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# National Greenhouse and Energy Reporting Bill 2007

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# National Greenhouse and Energy Reporting Bill 2007

**Date introduced:** 15 August 2007

**House:** House of Representatives

**Portfolio:** Environment and Water Resources

**Commencement:** Clauses 1 to 2 commence on the day of Royal Assent, with the remaining provisions commencing the day after Royal Assent. Note while clause 5 commences on the day after Royal Assent, it will apply on a day specified by way of regulations.

**Links:** The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

## Purpose

The National Greenhouse and Energy Reporting Bill 2007 ('the Bill') is intended to establish a national framework for reporting greenhouse gas emissions, certain abatement actions, as well as energy consumption and production by corporations, from the 2008-09 financial year.

## Background

The Communiqué of the April 2007 meeting of the Council of Australian Governments (COAG) states in part:

> COAG agreed to establish a mandatory national greenhouse gas emissions and energy reporting system, with the detailed design to be settled after the Prime Minister's Task Group on Emissions Trading reports at the end of May.[1]

The agreement to establish a national reporting system was an element of the Commonwealth government's new climate change policy, *Australia's Climate Change Policy: our economy, our environment, our future*, which was released by the Prime Minister on 17 July 2007. The policy endorses the key features of the emissions trading

1. Council of Australian Governments' Meeting, 13 April 2007 (Meeting Communique), at http://www.coag.gov.au/meetings/130407/index.htm#climate, accessed on 29 August 2007.

system outlined in the report of the Prime Ministerial Task Group on Emissions Trading. The report was presented to the Prime Minister on the 31 May 2007. In appears that, on the basis that the report did not vary greatly from the Regulatory Impact Statement prepared in 2006, the Bill was subsequently drafted without further formal consultation. Previous consultations were undertaken in 2006.[2]

The Explanatory Memorandum states the objectives of the Bill are:

- to provide a single, cooperative, streamlined reporting system for greenhouse and energy data across all jurisdictions that imposes the least cost and red tape burden needed to maintain the integrity of existing national data collections;
- to provide for the removal of current, and avoidance of future, duplicative reporting requirements;
- to provide greenhouse and energy data that are nationally consistent, robust and comparable across jurisdictions to inform decision making on greenhouse and energy policy and actions by government and business; and
- to make information on the greenhouse and energy related performance of companies available to the public, while maintaining the confidentiality of commercially sensitive information.[3]

It is intended that data reported through the proposed scheme in the Bill will underpin the eventual development of an Australian Emissions Trading System.

On 15 August 2007, the Bill was referred to the Senate Environment, Communications, Information Technology and the Arts Committee ('the Committee') for inquiry. The Committee received 35 submissions about the Bill, which have been made publicly available on the Committee's website. The Committee reported on 6 September. The major issues raised in the inquiry are discussed in the key issues section of this Digest.

## Main provisions

### Part 1 – Introductory Provisions

**Clause 3** of the Bill states the objects of the Bill. One of the objects is to 'underpin the introduction of an emissions trading scheme in the future', demonstrating the Commonwealth's intention to develop a future Australian Emissions Trading Scheme.

**Clause 4** sets out the Commonwealth constitutional provisions that are relied on to support the validity of the Bill. Notably these include the Commonwealth power to legislate with respect to:

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2. *Explanatory Memorandum*, p. 49, and Attachments C and D at pp 177–78
3. ibid, p. 19.

- census and statistics (section 51(xi))
- corporations (section 51(xx))
- external affairs (section 51(xxix)), and
- incidental matters (section 51(xxxix)).

**Clause 4** also states that the Bill relies on any 'implied powers' of the Commonwealth under the Constitution. Almost all of the Commonwealth's constitutional powers are explicitly stated in the Constitution. However, there are also some implied powers – for example, an implied nationhood power. The High Court has said that this implied power can be 'deduced from the existence and character of the Commonwealth as a national government…to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'[4]

**Subclause 5(2)** provides that the Act will exclude all State and Territory laws which provide for reporting, or disclosure of information, related to:

- greenhouse gas emissions
- greenhouse gas projects
- energy consumption, or
- energy production,

so far as those State and Territory laws apply in relation to a constitutional corporation.[5]

Additionally, the Act may also exclude any State or Territory law (of any description) where the relevant State or Territory law is specified in regulations made under the Act: **subclause 5(4)**. Such a regulation would be disallowable under section 42 of the *Legislative Instruments Act 2003*.

