



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2007

7 February 2007

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
Senator A Murray

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

FIRST REPORT OF 2007

The Committee presents its First Report of 2007 to the Senate.

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

Australian Energy Market Amendment (Gas Legislation) Bill 2006 *

Copyright Amendment Act 2006

- * Although this bill has not yet been introduced in the Senate, the Committee may report on its proceedings in relation to the bill, under standing order 24(9).

Australian Energy Market Amendment (Gas Legislation) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2006*. The Minister for Industry, Tourism and Resources responded to the Committee's comments in a letter dated 6 February 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 15 of 2006

Introduced into the House of Representatives on 29 November 2006
Portfolio: Industry, Tourism and Resources

Background

This bill amends the *Australian Energy Market Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Trade Practices Act 1974* (Trade Practices Act) to provide for a national regime for the regulation of gas pipeline infrastructure to apply throughout Australia, including the offshore area and external territories. The new regime will involve a new National Gas Law, established by the proposed *National Gas (South Australia) Act 2007*, and National Gas Rules to regulate access to gas pipelines. The new regime will fall within the jurisdiction of the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) will be responsible for changes to the new National Gas Rules made under the National Gas Law.

The bill repeals the *Gas Pipelines Access (Commonwealth) Act 1998* and amends the *Australian Energy Market Act 2004* to apply the National Gas Law and, where appropriate, complementary Western Australian legislation in the offshore area and the external territories. The bill also addresses technical issues with the conferral of functions and powers on the National Competition Council, the Commonwealth Minister, the AEMC, the AER and the Australian Competition Tribunal.

The bill amends the Trade Practices Act to maintain the existing incentives for greenfields gas pipelines, amends the ADJR Act to provide for judicial review of decisions under the new regime, and repeals redundant common carrier provisions and makes machinery amendments to the *Petroleum (Submerged Lands) Act 1967* and the *Offshore Petroleum Act 2006*.

Delegation of legislative power Schedule 1, Item 48

The National Electricity (Commonwealth) Law and Regulations, National Gas (Commonwealth) Law and Regulations and the Offshore Western Australian Pipelines (Commonwealth) Law and Regulations under the Australian Energy Market Act give effect as Commonwealth law to primary legislation, regulations, Rules and other instruments established under a co-operative scheme of legislation. Proposed new section 13F of the *Australian Energy Market Act 2004* provides that any instrument made under the National Electricity Law or the National Gas Law is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, and therefore cannot be disallowed by the Commonwealth Parliament. The explanatory memorandum states, at paragraph 12, that this reflects the legal status of these instruments because they are applied by and not made under a Commonwealth law. The explanatory memorandum goes on to state that if such an instrument were a legislative instrument under the Legislative Instruments Act, ‘an instrument made under the various state regimes would be disallowable in Commonwealth Parliament, which would undermine the cooperative nature of the scheme.’ While noting this explanation, the Committee is concerned to understand the degree of parliamentary scrutiny which will apply to regulations made under the National Electricity Law and the National Gas Law. The Committee **seeks the Minister’s advice** as to the provision for parliamentary scrutiny in the formulation of such instruments. The Committee also notes the statement in the explanatory memorandum that the AEMC, a Commonwealth body, will be responsible for changes to the new National Gas Rules made under the National Gas Law. The Committee **seeks the Minister’s advice** as to whether amendments to the National Electricity Rules and the National Gas Rules will be subject to parliamentary scrutiny at any level.

Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

The Bill amends the *Australian Energy Market Act 2004* (the Act) to allow the new National Gas Law to be applied in the Commonwealth's offshore jurisdiction. The National Gas Law is a cooperative national scheme for the regulation of access to natural gas services. It will be enacted in the South Australian Parliament and applied in the Commonwealth and all States and Territories, except Western Australia, by application Acts.

Two sets of instruments will be made under the National Gas Law; the National Gas Regulations which will be made by the South Australian Minister, on the unanimous recommendation of the relevant Ministers of the scheme participants, and the National Gas Rules which will be made by the independent Australian Energy Market Commission (AEMC). The Committee was concerned that these instruments inappropriately delegate legislative power and will not be subject to parliamentary scrutiny.

