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No. 172 2003–04

## Trade Practices Amendment (Australian Energy Market) Bill 2004

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Bills Digest  
No.172 2003-04

Trade Practices Amendment (Australian Energy Market)  
Bill 2004

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Law and Bills Digest Section  
25 June 2004

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# Trade Practices Amendment (Australian Energy Market) Bill 2004

**Date Introduced:** 17 June 2004

**House:** House of Representatives

**Portfolio:** Treasury

**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 amend the *Trade Practices Act 1974* to create the Australian Energy Regulator (AER) as a Commonwealth body.

## Background

For background to this Bill, see [Bills Digest No. 171 of 2003-04](#), Australian Energy Market Bill 2004.<sup>1</sup>

## Main Provisions

**Schedule 1 Item 9** inserts a **new Part IIIAA** into the Trade Practices Act to create the AER as a Commonwealth body.

## Establishment and staffing

**Proposed section 44AE** establishes the AER as a separate legal entity able to sue and be sued in its own name. **Proposed section 44AG** states that the AER is to consist of a Commonwealth member and 2 State/Territory members. The Commonwealth member must be a member of the Australian Competition and Consumer Commission (ACCC) (**proposed section 44AM**). The Commonwealth and State/Territory members must be

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appointed in accordance with the Australian Energy Market Agreement<sup>2</sup> (**proposed sections 44AM and 44 AP**).

**Proposed section 44AAC** provides that the Chairperson of the ACCC must make staff and consultants available to allow the AER to perform its functions.

### **Functions and powers**

**Proposed Division 3 of new Part IIIAA** provides Commonwealth authority for the conferral of functions and powers on the AER. Under the Australian Energy Market Agreement, the AER is to have regulatory and enforcement powers over the Australian electricity and gas industries. Electricity related functions and powers are conferred through the common application by the Commonwealth, States and Territories of the National Electricity Law, Regulations and Rules as contained in model South Australian legislation. The Australian Energy Market Bill 2004 confers national electricity functions and powers on the AER in areas under Commonwealth jurisdiction. Matching State and Territory legislation will confer equivalent functions and powers for other Australian jurisdictions.

**Proposed section 44AH** provides that the AER is to have any functions conferred by a Commonwealth law, or prescribed by regulations made under the Trade Practices Act. The note to the section states that the AER can have functions under the Australian Energy Market Bill and the *Gas Pipelines Access (Commonwealth) Act 1998*.

**Proposed sections 44AI and 44AJ** are designed to avoid constitutional problems in conferring State powers on the AER following the decision of the High Court in *R v Hughes* (2000).<sup>3</sup> The explanatory memorandum notes that 'significant AER functions and powers will be provided for by State and Territory laws'.<sup>4</sup> It is accepted that a Commonwealth body can be given functions and powers under State legislation.<sup>5</sup> In the *Hughes* case, however, the High Court said any attempt in Commonwealth legislation to impose a duty on a Commonwealth body to exercise State power which could adversely affect the rights of individuals must be firmly supported by a head of Commonwealth constitutional power.<sup>6</sup>

The AER will have legal enforcement powers under the National Electricity Law, such as:

- the power to obtain information
- the power to obtain and exercise search warrants, and
- the power to seek and obtain pecuniary penalties and related orders, from the Federal Court and State and Territory Supreme Courts.<sup>7</sup>

The exercise of such powers by the AER could plainly affect the rights of individuals. For activities within the jurisdiction of the States, the AER will be exercising State powers.

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The extent to which the AER's use of State powers will be covered by specific heads of power in the Commonwealth Constitution is unclear. However, where the AER needs to exercise powers conferred by State legislation, it may be doing so because there is no valid head of power under the Commonwealth Constitution. The approach in the Bill assumes that imposing *a duty* on the AER to exercise such powers may make enforcement action by the new body invalid.

**Proposed section 44AI** provides the Commonwealth's consent to the conferral of functions and powers on the AER by State and Territory legislation. As the High Court noted in *Hughes*, 'a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth'.<sup>8</sup> **Subsection 44AI(2)** provides that there is no consent to such conferral where this would 'contravene any constitutional doctrines restricting the duties imposed on the AER'. In addition, **subsection 44AI(3)** provides that the AER cannot exercise a duty, function or power under State/Territory energy law unless this is in accordance with the Australian Energy Market Agreement.