**Subclause 5(3)** enables the Minister to determine, by legislative instrument, that a State or Territory law is *not* excluded by the operation of **subclause 5(2)**. However, the listing of a law under **subclause 5(3)** will not affect its exclusion by **subclause 5(4)**. It is not clear under what circumstances the Government contemplates that a particular State or Territory law would be listed under *both* **subclause 5(3)** and **subclause 5(4)**.

The overall effect of **clause 5** is that, unless that the relevant State and Territory law(s) are made exempt by a **subclause 5(3)** determination,[6] a *corporation will not be legally bound*

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4. *Victoria* v. *Commonwealth* [1975] 134 CLR 338 at 197 per Mason J.
5. 'Constitutional corporation' means a corporation to which paragraph 51(xx) of the constitution applies; that is, foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
6. And assuming the law is not listed in a regulation made pursuant to subclause 5(4).

*by a State or Territory law which purports to require it to report or disclose information about the greenhouse or energy matters listed in* ***subclause 5(2).***

Importantly**, clause 5** only applies 'on and after a day specified in the regulations': **subclause 5(1)**. *It does not apply immediately upon commencement of the Bill.* The Minister has stated that:[7]

> The Government will continue to work cooperatively with state and territory governments to transition towards a single national reporting system in time for the 2009-10 reporting period.... If necessary, the Government will consider using provisions in the Bill that provide for the exclusion of state and territory laws on greenhouse and energy reporting.[8]

This suggests that **clause 5** may not come into force for at least eighteen months, if at all. However, this presumably depends on the outcomes on any future negotiations between the respective jurisdictions on greenhouse and energy reporting. The view of State and Territory governments, and related legal matters, on **clause 5** are discussed further in the 'Key Issues' section of this digest.

### Part 2 - Registration

**Part 2** deals with applications for registration of corporations onto the National Greenhouse and Energy Register. The Register (established in **clause 16**) is to hold the names of all corporations which report under the scheme (and any additional information prescribed by regulations (**paragraph 16(4)(b)**) within the parameters set out in **subclause 16(5))**. **Clause 16** allows all, or part of, the Register to be made publicly available by the Greenhouse and Energy Data Officer (GEDO) (a statutory office created by **clause 49**). Corporations have an obligation to apply to register under **clause 12**, if their group meets one or more of the 'thresholds' (that is, a certain level of activity, emissions, or energy consumption per year, as set out in **clause 13** – see below).

Failure to register is punishable by 2 000 civil penalty units or $220 000 (for a more detailed discussion of the civil penalty units system, see **Part 5** below).

The proposed approach to thresholds includes a phased approach for corporations, and an instant, non-phased approach for facilities such as a smelter or power station.

The thresholds are set out in **clause 13** of the Bill. The largest corporations (in terms of total emissions or total energy production / consumption from all of its operations) are

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7. Clause 5 will only apply from a date specified in a regulation, and such a regulation can be disallowed.

8. Turnbull, Malcolm, Second Reading Speech, National Greenhouse and Energy Reporting Bill 2007, House of Representatives, *Debates*, 15 August 2007, p. 2

obliged to register for the 2008-09 financial year, with slightly smaller corporations brought in the next financial year, and so on. The thresholds are set out as follows:

**THRESHOLDS AT WHICH A CONTROLLING CORPORATION MUST REGISTER**

| Financial year | total greenhouse gases emitted (carbon dioxide equivalence) | total energy produced from the operation of facilities | total energy consumed from the operation of facilities |
|---|---|---|---|
| 2008-09 | 125 kilotonnes[9] | 500 terajoules[10] | 500 terajoules |
| 2009-10 | 87.5 kilotonnes | 350 terajoules | 350 terajoules |
| 2010-11 and onwards | 50 kilotonnes | 200 terajoules | 200 terajoules |

For corporations that are members of a group that has operational control of a facility which causes:

- emission of greenhouses gases that have a carbon dioxide equivalence of 25 kilotonnes or more, or
- production of energy of 100 terajoules or more, or
- consumption of energy of 100 terajoules or more,

the Bill requires them to register for the 2008-09 financial year (i.e. there is not tiered entry into the scheme for these entities).

