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Australian Energy Market Bill 2004

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No. 171 2003–04

Australian Energy Market Bill 2004

Peter Prince and Mike Roarty
Law and Bills Digest and
Science, Technology, Environment and Resources Sections
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Australian Energy Market Bill 2004

Date Introduced: 17 June 2004

House: House of Representatives

Portfolio: Industry, Tourism and Resources

Commencement: The main provisions commence on Proclamation, or, if this does not occur within 12 months of Royal Assent, on the first day after the end of that period.

Purpose

To apply the National Electricity Law (NEL), the National Electricity Regulations and the National Electricity Code as Commonwealth law in offshore areas as part of a uniform scheme of national electricity regulation.

Background

Australian Energy Market Agreement

In June 2001, the Council of Australian Governments (CoAG) established the Ministerial Council on Energy (MCE) to provide effective policy leadership to meet the opportunities and challenges facing the energy sector and to oversee the continued development of a national energy policy.

The Council comprises Ministers with responsibility for energy from the Australian Government and all States and Territories. The Australian Government Minister for Industry, Tourism and Resources chairs the Council and the Department provides secretariat support.

The CoAG's Energy Market Review (the Parer Review) was presented to Government in December 2002 in a report titled [Towards a Truly National and Efficient Energy Market](#).¹

The MCE has agreed to introduce a cooperative national legislative framework for the Australian energy market on a collaborative basis between Commonwealth, State and Territory Governments and pursuant to a new inter-governmental agreement, titled the *Australian Energy Market Agreement*, being finalised by CoAG.² Under this agreement,

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the MCE is to assume a national policy oversight role for the Australian energy market, including for electricity and gas, superseding the National Electricity Market Ministers Forum.

The Parer Review found that the current multiplicity of regulators creates a barrier to competitive interstate trade and adds costs to the energy sector. There are currently 13 regulators operating across every layer of commercial activity. The Australian Government has worked with State and Territory governments to achieve a reform package that will see a significant reduction in the regulatory burden facing market participants and investors in the energy sector.³

The MCE announced on 11 December 2003 that it had finalised policy decisions for its major energy market reform program. Recommendations included the establishment of two new statutory commissions to be established on 1 July 2004, funded by an industry levy: the Australian Energy Market Commission (AMEC) with responsibility for rule-making and market development and an Australian Energy Regulator (AER) responsible for market regulation.

To streamline and improve the quality of economic regulation, lower the cost and complexity of regulation facing investors and enhance regulatory certainty, all governments agreed to establish the AER as a single, national energy regulator. The Trade Practices Amendment (Australian Energy Market) Bill 2004 (see separate digest) seeks to implement this agreement.⁴

Timetable for reform

According to a Commonwealth Government information paper, transfer of responsibilities to the AER and AEMC is to be in accordance with the following timetable:

- rule-making for, and regulation of, electricity wholesale and transmission in the participating National Electricity Market (NEM) jurisdictions – i.e. all States and territories except Western Australia and the Northern Territory, which are not linked into a national grid because of the distance from the national electricity market – from the second half of 2004
- rule-making for gas pipelines access, from July 2005
- regulation of gas transmission for all other than Western Australia, from July 2005
- provision will be made for the Northern Territory and Western Australia to join for electricity regulation, and Western Australia for gas pipeline access regulation under the AER, by agreement, and

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- the AER will assume responsibility for national regulation of distribution and retailing (other than retail pricing) by 2006, following development of an agreed national framework.⁵

National Electricity Market

Each NEM jurisdiction, together with the Commonwealth, will enact amendments to its electricity legislation using 'template' legislation agreed by the MCE.⁶

The template legislation:

- defines and recognises the AER, a Commonwealth body, in each NEM jurisdiction
- authorises the AER to perform functions conferred by the NEL, the NEL Regulations and described in the Code in each of the participating jurisdictions
- defines and recognises the AEMC – to be established in South Australian legislation as a separate statutory commission – in each jurisdiction, and
- authorises the AEMC to carry out functions that are conferred by the NEL, the NEL Regulations and described in the Code, in each of the participating jurisdictions of the NEL (in addition to being able to do so in South Australia).⁷

Under the current Bill the Commonwealth will pass its own application provisions for 'offshore' areas of the Commonwealth outside the jurisdiction of the States to ensure uniform application of the new national electricity laws.

Initially the AER will have responsibility for the economic regulation of wholesale electricity and transmission networks and enforcement of the National Electricity Code. It will undertake the regulatory and enforcement functions previously exercised by the Australian Competition and Consumer Commission (ACCC) and the National Electricity Code Administrator (NECA).⁸

Main Provisions

Part 2 of the Bill contains the key provisions.