**Proposed section 44AJ** applies where a State/Territory law purports to 'impose a duty' on the AER. It provides that a duty will be imposed by a State law where this is within the legislative power of a State and does not contravene any constitutional doctrine. Otherwise the duty will be deemed to be imposed under Commonwealth law by **new Part IIIAA** – using all available heads of power in the Constitution – but again only to the extent that this does not contravene any constitutional doctrine.

### Use of information

**Proposed section 44AAF** provides that the AER must take all reasonable measures to protect information given to it in confidence or obtained 'by compulsion in the exercise of its powers'. However the section specifically authorises disclosure of such information to the ACCC, the Australian Energy Market Commission (AEMC), the National Electricity Market Management Company Limited, any staff or consultant assisting these bodies, and to any other person or body prescribed by regulations.

### Federal Court orders

**Proposed section 44AAG** allows the AER to apply to the Federal Court for a declaration or injunction in relation to actual or anticipated breaches of the National Electricity Law, Regulations and Rules, including the National Electricity Code. The AER will be able to seek a financial penalty, an order that a particular activity be ceased or that a compliance program or other remedial action be undertaken. The explanatory memorandum notes that the financial penalty regime will be set out in the National Electricity Law, Regulations and Rules.<sup>9</sup>

The proposed section confers jurisdiction on the Federal Court in relation to breaches both of Commonwealth and State/Territory energy law. This raises the issue in *Re Wakim*

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(1999)<sup>10</sup> where the High Court held that Commonwealth legislation could not vest State judicial power in federal courts. However in *Edensor Nominees Pty Ltd* (2001)<sup>11</sup> the High Court agreed that where a body representing the Commonwealth sought a declaration or injunction in relation to a breach of State law, the Federal Court would have the necessary jurisdiction.<sup>12</sup> **Proposed section 44AAG** is consistent with *Edensor*, specifying that the AER acts 'on behalf of the Commonwealth' in seeking a declaration or an injunction under a State energy law from the Federal Court.

### Consultation on code changes and authorisation

**Item 13** inserts **proposed section 44ZZAB** in the Trade Practices Act allowing the ACCC to rely on consultations undertaken by an industry body – instead of conducting its own consultations – before approving, varying or withdrawing an access code.

**Item 15** inserts **proposed section 90B** in the Trade Practices Act. The new provision will allow the ACCC – instead of carrying out its own consultations in accordance with Part VII Division 1 of the Act – to rely on consultations undertaken by the AEMC in considering applications in relation to the National Electricity Code to authorise particular activities. This will apply, for example, where a market participant makes an application under section 88 to enter a 'proposed contract, arrangement or understanding [that]...might be an exclusionary provision or...might have the effect of substantially lessening competition'. If the AEMC has conducted the consultation process specified in the new provision, the ACCC is permitted to 'disregard any submissions...made by the Commonwealth, or by a State, or by any other person (other than the AEMC)'.

## Concluding Comments

As noted above, a significant part of the AER's enforcement powers will be conferred by State legislation. The drafters of the Bill appear to have interpreted the High Court's judgment in *Hughes* to mean that a constitutional issue will only arise if the Bill *imposes a duty* on the AER to exercise such powers. However this is not necessarily so. An alternative reading of *Hughes* is that any provision in a Commonwealth law that *authorises* the use of State law by a Commonwealth body for enforcement purposes may need to be supported by a specific head of power in the Constitution.

In *Hughes* the High Court pointed to section 15A of the *Acts Interpretation Act 1901* which states that every Commonwealth Act 'shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth'. As the Court noted:

s 15A of the Interpretation Act may be construed so as to read down a provision expressed in general terms, *including a power to prosecute so as to apply only where the particular prosecution is supported by a head of power*.<sup>13</sup> (emphasis added).