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9. A kilotonne is one thousand tonnes. The 2008–09 125 000 tonne threshold is equivalent to the annual emissions of around 28 000 cars.

10. A terajoule is one million million joules, or a thousand gigajoules, or a million megajoules. Annual total domestic energy consumption in Australia is around 6 million terajoules. To put the 500 terajoule threshold figures into context, it is equivalent to the energy content of around 20 000 tonnes of coal; the 200 terajoule threshold is equivalent to the energy content of around 8 000 tonnes of coal. 500 terajoules is also equivalent to the energy content of 14 million litres of automotive petrol; 200 terajoules is equivalent to the energy content of nearly 6 million litres of automotive petrol.

Corporations that are not required to apply to register for whatever reason (for instance, not meeting the threshold in **clause 13**) may still apply to be registered in relation to a greenhouse gas project: **clause 14.**[11] The Explanatory Memorandum states, regarding **clause 14**, that:

> It is envisaged that this will facilitate smaller companies providing offsets into the pre-emissions trading voluntary offsets market and potentially into a future Australian Emissions Trading Scheme.[12]

Corporations may apply to be deregistered under **clause 18**. The GEDO must deregister the corporation if it is found that they are not likely to meet any of the **clause 13** thresholds for the next three years.

### Part 3 - Reporting obligations

**Clause 19** requires registered corporations to annually report on their greenhouse gas emissions, energy production and energy consumption. Other information required in the report under this section may be prescribed by regulations made by the Minister: **subclause 19(6)**. **Clause 19(7)** ensures that the regulations made by the Minister can be tailored/targeted to specific groups – it allows the regulations to 'specify different requirements for different circumstances'. **Subclause 19(8)** of the Bill states that regulations made under the section may specify different requirements for registered corporations that do not meet the threshold(s) for a financial year.

Failure of a registered corporation to report is punishable by 2 000 civil penalty units or $220 000.[13] However, corporations are not required to report if the GEDO determines that the information is to be provided by another person: **clause 20** (see below).

**Clause 19(9)** enables the Minister to prescribe certain information for required inclusion in reports, at the specific request of a State or Territory. This provision enables the States and Territories to have some input towards the format of reports, and the data that is collected. However, it places the final discretion of inclusion on the Commonwealth Minister. The Explanatory Memorandum states that:

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11. A greenhouse gas project is defined in the Bill as an activity or series of activities, designed to remove or reduce the emissions of greenhouse gases, and which meet the requirements (if any) specified in the regulations. It does not include an activity, or series of activities, in the exclusive economic zone, except to the extent that it is an oil or gas extraction activity.
12. *Explanatory Memorandum*, op. cit, p 184.
13. They may also be liable to a civil penalty of up to 100 penalty units for every day past the relevant date that they fail to report.

> The Government's intention is to apply this subclause judiciously and to work cooperatively with states and territories to ensure that programme needs can be met in the most efficient way.[14]

**Clause 20** deals with the liability of other persons to provide certain information. Corporations may apply to the GEDO to make a determination about third parties responsibility to provide certain information. In cases where a registered corporation is required to report on certain information, but cannot do so because that information is possessed or controlled by a contracted third party, the GEDO can make a determination to the effect that the information is to be provided by another person.

The Explanatory Memorandum states that **clause 20** is:

> intended only to apply in cases where the other person is unable to disclose this information to the registered corporation for commercial reasons.[15]

Other obligations for registered corporations include an obligation to report on greenhouse gas projects (**clause 21)**, and obligations to keep records of activities to allow for accurate reporting (**clause 22).** Both obligations attract a penalty of 1000 civil penalty units, or $110 000, for failure to comply.