Clauses 6 to 8 apply the South Australian electricity law, regulations and rules – which are the model to be adopted by each participating State and Territory – as Commonwealth law 'in the adjacent area of each State and Territory'. By virtue of **subclause 3(1)**, 'adjacent area' has the meaning given in section 5A of the *Petroleum (Submerged Lands) Act 1967*, i.e. the area between 3 nautical miles from the coastline and the outer limits of the Australian continental shelf.

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The explanatory memorandum notes that the national electricity law is only applied as a Commonwealth law in the offshore adjacent areas to ensure that 'jurisdiction of the Commonwealth does not unnecessarily overlap with State or Territory jurisdictions'.⁹

Clause 6 defines the 'National Electricity (Commonwealth) Law' to be applied in such areas as that set out in the *National Electricity (South Australia) Act 1996* 'as in force from time to time'. **Clause 7** states that regulations 'as in force from time to time' made under the South Australian Act apply as Commonwealth regulations. **Clause 8** states that rules (including the National Electricity Code) 'as in force from time to time' made under the National Electricity Law set out in the South Australian Act apply as Commonwealth rules.

The explanatory memorandum notes that the Commonwealth, States and Territories have 'agreed generally' to apply the electricity provisions uniformly. Therefore changes to National Electricity Law, Regulations and Rules will not be subject to parliamentary disallowance in any jurisdiction.¹⁰ It also notes that under the *Australian Energy Market Agreement* 'the National Electricity Law and Regulations may only be amended with the agreement of the Ministerial Council on Energy', and that under subclause 14(3) of the Bill, the Commonwealth will be able to make regulations to modify the Law, Regulations and Rules as they apply as Commonwealth law.¹¹

Clauses 9 and 10 confer Commonwealth jurisdiction in relation to the offshore adjacent areas on the AEMC and the AER respectively.

Clause 13 provides for review under the *Administrative Decisions (Judicial Review) Act 1977* of decisions of the AER in relation to offshore adjacent areas.

Concluding Comments

The effect of the Bill *on its face* is to give the South Australian Parliament the ability to modify Commonwealth law, regulations and rules. However much this may make sense in practice, and notwithstanding the agreement of governments from all relevant jurisdictions, there may be an issue – should some person or body wish to challenge the scheme of national energy regulation – as to whether allowing the people of South Australia through their elected representatives to make laws applicable to the Commonwealth generally is allowable under the Australian Constitution.

It may be that for the purposes of this particular Bill this is not a significant issue, since any invalidity would only apply to offshore areas which are not central to electricity production (regulation of other areas would be authorised through matching State/Territory legislation). However the Government has said that the AER and AEMC will have authority over other forms of energy, including gas supply, where offshore areas are much more critical.

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The High Court and cooperative federalism

Parliament should note the warning of prominent constitutional lawyer Professor George Williams that 'the Constitution, as interpreted by the High Court, no longer provides an adequate framework for federal-State cooperation on national legislative schemes'.¹² Professor Williams notes that the High Court under Chief Justice Mason (1987-1995) showed a 'willingness to recognise...policy choices'.¹³ With particular reference to the troubles of the former national Corporations Law scheme he says, however, that the current High Court has approached Commonwealth/State legal cooperation 'in a formalistic manner divorced from overarching concepts or matters of policy'.¹⁴ In *Re Wakim* (1999), a decision which almost entirely prevented the Federal Court hearing Corporations Law matters, the High Court:

rejected as normative guidance the previously accepted notion that cooperative federalism ought, as a general rule, to be fostered and encouraged. Instead, the majority reached a decision that served no countervailing policy choice.¹⁵

In this context, Parliament needs to consider carefully potential difficulties with the constitutionality of the national legislative framework for the Australian energy market.

Section 1 of the Australian Constitution states that 'the legislative power of the Commonwealth shall be vested in a Federal Parliament...'. Instead, on its face, this Bill vests Commonwealth legislative power in the South Australian Parliament. There is no doubt that the legislative power of the Commonwealth Parliament carries with it an ability to delegate that power, provided the ability to revoke the delegation is always retained. But it is at least arguable that this power of delegation may not extend, under the system of government described in the Australian Constitution, to conferring the right to make Commonwealth laws *on another parliament*. From a legal/constitutional perspective, the idea that the people of one State could, through their parliament, make laws applicable to the people of the Commonwealth as a whole (albeit in this Bill, restricted to particular offshore areas) appears contrary to the constitutional federalism inherent in the Australian Constitution.

