mitch Fifield

Chair