### Part 4 - Disclosure of information

**Clause 23** creates a criminal offence for unauthorised disclosure of information obtained in the course of a person's official duties. The offence applies to very wide range of persons, including Commonwealth and State employees. Notably, the offence applies to disclosures that occur even after the person left the relevant employment. The maximum penalty is 2 years imprisonment. This is line with similar unauthorised disclosure offences applying to Commonwealth officers in section 70 of the *Crimes Act 1914*.

**Clauses 24-25** deal with the publishing of information – the GEDO must publish totals of greenhouse gas emissions, and energy production and consumption, each year. However, if a corporation does not meet the threshold for reporting under **paragraph 13(1)(a)** that year, the GEDO must not publish the information. Relevant corporations, or persons required to provide reporting information under clause 20, may apply to the GEDO for information not to be published if it might reveal trade secrets, or damage the commercial value of that information (**subclause 25(1)**).

**Clause 27** deals with disclosure of information to State and Territories. Information may be disclosed to States and Territories at the GEDO's discretion, if:

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14. *Explanatory Memorandum*, op. cit, p. 184.
15. ibid, p. 186.

- it is information that was specifically requested by the State or Territory for collection under **clause 19(9),** or
- if it is information relating to facilities that are wholly or partly located in the State or Territory.

This clause indicates that collected information (other than that published on the website) may only be accessed through the GEDO, and that the States and Territories do not directly participate in the collection of information for the scheme. The GEDO may impose conditions before agreeing to the disclosure of information – of particular note is **paragraph 27(2)(c)**:

> the State, Territory, or authority not requiring the reporting or disclosure of other information of a kind similar to greenhouse and energy information.

This provision seems to be directed at the same policy objective of clause 5 – to allow the Commonwealth, if thought necessary, to effectively prohibit State and Territories from requiring corporations to report under State and Territory legislative schemes.

### Part 5 – Enforcement

**Part 5** deals with enforcement of various requirements, particularly corporations' reporting requirements, set out in the Bill – see particularly **items 12, 19-22, 71, 73, and 74**.

The Bill uses civil penalties (**Division 1 of Part 5**), infringement notices (**Division 2**) and enforceable undertakings (**Division 3**) as an enforcement devices, as opposed to criminal penalties.

The use of these devices, rather than criminal ones, ensures that corporations do not commit a criminal offence for non-compliance with relevant parts the Bill. The Bill expressly states that contravening a civil penalty provision is not an offence (**clause 32**). This is especially significant in the first years of the scheme's operation, given that the Government has indicated that:

> The emphasis of the compliance and enforcement regime in the initial years of the scheme will accordingly be on encouraging compliance, rather than punitive measures. As the scheme matures, a more stringent approach will be appropriate, particularly with regard to data that will inform emissions trading.[16]

In addition, if a person or corporation fails to meet certain obligations before the required time under the Bill, civil penalty units will accumulate at a daily rate for every day that obligation is overdue, until the obligation is met. For registration (**clause 12**), reporting (**clause 19**), and reporting by third parties (**clause 20**), the penalty accumulates at a rate of

16. Second reading speech or EM, p. 14.

100 civil penalty units, or $11 000, per day. For external auditing (**clause 73**), the penalty accumulates at a rate of 10 penalty units, or $1 100, per day.

Although civil penalty units can be directly converted to a monetary value, a person or corporation is not automatically required to make payment for any civil penalties incurred. However, if the GEDO chooses to do so, they may apply to a Court for an order that a pecuniary penalty be paid (**clause 31)**. This action must be taken within six years of the alleged contravention occurring**.** A court may order payment of a pecuniary penalty if the court is satisfied on the balance of probabilities that the relevant requirement has been contravened. The amount of the pecuniary payment is at the discretion of the court, as long as it does not exceed the amount of the civil penalty units that are due under the relevant contravention.

**Subdivision B, clauses 35-38** govern the interplay between criminal and civil proceedings, and use of evidence in circumstances where the conduct is substantially the same.