Energy Market Governance

The energy market governance arrangements are established in the Australian Energy Market Agreement, signed by all First Ministers in 2004 and most recently amended in June 2006. This Agreement sets out the role of the Ministerial Council on Energy as the policy making body, the AEMC as rule maker and market developer, and the Australian Energy Regulator as regulator and enforcer of the law and rules. These arrangements already apply for the electricity regime. Under the National Electricity Law, it was considered inappropriate for the electricity rules and regulations to be subject to parliamentary disallowance, as the law is intended to be nationally consistent. It would quickly become unworkable if individual jurisdictions could disallow particular instruments. All participating jurisdictions therefore agreed to not apply their legislative instrument acts to instruments made under the National Gas Law.

Regulation Making

The National Gas Law only empowers the South Australian Minister to make regulations in a very limited number of technical areas such as prescribing civil penalty and conduct provisions. The SA Minister may only make regulations if he is given a unanimous recommendation of the relevant Ministers of the scheme participants. Given the cooperative nature of this scheme and the restrictions placed on the South Australian Minister, it was considered appropriate not to subject these regulations to parliamentary disallowance.

Rule Making

The National Gas Rules are a much more significant part of the National Gas Law framework, and cover a large number of regulatory functions. The initial National Gas Rules will be agreed by the relevant Ministers of the scheme participants and made by the South Australian Minister. For the same reason as the regulations, it was considered appropriate not to subject the initial rules to parliamentary disallowance.

After the creation of the initial National Gas Rules, the AEMC will be able to alter the initial rules and create new ones. The AEMC is a national body that was designed to allow stakeholders to initiate changes to the rules in an open and accountable manner. Any person may request a rule change. Once the AEMC has received a request for a rule change it must seek and consider written submissions before making a draft decision and must then consider further written submissions before making a rule. It may also hold public hearings. This consultative and transparent process ensures that the views of all stakeholders are considered before a rule comes into force.

Instruments made under the National Gas Law are not subject to parliamentary disallowance but this is appropriate because of the cooperative nature of the scheme and because of the consultative process that the AEMC is required to undertake. The scheme enjoys bipartisan support and would become unworkable if individual jurisdictions could disallow particular rules or regulations.

The Committee thanks the Minister for this response.

Copyright Amendment Act 2006

Introduction

The Committee commented on the bill for this Act in *Alert Digest No. 13 of 2006*. Whilst the Committee did not seek further information on the issue of strict liability, the Attorney-General has responded to the Committee's comments in a letter received on 29 January 2007.

Although the bill has passed both Houses the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2006

Introduced into the House of Representatives on 19 October 2006
Portfolio: Attorney-General

Background

This bill amends the *Copyright Act 1968* to implement recommendations from a number of copyright law reviews including changes to address copyright piracy through:

- the creation of a number of indictable, summary and strict liability offences;
- changes to evidential presumption provisions in civil criminal proceedings to assist copyright owners;
- amendments to the definition of 'article' to clarify the protection of digital files; and
- amendments to the 'Notice of Objection' provisions consistent with changes made to the *Trade Marks Act 1995*.

The bill also implements Australia's obligations under the Australia-United States Free Trade Agreement.

The bill also contains application and transitional provisions.

Strict liability

Schedule 1, items 6 and 33

A number of provisions to be inserted in the *Copyright Act 1968* by this bill would create offences of strict liability. The provisions to be inserted by item 6 of Schedule 1 are proposed new subsections 132AD(5), 132AE(5), 132AF(7) and (8), 132AG(7) and (8), 132AH(5), 132AI(7) and (8), 132AJ(5), 132AL(8) and (9), 132AN(5), 132AO(5), 132AQ(5), 132AR(5) and 132AS(5) and those to be inserted by item 33 of Schedule 1 are proposed new subsections 248PA(5), 248PB(5), 248PC(5), 248PD(5), 248PE(6), 248PF(5), 248PG(5), 248PH(5), 248PI(5), 248PJ(7) and (8), 248PK(5), 248PL(5), 248PM(5), 248QB(6), 248QC(5), 248QD(5), 248QE(7) and (8), 248QF(5), 248QG(5) and 248QH(5).