Abdication of legislative power

Academic commentary recognises two situations where an invalid 'abdication' of legislative power could be alleged. The first is where Parliament delegates this power to the executive or other agency subordinate to it. In this situation the test for an invalid abdication 'is simply whether the Parliament has always retained the capacity to revoke the delegation and recall the power to itself'. As constitutional lawyer Professor Gerard Carney from Bond University notes, this:

simply requires one to determine whether the provision can be repealed. This depends on whether the provision is singly or doubly entrenched. Only if it is doubly entrenched, is the provision incapable of repeal...¹⁶

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The second situation, however, is where 'Parliament delegates its powers to a body which is not authorised by the constitutional framework'.¹⁷ In this case the applicable principle is that a legislature cannot 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence'.¹⁸ Carney notes that:

a...provision which confers on such a body the power of future enactment will be invalid for infringing this principle. And this would seem to be the case whether the...provision is singly or doubly entrenched.¹⁹

Conferral in this Bill by the Commonwealth legislature of a power on the South Australian parliament – a body not directly answerable or subordinate to the Commonwealth parliament – to amend Commonwealth law, regulations and rules amounts to conferring a 'power of future enactment' and may infringe this principle.

It may be that if there were a challenge in the High Court, the court would take into account both the policy aim of building a unified national scheme of energy regulation and specific controls in the (yet to be finalised) *Australian Energy Market Agreement* on the South Australian Parliament's ability to unilaterally amend national electricity laws. But Professor William's comments suggest such factors may also be ignored by the High Court.

Comparison with Corporations Law scheme

Under the Corporations Law scheme in effect from 1990 to 2001, the *Corporations Act 1989* applied as law for the Australian Capital Territory and for the other States and Territories under uniform application Acts. The Commonwealth could amend the ACT legislation (and consequently the applicable law in the other States) using its full plenary power under section 122 of the Constitution.²⁰

In comparison, however, the Commonwealth Parliament has no direct power to amend the national electricity laws. It is only through the mechanism of the MCE that the South Australian Parliament agrees to amend these laws.²¹ The Commonwealth has no direct control over South Australian laws in the way it can have over ACT laws – although the Commonwealth can, of course, pass legislation overriding South Australian laws in areas within its power.

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Endnotes

- 1 <http://www.industry.gov.au/assets/documents/itrinternet/FinalReport20December200220040213110039.pdf?CFID=242389&CFTOKEN=11377123>
- 2 'Explanatory memorandum: Australian Energy Market Bill 2004, p. 1
- 3 Second Reading Speech, Australian Energy Market Bill 2004
- 4 *ibid.*
- 5 Ministerial Council on Energy Standing Committee of Officials, *Intergovernmental Agreement and Legislative Framework, Information Paper* May 2004, at <http://www.industry.gov.au/assets/documents/itrinternet/IGALegislativeframeworkfinal20040525161258.pdf?CFID=1658449&CFTOKEN=87460888>.
- 6 The following Acts are to be amended:
 - the *National Electricity (New South Wales) Act 1997*
 - the *National Electricity (Victoria) Act 1997*
 - the *Electricity – National Scheme (Queensland) Act 1997*
 - the *National Electricity (South Australia) Act 1996*
 - the *Electricity (National Scheme) Act 1997 (ACT)*, and
 - the *Electricity – National Scheme (Tasmania) Act 1999*.
- 7 *Intergovernmental Agreement and Legislative Framework, Information Paper*, *op. cit.*
- 8 *ibid.*
- 9 Explanatory memorandum, p. 5. The offshore area out to 3 nautical miles is within State/Territory jurisdiction.
- 10 *ibid.*
- 11 *ibid.*
- 12 George Williams, 'Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond', 20 *Companies and Securities Law Journal* 160, May 2002 at 160.
- 13 *ibid.*, p. 162.
- 14 *ibid.*
- 15 *ibid.*, p. 163.
- 16 Gerard Carney, 'An overview of manner and form in Australia', Qld University of Technology *Law Journal*, vol 5, p.69 at 83.
- 17 *ibid.*, p. 84.
- 18 *ibid.*, p. 83, citing the Privy Council in *In re The Initiative and Referendum Act*, [1919] AC 935.

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- 19 *ibid*, p. 84.
- 20 See Tomasic and Bottomley, *Corporations Law in Australia*, Federation Press 1995, p. 76.
- 21 From a theoretical perspective, it could be argued that the South Australian Parliament would have to give priority to the views of its elected representatives, in the case of any conflict with the views of the MCE.

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