Infringement notices (**Division 2**) may be issued by the GEDO within 12 months of the alleged contravention. Infringement notices are an alternative method of enforcement to the court-ordered civil penalty provisions. The amount payable under the notice cannot be more that one-fifth of the maximum penalty otherwise payable under a civil penalty provision.

Enforceable undertakings (**Division 3**) can be made between the GEDO and the relevant person or corporation. In the event of an alleged breach of the undertaking, the GEDO may apply to a court for a order enforcing the undertaking, along with other orders that the court thinks appropriate.

**Division 4** includes a fairly standard provision on the liability of a chief executive officer (CEO) in the case that a corporation contravenes a civil penalty provision. In such cases, the CEO of the corporation may be liable to a penalty if:

- they were reckless or negligent as to whether the contravention would occur
- they were in position to influence the conduct of the corporation, and
- they failed to take all reasonable steps to prevent the contravention.

Whilst these three elements above are standard ones for determining liability, some other Commonwealth legislation (see for example section 494 of the *Environment Protection and Biodiversity Conservation Act* 1999) makes *all* executive officers, not just the CEO, liable for the corporation's actions under prescribed circumstances.

## Part 6 - Administration

**Clause 49** establishes the statutory position of the GEDO. They are employed under the Public Service Act 1999. Support staff will be employees of the administering Department (currently Environment and Water) (**clause 52)**. The GEDO may delegate any of their powers down to the level of an Acting SES employee (**clause 53)**.

**Clause 56** allows applications to be made to the Administrative Appeals Tribunal regarding decisions of the GEDO under a number of provisions of the Act, including decisions relating to registration and deregistration of corporations, suppression of otherwise publicly-reportable information, and questions of who has operational control of specified facilities.

**Clauses 57-75** deal with powers for monitoring compliance with the reporting scheme established by the Bill.

These include powers such as entry of officials onto premises, search and securing of evidential material, issue and use of warrants, and the conditional ability to compel the answering of questions/production of documents. Other comparable Commonwealth legislation, such as the *Energy Efficiencies Opportunities Act 2006*, contain similar powers.

The persons that exercise these powers are called 'authorised officers'. These are appointed by the GEDO. As is usual, such officers are subject to the direction of the appointing authority in exercising their powers or performing their functions.

**Clause 58** requires authorised officers to have identity cards. Importantly, a related provision is that an authorised officer cannot exercise their powers with respect to premises if they fail to produce their identity card if so required by the occupier of the relevant premises (**clause 62)**.

Entry into premises by authorised officers must be under a warrant or by the consent of the occupier. If seeking the consent of the occupier to enter premises, the authorised officer must inform them that they may refuse consent (**clause 63)**. However, there is no obligation to tell the occupier that they may withdraw consent after entry – this contrasts with other legislation – for example subsection 49(2) of the *Water Efficiency Labelling and Standards Act 2005*. Consent must be voluntary for entry without a warrant to be lawful (**subclause 63(2)**).

Under **clause 64**, when entry is done pursuant to warrant, the authorised officers must announce that they are authorised to enter the premises and to provide any person at the premises with the opportunity to let them in. If the occupier of the premises (or someone who apparently represents the occupier) is present during the execution of the warrant, the authorised officer must identify himself or herself to the occupier and 'make available' a copy of the warrant (**subclause 65(1)).**

Once entry is gained through consent or by warrant, authorised officers may exercise various powers listed in **clause 60** – essentially they are to search the premises and anything on them, inspect records and documents and take extracts or copies of them. Evidential material can only be seized by a warrant, although can be secured until a warrant is obtained (**paragraph 60(1)(h**)). There is no express limitation of how long evidential material may be 'secured' if there is a delay in obtaining a warrant to seize it.