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Justice Kirby's judgment in *Hughes* indicates more specifically that *imposition of a duty* may not be needed before a specific head of Commonwealth constitutional power is required to support a prosecution under State law. As he said:

to the extent that federal law *purports to authorise* an officer or authority of the Commonwealth to perform functions which seriously affect the liberty and property rights of individuals, it may be expected that, when challenged, those who propound the constitutional validity *of such authorisation* will be able to demonstrate that validity exists.<sup>14</sup> (emphasis added)

Justice Kirby also indicated that the constitutional validity of a prosecution by a Commonwealth body using State law would depend on the circumstances of the particular case, especially the penalty sought. In this context it might be noted that the penalty regime enforceable by the Federal Court under this Bill is yet to be finalised.<sup>15</sup> As Justice Kirby said:

The more drastic the consequences for those affected, the more vigilant will be the scrutiny of the impugned law, measured against the constitutional warrant. The proposition that serious and burdensome consequences of criminal proceedings may be sustained by reference to nothing more than the creation of the office of the Commonwealth DPP and incidents thereto in the context of the joint co-operative scheme...is highly doubtful. For such outcomes a firm foundation of constitutional authority would appear to be necessary. Under our Constitution, criminal liability and punishment, when provided in a federal law, must be supported by demonstrable constitutional authority. Convenience and desirability are not enough if the constitutional foundation is missing.<sup>16</sup>

As discussed in [Bills Digest No. 171 of 2003-04](#), these remarks indicate that the achievement of the Commonwealth, States and Territories in agreeing to a national energy regulation scheme may not be given any special consideration by the High Court in determining the scheme's constitutional validity, including the validity of prosecutions by the AER using State law.

Moreover, the above statement by Justice Kirby indicates that it is the more serious breaches of national energy laws, regulations and codes – which might justify criminal proceedings – where prosecutions by the AER under State law would be most doubtful from a constitutional perspective.

An article written in 2002 by the then Counsel assisting the Solicitor-General for the Commonwealth, Graeme Hill reinforces questions about the constitutional validity of provisions in the Bill. Indicating that these were his personal views (so not necessarily those of the Government), he stated:

One reading of *Hughes* is that a Commonwealth body cannot be given exclusive power to perform a function conferred by State law unless it is a function that the Commonwealth could have conferred itself.<sup>17</sup>

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The Government has pointed out that the point of creating the AER is to give it exclusive regulatory and enforcement power in relation to the national energy market, to replace the 13 existing State, Territory and Commonwealth regulators.<sup>18</sup>

Hill notes, however, that the judgment in *Hughes* may also indicate that the Commonwealth could rely on its executive power (based on section 61 of the Constitution) 'to authorise Commonwealth bodies to perform exclusively what might be termed "non-coercive" functions (that is, functions that do not adversely affect the rights of individuals)'.<sup>19</sup> Based on this view, a question mark clearly remains about the validity of the AER's exercise of State power for its coercive enforcement functions.

In this context, Parliament may wish to consider requesting detailed submissions on the constitutional validity of the enforcement regime envisaged by this Bill, including the consequences of any invalidity.

Finally, it would have been useful for Parliament when considering this Bill to have had available to it the full package of State and Territory legislation making up the National Electricity Law, Regulations and Rules, as well as the final Australian Energy Market Agreement.

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- 1 <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd171.pdf>.
  - 2 As of 17 June 2004, this agreement was being finalised under the auspices of the Council of Australian Governments: see 'Explanatory memorandum: Australian Energy Market Bill 2004', p.1.
  - 3 (2000) 202 CLR 535.
  - 4 'Explanatory memorandum: Trade Practices Amendment (Australian Energy Market) Bill 2004', p. 12.
  - 5 *R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
  - 6 *R v Hughes* (2000) 202 CLR 535 at 558.
  - 7 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>.
  - 8 202 CLR 535 at 553.
  - 9 Explanatory memorandum, p. 21.
  - 10 (1999) 193 CLR 511.
  - 11 204 CLR 559
  - 12 By virtue of section 39B(1A)(a) of the *Judiciary Act 1903 (Cth)* supported by section 75(iii) of the Constitution. See the discussion in George Williams, 'Cooperative Federalism and the

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Revival of the Corporations Law: Wakim and Beyond', 20 *Companies and Securities Law Journal* 160, May 2002 at 163-4, fn 30.

13 202 CLR 535 at 557.

14 *ibid*, at 583.

15 Explanatory memorandum p. 21.

16 *ibid*.

17 Graeme Hill, 'Revisiting Wakim and Hughes: The Distinct Demands of Federalism', 13 *Public Law Review*, 205 at 214.

18 'Explanatory memorandum: Australian Energy Market Bill 2004, pp 2-3.

19 Hill, *op.cit.*, p. 214.

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