In each case, the explanatory memorandum notes the fact that the imposition of strict liability means that no fault element is required to be proved, and that the offence has a maximum penalty of 60 penalty units and that it will be ‘underpinned by an infringement notice scheme to be inserted into the Copyright Regulations.’ The explanatory memorandum makes no explicit reference to the Committee’s *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide), however, the Committee notes that the new offences appear to fall broadly within the principles stated in the Guide. While the Committee would generally prefer to see a more detailed justification for such offences, it makes no further comment in this case.

In the circumstances, the Committee makes no further comment on this bill.

Relevant extract from the response from the Minister

I welcome the Committee’s finding that the strict liability offences in the Copyright Amendment Bill 2006 appear to fall broadly within the principles stated in my Department’s publication, *Guide to Framing Commonwealth Offences* which is based, in part, on the Committee’s *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*.

Although the Committee did not seek any further clarification on these offences, I note the comment that it would generally prefer to see a more detailed justification for such offences. In responding to this, the Committee should be aware that the Senate Standing Committee on Legal and Constitutional Affairs closely considered the strict liability offences as part of its consideration of the Bill. It recommended

they be re-examined for amendment to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.

Government amendments to the Bill addressing this recommendation have since been passed by both Houses of Parliament. In particular, eleven strict liability offences were removed and a further one was amended, to address any perceptions of possible 'overreach' of the laws. The amendments were intended to ensure that persons without criminal intent will not be subject to criminal liability for legitimate everyday activities, such as possession of iPods and computers, and the recording of concerts on their mobile phones for personal use.

The Committee thanks the Attorney-General for this response and for his advice regarding the subsequent amendments to the bill.

Robert Ray
Chair



The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

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6 FEB 2007

Senate Standing C'ttee
for the Scrutiny of Bills

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator R Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

- 6 FEB 2007

Dear Senator

I have prepared the following response to the issues raised by the Standing Committee for the Scrutiny of Bills (the Committee) in Alert Digest No. 15 of 6 December concerning the delegation of legislative power under the *Australian Energy Market Amendment (Gas Legislation) Bill 2006* (the Bill).

The Bill amends the *Australian Energy Market Act 2004* (the Act) to allow the new National Gas Law to be applied in the Commonwealth's offshore jurisdiction. The National Gas Law is a cooperative national scheme for the regulation of access to natural gas services. It will be enacted in the South Australian Parliament and applied in the Commonwealth and all States and Territories, except Western Australia, by application Acts.

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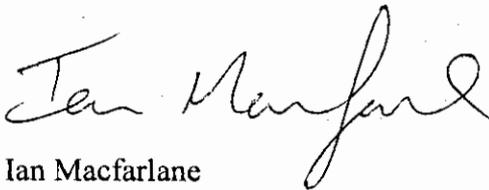
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Yours sincerely



Ian Macfarlane



ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

06/3494, M06/19310

RECEIVED

29 JAN 2007

Senate Standing C'ttee
for the Scrutiny of Bills

Senator Robert Ray
Chair
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the *Alert Digest* (No 13 of 2006) that was provided to my office on 9 November 2006 by the Secretariat of the Senate Standing Committee of the Scrutiny of Bills.

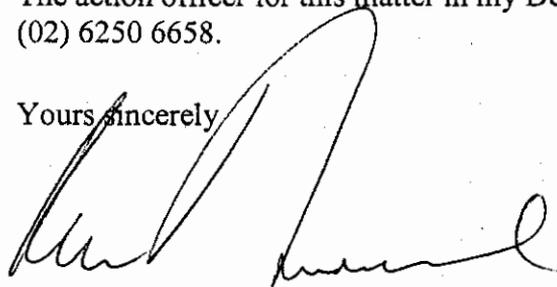
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The action officer for this matter in my Department is Fiona Phillips who can be contacted on (02) 6250 6658.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Philip Ruddock', written in a cursive style.

Philip Ruddock