If entry is by warrant, an authorised officer can require the occupier of the premises (or someone who apparently represents the occupier) to answer questions and produce documentation (subclause **29(2**)).[17] Failure to comply with such a request is an offence carrying a maximum penalty of six months imprisonment.[18] There is no requirement on the part of the authorised officer to warn a person about the penalty for non-compliance. Note that **subclause 61(4)** provides that a person is not obliged to comply with the demand if this would tend to incriminate them or expose them to a penalty. Again, there no requirement on the part of the officer to inform a person that they are excused from complying under the self-incrimination provision.

Under **clause 71,** the GEDO may also require information (compellable information) to be provided relating to a person's compliance with the provisions of the Bill. The GEDO may only require this if they have reason to believe that a person has information relating to compliance in the persons possession, custody or control. Should a person fail to supply the requested information within the specified period, he or she is subject to a civil penalty of 50 penalty units. A person does not have to supply the required information if he or she has 'a reasonable excuse'. However, this does not include the situation of where the information is commercially sensitive or confidential. However, a person is excused from supplying the information if it might tend to incriminate the person or expose the person to a penalty.

The GEDO can require external audits of one or more aspects of the corporation's compliance practices (**clauses 73-5**).

## Financial implications

The Explanatory Memorandum states that:

> the current total cost to the economy of current greenhouse and energy reporting arrangements was estimated at $16.2m per year.[19]

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17. If entry is by consent, the authorised officer may only 'request' answers and documentation.
18. The standard Criminal Code offence provisions of giving false or misleading evidence would also apply.
19. *Explanatory Memorandum*, p. 14.

The Government has appropriated $26.1 million over five years from 2007-08 to introduce the measure.[20]

## Key issues

### Potential Commonwealth override of State and Territory Greenhouse and energy reporting schemes

This was a key issue in the Senate Committee inquiry referred to earlier in this Digest. All States and Territories (except the ACT) made submissions to the Committee about the Bill. While they expressed support for the development of a national system of reporting – something reflected in the April 2007 COAG agreement - the submissions have overwhelmingly stated serious concerns regarding key aspects of the Bill, most common being:

- the potential impact on current State and Territory reporting schemes upon application of **clause 5**, and
- uncertainty of access to information for States and Territories (**clause 27**).

For example, in relation to clause 5, South Australia contended that

> Taken in isolation, clause 5 can be viewed as the implementation of the streamlining agreed by all jurisdictions as being desirable and necessary. However, when considered in the context of the rest of the legislation, it has the potential to disrupt legitimate activities being undertaken by other jurisdictions, which were never intended to be prohibited by this legislation.[21]

Professor George Williams, Director of the Gilbert & Tobin Centre of Public Law, also made a similar comment in his submission to the Committee:

> In particular, I am concerned that by denying an effective operation to state and territory laws providing for reporting and disclosure this will prevent those jurisdictions from enacting carbon trading or other schemes. Section 5 may strike at the heart of such schemes and prevent them form being put into place. The Commonwealth may well not wish to operate such a scheme, but until it actually establishes its own regime it should not provide legislation denying the states information vital to their own.

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20. ibid, p. 5.
21. Department of the Premier and Cabinet, South Australia, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at: http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub10.pdf, accessed on 4 September 2007.

> Section 5 should be removed from the Bill. Section 109 of the Constitution[22] deals regulates (sic) where a federal law cannot operate consistently with a state law. It provides a sufficient mechanism for dealing with such conflicts without needing a Commonwealth Bill to cover the field so widely as to undermine any related state laws. [23]

Besides the issue of whether the powers contained in **clause 5** provide an appropriate policy approach, evidence to the Committee raised questions as to whether at least elements of **clause 5** could be constitutionally invalid under the principle set out in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. Essentially the principle prevents Commonwealth law from affecting the operations of State Governments to such an extent that the law curtails the State's ability to act as a separate and independent government. In this context, it is a reflection of the federal balance between the various governments established at Federation and underpinned by the relevant areas of the Commonwealth constitution. As emphasised in later judgements (such as *Austin v Commonwealth* (2003) 215 CLR 185), whether a particular Commonwealth law might be invalid turns largely on its actual operation.

As pointed out in the Committee report, some of the corporations that might be covered by the scope of the Bill may be State or Territory government owned entities. If the Commonwealth, by virtue of **subclauses 5(2) and 5(4),** excluded the operation of a State or Territory law that required such government entities from reporting to the State or Territory government on greenhouse or energy matters, would this offend the *Melbourne* principle? Of course, such governments could request reporting from such entities on a voluntary (non-legal basis), but the scope of **subclause 5(4)** in particular seems very broad. It would be useful if the Government to confirm the substance of its legal advice in relation to the potential operation of **clause 5.** Whilst it may be that, as result of future negotiations with the States and Territories, the Commonwealth does not seek exclude the operation of their greenhouse or energy reporting laws, this issue should be addressed in the parliamentary debate on the Bill.

In relation to access to information under **clause 27,** the Tasmanian government stated in its submission to the Committee inquiry that:

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22. Section 109 of the Constitution states that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

23. Williams, George, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at: http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub02.pdf accessed on 4 September 2007.

> Access to this data is essential to enable jurisdictions to develop and manage existing and future policies and programs. The existing provisions in the Bill will have the effect of significantly limiting the capacity of Tasmania and other jurisdictions to implement any initiative that relies upon energy or greenhouse gas data.[24]

Tasmania recommended that the word 'may' in **clause 27** be replaced with 'must' to ensure that States and Territories are guaranteed access to data.

The Senate (majority) report suggested some redrafting of **clauses 5** and **27**. Australian Labor Party and Australian Greens members of the Senate Committee expressed similar criticisms and concerns on the potential Commonwealth override of State and Territory Greenhouse and energy reporting schemes

### Alternate reporting scheme proposals

The National Emissions' Trading Taskforce, established by all State and Territory Governments to develop a multi-jurisdictional emissions trading scheme, stated on it's website that:

> The Prime Minister has recently announced a joint Commonwealth-business Task Group to advise on the nature and design of a workable global emissions trading system in which Australia would be able to participate. The Prime Ministerial Task Group will also advise and report on additional steps that might be taken, in Australia, consistent with the goal of establishing such a system.
>
> The Prime Minister's Task Group is entirely separate to the National Emissions Trading Taskforce (NETT). The NETT is not represented on the Task Group or its Secretariat.
>
> Given the differences in focus between the work of the NETT and of the PM's Task Group, the NETT will continue with its work on the development of a design for a possible national emissions trading scheme, with a view to recommending a preferred scheme design in the second half of 2007.

In addition, the Victorian Government released a media release on 2 June 2007, indicating alternate progress towards the development of an emissions and energy reporting scheme by the Environment and Heritage Protection Council (represented by Ministers from each jurisdiction, including the Commonwealth). This announcement occurred prior to the introduction of the Bill in Parliament.

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24. Department of the Premier and Cabinet, Tasmania, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at: http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub29.pdf, accessed on 4 September 2007.

## Thresholds for reporting

The use of thresholds is discussed in the Regulatory Impact Statement (RIS).[25] The RIS states that:

> It is recognised that the proposed model introduces a greater level of complexity to the threshold design than has been considered in previous consultations. However, the different elements are intended to deliver on the above aims in a different way. The company-level threshold is intended to exclude companies with relatively low total emissions/energy use or production, while the lower, facility-level threshold is intended to capture large facilities operated by companies that do not trigger the company-level threshold, recognising the significance of facility-level data to existing data collections.[26]

The thresholds system will not pick up all the companies it targets until the financial year 2010–11; reporting in its entirety under this scheme will not be until around 2012. Given that most reporting entities under these thresholds are already reporting, the proposed three-year phasing-in may be longer than is necessary.[27]

The Nature Conservation Council of NSW believes that thresholds need to be lower.[28] It points out that this Bill requires only 20 per cent of the facilities reporting under the National Pollution Inventory need to report in the Bill's proposed scheme.[29] The submission from the ACF, Greenpeace and the TEC expresses a desire for the thresholds to be set at 10 000 tonnes, which they claim is used in Europe for its Emissions Trading Scheme.

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25. *Explanatory Memorandum*. p. 22.
26. ibid., p. 23.
27. This was raised in various submissions, including those from the Australian conservation Foundation, Investor Group on Climate Change and Environmental Defender's Office (NSW)
28. Nature Conservation Council of NSW, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at: http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sublist.htm accessed on 4 September 2007.
29. This is also stated in: Moreland Energy Foundation Ltd, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub32.pdf accessed on 4 September 2007.

The Tasmanian Government wants voluntary registration for companies who do not meet the **clause 13** thresholds.[30] It is unclear how corporations which never meet the threshold, but may wish to register, are treated (although there is an added avenue for registration into the scheme through the undertaking of greenhouse gas projects – **clause 14 –** for corporations who fail to meet the threshold). It is likely that corporations that never meet the threshold, and are not eligible for registration under **clause 14**, are unable to report to the GEDO under the scheme. In such cases, the ability for those companies to participate in a future carbon emissions trading scheme may be limited or restricted, depending on how the anticipated scheme is developed.

### International data consistency

Some submissions also point out a need to make data collection methodologies consistent with internationally developed standards (currently, this matter is not explicitly dealt with in the Bill). For instance, the Business Council of Australia notes that many Australian businesses operate internationally, and that the Bill's reporting scheme needs to be able to be linked with regional and international abatement schemes.[31] According to the submission by the Investor Group on Climate Change, this includes the current international standard *Greenhouse Gas Protocol: Corporate Accounting and Reporting Standard (revised edition)* developed by the World Business Council for Sustainable Development and the World Resources Institute.[32] This submission also points to the data needs of the Global Framework for Climate Risk Disclosure and the Carbon Disclosure Project. The Australian Industry Greenhouse Network supports this and points to the emerging international standard on greenhouse gas accounting: ISO 14064.[33] The Australian Institute of Petroleum points to another data collection standard, the Petroleum Industry Guidelines for Reporting Greenhouse Gas Emissions.[34] The Australian Petroleum

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30. Department of the Premier and Cabinet, Tasmania, op cit.

31. Business Council of Australia, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub28.pdf accessed on 4 September 2007.

32. Investor Group on Climate Change, op. cit.

33. Australian Industry Greenhouse Network, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub07.pdf accessed on 4 September 2007.

34. Australian Institute of Petroleum, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at

Production & Exploration Association Limited also refers to the *Compendium of greenhouse gas emissions estimation methodologies for the oil and gas industry* from the American Petroleum Institute.[35]

The South Australian Government indicates that there is no mechanism in this Bill for external input to data specification – for example, from the States and Territories – or for external input to the way in which the resulting aggregate data is made available.[36] A concern here is the compatibility with previously obtained data.

The Western Australian and Tasmanian Governments both observe in their submissions that the Bill does not appear to have any in-built data quality assurance provision apart from the fact that the GEDO can request audits.

## Conclusion

The Bill, while generally supported by most interest groups, has raised significant concerns from State and Territory Governments, particularly in regards to clause 5. Industry groups generally have also commented on the uncertainty that clause 5 creates in regards to their reporting obligations. While some submissions have suggested that clause 5 be removed, others have supported its intent (to support the creation of a single reporting framework) and have suggested amendments to alleviate any negative impact of the clause, while keeping the clause somewhat intact.

The stakeholder discomfort with clause 5, along with the continued development of alternate reporting scheme proposals within other forums, appears to be indicative of the lack of common approach between the Commonwealth and the State and Territory governments over significant details of policy responses to climate change issues. While the Bill may be effective in creating a single national reporting system, if passed in its current form, it will likely, at least in the short term, create considerable uncertainty over current greenhouse and energy activities at the State and Territory level.

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http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub06.pdf accessed on 4 September 2007.

35. Australian Petroleum Production & Exploration Association Limited, *Submission to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the National Greenhouse and Energy Reporting Bill 2007,* August 2007, available at http://www.aph.gov.au/Senate/committee/ecita_ctte/greenhouse/submissions/sub17.pdf accessed on 4 September 2007.

36. Department of the Premier and Cabinet, South Australia, op. cit.

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